A Practitioner’s Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability

December, 2010
Third Edition

The International Justice Project is grateful for the significant contribution of the Cornell Law School Death Penalty Project, Federal Death Penalty Resource Counsel, and Habeas Assistance and Training Counsel to the preparation of this guide.

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Adaptive Behavior: Background Questions to Ask Credible Informants (Combined Version)
'Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning'
INTRODUCTION: THE PURPOSE OF THIS GUIDE

For an individual facing capital prosecution or one imprisoned under sentence of death, nothing is more consequential than the determination whether he or she qualifies for a diagnosis of mental retardation. The Supreme Court’s ruling that the execution of an individual with mental retardation violates the Eighth Amendment’s prohibition against cruel and unusual punishment, Atkins v. Virginia, 536 U.S. 304 (2002), makes this literally a matter of life and death. Nevertheless, we defense team members have made and continue to make numerous mistakes, too frequently concluding – prematurely, incorrectly, and without sufficient investigation – that our clients do not have mental retardation. The Practitioner's Guide has been produced in an effort to reduce the number of these costly, often deadly errors.

Lawyers, mitigation specialists and even mental health professionals make mistakes about mental retardation because we lack a deep understanding of developmental disabilities. We miss the diagnosis in our clients because they defy our stereotypes, biases and expectations about people who carry this diagnosis. Most often these clients strike us as no different from many other individuals we have represented. Therefore, the most important thing for practitioners to know about mental retardation/intellectual disability is that “we don’t know it when we see it.” In other words, “you can’t tell by looking” whether or not someone has mental retardation. Investigation is required – not just sometimes, but in all cases. In no instance should the possibility of mental retardation be ruled out until there has been a thorough investigation of the client’s intellectual and adaptive functioning along the lines of what is described in these pages.

The Practitioner’s Guide provides an introduction to the most common clinical, factual and legal issues that arise in the investigation and litigation of mental retardation claims in capital cases. It is divided into three sections and an accompanying appendix.

PART I ADDRESSES THE EVIDENCE OF MENTAL RETARDATION/INTELLECTUAL DISABILITY:

1. What is mental retardation/intellectual disability?

2. How does it affect people who have it?

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1 Developmental disabilities organizations, advocates and health professionals have abandoned the term “mental retardation” in favor of the term “intellectual disability.” Indicative of this trend to eradicate stigmatization of the disability and prejudices against those affected by it, the former American Association on Mental Retardation has changed its name to the American Association on Intellectual and Developmental Disabilities. This 2010 edition of the Practitioner's Guide will continue to utilize the term “mental retardation,” however, because that remains the operative legal language. As a result of the changed terminology in the field chapter headings in the Guide, reference “intellectual disability” as well as “mental retardation.” In addition, the “person-first” language preferred in the disabilities community (i.e., “person with mental retardation” as opposed to “mentally retarded person”) is used throughout the Guide.
3. What is the investigation necessary to screen for mental retardation/intellectual disability?

4. Developing the evidence of mental retardation/intellectual disability.

5. What are the commonly recurring issues that must be addressed to establish that a client has mental retardation/intellectual disability?

**PART II ADDRESSES THE ARRAY OF LEGAL ISSUES THAT NEED TO BE RAISED, OR AT LEAST CONSIDERED, IN REPRESENTING A CLIENT WHO HAS MENTAL RETARDATION/INTELLECTUAL DISABILITY IN A DEATH PENALTY CASE AT ANY STAGE OF THE PROCEEDINGS:**

1. Eligibility for the death penalty under *Atkins*;

2. Competence to stand trial;

3. Waivers of rights and guilty pleas;

4. Coerced confessions;

5. False confessions;

6. Criminal responsibility – insanity, lack of intent to kill, coercion or domination by others, or imperfect self-defense;

7. Unadjudicated charges and prior convictions that could otherwise be used against the client in the current case;

8. Explaining courtroom behavior that can be highly prejudicial – such as appearing indifferent or disinterested, falling asleep, or getting angry – in a way that diminishes the prejudicial effect of such behavior;

9. Explaining difficulties in the client’s adjusting to being in custody;

10. Competence to assist in post-conviction proceedings and competence to be executed; and

11. Clemency in cases in which the judicial process rejects a finding of mental retardation.
PART III ADDRESSES THE ARTICULATION OF INTERNATIONAL LAW, INSTRUMENTS AND NORMS RELATING TO CAPITAL PUNISHMENT AND MENTAL RETARDATION/INTELLECTUAL DISABILITY AND THE POSSIBILITIES OF ALTERNATIVE AVENUES OF APPEAL TO THE DOMESTIC U.S. LEGAL SYSTEM:

1. International law: why is it important in a domestic context?

2. International institutions;

3. Articulating international arguments in capital cases involving persons with mental retardation/intellectual disability;

4. Regional bodies


APPENDIX

Adaptive Behavior: Background Questions to Ask Credible Informants (Combined Version)
'Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning'

The Practitioner’s Guide is not a stand-alone resource. Rather, it is a starting point, providing an overview of important substantive and procedural issues and pointing the way for further and deeper research and investigation. It is never a mistake to explore the possibility of mental retardation for a capital client. The issue should be comprehensively investigated at the outset of every case, and defense teams should always be willing to reconsider the issue at a later point if new information becomes available.

This guide can be downloaded at, http://www.capdefnet.org/, the website of the Federal Death Penalty Resource Counsel and Habeas Assistance and Training Project. It is also available from the International Justice Project.

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1 CLINICAL DEFINITIONS OF MENTAL RETARDATION/INTELLECTUAL DISABILITY

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court prohibited the execution of persons with mental retardation, leaving to the states and lower federal courts the task of determining who qualifies for the diagnosis and the protection it affords. The following chapters of Section I of the Practitioner’s Guide will explore the generally accepted diagnostic criteria for mental retardation and issues relating to their application in capital cases, while Section II of the Guide provides extensive information about how the courts are implementing *Atkins*. One recent case, however, warrants attention here at the outset.

In *United States v. Davis*, 611 F.Supp. 2d 472 (D. Md. 2009), a federal death penalty case, the court found the client to have mental retardation and produced an opinion that comprehensively explores and favorably resolves many of the controversies that arise in *Atkins* litigation. It is more thoughtful and helpful than any decision since *Atkins* itself, and is required reading for every practitioner preparing to undertake a mental retardation investigation.

Although the diagnostic criteria for mental retardation are not in dispute – all definitions employ the three criteria set forth below – recognizing them and understanding the condition as it affects people whose IQs are in the higher range of eligibility for diagnosis can be difficult, not only for lay people (including lawyers), but also for mental health and other health care professionals. Unless they have pursued specialized training in developmental disabilities, even pediatricians, psychologists and psychiatrists have limited understanding of mental retardation. It has always been a stigmatizing diagnosis, one that both families and care providers would wish to avoid if possible. For this and other reasons, the diagnosis of mental retardation is frequently "missed" in individuals with mental retardation and IQs at the higher range of the disability.

The diagnosis of mental retardation/intellectual disability has three prongs. Each of the following criteria must be demonstrated in order to warrant the diagnosis:

1. Intellectual functioning that is significantly impaired.
2. Adaptive behavior that is significantly impaired.
3. Origin of these impairments in childhood, prior to the age of 18.

To diagnose mental retardation, doctors and mental health professionals rely either on one or both of two professional texts which use somewhat different language to describe essentially the same set of diagnostic criteria: the American Association on Intellectual and

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2 As explained in Footnote 1 (Introduction), those in the developmental disabilities field have replaced the highly stigmatized term “mental retardation” with the term “intellectual disability” and encourage the use of “person-first” language.

AAIDD is the leading professional association concerned with the diagnosis and treatment of mental retardation. Its manual provides a comprehensive analysis of all aspects of assessment, including entire sections focused on the evaluation of individuals whose IQ falls at the upper range of mental retardation and on “retrospective diagnosis,” which is often required in capital cases. It is an indispensible resource. The DSM-IV-TR is likewise a required reference. Every capital lawyer should possess a copy of both the Green Book and the DSM-IV-TR.

AAIDD 2010 describes the three prongs of the diagnosis in this way:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18.

AAIDD 2010 at 5. The DSM-IV-TR uses the following language to capture the same three criteria, though (for historical reasons explained in Chapter 1.2, below) it breaks adaptive function into 11 areas rather than the three broader domains (conceptual, social, practical) that AAIDD 2010 utilizes. The diagnosis of mental retardation, according to the DSM-IV-TR, requires

> significantly sub-average intellectual functioning … that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety…. The onset must occur before age 18 years…..

DSM-IV-TR at 41.

The DSM-IV-TR further specifies four categories or “degrees of severity” of mental retardation, which reflect increasing levels of intellectual impairment, as indicated by IQ, from “mild” to “profound.” It is the “mild” category, or the upper IQ range of retardation, which concerns us here. Such individuals, with IQs between approximately 55 and 75, comprise about 80 to 90 percent of all persons with mental retardation. AAIDD 2010 at

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3 AAIDD 2010 is also referred to as “the Green Book,” based on the color of the book’s jacket. The 2002 version of the text (the 10th Edition) is known as “the Red Book.” Counsel should be certain to obtain a copy of the most current edition of this very important volume.
151. Individuals with lower IQs are unlikely to enter the criminal justice system. This comparatively higher functioning group is sometimes described as “invisible,” because its members so frequently go undiagnosed, their difficulties apparent but the fact that they are driven by a disability overlooked. Children with mental retardation and higher IQs are often not distinguishable from their nondisabled peers in early childhood. Their challenges manifest later, and they may struggle into adulthood and throughout their lives without the brain-based reason for their difficulty being understood.

AAIDD historically relied on these same categories of severity, from “mild” to “profound,” but beginning in 1992 abandoned this structure in favor of a system that classifies individuals in terms of the nature of the “supports” they require in order to live with dignity. Beginning with the 9th edition of its manual, AAIDD discarded the mild-moderate-severe-profound classification system because it was too heavily based upon IQ scores, and because, as the current manual explains, the term “mild” is a misnomer. It erroneously suggests that an individual is not affected by a seriously disabling condition when there are ways in which individuals with mental retardation and higher IQs are in fact at higher risk and more challenged than those with lower IQs. AAIDD 2010 at 153. For practitioners, it is essential to note that regardless of whether one uses the term “mild mental retardation,” or refers to individuals “with mental retardation and higher IQs,” there is distinct and vitally important set of issues that are unique to this subset of persons.

1.1 **SIGNIFICANT LIMITATIONS IN INTELLECTUAL FUNCTIONING**

*Intelligence* is a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience.

AAIDD 2010 at 15. The consensus among mental health professionals is that a full-scale IQ of 70 to 75 or below – on a standardized, individually administered IQ test – satisfies the requirement of significant limitations in intellectual functioning. IA IQ scores are typically rendered with three components: verbal IQ, performance IQ, and full-scale IQ.

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4 The quality of the specific IQ test and the manner of its administration (standardized, individually administered) are very important. Practitioners need to be aware that “an IQ score is not an IQ score,” and careful investigation must be made regarding any current or previous testing. The “gold standard” instruments for assessing intelligence in the United States are the Wechsler (WAIS and WISC) and Stanford-Binet families of tests. Anything else is likely to be a “screening tool,” intended to provide a rough measure of intelligence but not to be relied upon for important decisions, or an alternative test chosen either for ease of administration or to overcome a language or other barrier. Such scores must always be viewed skeptically and never should be relied upon to rule out mental retardation. Recorded “IQ scores” obtained, for example, during military service or in institutional settings like schools, hospitals and detention facilities, often are not individually administered, but rather are group measures intended to provide a rough assessment of intelligence.
Because it is deemed the best measure of overall intelligence, it is the full-scale score that is relied upon for assessing mental retardation. An individual with an IQ in this range is generally capable of academic achievement at the level of a sixth grade student, or a child of approximately eleven years of age. DSM-IV-TR at 43.

The reason the upper range of mental retardation is generally set at an IQ level of 70-75 is to capture in the diagnosis those individuals whose intellectual functioning is two standard deviations below the mean, which is 100 (representing “average” intelligence). An individual with an IQ score of 70 has intellectual functioning lower than 98 percent of the population. Note, however, that it is not 70 but 75 that is used as the dividing line by AAIDD and the DSM-IV-TR. This is necessary to account for what is called the “standard error of measurement,” a principle that applies to all psychological testing.

Although the upper range of IQ for persons with mental retardation is 70-75, there are many reasons why an individual with mental retardation may nevertheless have recorded IQ scores that are higher. The reasons why such scores do not disqualify a client from a mental retardation diagnosis, including the phenomenon known as “the Flynn effect,” are explored in Chapter 5 of this section. Chapter 5 also contains additional discussion of the standard error of measurement.

Some state statutes and court decisions create bright-line cutoffs for the diagnosis of mental retardation at 70, but there is no support for this approach in the clinical literature and it should be challenged. Diagnostically, both the DSM-IV-TR and AAIDD 2010 require consideration of measurement error, and say so clearly and explicitly. AAIDD 2010 at 35, 40; DSM-IV-TR at 41, 48.

1.2 **Significant Limitations in Adaptive Behavior**

“Adaptive behavior” (or “adaptive functioning” – the terms are used interchangeably) is the term used to capture all the skills that are required for an individual to care for him or herself, relate to others, and meet the demands of living in a community. An assessment of adaptive behavior looks at the extent to which an individual can manage for himself in all aspects of life, and includes everything from personal hygiene to employment, managing a budget, maintaining friendships, exercising appropriate judgment and more. As with IQ, there are norms for adaptive behavior, and a diagnosis of mental retardation requires functioning that is substantially below those norms.

Adaptive behavior assessment requires comparing the individual to peers in his or her community. Typical community environments include “homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work, and interact.” AAIDD 2010 at 7. Prison, by virtue of its extraordinary structure, is
not an appropriate environment for assessment of adaptive behavior. Therefore, in capital cases, a “retrospective evaluation” of adaptive behavior is required.

Assessment of adaptive behavior should include “a systematic review of the individual’s family history, medical history, school records, employment records (if an adult), other relevant records and information, as well as clinical interviews with a person or persons who know the individual well.” AAIDD 2010 at 45. It should not, as the AAIDD manual states repeatedly, be based on self-report of the client. AAIDD 2010 at 51-52, 98, 102, 160. Due to shame, lack of insight, and other reasons, individuals with mental retardation are not reliable reporters with respect to their own adaptive behavior. Self-ratings “have a high risk of error because people with intellectual disability are more likely to attempt to look more competent and normal than they actually are, as well as frequently exhibit an acquiescence bias.” AAIDD 2010 at 102.

As mentioned above, AAIDD 2010 and DSM-IV-TR use different language to describe the diagnostic criteria for adaptive function. This is not due to any disagreement but rather is a matter of timing. When it was published in 2000, DSM-IV-TR relied on the adaptive function framework of the then-current 1992 Ninth Edition of the AAIDD manual, which identified ten separate domains of adaptive behavior, requiring a finding of significant deficits in two of them to support a diagnosis of mental retardation. In its Tenth Edition, in 2002, AAIDD collapsed those ten domains into three broader, overarching categories (conceptual, social, practical), requiring a diagnosis to be based on significant limitations in at least one or in an overall measure of all three. However, the DSM has not had an opportunity to catch up and reconcile its criteria with those of AAIDD, since a new manual has not been published in over a decade. In each prior edition of the DSM, the American Psychiatric Association has drawn its diagnostic criteria for mental retardation from the then-current edition of the AAIDD manual.5

AAIDD 2010 defines adaptive behavior as “the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.” AAIDD 2010 at 45. Representative, though not exclusive, components of these three domains include the following:

Conceptual skills: Language  
Reading and writing  
Money, time, and number concepts

Social skills: Interpersonal skills  
Social responsibility

5 For this same reason, where AAIDD uses the term “intellectual disability” the DSM-IV-TR still relies on the term “mental retardation.”
Self-esteem
Gullibility
Naïveté or wariness
Follows rules/Obeys laws
Avoids victimization
Social problem solving

Practical skills: Activities of daily living (e.g., hygiene, feeding oneself, dressing, toileting, cooking, housekeeping)
Occupational skills
Use of money
Safety
Health care
Travel/transportation
Schedules/routines
Use of the telephone

AAIDD 2010 at 44.

The DSM-IV-TR offers the following definition: “Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting.” DSM-IV-TR, at 42. The DSM-IV-TR requires “significant limitations” in at least two of the following eleven domains:

• Communication;
• Self-care;
• Home living;
• Social/interpersonal skills;
• Use of community resources;
• Self-direction;
• Health;
• Safety;
• Functional academics;
• Leisure; and
• Work.

DSM-IV-TR, at 41.6

6 Due to a typographical error in the DSM-IV-TR that resulted in a comma being inserted following the word “health,” the AAIDD 1992 domain called “health and safety” is reflected in the DSM-IV-TR as two separate domains of adaptive behavior. Consequently, some experts view the DSM-IV-TR as identifying ten domains of adaptive behavior while others count eleven.
It is critical to understand that people with mental retardation have strengths as well as deficits and this is particularly important in assessing the adaptive behavior of individuals with mental retardation and higher IQs. The assessment of adaptive behavior involves examining limitations, not strengths. AAIDD 2010 at 45. Mental retardation can never be ruled out on the basis of what a client can do well. As Professor James Ellis, who argued Atkins in the Supreme Court explains:

The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain on the individual's limitations, rather than any skills he or she may also possess. AAMR [now AAIDD] and other clinical experts emphasize that the presence of skills cannot preclude the appropriate diagnosis of mental retardation. In the most recent edition, the definition of mental retardation is prominently accompanied by the admonition that ‘Within an individual, limitations often coexist with strengths.’ AAMR, MENTAL RETARDATION (2002) at 1 (emphasis supplied). Accord AAMR, MENTAL RETARDATION (1992) at 1 (‘Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities.’). The skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying. The sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences. Thus, the presence of confirming deficits must be the diagnostician’s focus.

James W. Ellis, “Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,” 27 Mental & Physical Disability Law Reporter 11, 13 n.29 (January/February 2003). Thus, mental retardation can never be ruled out by determining what a person can do – it is what he or she cannot do that counts.

1.3 ONSET PRIOR TO AGE 18

The third prong of a mental retardation diagnosis onset before age 18 – derives from the recognition that mental retardation is a developmental disability.\(^7\) It is neither a mental illness nor a medical disorder. Onset during the developmental period distinguishes mental retardation from other conditions, such as traumatic brain injury or dementia, which might give rise to similar cognitive and behavioral difficulties, but have their onset in adulthood.

\(^7\) A developmental disability is a disability that appears during the “developmental period,” the years during which a human being is developing to maturity – that is, from birth through at least age 18 and, more likely, the early twenties. See note 8, infra.
after the individual has had the opportunity to mature through the milestones of child development without the disabling impact of brain impairment.

To satisfy this component, it is not necessary that the mental retardation was actually identified or formally diagnosed before the person’s 18th birthday. It is only necessary that the disability was manifested then: that limitations in adaptive functioning existed before the age of 18, that IQ testing sometime during the person’s life has reliably established an IQ of 75 or below, and that there has been no intervening reason, such as a traumatic brain injury, for the person’s IQ to have diminished since the age of 18. In most cases, a thorough social history will provide sufficient evidence to show onset during the developmental stage of life.

A Note about Causation

There is no fixed etiology (cause) for mental retardation, and in fact causation cannot be determined in the majority of cases of mild mental retardation. AAIDD 2010 at 67, 151. The cause may be genetic, acquired (i.e., from a brain injury or disease or exposure, such as alcohol, pesticides, etc.), unknown, or a combination of those and other reasons. Increasingly, the cause of mental retardation in any individual is considered a constellation of “risk factors.” See Section 3.1, infra. Identifying the etiology of a client’s mental retardation is not necessary for the diagnosis, because the disability is defined by the dysfunction itself and not by its cause. Nevertheless, identifying possible causes, or risk factors, may be very helpful in establishing a well-supported diagnosis. Mental retardation is not an exclusive diagnosis and often exists alongside (i.e., is “comorbid” with) other mental conditions. There is a higher degree of comorbidity of mental disorders in persons with mental retardation than there is in the general population. ADHD and mood disorders are among the most common mental conditions that are comorbid with mental retardation. DSM-IV-TR at 45.

8 Some statutes defining mental retardation, for example those of New Mexico and Nebraska, do not have an age-of-onset requirement. Others set an outer limit that is older than 18. Maryland, for example, uses age 22. It is important, therefore, to review the relevant statutes or caselaw in your jurisdiction. Moreover, current research concerning human brain development – some of which suggests that maturation is not complete until the early 20's, see, e.g., Giedd, et al., “Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,” 2 Nature Neuroscience 861-863 (1999) – may lead to a consensus in the future that the “developmental period” extends beyond age 18. Thus, faced with a client who, except for onset by age 18, meets the criteria for mental retardation, counsel should consider utilizing current research to challenge an age-of-onset requirement.
2 HOW MENTAL RETARDATION/INTELLECTUAL DISABILITY AFFECTS PEOPLE WHO HAVE IT

Virtually every capital client with mental retardation will have what is referred to, inaptly, as “mild” mental retardation, meaning mental retardation with an IQ in the higher range of the disability category. An individual with an IQ beneath this range (i.e., an IQ of 55 or below) is so severely cognitively impaired as to be unlikely to be charged with a crime or found competent for trial. Two things are critical to recognize about this type of mental retardation. First, its impact is anything but mild; in fact, the disability dictates and limits an individual’s progress and achievement in profound ways in all areas of life, from childhood to adulthood. Second, because no human condition is more stigmatizing and emotionally painful, individuals with “mild mental retardation” typically develop numerous ways to “mask,” or cover up, the nature and extent of their disability.

In addition, it is very likely that no one – and, particularly, no one in the justice system – has previously considered the possibility that your capital client has mental retardation. The suggestion will undoubtedly be met with skepticism, even by members of the defense team. The adaptive behavior deficits and/or economic poverty of individuals with mental retardation frequently causes them to be viewed by lawyers, judges, probation officers and others through a sociological prism that obscures their intellectual disability. For example, if an individual is viewed as “homeless,” a “drop-out,” “welfare recipient,” “drug addict,” “mentally ill person,” or simply as a “criminal,” these labels may prevent the recognition that cognitive deficits are the basis of, or contribute to, this status. Like anyone else, people with “mild” mental retardation will emulate those in their social milieu to be accepted. As a result, they may violate laws or social norms because they are socially and economically marginalized by those who are higher achieving within their communities. A higher degree of maladaptive behavior may prevail among those who are willing to accept them, or they might behave in socially undesirable or law violating ways because it is preferable and less stigmatizing to be thought “bad” than “incompetent”.

It should also be noted that clients’ family members and others who know them well often accept and normalize their functioning without recognizing it arises from disability. They also may simply be unaware of the extent to which the individual has struggled and has disguised his cognitive inadequacy by masking or other behaviors. For example, family members as well as teachers and peers may ascribe a problem such as school failure to boredom, peer influence, drug use or truancy without regard to the tremendous difficulty the individual encountered with academic content. Unless such reporters are thoroughly interviewed and carefully probed for details, the critical missing pieces of adaptive behavior deficits may not be uncovered.

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9 Approximately 80 to 90 percent of persons with mental retardation have IQs in this higher range. AAIDD 2010 at 151; DSM-IV-TR at 43; Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 423 (1985).
Utilizing the AAIDD’s three domains of adaptive behavior, the remainder of this chapter discusses some typical areas of challenge for individuals with mental retardation and higher IQs. Aided with this understanding, the defense team can gently but thoroughly probe the client and those who know him or her, to remove the mask and reveal the difficulties that clarify a mental retardation diagnosis.

2.1 CONCEPTUAL SKILLS

The “representative skills” in this domain include the use of language; reading and writing; and money, time, and number concepts. AAIDD 2010 at 44. The comparable skills areas in the DSM-IV-TR are communication, self-direction, and functional academics. The term “functional academics” refers to the ways in which reading, math, and other “academic skills” are drawn upon in the real world. A person with mental retardation and higher IQ may function at up to a sixth grade academic level. DSM-IV-TR at 43. All manner of everyday transactions in our industrialized world draw heavily on functional academic skills, as illustrated below.

Impairments in reading, writing, and math skills – functional academics – are almost invariably reflected in poor and failing grades in school, though this may not be apparent during the early school years. As they get older, children with mental retardation have difficulty keeping up in school, may be retained to repeat grades or given a “social” pass to the next grade in spite of inadequate achievement. They are often “tracked” to the lowest functioning group of students or placed in special education classes, where they are more likely to be designated “learning disabled” or even “emotionally disturbed” than “mentally retarded.” In the lowest tracks or in special education classes, they may receive higher grades, either because of greater success with individualized instruction or because their grades in such classes do not reflect an expectation of grade-level achievement. Slow and faltering reading, which becomes particularly apparent when asked to read aloud, and poor reading comprehension are signs of impairment. Everyday tasks, such as reading a newspaper, a letter, a menu, a label on an item in a grocery store, and public postings, may be challenging. Filling out a job application or locating a number in a telephone directory may be difficult or impossible. Writing ability will also be diminished. Clients with mental retardation can write simple letters but cannot produce writing requiring a high level of abstraction, complexity of ideas and expression. They rarely write notes to themselves. Spelling, grammar, sentence structure and use of paragraphs are likely rudimentary.

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10 The following discussion of the three domains of adaptive behavior draws upon the work of two extremely knowledgeable mental retardation experts. Dr. James R. Patton, of Austin, Texas, has developed a comprehensive list of background questions to ask of credible informants in assessing adaptive behavior. With Dr. Patton’s permission, that list has been attached as Appendix One. Dr. Richard Garnett, of Fort Worth, Texas, has served as an expert in a number of post-Atkins Texas cases and has testified in both a teaching and evaluating capacity. Dr. Patton’s list of background questions and Dr. Garnett’s testimony serve as the basis for the following discussion.
Impairments in mathematical skills may be evidenced by difficulty buying items in a store, selecting items that are affordable, counting out money and making or obtaining the proper change. The ability to tell time or to determine elapsed time from a clock or watch is often impaired. There may be poor understanding of weights and measures and of concepts like fractions (e.g., how many days in a week, weeks in a year, ounces in a pound; how many quarter pounds in a pound). Using a bus or train schedule may be difficult. Furthermore, there may be difficulty maintaining bank accounts, paying bills or using simple tools such as a ruler or measuring tape. If an individual ever received special education services, then his or her Individualized Education Plan (IEP) is an excellent place to find documentation of deficits in functional academics.

Self-direction encompasses a broad range of skills necessary for living independently, channeling emotions, and setting and achieving goals appropriate to one’s strengths and limitations. The ability to learn, abstract from what we learn, and apply it in different contexts, is critical to self-direction, as is the ability to understand oneself and exercise some control over behavior.

One of the most important components of self-direction is the ability to learn. Impairments in this ability can manifest directly, for example, in simplistic and concrete thinking and in difficulty comprehending concepts and words. Impairments in the ability to learn and comprehend can also be reflected indirectly in numerous ways. For example, people with mental retardation repeat mistakes more frequently than people with normal intellectual functioning. The ability to avoid repeating mistakes is a function of learning from experience in the abstract – it involves learning from prior mistakes and negative consequences, transferring that learning to similar circumstances, and modifying one’s behavior accordingly. This is a difficult process for people with mental retardation.

Successfully completing activities that require the integration and application of various pieces of knowledge or multiple skills will be difficult. A client with mental retardation may be able to learn, for example, the individual skills necessary to drive a truck safely and proficiently. However, when placed in a job where all of the driving skills need to be utilized and, in addition, flexible thinking is required, he may be unable to perform successfully. For example, when asked to pull out onto the highway, drive to a particular location, and back up to a loading dock, the client may not be able to carry out the whole job. Or he may be able to accomplish this but not know what to do if a change in the route is required, or if he must vary from the specific route he has been taught to drive. The integration of skills and knowledge into a whole is a complex behavior that requires a person to generalize from the specific, and to adapt to changing conditions; this often exceeds the ability of a person with mental retardation.

The ability to engage in goal-directed behavior is also often impaired. Goal-directed behavior requires the individual to engage in a sequencing process. He must understand that what is done now has consequences that lead to something else, and that ultimately produce a predicted and desired outcome. Clients with mental retardation may be unable to
engage in such a process because their ability to anticipate and plan—look ahead, understand how one set of behaviors leads to another, and how a certain sequence of behaviors is necessary to reach a goal—is impaired.

Managing daily life can also be a challenge for clients with mental retardation. Developing and keeping to a schedule which allows the necessary tasks and responsibilities of daily life to be carried out in an orderly fashion requires initiative and considerable integrative thinking. Necessary skills include the ability to identify and keep in mind tasks that must be completed, project the amount of time needed for each, and organize time in the manner that permits these tasks to be accomplished. Each activity or task must be initiated and completed in a manner consistent with the schedule that has been established. This can be difficult or impossible for people with mental retardation.

Decision-making is another area that requires integrative thinking. It requires an awareness of a hierarchy of goals and desires, an appreciation of the social norms and values that establish the context for our behaviors, and the ability to identify possible alternative choices and appreciate and evaluate the consequences of those choices. Clients with mental retardation have difficulty engaging in this process effectively.

One of the deficits that compounds the difficulty of decision-making for clients with mental retardation is that they often do not accurately assess and appreciate their strengths and weaknesses. It is extremely common for a person with mental retardation to overestimate his or her abilities, leading to undesired consequences and failure. In keeping with this, such individuals typically do not recognize the need to ask for assistance to avoid a problem or correct a mistake.

Impulsive behavior is almost always a very serious problem for capital clients with mental retardation. Everyone has impulses—strong emotions or urges that can lead to “unplanned” behavior. The ability to control, defer, redirect, or moderate impulse-driven behavior is impaired in clients with mental retardation. Combined with poor judgment and impaired decision-making, impulsivity can produce devastating results.

Communication, another behavior in the conceptual domain, also involves utilizing numerous skills and abilities. The communication process demands both expressive and receptive tasks. We listen, we respond, we explore in detail the same subject, or we change subjects—all within a reciprocal framework, which is the core of the communication process. The person with mental retardation may or may not be challenged by the building blocks of expressive communication, such as word pronunciation, word usage, vocabulary, and syntax. Figurative language and abstract concepts, however, even simple ones, are often difficult to understand. Or difficulties may be more integrative, for example, making sense to and being understood by others or communicating matters which are essential to well-being, such as feelings and desires. Additionally, receptive communication involves being attentive to and appreciative of what others are expressing. While clients with mental retardation may have difficulty in one or more of these areas, it should also be
recognized that social conversation may, on the other hand, be an area of relative strength. Many people with mental retardation are good conversation partners so long as the substance of the discussion remains concrete as opposed to abstract, and does not exceed their intellectual range. When lawyers “miss” the mental retardation diagnosis as a possibility it is frequently because they find their client so interpersonally engaging.

2.2 SOCIAL SKILLS

The “representative skills” in this domain are interpersonal skills, social responsibility, self-esteem, gullibility, naiveté, the ability to follow rules, obey laws and avoid victimization, and social problem-solving. AAIDD 2010 at 44. The comparable skills areas in the DSM-IV-TR are, simply, “social skills.”

Interpersonal skills are reflected in the number of close friends a client has, how much time he or she spends in their company, how well he or she gets along with these friends, whether he or she can make new friends easily, and what types of social activities are undertaken. The nature of friendships in the client’s childhood may be particularly revealing: were they with same-age peers; was the client valued as an equal or made fun of or treated with derision. Additional contexts within which to examine social relationships include school, dating, marriage, family (of origin and by marriage), and work. The core of enduring and meaningful relationships is a give-and-take process in which both partners appreciate the consequences of their actions upon the other, acknowledge these consequences in ways that reinforce the relationship, continue to make it satisfying for each person, and empathize with each other. People with mental retardation often cannot satisfy these dynamics. Their limitations may be reflected in the small number of truly close friends they have, the ways in which they relate to people, and in which others relate to them. On the other hand, the presence of romantic partners and/or close friends should never be viewed as contraindicating mental retardation. Many people with mental retardation marry, have children and maintain friendships.

Responsibility, gullibility, naiveté, and victimization are dimensions of social behavior that are often interconnected. Individuals with mental retardation typically act as followers rather than leaders and are easily influenced and taken advantage of by others. For this reason, they are frequently the object of practical jokes. Such characteristics often lead to clients being victimized both by people who know them and by strangers.

Understandably, low self-esteem is a consequence of these social limitations. Clients with mental retardation often feel that they are worthless, unable to do anything right, friendless, unlovable, and scorned. Self-confidence is a feeling they may never have experienced. Accomplishments are difficult to recall; however, criticism for failure is not. It is often difficult for clients with mental retardation to describe any kind of performance – in their families, school, work, or the community – that they feel good about or for which they were praised.
Finally, social behaviors include following rules and laws. Clients with mental retardation will often have had trouble following rules in school and at home. Getting in trouble at school for not following rules, even to the extent of being suspended or expelled, is not unusual. Being punished at home for failing to comply with family rules and expectations usually accompanies problems at school. Involvement within the juvenile justice system is frequent, and as adults, clients with mental retardation often have had numerous criminal charges and periods of incarceration.

2.3 PRACTICAL SKILLS

The “representative skills” in this domain include “personal” activities of daily living, “instrumental” activities of daily living, occupational skills, and maintenance of a safe environment. AAIDD 2010 at 44. The comparable skills areas in the DSM-IV-TR are self-care, home living, health, safety, use of community resources, and work.

Most individuals with “mild” mental retardation or higher range IQs can successfully carry out the basic personal activities of daily living – the self-care behaviors that include such physical tasks as eating, dressing and toileting. They may evidence difficulty, however, in more demanding aspects of these behaviors, such as grooming and selecting clothing that is appropriate for the weather or occasion.

The instrumental activities of daily living, or in DSM-IV-TR terminology, home living, health, and use of community resources, involve more complex behaviors. These include preparing meals, housekeeping, using the telephone, using household appliances and basic household tools, performing basic home maintenance, using transportation, managing money, using community resources (e.g., stores, banks, entertainment and recreational facilities), monitoring personal health, seeking medical assistance as required, taking prescribed medications, and using over-the-counter medications as needed. Clients with mental retardation will often have difficulty with aspects of these behaviors.

Occupational skills, or in DSM-IV-TR terminology, work, include jobs held, job performance, job terminations, vocational interests, job-seeking/findings abilities, work attitude, work/vocational skills, job training, getting to work on time, and the degree of assistance and supervision needed. Clients with mental retardation are likely to have difficulty in these areas, though they may perform extremely reliably if provided with sufficient training, structure and support.

Finally, maintaining safe environments includes properly assessing the risks associated with various activities, taking appropriate precautions, perceiving whether others are at risk, eliminating avoidable risks in a home environment (e.g., keeping household cleaning agents and medications away from children), and following prescribed safety rules at work. Clients with mental retardation may have difficulty with these behaviors.
3 INVESTIGATION: FINDING EVIDENCE OF MENTAL RETARDATION/INTELLECTUAL DISABILITY

Time spent investigating the possibility that a client has mental retardation is never wasted, as it involves the same wide and deep exploration of social history that should be the foundation of every mitigation investigation in every case. Even if a mental retardation claim does not result, the knowledge that has been gained will be woven into the case in a variety of ways.

As explained previously, capital clients who have mental retardation are almost always in the highest functioning category – that is, they are classified as having “mild” mental retardation or described as individuals with mental retardation and IQs in the higher range. A striking characteristic of such individuals is that without IQ testing and thorough assessment of adaptive functioning, it would be difficult for anyone – especially a lay person – to determine reliably whether they have mental retardation. There are no unique physical features, patterns of speech or expression, patterns of activity, mannerisms, thought processes, emotional expressions, or interactive styles that are indicative of mental retardation in this population.

In addition, people with mild mental retardation are adept at “passing,” or masking signs of their disability. For example, by answering questions with “yes,” repeating what others say in a natural conversational style, and looking for the answers in the questions asked of them, such persons are often able to blend in and conceal their socially stigmatizing condition. In keeping with this, people with mental retardation will also frequently overrate their skills, either due to honest misapprehension of their abilities11 or because of defensiveness.12 Overstating academic achievement, physical skills, and intellectual abilities is not uncommon.13 As explained by Ellis and Luckasson, “Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.” Ellis & Luckasson, supra, note 9, at 430.14

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12 Cleland, Patton & Seitz, “The Use of Insult as an Index of Negative Reference Groups,” 72 Am. J. Mental Deficiency 30, 33 (1967) (the most common insults used by people with mental retardation relate to intelligence, indicating that denial of their intellectual limitations is a nearly universal defense).
14 Ellis and Luckasson cite the following in support of this observation: “For example, in one study individuals institutionalized for mental retardation attempted to conceal the reason for institutionalization with ‘tales’ of ‘mental illness,’ ‘nerves,’ and even ‘criminal offenses.’” R. Edgerton, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED 148 (1967). See generally J. Dudley, LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED (1983).”
The direct consequence of this deep-seated inclination to appear “normal” is that clients with mental retardation and higher IQs will often go to great lengths to hide their disability even though, under *Atkins*, it could save their lives. The very condition that makes these clients ineligible for execution makes them unable to appreciate that their lifelong tendency to hide their limitations is, in this context, not in their interest.

Accordingly, to avoid overlooking mental retardation in our clients, it is imperative to proceed with extreme care. It is inappropriate to rely upon impressions derived from our interviews with clients, their letters to us, or what others think of them to rule out mental retardation. Furthermore, we absolutely must not rely on a client’s assertions about his or her own skills and abilities. These must always be probed. We do not and cannot “know” mental retardation when we see it, and therefore must undertake a thorough investigation for every client.

This includes gathering records from numerous sources such as:

- Maternal, paternal, and sibling medical records;
- Pregnancy and birth records;
- Medical and mental health records;
- School records;
- Social welfare agency records;
- Social security records;
- Military and employment records;
- Juvenile and criminal records;
- Neighborhood or other relevant local environmental toxin reports; and
- Records reflecting community dysfunction (such as incidents of violence and prevalence of drug-dealing in the neighborhood);

and interviewing of scores of people such as:

- Parents;
- Grandparents;
- Siblings;
- Knowledgeable extended family members;
- Child care workers;
- Teachers;
- Social service providers;
- Previous health care providers;
- Pastors;
- Friends and schoolmates;
- Neighbors;
- Co-workers and employees;
- Military buddies and commanders;
- Police officers;
- Jail and prison personnel and fellow inmates; and
- Co-perpetrators in criminal offenses.

Only after assembling and analyzing all of this information can a complete life history be developed.

As we delve into the client’s life history, we must look for evidence indicating a need for follow-up because it is a red flag for mental retardation, such as:

a. **Any possibility that the client’s family members – previous paternal and maternal generations, parents and their siblings, siblings and first cousins, and biological children – have mental retardation, learning disabilities, or any neurological or other brain-based disability.**

Genetic disorders that produce mental retardation can be passed on from one generation to the next. If other family members have mental retardation, sometimes their disability is known, sometimes it is not. Thus, in exploring the extended family, look for accounts of any family member thought of as “slow,” who had repeated failures in school, who failed to complete high school (or whatever level of school completion is the norm in the community), who has trouble reading or writing, or who receives social security disability payments for “mental handicaps.” Additional records should be gathered for these family members to determine whether they have mental retardation.

b. **Any abnormal physical findings at birth or shortly thereafter, as well as indications in birth, pre-natal or other records of early or in utero exposure to diseases, alcohol or other substances.**

Counsel should research any physical abnormality present at birth; unusual health findings during infancy or childhood; experience of head trauma during or after birth; infant or childhood illness; and exposure to infection, disease or toxic substances to assess the possibility of a link to mental retardation. Fetal alcohol syndrome is one of the leading known causes of mental retardation, and the mother’s labor and delivery records (typically separate from child birth records) and her records of pre-natal care should be reviewed carefully. The possibility of fetal exposure to alcohol or drugs should be explored through every possible avenue.

c. **In the client’s developmental history, a failure to meet normal milestones of development – e.g., lifting head, rolling over, smiling, crawling, pulling to stand, standing, walking, toileting, talking; difficulty later in childhood including speech impairments, trouble learning to feed and dress himself, or acquiring motor skills such as tying shoe laces, skipping, riding a bicycle.**
Since mental retardation is a developmental disorder, early signs of delayed development may be associated with mental retardation. Furthermore, physical disabilities frequently derive from brain dysfunction and may be indicative of a problem that affects mental functioning as well.

d. **School records revealing failing grades, non-promotion, tracking to lowest academic group, placement in special education or an alternative school program, low (below 80) IQ scores, or persistent below grade-level achievement scores; also, school records reflecting behavioral difficulties.**

Children with mental retardation do not perform as well as their peers in school, and most people with mental retardation cannot progress beyond sixth grade skills in academic achievement. DSM-IV-TR, at 43. It should be noted that mental retardation may not be reflected in school performance initially in the earliest elementary years, and the child may keep up until the demands grow too great. As the child ages, he or she may begin to fall behind peers with this gulf widening as time progresses. In addition, children with mental retardation are more likely to have behavioral difficulties such as tantrums and physical aggression, particularly when experiencing frustration. This reflects the combination of impaired communications skills, the strain of cognitive or social demands, and difficulty controlling impulses. If placed in the lowest academic track or in special education, children with mental retardation may begin to achieve better grades, including A’s and B’s. Some entire schools may be composed of children who have learning problems, behavioral problems, or other disadvantages in learning. Therefore, to understand school records accurately, one should be fully aware of the school environment, context and additional factors relating to the schools attended.\(^{15}\)

e. **Arrests, disposions.**

Many clients with mental retardation will have had numerous prior arrests for relatively minor offenses, sometimes resulting in dismissal, sometimes in adjudication. If the

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\(^{15}\) School records are sometimes difficult to find, and the records custodians frequently respond to the first request by stating that they have been lost or destroyed. Do not be deterred. Find out every place where old records are stored and volunteer to look for them yourself. Often, “they have been destroyed” means only, “I cannot find them” or “they are in deep storage and it’s a lot of trouble.” In seeking school records, a member of the defense team should always go personally to the school and to any other location where the records might be lodged and offer to help search until they are found. These documents contain critically important evidence, but because they are almost always a nuisance to locate it is very common to receive an initial assertion that they cannot be located, followed by a discovery of the records once the defense team has impressed upon the relevant persons the importance of finding them. Sometimes, as well, school records may be found outside the school system – having been obtained by other agencies dealing with your client, such as juvenile authorities, probation officers, and jails and prisons. At worst, try to reconstruct school records through interviews with teachers, guidance counselors, family members, and classmates. Such interviews, however, are much more productive when supported by reference to documents. The importance of school records to a mental retardation investigation – indeed, to any mitigation investigation – cannot be overstated.
offenses were committed alone, they will often be property crimes (and often similar types of property crimes), or assaults (frequently associated with a perceived threat from the victim). If the offenses were committed with others, clients with mental retardation are likely to have had a more low-level role rather than having planned the action. The commission of sex offenses, which results from involvement with a child too young to consent or a social misunderstanding about what is inappropriate, is also not uncommon. Often a more savvy co-defendant will “make a deal”, shifting blame to the person with mental retardation, who may not be quick enough or capable of acting similarly in his own self-interest. This is not to say, of course, that an individual with mental retardation cannot lie. He is unlikely, however, to be a very good or successful liar. Ultimately, to establish a diagnosis of mental retardation and address the challenges raised by the prosecution, it will be essential to have a complete understanding of the facts and circumstances of each and every prior offense. Typically, they will illustrate behavior entirely consistent with mental retardation. In addition, there is a very real likelihood that among them there will be evidence of false confessions and even false convictions.

f. **Juvenile records revealing persistent involvement in the juvenile system over a relatively long period of time.**

Clients with mental retardation have often been committed to the juvenile system. Commitment usually occurs because of frequent arrests, failing to attend school, or running away from home. Juvenile records will often show a revolving door history, in which the client gradually makes progress during a commitment, is eventually released, almost immediately fails to meet the post-release requirements of supervision or counseling, re-offends, and is then re-committed.

g. **Prison records.**

Clients with mental retardation commonly have prior adult offenses and periods of incarceration. Classification records usually contain IQ scores and educational achievement test scores. Depending on the tests utilized, and the manner in which the tests are administered, low scores may suggest mental retardation. Because testing may be unreliable, however, low or high scores should not be taken as accurate assessments of intellectual functioning until the reliability of the tests, their administration, and their scoring is determined. During incarcerations, most prisoners are channeled into work programs, vocational training programs, academic programs, and various counseling programs. Prison records usually have detailed records of a prisoner’s performance and progress in such programs. For clients with mental retardation, these records may reveal limitations in adaptive functioning – for example, not learning effectively, not performing work tasks properly or efficiently, being able to perform only the simplest tasks rather than the whole range of tasks within a job classification, persistently showing up late for work, making similar mistakes repeatedly, and acting impulsively. Disciplinary infractions will
often track these same limitations. On the other hand, the client with mental retardation may be well supported by the prison’s highly structured environment, the predictability of its routines, and the clarity of expectations, and thus may be a model prisoner.

h. **Military records.**

People with mental retardation may have served in the military. Military IQ testing has not always been reliable, and a pre-military school record that shows marginally satisfactory performance, even if in special education or the lowest academic tracks, may be sufficient to permit acceptance into the military (active service or national guard/reserves). Military records, like prison records, reflect fairly thorough assessments of performance and behavior during basic training and duty assignments thereafter. Limitations in adaptive functioning may manifest during military service, resulting in discharge for unsuitability, lack of or extremely slow advancement, or frequent disciplinary charges. Or, again, so long as the demands do not become too complex, the structure, predictability and clarity of the military environment may permit the individual with mental retardation a degree of success and achievement.

i. **Employment records.**

Clients with mental retardation tend to hold jobs that call for repetitive, often physical labor, rather than jobs that require flexibility, the exercise of judgment, the use of academic skills (math, reading, writing) or applied academic skills (such as measuring, timing, scheduling, sorting by words or numbers), the exercise of independent choice or initiative, or the supervision of others. Often, clients do not hold jobs for long periods of time, either because the jobs are temporary or seasonal, or because they are terminated for not showing up on time or not showing up at all. It is imperative, in investigating a client’s employment, that the defense team probe beneath the client’s assertions about what his job title was and what responsibilities it involved, by asking for a detailed description of what he did, and then asking similar questions of an employer or co-worker. Consistent with their desire to mask the disability and convey an impression of greater competence, clients with mental retardation frequently exaggerate the nature of their responsibilities and quality of their job performance.

j. **Social Security records.**

The Social Security Administration maintains earnings records for any period of employment with an employer who reports earnings and makes periodic payments into the social security system (which should be all employers who pay wages to employees). Earnings records can reveal that the client failed to maintain employment with the same employer for very long, held numerous short-term jobs, held relatively few jobs, and was

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16 The “unpacking” of disciplinary offenses is especially important for responding to prosecution assertions that such offenses show how our clients are deserving of death.
paid low wages. All these factors are consistent with many people, especially poor people, who have mental retardation. On occasion, social security disability records will show that a client has been diagnosed with mental retardation and has been provided with disability payments.

k. **Records of likely exposure to environmental toxins.**

Part of standard life history investigation includes investigation of possible exposure to environmental toxins, such as lead, mercury, and pesticides. These and other environmental toxins can cause brain damage in children, which can produce mental retardation.

l. **Social welfare agency records.**

Social welfare agencies – child protective services, welfare departments, public health departments, and private non-profit agencies addressing problems associated with poverty – may have relevant records. In particular, one should look for the client’s parental dysfunction, which may have led to temporary or permanent loss of custody of the client and/or siblings, or investigations into problems that could have led to the loss of custody. Parental dysfunction is not only a risk factor for mental retardation (*see infra*), but also may be indicative of limitations in parental intellectual and adaptive functioning.

m. **Medical and mental health records.**

For many clients facing capital charges, medical and mental health records are hard to find, or simply unavailable. Medical and mental health care is often not accessible to our clients or their families. Mental health records are more likely to exist if our clients were “problem children” who were taken into the state school system (for children with mental retardation), or into the juvenile system, through which mental retardation may have been diagnosed or in some way documented. State mental health/mental retardation agency records should always be searched for any record of a client, his or her parents, or his or her siblings. Parental dysfunction is particularly important. Thus, it is imperative to ensure that the parents are included in such searches.

### 3.1 A NOTE ABOUT “RISK FACTORS”

AAIDD 2010 discusses numerous “risk factors” – biomedical, social, behavioral, and educational – that are frequently associated with mental retardation. Risk factors are categorized by the stage of development in which they are likely to have an effect in the development of the individual. *See AAIDD 2010, at 60 (Table 6.1).*

**The prenatal period is the time from conception to approximately three months before birth.** The risk factors during this period are most likely to be documented in the
client’s and/or his or her parents’ medical records, mental health/mental retardation records, and social welfare agency records. They are also likely to emerge during interviews with people knowledgeable about the client’s family. These risk factors are the following:

<table>
<thead>
<tr>
<th>Biomedical</th>
<th>Social</th>
<th>Behavioral</th>
<th>Educational</th>
</tr>
</thead>
<tbody>
<tr>
<td>chromosomal disorders</td>
<td>poverty</td>
<td>parental drug abuse</td>
<td>parental cognitive disability without supports</td>
</tr>
<tr>
<td>single-gene disorders</td>
<td>maternal malnutrition</td>
<td>parental alcohol abuse</td>
<td></td>
</tr>
<tr>
<td>syndromes</td>
<td>domestic violence</td>
<td>parental smoking</td>
<td></td>
</tr>
<tr>
<td>metabolic disorders</td>
<td>lack of access to prenatal care</td>
<td>parental immaturity</td>
<td></td>
</tr>
<tr>
<td>cerebral dysgenesis</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>maternal illness</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>parental age</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The perinatal period is from approximately three months before, to one month after, birth. The risk factors during this period are most likely to be documented in the same records and by the same people as the factors during the prenatal period. The risk factors during this period are the following:

<table>
<thead>
<tr>
<th>Biomedical</th>
<th>Social</th>
<th>Behavioral</th>
<th>Educational</th>
</tr>
</thead>
<tbody>
<tr>
<td>prematurity</td>
<td>lack of access to prenatal care</td>
<td>parental rejection of caretaking</td>
<td>lack of medical referral for intervention services at discharge</td>
</tr>
<tr>
<td>birth injury</td>
<td></td>
<td>parental abandonment of child</td>
<td></td>
</tr>
<tr>
<td>neonatal disorders</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The final category of risk factors, postnatal risk factors, are less likely to be documented in the medical and mental health records of the client or his or her family members, unless the client has suffered certain acute or chronic medical conditions that demand some sort of treatment. Postnatal risk factors may come into play any time after the client’s birth.
and during the developmental period. Any of these factors, in combination with other risk factors, may cause mental retardation, and are likely to be discovered in the investigation of any client’s life history. Social welfare agency records, school records, juvenile records, as well as interviews of people with direct knowledge of the client and his or her family are likely sources of information. These risk factors include the following:

<table>
<thead>
<tr>
<th>Biomedical</th>
<th>Social</th>
<th>Behavioral</th>
<th>Educational</th>
</tr>
</thead>
<tbody>
<tr>
<td>traumatic brain injury</td>
<td>impaired child-caregiver</td>
<td>child abuse and neglect</td>
<td>impaired parenting</td>
</tr>
<tr>
<td>malnutrition</td>
<td>interaction</td>
<td></td>
<td>delayed diagnosis</td>
</tr>
<tr>
<td>meningoencephalitis</td>
<td>lack of adequate stimulation</td>
<td>domestic violence</td>
<td>inadequate early intervention</td>
</tr>
<tr>
<td>seizure disorders</td>
<td>family poverty</td>
<td>inadequate safety measures</td>
<td>services</td>
</tr>
<tr>
<td>degenerative disorders</td>
<td>chronic illness in the</td>
<td>social deprivation</td>
<td>inadequate special education</td>
</tr>
<tr>
<td></td>
<td>family</td>
<td>difficult child behaviors</td>
<td>services</td>
</tr>
<tr>
<td></td>
<td>institutionalization</td>
<td></td>
<td>inadequate family support</td>
</tr>
</tbody>
</table>

3.2 DOCUMENTING THE INVESTIGATION OF ADAPTIVE BEHAVIOR

The investigation of adaptive behavior is extremely wide-ranging. Chapter 8 of the AAIDD manual discusses the elements of a social, medical and educational history that should be investigated and, like the discussion at the beginning of this chapter of the Guide, provides suggestions for a wide-ranging scope of inquiry. AAIDD 2010 at 94-94. The manual’s table of “Risk Factors for Intellectual Disability” is a similarly useful tool. AAIDD 2010 at 61. In addition, the three tables set forth below may help the defense team plan and catalog key aspects of the investigation and documentation of deficits in adaptive behavior.

- The first table describes the ten domains of adaptive behavior that were promulgated in the 1992 AAIDD manual, the same ones that are currently relied upon in the DSM-IV-TR.  

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17 As indicated above, beginning in 2002, AAIDD collapsed the ten domains, making them components of three broader categories of functioning. For investigation, it is easier to rely on the more discrete domains. Also, note that “health and safety” comprise a single domain in the AAIDD construct, though they are listed as two separate domains in DSM-IV-TR as a result of a typographical error.
- The second table lists and defines the four aspects of “inadequate social responding and judgment” that are characteristic of individuals with mental retardation who have higher IQ scores.

- The third table derives from the first two, though it can also be generated independently. It explores behaviors and accomplishments of the client that may appear on first glance to contraindicate a diagnosis of mental retardation. Very often it is discovered that a) these behaviors represent strengths that are not inconsistent with a diagnosis of mental retardation; b) the actual underlying tasks comprising the behaviors were not complex; c) the client’s performance of the underlying tasks was poor and reveals his deficits; or d) the client’s achievement was made possible through the assistance of a “benefactor” more competent than himself.

To turn the first two tables into working tools, the defense team should add two columns to the right hand side of each table: one for recording documentation of behaviors that illustrate the client’s deficits in the listed domain and the other for recording documentation of client behaviors that seem either to represent strengths in the domain or to contraindicate mental retardation. To the extent possible, the source of information for each instance of behavior should be historical records obtained in the investigation, and each such information source should be reflected in the chart. It should be noted that all of the documents described here are defense work product. They should never be turned over to defense experts. They are simply a way for the team to systematically work through its investigation.

Teams are often concerned about whether particular behaviors the client either is known to have engaged in or is believed to have accomplished may contraindicate mental retardation. Each of these behaviors or accomplishments must be examined closely; investigation most often reveals that they are not what they seem at first glance. First, since people with mental retardation are often capable of more than conventional stereotypes of the condition suggest, it’s possible that the questioned behavior is in fact indicative of an area of strength for the client that is not inconsistent with his diagnosis of mental retardation. On the other hand, however, it is even more frequently the case that assertions about a client’s accomplishments turn out to be exaggerated. Investigation often establishes that the client did not do what was claimed or that he accomplished what he did only due to the substantial assistance of another, more able person.

For example: it is asserted that the client had a job as a truck driver. The team will want to identify exactly what the components of the job were, how effectively the client performed each aspect of the job, and what degree of independence and judgment was involved at each step. Choosing one illustrative component: in order to have this job, the client needed to obtain a driver’s license. Many people with mental retardation can drive, so for this client the ability to drive may be an area of strength. Looking more closely, however, it may be discovered that the client was not able to pass the written test to obtain his license.
He may have succeeded only after multiple efforts; he may have had someone else take the exam for him; or he may have obtained a false license. On the other hand, since it is possible for people with mental retardation to read and write on a sixth grade level, passing the written test may have been entirely within this client’s capacity and not at all inconsistent with his diagnosis of mental retardation. The defense team will want to complete this sort of analysis for every aspect of the client’s experience in this truck driver job, beginning with reviewing the client’s job application and how his training proceeded, and continuing with an evaluation of how successfully he fulfilled every aspect of the work.

In any client’s life history there are likely to be numerous instances of behavior that need to be explored in this manner, and it is essential to have a way to capture and analyze each one. Charting is one effective way to go about this. It is recommended that teams periodically brainstorm to compose a list of the behaviors and accomplishments that are or might be, correctly or incorrectly, perceived to be obstacles to a diagnosis of mental retardation. The team might be asked to complete this sentence: “You know the client couldn’t have mental retardation because…” Common endings for this sentence will include phrases like: he had attractive girlfriends; he held a responsible job and was a valued employee; he was a successful gambler; he reads the newspaper; he’s a great conversationalist; he served in the military; he’s street smart; he’s so well groomed and such a sharp dresser. Through careful investigation, it is frequently the case that what underlies these claims turns out to support, rather than undercut, the diagnosis of mental retardation.

A separate table along the lines of Table 3 can be created for investigating and analyzing each behavior or accomplishment in the community or in prison that might potentially contraindicate a diagnosis of MR. For each such behavior or accomplishment, the team should determine its component parts (what actually needed to be done in order for this behavior to be accomplished) and their degree of difficulty, identify what parts the client himself actually performed, how successfully and how independently he did so, and, finally, what assistance he had from family, friends and others who served as “benefactors” in the process. Again, it should always be kept in mind that people with mental retardation have areas of strength and also may go to great lengths to mask their deficits. Nothing should be accepted on face value and everything should be probed.

There are professional resources that may assist in analyzing the components and required skill level for the various tasks that comprise a job. The defense team might consider consulting with a rehabilitation or vocational counselor who is familiar with the strengths and deficits of individuals with cognitive impairments. Such professionals often are used in personal injury litigation to show job functions that have been lost due to injury. In addition, there are books that break down the job skills required in various types of work. One (unfortunately dated) example is Jacobs, Larson and Smith’s Handbook for Job Placement of Mentally Retarded Workers: Training, Opportunities and Career Areas (Garland STPM Press, 3d ed. 1979, which analyzes jobs such as sewage treatment worker,

**TABLE 1: DOMAINS OF ADAPTIVE FUNCTION**

<table>
<thead>
<tr>
<th>Domain</th>
<th>Definition (from AAIDD 1992)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication</td>
<td>Skills include the ability to comprehend and express information through symbolic behaviors (e.g., spoken word, written word/orthography, graphic symbols, sign language, manually coded English) or nonsymbolic behaviors (e.g., facial expression, body movements, touch, gesture). Specific examples include the ability to comprehend and/or receive a request, an emotion, a comment, a protest, or rejection. Higher level skills of communication (e.g., writing a letter) would also relate to functional academics.</td>
</tr>
<tr>
<td>Self-care</td>
<td>Skills involved in toileting, eating dressing, hygiene, and grooming.</td>
</tr>
<tr>
<td>Home–living</td>
<td>Skills related to functioning within a home, which include clothing care, housekeeping, property maintenance, food preparation and cooking, planning and budgeting for shopping, home safety, and daily scheduling. Related skills include orientation and behavior in the home and nearby neighborhood, communication of choices and needs, social interaction, and application of functional academics in the home.</td>
</tr>
<tr>
<td>Social/Interpersonal skills</td>
<td>Skills related to social exchanges with other individuals, including initiating, interacting, and terminating interaction with others; receiving and responding to pertinent situational cues; recognizing feelings; providing positive and negative feedback; regulating one’s own behavior; being aware of peers and peer acceptance; gauging the amount and type of interaction with others; assisting others; forming and fostering of friendships and love; coping with demands from others; making choices; sharing; understanding honesty and fairness; controlling impulses; conforming conduct to...</td>
</tr>
</tbody>
</table>

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18 Attorney Kathryn Kase of the Texas Defender Service provided these helpful resources.
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of community resources</td>
<td>Skills related to the appropriate use of community resources, including traveling in the community; grocery and general shopping at stores and markets; purchasing or obtaining services from other community businesses (e.g., gas stations, repair shops, doctor and dentist’s offices); attending church or synagogue; using public transportation and public facilities, such as school, libraries, parks and recreational areas, and streets and sidewalks; attending theaters; and visiting other cultural places and events.</td>
</tr>
<tr>
<td>Self-Direction</td>
<td>Skills related to making choices; learning and following a schedule; initiating activities appropriate to the setting, conditions, schedule, and personal interests; completing necessary or required tasks; seeking assistance when needed; resolving problems confronted in familiar and novel situations; and demonstrating appropriate assertiveness and self-advocacy skills.</td>
</tr>
<tr>
<td>Functional Academics</td>
<td>Cognitive abilities and skills related to learning at school that also have direct application in one’s life (e.g., writing; reading; using basic practical math concepts, basic science as it relates to awareness of the physical environment and one’s health and sexuality; geography; and social studies). It is important to note that the focus of this skill area is not on grade-level achievement, but, rather, on the acquisition of academic skills that are functional in terms of independent living.</td>
</tr>
<tr>
<td>Health and Safety</td>
<td>Skills related to maintenance of one’s health in terms of eating; illness identification, treatment, and prevention; basic first aid; sexuality; physical fitness; basic safety considerations (e.g., following rules and laws, using seat belts, crossing streets, interacting with strangers, seeking assistance); regular physical and dental checkups; and personal habits. Related skills include protecting oneself from criminal behavior, using appropriate behavior in the community, communicating choices and needs, participating in social interactions, and applying functional academics.</td>
</tr>
</tbody>
</table>
### Work
Skills related to holding a part or full time job or jobs in the community in terms of specific job skills, appropriate social behavior, and related work skills (e.g., completion of tasks; awareness of schedules, ability to seek assistance, take criticism, and improve skills; money management, financial resources allocation, and the application of other functional academic skills and skills related to going to and from work, preparation for work, management of oneself while at work, and interaction with coworkers).

### Leisure
The development of a variety of leisure and recreational interests (i.e., self-entertainment and interactional) that reflect personal preferences and choices and, if the activity will be conducted in public, age and cultural norms. Skills include choosing and self-initiating interests, using and enjoying home and community leisure and recreational activities alone and with others, playing socially with others, taking turns, terminating or refusing leisure or recreational activities, extending one’s duration of participation and expanding one’s repertoire of interests, awareness, and skills. Related skills include behaving appropriately in the leisure and recreation setting, communicating choices and needs, participating in social interaction, applying functional academics, and exhibiting mobility skills.

### TABLE 2: ADDITIONAL COMMON CHARACTERISTICS OF INDIVIDUALS WITH MENTAL RETARDATION WHO HAVE HIGHER IQ SCORES

It is typical that individuals with mental retardation wish not to expose their limitations, are vulnerable to the influence of others, and are more frequently followers than leaders. See discussion of “inadequate social responding and judgment,” AAIDD 2010 at 44, 160-161

<table>
<thead>
<tr>
<th>CHARACTERISTIC</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denial, Cloak of competence</td>
<td>Individuals may go to great lengths to hide their limitations. They may exaggerate their skills and capabilities, making efforts to appear more competent and independent than they are in a variety of areas</td>
</tr>
<tr>
<td>Desire to please</td>
<td>Individuals may tend to do what they perceive others to want in an effort to be accepted and liked. This may</td>
</tr>
</tbody>
</table>
lead to risky or inappropriate behavior. It can also lead to false confessions and exaggerations about their own accomplishments. While this desire to please can be an asset in many situations, “when coupled with gullibility or limited decision making and untrustworthy people, it can result in agreeing without understanding and, thereby, may increase an individual’s vulnerability.”

Gullibility

This characteristic is “often identified as a cardinal feature of ID,” and includes “occurrences of being successfully fooled, tricked, or lied to by others.” It may result in individuals “being taken advantage of, being made fun of without realizing it, or being talked into doing things without understanding the potential consequences.”

Naivete/Suggestibility

Individuals may be “overly trusting, immature, innocent, or inexperienced,” and might uncritically accept what is said or suggested by another, particularly another who is perceived as powerful. Individuals with this trait “have a tendency to quickly look to others for guidance due to their difficulty in understanding a situation and their frequent history of failure in novel situations. This trait may result in making poor choices. The combination of suggestibility and gullibility may increase one’s risk of making poor decisions.”

### TABLE 3: BEHAVIORS AND ACCOMPLISHMENTS OF THE CLIENT THAT GIVE RISE TO QUESTIONS

<table>
<thead>
<tr>
<th>BEHAVIOR OR ACCOMPLISHMENT (list below is meant to be illustrative; supplement as appropriate)</th>
<th>REQUIRED COMPONENTS AND DEGREE OF DIFFICULTY (could a 6th grader do this?)</th>
<th>How did the client perform? How successful were his efforts? What was the role of benefactors?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drove a car</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed grievances in prison</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rented and paid for apartment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintained job at fast food restaurant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Well groomed and dressed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Street smart (describe)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Read the newspaper and other periodicals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gambled successfully or played chess, cards, etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Had attractive and capable girlfriends</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is a loving father</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cooperates with counsel and appears to understand his case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has good conversations about current events, sports, etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bought and sold drugs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lied to avoid being caught</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4 INVESTIGATION: DEVELOPING THE EVIDENCE OF MENTAL RETARDATION/INTELLECTUAL DISABILITY

This stage of investigation, which involves retention of an expert and decisions about IQ testing and formal assessment of adaptive function, should never be made at the outset of a case, but rather should begin only after a significant amount of social history information has been developed. It is a common error to embark on this part of the work too early. In order for such decisions to be reliable, however, they must be informed by the client’s social history.

4.1 ENGAGING A MENTAL RETARDATION/INTELLECTUAL DISABILITY EXPERT: THE IMPORTANCE OF CLINICAL JUDGMENT

Once a social history has been developed, it is time to engage the services of a true mental retardation expert or experts. It is important to note that most forensic mental health professionals are not mental retardation experts. People who are experts in mental retardation come from a variety of educational backgrounds such as psychology, education, social work, or law. What all have in common is a wealth of experience working with people who have mental retardation. Their experience usually will include diagnosis, but also often will include designing and providing services to people with mental retardation. Their assistance is critical because they are adept at recognizing and eliciting evidence of limitations in adaptive behavior and at assessing whether the overall combination of limitations and strengths is indicative of mental retardation. Such evidence is frequently missed by other mental health professionals. There is no substitute for this kind of experience and expertise, referred to as “clinical judgment,” and AAIDD 2010 devotes an entire chapter to discussing its importance in obtaining a reliable determination of mental retardation. AAIDD 2010 at 85-103. See also, Olley, J.G., “Knowledge and Experience Required for Experts in Atkins Cases,” 16 Applied Neuropsychology, 135-140 (2009). Without it, an expert will not have the ability to discern, from the client’s life history, the limitations in adaptive behavior that are the bedrock of diagnosis. In addition, when it comes time to present evidence of mental retardation to a prosecutor or judge, a true mental retardation expert, as opposed to a general forensic mental health expert, will be unquestionably far more persuasive.

The importance of this advice cannot be overstated. Mental health experience does not imply a deep understanding of mental retardation. For example, psychiatrists may have studied mental retardation in their training, but most will not have had substantial experience diagnosing or providing services for people with mental retardation. Similarly, most psychologists lack relevant experience. They can offer IQ testing services but, unless they have training, experience and expertise in diagnosing and working with people with mental retardation, they cannot fill the need for a mental retardation expert. Even if you have confidence in a particular psychiatrist or psychologist who has performed high-quality...
work for a mentally ill client in another case, do not use him or her for this evaluation – except, perhaps, for IQ testing. Furthermore, if IQ testing is performed by a psychologist who does not specialize in mental retardation, do not rely upon his or her conclusions to rule out mental retardation. Such experts frequently miss the mental retardation diagnosis, taking too narrow a view of who qualifies for it, due to their lack of specialized experience and clinical judgment.

A multi-disciplinary team approach can be very helpful in establishing a diagnosis of mental retardation. Mental retardation was persuasively and conclusively established in U.S. v. Davis, for example, through five defense expert witnesses: a developmental pediatrician, a pediatric neuropsychologist, two clinical psychologists and a neuropsychiatrist. 611 F.Supp. 2d 472 (D. Md. 2009).

4.2 IQ TESTING

The question of whether to conduct new IQ testing requires careful consideration if the life history investigation reveals IQ scores consistent with mental retardation. If the client’s historical record includes IQ testing with reputable and reliable instruments – for example, the Wechsler Intelligence Scale for Children (WISC), the Wechsler Adult Intelligence Scale (WAIS), the Stanford-Binet Intelligence Scale – and investigation reveals that the test or tests were properly administered by qualified individuals, under suitable conditions, and were correctly scored, the historical scores will be extraordinarily valuable. It is possible that it might be best to rely on these scores and not conduct new intelligence testing, or at least to consider proceeding in that fashion. If, however, the historical scores do not meet all these criteria, they have less value and the balance shifts toward new testing.19

No matter what, it will be important to think strategically about new testing. In most cases, if the defense raises mental retardation, it is likely, though not inevitable, that the prosecution will ask for access to the client to conduct an IQ test. If a prosecution request for new testing cannot be avoided, it may be advantageous for a defense expert to administer the test first. This may make prosecution testing unnecessary, either because the prosecution expert will be willing to rely on the defense expert’s results or because the well-established “practice effect” of repeated intelligence testing may give rise to an inaccurately inflated score that the prosecution expert cannot rely on.20

19 Even if a reputable and reliable IQ test is used, it must be administered under the proper conditions by a properly trained test administrator – e.g., in a relatively quiet isolated space free from distraction, with a table or desk that allows ample room for the test materials, with the subject and administrator able to pass materials back and forth and to see each other and communicate freely, and with the time available as prescribed by the test protocol. Every reliable IQ test requires individual administration. No “group” test (administered to a group of people) can yield reliable results.

20 See Section 5, infra.
expert may ask to review the “raw data” collected by the defense expert or may wish to administer a different IQ instrument to avoid the practice effect.\textsuperscript{21}

If testing is conducted, the test instrument that is used should be one of the Wechsler or Stanford-Binet family of instruments. In \textit{Atkins}, the Court referred to the WAIS-III as “the standard instrument in the United States for assessing intellectual functioning.” 536 U.S. at 309 n.5. The WAIS-IV and Stanford-Binet-V are the most current versions of these instruments.\textsuperscript{22}

With respect to IQ testing and, even more with respect to any other psychological testing, the defense team should proceed with great caution and only after consultation with experts and with lawyers who have expertise in mental retardation in the context of capital litigation. \textit{See} Chapter 5.9, \textit{infra}. Few decisions are more consequential than those about whether to test and what instruments to use, and these choices will have far-reaching implications. They may generate information that is both unreliable and unhelpful, and will open wider the door for the prosecution’s testing. While various neuropsychological measures may be appropriate to consider, there is no basis for undertaking most other psychological testing in the context of a mental retardation evaluation, including and especially personality assessment. Instruments such as the Minnesota Multiphasic Personality Inventory (MMPI), the Million Clinical Multiaxial Inventory (MCMI), and the Psychopathy Checklist-Revised (PCL-R) are not normed for persons with mental retardation and have no place in mental retardation evaluation. The use of instruments to assess malingering is addressed in Chapter 5.9, \textit{infra}. No matter what a psychologist says about his or her standard practice in an evaluation, not a single test should be administered to a capital client without a specific decision by the defense team that such testing is appropriate.

4.3 \textbf{FORMALLY ASSESSING ADAPTIVE BEHAVIOR LIMITATIONS}

At the outset, it is important to note two things: first, the assessment of adaptive behavior limitations is not only necessary, but crucial to the diagnosis of mental retardation. Without a clinical conclusion that your client has significant limitations in adaptive

\textsuperscript{21} Intelligence testing involves the assignment of points for each task performed (\textit{e.g.}, 0, 1, or 2) and the compilation of these “raw” scores into “scaled” and “standard” scores. An expert may review another’s raw data to see whether he or she agrees with the number of points that were awarded for a particular answer and to check the arithmetic involved in calculating scores, etc. Counsel should expect the defense raw data to be examined closely and ensure it is error-free. Similarly, counsel should have a defense expert review and critique the raw data of the prosecution expert.

\textsuperscript{22} Consult with your mental retardation expert and psychologist about the reliability of historical tests as well as the choice of IQ tests for current administration. A good reference on IQ and other psychological tests is Robert A. Spies, Janet F. Carlson, Kurt F. Geisinger (editors), \textit{MENTAL MEASUREMENTS YEARBOOK} (Buros Institute, 18th Ed. 2010).
behavior, he or she will not be found to have mental retardation. Cases have been lost because the evaluation focused solely on the IQ, even though there was available evidence of limitations in adaptive behavior. Limitations in adaptive behavior manifested during the developmental period also provide independent and irrefutable corroboration of the client’s significant limitations in intellectual functioning. Developing evidence of these limitations is, therefore, the lynchpin of establishing mental retardation. The second thing to note at the outset is that a formal assessment of adaptive function by a mental retardation expert absolutely should not take place until the defense team has completed a comprehensive investigation, as described in the preceding sections of this guide. The defense team will then work with the expert to provide him or her with the documents and witnesses that provide evidence of the client’s limitations.

While identification of adaptive behavior deficits in people with more severe forms of mental retardation can be reasonably straightforward, for higher functioning individuals the task is more complex as it requires subtler determinations and greater reliance on clinical judgment. For individuals who are incarcerated and require a retrospective assessment of their functioning when they were in the community, the task is even more complicated.

The AAIDD manual reflects a general consensus that under such circumstances, a reliable assessment will incorporate data from numerous sources that reflects functioning over a wide range of time and settings. “Obtaining information from multiple respondents and other relevant sources (e.g., school records, employment history, previous evaluations) is essential to providing corroborating information that provides a comprehensive picture of the individual’s functioning.” AAIDD 2010 at 47.

The individual’s adaptive behavior should be evaluated using multiple respondents and multiple sources of converging data. Relevant archival data may include medical evaluations, school records, prior psychoeducational evaluations, Social Security Administration records, employment history, and family history.

Id. at 49-50. See also, 29, 43-55, 85-103. The DSM-IV-TR suggests that evidence of adaptive function deficits be gathered from “one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history),” and mentions the availability of standardized scales that vary in their reliability and appropriateness for the individual. DSM-IV-TR, at 42.

There are several standardized measures of adaptive function, written instruments that measure a wide range of behaviors and compare them to population norms. Examples include the Vineland Adaptive Behavior Scales II, Adaptive Behavior Assessment System II, Scales of Independent Behavior-Revised, and others. Such formal testing is problematic, however, because the instruments focus on more concrete skills and fail to capture the more subtle, abstract and multi-faceted adaptive deficits, including characteristics such as gullibility, naivete, impulsivity, poor judgment, and inability to avoid victimization, which are more fully defined and described in the 2010 AAIDD
The nature of the mental retardation expert’s formal assessment of adaptive behavior is always going to depend upon the specific facts the defense investigation has revealed. A decision about whether to have that expert employ a standardized instrument needs to be made collaboratively, after much discussion and only after the investigation is very advanced.

Before moving forward in this area, practitioners should carefully review the relevant sections of AAIDD 2010 which are cited in this chapter and in Chapters 1.2, 2 and 3 of the Guide. The Davis decision is also helpful in parsing these thorny issues. 611 F.Supp. 2d 472 (D. Md. 2009). In addition, practitioners will benefit from a series of three articles published by the American Psychological Association’s Division 33 (the Division that focuses on mental retardation), that was relied upon by the judge in Davis. J. Gregory Olley, The Assessment of Adaptive Behavior in Adult Forensic Cases, Parts 1, 2, and 3 PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/Division 33, Washington, D.C.) Summer 2006, Fall 2006, Summer 2007.)


4.4 ACHIEVEMENT TESTS

Achievement tests are measures of academic learning – typically reading and math – that are routinely given at multiple points during the course of most children’s school careers in the United States. Anyone who has grown up in this country can recall sitting with his or her classmates and using a Number 2 pencil to fill in bubbles on a page. In addition to this group testing, students who are evaluated for special education or who receive a psychological evaluation for any reason are likely to receive individual achievement testing, often involving multiple instruments.

There are a number of system-wide achievement tests, and it is best to ask someone knowledgeable about the client’s school system for information about what group testing instruments were utilized in that area’s schools during the relevant years. Typical individually-administered instruments include the Wechsler Individual Achievement Test (the WIAT-III is current), the Woodcock Johnson Tests of Achievement (the WJ III ACH is current), and the Wide-Range Achievement Test (the WRAT-IV is current). It is critical to keep in mind that such tests have varying degrees of depth and sophistication. For example, the “reading” portion of the WRAT assesses only word recognition (i.e., the ability to “sound out” words), and indicates nothing about the test-taker’s comprehension.
of those words. The defense team should work closely with its experts to insure a thorough understanding of the interpretation of test scores and that this information is properly used to illuminate the mental retardation diagnosis.

Scores on achievement tests may be reported in several ways. They may identify the grade level at which the student performed, or the comparable age level that the student’s achievement indicates. Alternatively, test results may identify a “standard score,” comparing the student to others of his age or grade on a normal curve, with 100 representing an average score. Or they may reflect a percentile ranking indicating the percent of students who scored higher and lower than the student in his or her city, state or country. It is essential to know how to read these scores. For example, if the client is in fifth grade and being compared to fifth grade students, it will be important to factor in the fact that he is repeating fifth grade for the second time and is three years older than his peers.

In general, achievement test scores are expected to fall in a range that is comparable to the client’s IQ score. However, “it is not accurate to expect extremely low performance over all achievement areas,” as individuals with mental retardation and higher IQs may score “at an average or near average level” in some areas. Reschly, D.J., Documenting the Developmental Origins of Mild Mental Retardation, 16 Applied Neuropsychology 124, 130 (2009). “It is crucial to note that persons with MMR [mild mental retardation] often do exhibit areas of relative strength and weakness; therefore, uniformly low performance over all intellectual, achievement, and adaptive behavior subareas or domains should not be expected.” Id.

If they can be located, achievement test scores can have a significant role in the diagnosis of mental retardation both by corroborating IQ and by documenting adaptive behavior deficits in the conceptual domain (e.g., reading, writing, math skills). As previously noted, persons with mental retardation may achieve up to a sixth grade level in reading and math. If a client’s historic achievement test scores were never higher than the sixth grade level of functioning, this is powerful corroboration of the validity of IQ scores at 75 or below, and of the significance of the adaptive behavior limitations directly measured by achievement tests. If, on the other hand, the historic achievement test scores are consistently higher than the sixth grade level of functioning, this does not rule out mental retardation, but it does raise questions that must be addressed. For such a client, limitations in adaptive behavior, other than those measured by achievement tests, must be present and well-documented, and IQ scores on reliable tests must consistently be 75 or below.

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23 A learning disability may be diagnosed in addition to mental retardation if achievement scores are significantly lower than an IQ that is in the mental retardation range. For a discussion of the relationship between learning disabilities and mental retardation, see Section 5.5, infra.
4.5 **ONSET DURING THE DEVELOPMENTAL PERIOD**

Onset during the development period, the third diagnostic element of mental retardation, is relatively straightforward. It requires that the signs of mental retardation – significantly sub-average intellectual functioning and significant limitations in adaptive functioning – be apparent before the client’s 18th birthday. However, some confusion may arise about how these signs must be “apparent.” It is not required that IQ or adaptive function actually were *measured* prior to age 18. Obviously, such facts are immensely helpful in proving mental retardation if they exist, but they are not essential and only rarely will be found. It is, however, required that the disabling effects of mental retardation were manifested prior to age 18. Establishing age-of-onset emphasizes the retrospective nature of diagnosis in the capital context and the resulting necessity of developing a comprehensive life history of the client. The source of the most critical evidence of limitations that prove age-of-onset will be the documents and witnesses that relate the client’s life history.24

4.6 **SELECTING EXPERTS**

The defense will likely need at least two experts to evaluate the client: a mental retardation specialist, who typically has a Ph.D or an Ed.D, and a clinical psychologist or neuropsychologist, who typically has a Ph.D and expertise in IQ testing. As explained in Chapter 4.1, *supra*, most experts who do IQ and neuropsychological testing do not have sufficient “clinical judgment” (*see* AAIDD 2010 at 85-103) or a deep enough understanding of mental retardation at the higher range of IQ, to assess adaptive function. Similarly, many mental retardation specialists do not perform psychological testing. If the case proceeds to a hearing, then the defense also will need to ensure that there is a testifying expert who can fulfill a teaching role, educating the court or other fact finder about mental retardation based on his or her deep understanding of developmental disabilities. This “teaching expert” can be one of the evaluating experts, but need not be. Sometimes, for example, counsel may find a developmental disabilities expert – a clinician, researcher or professor – who is prominent in the region but can’t offer the extensive amount of time that would be required for completing an assessment of the client. Such an expert might, however, be willing to work with counsel on a more limited basis and come to court for a few hours of testimony to educate the court about mental retardation. Experts like this, particularly if they have ties to the local community and very strong credentials in their field, can be very effective, helping the court to overcome common misconceptions about mental retardation and explaining the complexities of diagnosing individuals who have mental retardation and higher IQs.

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24 The historic evidence of limitations in adaptive behavior during the developmental period plays an important related role as well. It persuasively refutes the accusation or insinuation of malingering. *See* Section 5. No one lives through the developmental period of his or her life trying to appear to have the limitations in adaptive behavior that would lead a court years later in a capital prosecution to determine that the person has mental retardation.
For purposes of later testimony in an evidentiary hearing, it is imperative that prior to engaging the services of experts, their licensing status is determined. Most clinical psychologists will be licensed in the state in which they practice. If an expert is from out of state, he or she may need to associate with a local licensed clinical psychologist to perform the necessary intelligence testing and assessment (much like out-of-state, pro hac vice counsel needs to associate with local counsel to represent someone). Mental retardation experts often are not licensed as clinical psychologists, either because they are not clinical psychologists or, though they are, because they do not have a practice in clinical psychology. However, they may be licensed under other specialties that permit them to diagnose mental retardation. The critical matter is that the mental retardation specialist be able, under applicable state licensing laws, to diagnose mental retardation, because it is preferable for this expert to make and defend the diagnosis. If, in your jurisdiction, only licensed clinical psychologists or psychiatrists can diagnose mental retardation, you will need such an expert to make and defend the diagnosis. In such jurisdictions, it is important that you select one – and more typically this will be a clinical psychologist rather than a psychiatrist – who has experience diagnosing mental retardation, and can collaborate – and is accustomed to collaborating – with mental retardation specialists.
5  **ISSUES CONCERNING THE DIAGNOSIS**

The following sections pertain to issues that commonly arise in the course of litigating a mental retardation claim. Defense teams should be prepared to address all of them.

5.1  **IQ SCORES BETWEEN 70 AND 75: REPORTING CONFIDENCE INTERVALS AND THE STANDARD ERROR OF MEASUREMENT**

Although a score of 70 represents the point that is two standard deviations below the mean of 100, both AAIDD 2010 and DSM-IV-TR explicitly state that a score of up to 75 meets the significantly sub-average intellectual functioning element of the diagnosis of mental retardation. This is because of the standard error of measurement, a statistical concept that accounts for the unavoidable imperfection of instruments and the testing process.

Owing to variations in test performance, the examiner or examinee’s behavior, or other personal or environmental factors, IQ and other tests are not considered to be absolutely accurate. Accordingly, a “standard error of measurement” must be taken into account when interpreting the score obtained on any test. AAIDD 2010 at 36, DSM-IV-TR at 41, 48. The standard error of measurement, or “confidence interval,” is the range of IQ scores within which there is a high level of confidence that a person’s “true” IQ resides. For example, if the standard error of measurement is plus or minus five points from the IQ score obtained on the test, then the “true” IQ score of a person who obtains a score of 75 is within the range of 70 to 80.

Both the DSM-IV-TR and AAIDD 2010 require that the standard error of measurement be accounted for. The DSM-IV-TR references the upper range of IQ as 75 not once but twice. DSM-IV-TR at 41-42, 48. Likewise, AAIDD 2010 indicates that reporting of the relevant confidence interval “must be a part of any decision concerning the diagnosis” of mental retardation. AAIDD 2010 at 57.

Despite these clear clinical principles, some legislatures and courts have been inclined to disregard measurement error if the client’s obtained IQ score is between 70 and 75, imposing a strict cut-off at 70. This approach is contrary to the instructions of the diagnostic manuals, at odds with clinical best practices, and unsupported by science. As any psychologist or statistician will verify, accounting for the standard error of measurement is fundamental. It cannot be ignored without violating the standard of practice in the field.

5.2  **IQ SCORES HIGHER THAN 75: TEST-RETEST SITUATIONS AND THE PRACTICE EFFECT**

A “test-retest” situation, implicating what is referred to as “the practice effect,” occurs when an individual takes a particular IQ or other test more than once, particularly if the second administration occurs within months of the first. The absence of novelty usually
results in a higher score on the retest for several reasons, including the fact that the person is able to provide better answers to questions the second time around or because, on a timed test, he or she is able to respond more quickly, leading to higher scores. Study of this phenomenon indicates that the increase typically diminishes somewhat over time and varies with demographic variables such as the person’s age, education, and gender. Basso, M.R., Carona, F.D., Lowery, N., & Axelrod, B.N., “Practice Effects on the WAIS-III Across 3- and 6-Month Intervals,” 16(1) The Clinical Neuropsychologist 57-63 (2002). The average practice effect for the WAIS-III is 4.51 points, and that effect does not appear to be reduced significantly by longer test intervals. Id. Accounting for a practice effect may explain scores attained by a client that seem too high. After accounting for the practice effect, IQ scores higher than 75 that were obtained on a retest may be fully consistent with a diagnosis of mental retardation. It is due to the potential practice effect that psychologists generally will not have a client take the same IQ test again within a 12-month period.

In a test-retest situation, not only must the practice effect be taken into account when interpreting the score on the retest, but also the standard error of measurement must be accounted for. The standard error of measurement must be reported for all scores.

In the context of serial evaluations, simple difference scores are particularly vulnerable to the influence of measurement error. Difference scores, in essence, combine the measurement error associated with scores from each of the two evaluations, and thereby magnify the impact of measurement error on test results. Thus, in order to interpret the clinical significance of change scores, they must be interpreted in light of their measurement errors.


An example helps to illustrate these important principles. In a first administration of the WAIS-III test, the client obtained a full scale score of 72. Taking into account the standard error of measurement, this means his true IQ score fell within the range (or confidence interval) of 67-77, and satisfies the sub-average intellectual functioning prong of the mental retardation diagnosis. Taking into account both the practice effect and the SEM in a second test administration, this client’s true IQ score would be expected to fall within the range of 66-85. Thus, so long as he in fact scored 85 or lower on the retest, his IQ still fell within the range necessary to establish the sub-average intellectual functioning component of mental retardation.

5.3 IQ SCORES HIGHER THAN 75: THE FLYNN EFFECT

The Flynn Effect is significant because its impact on the interpretation of a client’s IQ score can be the difference between life and death. Named for the social scientist who first identified the phenomenon of rising IQ scores, “Flynn Effect” refers to the generally
accepted principle that collective IQ scores rise in a measurable fashion over time. 25 In the United States, on the Stanford-Binet and Wechsler tests, average test scores rise 0.33 points per year. Since the intellectual functioning prong of mental retardation is met by a test score that is two standard deviations below the mean (70, where the mean is 100), in order to accurately calculate the relationship of an individual’s test score to the mean, that score must be adjusted downward 0.33 points for each year since the year the instrument was normed. AAIDD 2010 expressly requires that a correction be made to reflect the Flynn Effect if an individual was assessed using a test with aging norms. AAIDD 2010 at 37. Since it can be many years between editions of tests, and since individuals are sometimes administered outdated editions of tests even after a new version has been published, adjusting for the Flynn Effect can be very important.26

Here is an example: the WAIS-III was normed in 1995.27 In 2004, a client is tested and receives a score of 76. When that score is adjusted for the Flynn Effect (0.33 x 9 years), the score decreases three points, and is now 73. The mandatory adjustment for the Flynn Effect puts this individual’s IQ squarely within the mental retardation range.

Such adjustments must be made for all IQ scores in the client’s history. For example: records reflect that the client was tested at age eight, in 1975. The examiner used the WISC, normed in 1947-48, rather than the then-recently released WISC-R, published in 1974 (and normed in 1972), and the client received a score of 75. Since 27.5 years had passed since the norming of the WISC and its administration to the client in 1975, its norms were 8.25 points out of date (0.33 x 27.5). The score of 75 should really be 67. Moreover, had the client been tested using the newly published WISC-R, he would be expected to have scored 68. Tethering the Elephant at 185 (2006).

The table below provides information about the publication dates of some common IQ tests and the years in which their norming studies were completed.

<table>
<thead>
<tr>
<th>Measure</th>
<th>Normed</th>
<th>Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>WISC</td>
<td>1947-48</td>
<td>1949</td>
</tr>
<tr>
<td>WISC-R</td>
<td>1972</td>
<td>1974</td>
</tr>
</tbody>
</table>

25 A comprehensive discussion of the relevance of the Flynn Effect to the diagnosis of mental retardation in death penalty cases is found in J. Flynn, “Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect,” 12 Psychology, Public Policy, and Law 170-189 (2006). The article also discusses the possibility that the norms for the WAIS-III are too low, resulting in test scores that are too high. This is evidenced by, among other things, the fact that individuals generally score lower on the Stanford-Binet instrument. According to Professor Flynn, the score inflation that results from the too-low norms results in depriving individuals with mental retardation and higher IQs of the protection they are due under Atkins. Professor Flynn also discusses these issues in a journal dedicated entirely to the assessment and diagnosis of mental retardation in capital cases. J. Flynn, “The WAIS-III and WAIS-IV: Daubert Motions Favor the Certainly False Over the Approximately True,” 16 Applied Neuropsychology 2, 98-104 (2009).

26 Particularly in institutional settings, where administrators may wait to exhaust their old supply of test materials before ordering the new version of an instrument (psychological tests are quite expensive) it is not uncommon to find that outdated editions of tests were used.

27 Although published in 1997, the instrument was normed in 1995.
Correction for the Flynn Effect is made by multiplying 0.33 times the number of years between the year of the norming study and the year the test was administered.

In conclusion, the interpretation of IQ scores should always take into account the Flynn Effect and the standard error of measurement, as well as, where applicable, practice effect based on repeated test administration. It is typical for prosecution evaluators to assert that it is not standard practice to actually “change” an IQ score to reflect the Flynn Effect, but AAIDD 2010 specifically requires such adjustment. AAIDD 2010 at 37. While acknowledging that it is “a challenging issue,” the manual concludes that “best practices require recognition of a potential Flynn Effect” and that correction for aging norms is warranted. Id. 28 The manual underscores the importance of correcting for the Flynn Effect in circumstances involving retrospective evaluation of mental retardation. AAIDD 2010 at 96. Courts increasingly recognize that IQ scores must be adjusted to account for the Flynn Effect. See e.g., United States v. Davis, 611 F.Supp. 2d 472 (D. Md. 2009).

5.4 IQ SCORES HIGHER THAN 75: OTHER REASONS

It is not unusual for a client who is properly diagnosed with mental retardation to have obtained, at some point in the past, an IQ score higher than 75. Such scores are referred to as “outliers,” and should never cause a team to abandon a potential mental retardation diagnosis. In addition to evaluating the possibility that the outlier score is inflated due to a test-retest situation or the Flynn Effect (see Sections 5.2 and 5.3, supra), the defense team should explore other reasons for the higher score. A number of important considerations are discussed on pages 100-102 of AAIDD 2010. Among the possible explanations are:

- The previous test was not properly administered. The administrator may have been inadequately trained, or failed to follow the prescribed test protocol (e.g., giving the client subtle assistance, too much time, an inappropriate chance to correct answers); or, the conditions under which

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28 Professor Flynn offers this analogy: “Suppose you are coaching an athlete who aspires to qualify for the Olympic high jump. He jumps 6ft 6in., and you assure him that he will qualify. He replies: ‘but that was the standard in 1985. Since then, performances have improved, and today, I have to jump 7 feet to qualify. You are judging my performance in terms of the norms of yesterday rather than today.’ He would do well to hire a new coach.” Tethering the Elephant at 173.
the test was given may have been substantially different from those prescribed. Any variation from standardization compromises the resulting score.

- The previous test was improperly scored. This may mean that the individual items were scored incorrectly (e.g., more points were awarded for a particular item than should have been granted; each scoring decision is governed by specific directions contained in the test manual) or that mathematical errors were made in calculating the IQ score from the underlying scores. Both types of errors are discovered frequently. Wherever possible, the raw data for a disputed test should be obtained and the test carefully rescored by a trusted psychologist or neuropsychologist.

- The previous test itself is not a reliable measure of IQ for this purpose. There are numerous instruments that – although they yield “IQ scores” – are not appropriate for diagnosing or ruling out mental retardation, and are used in the field either because a rough measure of cognitive ability is all that is required or because there are other barriers, such as language or disability, that impede the administration of a “gold standard” IQ test. This includes any instrument that is considered a “screening” test, any group-administered instrument, and any abbreviated version of an otherwise reliable instrument. It also includes instruments that are not normed for individuals who have mental retardation. In short, any score that cannot clearly be associated with the name “Stanford-Binet” or “Wechsler” must be viewed skeptically and investigated thoroughly; indeed, even those highly regarded tests are sometimes administered in abbreviated forms that cannot be relied upon in this context.

- The test is an aberration that, although unexplained, cannot be trusted. On occasion, the record contains a score that is inconsistent with all other data, including previous or subsequent IQ scores, achievement testing, school performance, adaptive behavior limitations, and onset during the developmental period. If it cannot be reconciled with the remaining and reliable information about the client, such a score must be deemed an irrelevant anomaly.

5.5 **THERE IS NO HISTORY OF SPECIAL EDUCATION, OR THERE IS A DIAGNOSIS OF LEARNING DISABILITY**

It is possible, and not unusual, for a client who has mental retardation and higher IQ to have gone through his or her entire school career without ever having been identified for special education. It is even possible that a client may have been screened for special education but never found eligible for services. This was, in fact, the case with Daryl Atkins himself. So a school history that includes no special education should never deter the defense team from thoroughly investigating mental retardation.
It is also possible for a client with mental retardation and higher IQ to have been placed in special education and received services without ever being identified as having mental retardation. In fact, in most school systems it would be highly unusual for a student with an IQ in the so-called “mild” mental retardation range to receive services as a person with mental retardation. For at least thirty years, due to the stigma associated with the label, it has been much more common for students with IQs in the higher range of mental retardation to be called “learning disabled” even if the student does not, in the true sense of the term, have a learning disability.

Whether or not the client was called learning disabled in school, the distinction between learning disabilities and mental retardation is important to understand because it frequently arises in capital cases. Often a prosecution expert (and sometimes even a defense expert) will suggest that a diagnosis of learning disability is more appropriate than a diagnosis of mental retardation even though the client’s IQ is in the mental retardation range. It is important to be prepared to challenge this suggestion and be well informed about the differential diagnosis of learning disability and mental retardation.

As a general matter, learning disability involves a specific or circumscribed area of deficit that stands in stark contrast to the individual’s overall intellectual and adaptive functioning, while mental retardation involves generally compromised mental ability as well as deficits in adaptive function. In order to be identified as having a learning disability, an individual should display a range of abilities such that the learning disability affects a specific area of academic functioning, while other areas either are unimpaired or are, comparatively, less impaired. Typically, an individual with a learning disability would possess an IQ above the range associated with mental retardation but achievement testing (meaning academic functioning) at a level that is below, and that is not commensurate with, his IQ. The court in *U.S. v. Davis* adopted a defense expert’s characterization that learning disability is “unexpected underachievement,” whereas mental retardation makes low achievement scores “expected.” *Davis*, 611 F. Supp. 2d at 482.

It should also be noted that diagnoses of mental retardation and learning disability are not mutually exclusive. A person can have mental retardation (by virtue of meeting all three criteria for the diagnosis) and also have a learning disability. This would be indicated by academic achievement that is even lower than the individual’s limited intellectual functioning would predict. The learning disability diagnosis would be applied in addition to, and not instead of, the diagnosis of mental retardation. According to the DSM-IV-TR, the diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder. In *Learning Disorders* or *Communication Disorders* (unassociated with Mental Retardation), the development in a specific area (e.g., reading, expressive language) is impaired but there is no generalized impairment in intellectual development and adaptive functioning. A Learning Disorder or Communication Disorder can be diagnosed in an individual with Mental Retardation if the specific deficit is out of proportion to the severity of the Mental Retardation.
DSM-IV-TR at 47.

The DSM-IV-TR also discusses the interplay between these two diagnoses in its chapter on Learning Disorders.

In Mental Retardation, learning difficulties are commensurate with general impairment in intellectual functioning. However, in some cases of Mild Mental Retardation, the level of achievement in reading, mathematics, or written expression is significantly below expected levels given the person's schooling and severity of Mental Retardation. In such cases, the additional diagnosis of the appropriate Learning Disorder should be made.

DSM-IV-TR at 51 (emphasis added).

Another resource for distinguishing between learning disability and mental retardation is the User’s Guide produced by AAIDD (then AAMR) to accompany the 2002 diagnostic manual. Schalock, R. L. et al., A User’s Guide for AAMR’s 2002 Definition, Classification and Systems of Supports: Applications for Clinicians, Educators, Disability Program Managers, and Policy Makers (2006). The distinction, the User's Guide explains, is that learning disability "is defined on the basis of discrepancy between aptitude (as measured by a normal IQ) and academic achievement or by the assessment model of Response to Intervention," whereas individuals with mental retardation in the higher range of IQ "are identified in terms of relative consistency between their subaverage IQ and achievement, as indicated by low performance on average across academic areas." User's Guide at 17.

The differential diagnosis of mental retardation and learning disabilities arises frequently in the context of social security eligibility determinations. Reschly, D.J., Myers, T.G., & Hartel, C. R. (Editors) Mental retardation: Determining eligibility for Social Security benefits, (National Academy Press 2002). In a chapter devoted entirely to this issue, the manual notes that in many instances, school-aged children who meet criteria for the diagnosis of mental retardation are not given that diagnosis and are not placed in special education programs designated for those with mental retardation because the label is shunned by both parents and educators. "[T]he current social and political climate tends to limit both the number of mental retardation diagnoses and placement in designated special education programs because these actions may be considered to be stigmatizing," Determining Eligibility at 262. Because "learning disability" is a more palatable term, it is preferred, and thus "[m]any children who in the past might have been diagnosed with mental retardation are now being classified otherwise (e.g., learning disability)...." Id.. Although the diagnostic criteria for mental retardation are clear, the manual notes, "advocacy and administrative policies in public school districts also influence how children are labeled, and "learning disability" is often preferred to "mental retardation" because it can "reduce stigmatization." Id..

The eligibility manual next addresses how to accurately distinguish learning disability from mental retardation: "Children with specific learning disabilities show academic underachievement relative to their composite IQ." Further, "[w]hile impairments limited to
a specific cognitive domain are characteristic of learning disabilities, mental retardation is associated with a substantially broader profile of deficits." It is noted that even in an individual with Mental Retardation, an additional diagnosis of learning disability may be warranted "if there is documented performance in a specific domain that is substantially below the level typical of the individual's composite IQ." Determining Eligibility at 263.

One of the manual’s editors expands on many of these points at greater length in a 2009 article. Reschly, D.J., Documenting the Developmental Origins of Mild Mental Retardation, 16 Applied Neuropsychology 124-134 (2009).

In summary, there are a number of reasons why a student with mental retardation and higher IQ may never have been identified as needing special education, or may have been diagnosed with learning disabilities rather than mental retardation.

- **Stigma.** The term “mental retardation” is applied to an extraordinarily heterogeneous group of individuals whose disabilities manifest across a very wide range. Due to concern that the label will stigmatize and lead to unreasonably low expectations, due to fear of a parent’s negative response, and due to real ignorance about what mild mental retardation is, schools have been reluctant to apply it to students whose IQ is in the upper range for retardation.

- **Absence of programs for students with mental retardation and higher IQs.** Most school programs specifically designed to serve students with mental retardation are aimed at individuals functioning below the level of “mild” mental retardation, whose educational needs are more functional and less academic. Few formal “special education” programs target the needs of students with this level of mental retardation. As a result, such students instead have frequently been tracked into the lowest achieving classes or into “alternative” schools or programs for “slow learners.”

- **Backlash against overdiagnosis.** Historically, mental retardation was indiscriminately and inappropriately diagnosed in African American people, and particularly in African American boys. Recognition of this problem, termed “overdiagnosis,” led not only to an obviously needed effort at correction, but to backlash that created incentives for schools to avoid making the diagnosis even where appropriate. In certain school systems, the scrutiny and disapprobation that adhered to a suggestion of mental retardation about an African American student was sufficient to dissuade an educator from making it.

- **Expense.** Special education programs are more costly than general education. They require smaller classes and specially qualified staff. The cost of “identifying” a student for special education serves as a disincentive for school systems.
“LD,” meaning “learning disabled,” is now, and has been for some time, the favoured diagnosis for children. Department of Education statistics reflect the number of students diagnosed as “learning disabled” has grown as the number diagnosed with “mental retardation” has decreased. Studies have shown that educators are hesitant to diagnose students with low IQs and learning problems as having mental retardation and more often classify them as having learning disabilities, even if the difference between IQ and achievement which is required for diagnosis of learning disability is lacking. A diagnosis of learning disability is appropriate where there is a wider than anticipated difference between an individual’s IQ and his or her achievement level. Where both IQ and achievement scores are comparably low, then a learning disability diagnosis is inapt, and mental retardation is more likely the problem. In addition, it is also possible that a person may have both a learning disability and mild mental retardation, as described below.

The student has a learning disability and mental retardation. If an individual’s IQ is in the mental retardation range (up to 70-75), but his or her achievement scores are significantly lower (for example, due to a specific language processing problem), then he or she may have a learning disability as well as mental retardation. The key feature of a learning disability is the gap between IQ and achievement. A learning disability prevents a student from achieving at the level of his or her potential, as indicated by IQ. For all of the aforementioned reasons, schools are more likely to choose the “LD” label and avoid mentioning mental retardation.

All of these factors are identified in one of AAIDD 2010’s “Synthesis Guidelines,” which advises evaluators to “[r]ecognize that a number of reasons might explain the lack of an earlier, official diagnosis of intellectual ability,” and goes on to list them. AAIDD 2010 at 102.

5.6 THE QUESTION OF MALINGERING

Malingering is the deliberate fabrication or exaggeration of symptoms to achieve an external goal. Although rarely the focus of much attention in the clinical world, it is often a significant aspect of mental health evaluations that arise in the context of either civil or criminal litigation. There are a number of instruments that specifically test for cognitive malingering. Typically, these instruments are designed to identify the faking of memory deficits, and are based on the presumption that nearly everyone – even people with intellectual impairments – can answer the test’s questions correctly, but that a malingerer will be unaware of this fact and, continuing his or her pattern of deception, will deliberately give “wrong” answers, resulting in a score which will expose him as a faker. Examples of such instruments include the Test of Memory Malingering (TOMM), the Word Memory Test (WMT), the Validity Indicator Profile (VIP), and the Rey 15 Item Visual Memory Test (Rey 15).
Although there has been extensive research on malingering of cognitive deficits and psychiatric symptoms, little research has been directed to the question of malingering of mental retardation. This is because the adaptive behavior deficits that must appear before age 18 generally are not susceptible to being fabricated or exaggerated. As one forensic text explains, “The feigning of mental retardation will be de-emphasized; school records and past achievement tests often provide important corroborative data about spurious reports of mental retardation.” Richard Rogers & Daniel W. Shuman, Conducting Insanity Evaluations at 105 (2d ed. 2000).

Generally, mental retardation experts do not view malingering of mental retardation to be a problem:

The issue of malingering, which has received considerable attention in the clinical literature regarding mental illness, has not proven to be a practical problem in the assessment of individuals who may have mental retardation. But any concerns that an individual could somehow manage to feign cognitive impairment, undetected by clinical evaluators, should be dispelled by the fact that such deception would have had to begin during the individual's childhood. There are no reports in the clinical literature indicating that this is a practical problem in the assessment of individuals who are thought to have mental retardation. James W. Ellis, “Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,” 27 Mental & Physical Disability Law Reporter 11, 13-14 (January/February 2003) (Footnote omitted).

However, while there may be a diminished clinical need to test for malingering in mental retardation cases, nevertheless there may be strategic reasons for the defense to employ an appropriate malingering instrument in its evaluation. The prosecution evaluator almost certainly will use one.

While malingering instruments such as those listed above are often used as part of a neuropsychological test battery, their use in assessing an individual with mental retardation is fraught with problems, including the following; the instrument may require a reading level beyond that of the client; it may not be normed for persons with an IQ in the mental retardation range; or it may yield scores in the malingering range for individuals with low IQ whose incorrect answers reflect cognitive deficits as opposed to feigning. For example, research indicates that the VIP should not be used to determine whether a person with mental retardation has put forth good effort in cognitive testing. Frederick, R.I., Validity Indicator Profile Manual (1997) (see pertinent excerpt posted on the publisher’s web page at www.pearsonassessments.com/resourceses/vip-retardation.html).

No malingering instrument should be utilized without thorough research into its appropriateness for use with the particular client.
Thus, on the one hand there is diminished need for assessing malingering of mental retardation, and on the other hand there is the increased potential for mistakenly calling a person with mental retardation a malingeringer because the instruments are inappropriate for assessing this lower-IQ population. As one scholar concludes, “[t]he message that should be taken from available empirical research is that evaluators must be wary of using effort tests and imbedded validity indicators to assess malingering with individuals who have, or may have, intellectual disability.” Karen L. Salekin & Bridget M. Doane, “Malingering Intellectual Disability: The Value of Available Measures and Methods, 16 Applied Neuropsychology 105, 106 (2009).

The defense should address the use of malingering instruments in advance of the prosecution’s testing by moving to preclude the use of inappropriate instruments, pointing out that “review of the research in the assessment of malingered ID demonstrates that effort tests and indices of cognitive malingering are not working with this population, and that true cases can be misidentified as malingered.” Id. At 111. If this does not succeed, then prior to a hearing counsel can use existing research relevant to the specific instrument’s lack of utility in the assessment of mental retardation, as well as raw data from the particular administration of the instrument, to demonstrate that any negative conclusions it suggests about the client are unreliable.

In addition to instruments specifically designed to assess cognitive malingering, “personality assessment” instruments such as the Minnesota Multiphasic Personality Inventory (MMPI), and the Personality Assessment Inventory (PAI), contain scales rating an individual’s “response style” which purport to identify malingering. These instruments are simply inappropriate for a mental retardation evaluation and should not be used. See Keyes, D. “Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation,” 42 Mental Retardation 151-153 (2004).

Stakes are high whenever the malingering question is asked. There must, therefore, be careful scrutiny of any instrument that is proposed to be utilized. And the most effective means of ruling out malingering will always be by reference to historical data gleaned from the client’s social history.

5.7 THE CONTEXT WITHIN WHICH ADAPTIVE BEHAVIOR IS ASSESSED

AAIDD 2010 emphasizes that adaptive behavior “must be examined in the context of developmental periods of infancy and early childhood, childhood and adolescence, late adolescence, and adulthood.” AAIDD 2010 at 46. An individual’s adaptive behavior is assessed in comparison to the norms of the community and cultural environments typical of his or her age peers. AAIDD 2010 at 45, 47. In a chapter on clinical judgment, AAIDD 2010 discusses the components of obtaining a thorough social, medical and educational history, and the particular significance of such a history when “retrospective diagnosis” is required. AAIDD 2010 at 94-96.
Jail, prison, residential placement and other highly structured environments are not the appropriate context within which a client’s adaptive function should be assessed. Such a structured environment is “atypical” in that it does not require a high level of adaptive functioning. Functioning without significant limitations in such an environment does not mean that the client does not possess significant limitations in adaptive behavior. Performance in an environment with such extensive supports, and comparison with the limited population of other prisoners “would have little relevance when attempting to measure the skills someone has learned and performs to meet societal demands and expectations for someone his or her age and cultural group.” Marc J. Tasse, “Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,” 16 Applied Neuropsychology 114, 115 (2009). “The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior.” Id. At 119.

It can be challenging to find records and witnesses to document a client’s adaptive functioning years prior, when he was in a community setting, but that is what must be done. Above all, it is essential not to rely on a client’s own description about his functioning in the community. AAIDD 2010 at 51-52.

5.8 THE MYTH OF “STREET SMARTS”

A common but insidious suggestion about our clients is that in spite of their low IQ and deficits in adaptive behavior, they do not deserve a mental retardation diagnosis because of their “street smarts.” It is suggested that their ability to survive, albeit in a marginal way, establishes that they do not have significant limitations in adaptive behavior.

Many clients do have something that might be referred to (with many negative connotations) as “street smarts.” Despite their lack of material resources, they may be able to get places, obtain assistance from friends, acquire food, shelter and clothing and plan, carry out and occasionally “get away” with crimes – in short, to survive. The behaviors required to undertake the above tasks are, in a sense, “strengths” in that they are somewhat adaptive. And an unskilled or biased evaluator might find such skills especially significant because they involve coping in settings that most educated, middle class people (such as psychologists or lawyers) would find hostile, unfamiliar and daunting. However, viewing such survival skills as necessarily meaning that a person is “street smart” and therefore not impaired, reveals a significant error; what the AAIDD manual refers to as a “thinking error.” AAIDD 2010 at 91-92. Such an assumption overlooks a basic question: Why is this person consigned to this kind of life in the first place? Is it because he or she cannot read or perform simple math well enough to obtain a job that pays a living wage? Because he or she cannot cope with even the most minor of conflicts, becoming angry or frustrated, consequently leaving a job as soon as anyone criticizes his or her performance? Is it because he or she cannot conform to the demands of a work schedule, or is unable to plan his or her time, or get enough sleep or wake up each morning at the same time and actually get to work? Is it because he or she cannot learn or find a patient-enough teacher to
demonstrate how to perform the sequence of tasks required to maintain and operate a machine, which would allow more remunerative employment?

Having “street smarts” may indeed evidence some strengths in adaptive behavior, but such abilities merely divert attention from the significant limitations in those same or other domains of adaptive functioning. The reliance on a client’s “street smarts” to declare that he or she does not have mental retardation is an insidious overlooking of limitations in favor of strengths and is precisely what the AAIDD manual counsels readers to avoid.

5.9 PROTECTING THE CLIENT DURING PROSECUTION TESTING

The defense team has a vital role to play in defending the client and the mental retardation claim in the process of testing by the prosecution’s expert. Vigilance begins during the defense testing process, when thoughtful decisions must be made about which instruments to administer, for these will set the parameters of what the prosecution may do. The defense expert must not do personality assessment, for example, or this will open the door to such testing by the government. Similarly, the defense should not permit its expert to query the client about criminal behavior if it wishes to preclude the prosecution expert from doing the same.

Defense counsel’s protection of the client and the integrity of the mental retardation determination continues with a comprehensive strategy for ensuring that the government does not exceed the boundaries of the defense evaluation or the scope of what is proper for a mental retardation assessment. As soon as it is clear the prosecution evaluation will be ordered, defense counsel should file a motion seeking protections that will, at a minimum, a) limit the scope of the evaluation; b) provide defense counsel with notification of the specific tests the prosecution wishes to administer and an opportunity to object; c) limit the scope of the clinical interview and define areas (e.g., the capital offense) that exceed it. The defense team should consider whether it needs to move to preclude (or require) video taping or audio taping (in some instances audio taping has been found helpful; in others it may not be), and also whether to request the presence of defense counsel, the defense expert, or some other member of the team.

Litigating the terms of a prosecution mental health examination requires extensive and sophisticated preparation that cannot adequately be described in this Practitioner’s Guide. Defense counsel should seek out available resources and obtain assistance from lawyers experienced in this area as appropriate.

5.10 ANTI-SOCIAL PERSONALITY DISORDER

There is some overlap between the disabling behaviors associated with mental retardation and the types of behaviors that are sometimes (and most often erroneously) relied upon as the basis of a diagnosis of Antisocial Personality Disorder (APD):
• People with mental retardation are often impulsive, as are people with APD. See DSM-IV-TR, at 706 (diagnostic criteria for APD, including, “impulsivity or failure to plan ahead”).

• People with mental retardation may have difficulty maintaining safe environments. One of the diagnostic criteria for APD is “reckless disregard for safety of self or others.” Id.

• People with mental retardation may have difficulty securing and maintaining employment and paying their bills or meeting other financial obligations. One of the diagnostic criterion for APD is “consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.” Id.

• People with mental retardation may get into fights for a number of reasons related to their limitations, for example, an inability to restrain impulses, vulnerability to victimization and marginalization, poor communication skills that cannot be relied upon for avoiding or solving problems, and sensitivity to accusations of being stupid. The resulting behavior might be mistaken for another diagnostic criterion for APD – “irritability and aggressiveness, as indicated by repeated physical fights or assaults.” Id.

• People with mental retardation may have impaired social skills and concrete thinking which can result in their not being sensitive to, or trying to ameliorate, hurtful things done or said to others. This impaired behavior might mistakenly be seen as meeting another diagnostic criterion for APD – “lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.” Id.

• Finally, given their tendency to repeat mistakes and not learn from experience, some people with mental retardation may fall into a pattern of repeating petty crimes such as shoplifting or minor breaking and entering offenses, and with this appear to meet one other diagnostic criterion for APD – “failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.” Id.

This overlap provides fertile ground for prosecutors and their experts who seek to transform limitations in adaptive behavior into evidence of APD that undermines the diagnosis of mental retardation. This can be countered in two ways. First, through careful and thorough examination of the facts, a mental retardation expert can distinguish limitations in adaptive behavior from behaviors that superficially may seem to meet similar APD criteria. Second, even if a client is diagnosed with APD (which should be exceedingly rare, since APD is a diagnosis of exclusion and good social history investigation almost invariably provides a better explanation for the client’s symptoms and behavior than APD), this does not exclude the possibility of a diagnosis of mental retardation. As the DSM-IV-TR explains,
The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.

DSM-IV-TR at 47.

5.11 PUTTING IT ALL TOGETHER AND MAKING THE CASE FOR MENTAL RETARDATION/INTELLECTUAL DISABILITY

It is tempting to believe that you will be able to establish that your client has mental retardation once you have an IQ score of 75 or lower on a reliable test. Nothing could be further from the truth. Establishing, beyond effective prosecution challenge, that your client has mental retardation is a heavy burden, especially because the consequences in a capital case are so enormous. The defense team must anticipate that the prosecution will attack and seek to minimize even seemingly conclusive evidence of mental retardation, as well as to divert the court's attention from the facts that actually establish whether a defendant does or does not have this disability.

To make the best case that a client has mental retardation, it is imperative to integrate every factual detail of the client’s life into a story about the life of a disabled person whose disability has affected and constrained every facet of his or her life. To do this, it is necessary to present not only the hard data from tests and records, but also the more qualitative evidence of human experience – the small stories and incidents that, together, weave the tapestry of the client’s life, and reveal a person with mental retardation. Within this tapestry, there will be strengths and abilities, but there will always be limitations: failed perceptions; failed relationships with friends who gradually withdraw; repeated mistakes; impulses that are naively acted upon without constraint; vulnerability to mere suggestion by others; victimization by more calculating peers; inability to keep track of time, places and promises; the inability to obtain a job; to keep or advance within a job; the inability to plan for the future and obtain goals; feeling distressed when treated as stupid; the pain of isolation and loneliness. The client’s story cannot be a dry, clinical presentation of a “disorder.” It has to be an emotional presentation of a life limited in the particular ways that mental retardation limits – diminishing (though not eliminating) the wonder and possibility of being human.
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**ATKINS v. VIRGINIA**

Although the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of a mentally retarded defendant is prohibited by the Eighth Amendment, it neither adopted a single definition of mental retardation nor proscribed procedures for implementing the decision. Instead, the Court followed its approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), which prohibited the execution of a prisoner who is insane, and left “to the State [s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.” *Atkins v. Virginia*, 536 U.S. at 317 (quoting 477 U.S. at 405, 416-17).

Immediately after the *Atkins* decision, courts and legislatures in jurisdictions that had permitted the execution of the mentally retarded began efforts to implement the Supreme Court’s directive. Jurisdictions that barred execution of the mentally retarded pre-*Atkins* were also faced with challenges to their statutes in light of the Supreme Court’s ruling. Many significant issues have arisen in the eight years since *Atkins* include:

- Can a definition of mental retardation adopted by a state be challenged on the ground that it fails to adequately encompass the class of persons the Supreme Court intended to capture in *Atkins*?

- Are there burdens and standards of proof adopted by states that fail to meet constitutional requirements?

- Can a claim of mental retardation be rejected on the ground that the condition was not documented during the developmental period?

- Is adaptive behavior during the developmental period the sole focus or can it be required that a defendant/petitioner also prove adaptive deficits at the time of the crime and/or at the time of the *Atkins* determination?

- Is a defendant entitled to a pre-trial judicial determination of the mental retardation question?

- Is a defendant entitled to a jury determination of the mental retardation question if the case is in a pre-trial posture?

- Is a defendant entitled to a jury determination of the mental retardation question if the case is on collateral review?

- Are the parties entitled to discovery?

- When is a defendant/petitioner entitled to expert assistance?

- Can statements made by a defendant during the course of a mental retardation examination/hearing be used against the defendant at either the guilt or sentencing phase of the trial?
Is the state entitled to have its own expert examine the defendant, and, if so, when should this occur and are there limits on the permissible scope of the examination?

Is defense counsel entitled to be present during an examination of the defendant by a prosecution expert?

If there is a post-conviction or pre-trial mental retardation trial in front of a jury, must the jury be death qualified?

What if a jury fails to unanimously agree on whether or not a defendant is mentally retarded?

Can courts refuse to consider such things as standard error of measurement when determining the significance of an IQ score?

Is evidence about the capital offense or other crimes admissible at a mental retardation hearing or trial?

What is the showing required to receive an evidentiary hearing on mental retardation when the claim is raised in post-conviction proceedings?

What type of judicial review is available from a finding that a defendant is or is not mentally retarded?

Can a claim of mental retardation be procedurally defaulted, waived, or barred by a statute of limitations?

When, if ever, does collateral estoppel or res judicata preclude relitigation of a finding that a defendant is or is not mentally retarded?

1.1 DEFINITION OF MENTAL RETARDATION

Although the United States Supreme Court did not adopt a single definition of mental retardation, the Supreme Court made approving references to the definitions employed by DSM-IV and the AAMR.29

See Part I of the manual for a complete description of these definitions. If a state court adopts or employs an overly restrictive definition of mental retardation, counsel must argue that this violates Atkins.

29 The American Association on Mental Retardation (AAMR) has since changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). Although it now uses the term “intellectual disability” in place of mental retardation, this section of the manual will continue to refer to mental retardation given that this is the term used in Atkins and the cases applying Atkins.
Texas provides an example of this. At the time of publication, the Texas legislature has been unable to pass a statute implementing *Atkins*. Because of the large number of death row inmates with pending *Atkins*-based claims, the Texas Court of Criminal Appeals stepped into the void and adopted temporary judicial guidelines for handling such claims. *In re Briseno*, 135 S.W.3d 1 (Tex.Crim.App. 2004). In its opinion, the court framed the question of appropriate definition as follows: “We . . . must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.” *Id.* at 6. This is a flawed view of the freedom provided to the states by the Supreme Court in *Atkins* and must be opposed as inconsistent with *Atkins’* clear prohibition of the execution of all mentally retarded defendants, not just a subset a state court or an individual fact-finder decides should be protected. *See, e.g., Chase v. State*, 873 So.2d 1013, 1027 (Miss. 2004) (after reviewing majority opinion and dissents, Mississippi Supreme Court concludes that “the *Atkins* majority granted Eighth Amendment protection from execution to all mentally retarded persons.”)

Ultimately, the Texas Court of Criminal Appeals never actually resolved the question of definition. Because both parties, as well as the trial court, had utilized the AAMR definition, the appellate court concluded it would follow that definition, or the one contained in the Texas Health and Safety Code section 591.003(13), until the Texas Legislature provides an alternative statutory definition. *See also Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App. 2004) (under *Briseno* guidelines, “a person is considered mentally retarded if he has these three characteristics: (1) ‘significantly subaverage general intellectual functioning’ (an IQ of about 70 or below), (2) ‘related limitations in adaptive functioning,’ and (3) onset of the above two characteristics before age eighteen.”)

Regarding the adaptive function prong of the mental retardation definition, the Texas Court of Criminal Appeals went on to identify some “evidentiary factors” it believed “factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.” *Id.* at 8. These factors are:

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30 The Texas Court of Criminal Appeals in *Neal v. State*, 256 S.W.3d 264, 271 (Tex. Crim. App. 2008), rejected an argument that use of judicial, rather than statutory guidelines, contravenes *Atkins*. It also refused to delay adjudicating *Atkins* claims until the Texas Legislature enacts a statute implementing *Atkins*. *See also Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003) (“the Georgia General Assembly . . . remains within constitutional bounds in establishing a procedure for considering alleged mental retardation that limits exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.”); *but see State v. Scott*, 921 So.2d 904, 959 (La. 2006) (interpreting *Atkins* as holding that executing “some mentally retarded offenders is prohibited by the Eighth Amendment while leaving to the States the task of developing a means of determining which offenders are sufficiently impaired in intellectual functioning and adaptive skills to be exempt from capital punishment.”)

31 *See also Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003) (“the Georgia General Assembly . . . remains within constitutional bounds in establishing a procedure for considering alleged mental retardation that limits exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.”); *but see State v. Scott*, 921 So.2d 904, 959 (La. 2006) (interpreting *Atkins* as holding that executing “some mentally retarded offenders is prohibited by the Eighth Amendment while leaving to the States the task of developing a means of determining which offenders are sufficiently impaired in intellectual functioning and adaptive skills to be exempt from capital punishment.”)

32 This includes the following definitions: “‘Mental retardation’ means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.” “‘Sub-average general intellectual functioning’ refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used.” “‘Adaptive behavior’ means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.”
(1) “Did those who knew the defendant best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?”;

(2) “Has the person formulated plans and carried them through or is his conduct impulsive?”;

(3) “Does his conduct show leadership or does it show that he is led around by others?”;

(4) “Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?”;

(5) “Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?”;

(6) “Can the person hide facts or lie effectively in his own or others’ interests?”; and

(7) “Putting aside any heinousness or gruesomeness surrounding the capital offense, whether the commission of that offense required forethought, planning, and complex execution of purpose?”

See also Van Tran v. State, 2006 WL 3327828, *24-25 (Tenn. Crim. App. Nov. 9, 2006) (unpublished) (looking to the Briseno factors when assessing adaptive functioning and stating: “the court cannot forget to examine the nature of the criminal conduct and the circumstances involved in that conduct when determining whether a person is mentally retarded.”) Counsel litigating in Texas are obviously well advised to develop evidentiary support for these factors. Counsel should also be prepared, however, to attack the use of the factors if they are undermining the showing of mental retardation. As discussed in the first part of the manual, adaptive functioning has a specific meaning in the context of mental retardation. Nothing in the Atkins decision provides states with a free rein to concoct definitions that exclude persons who would be found mentally retarded in other contexts or jurisdictions. See, e.g., Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005), cert denied, 126 S.Ct. 2936 (2006) (finding that although states are free to impose a higher standard, the minimum definition of mental retardation sufficient to meet the national consensus found in Atkins must be uniform; Atkins requires at least general conformity with the AAMR and DSM-IV definitions); but see Taylor v. Quarterman, 498 F.3d 306, 308 n.4 (5th Cir. (Tex.) 2007) (Regarding petitioner’s contention that Ex parte Briseno fails to properly implement Atkins, the appeals court observed that “Briseno has been cited favorably several time by this court in contexts indicating that Briseno is not contrary to clearly established Supreme Court precedent.”); Woods v. Quarterman, 493 F.3d 580, 587

33 See, e.g., Ex Parte Elizalde, 2006 WL 235036 (Tex. Crim. App. Jan. 30, 2006) (unpublished) (in finding that petitioner failed to make a prima facie showing of mental retardation, concurring judges note that “applicant provides no evidence in the form of medical records, affidavits, or expert testimony to address any of the factors outlined in Briseno.”)
A Practitioner’s Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability

n.6 (5th Cir. (Tex.) 2007) (Ex Parte Briseno, which was relied upon by the state habeas court in adjudicating petitioner’s Atkins claim, is not inconsistent with Atkins in the way it requires courts to evaluate limitations in adaptive functioning.); Wilson v. Quarterman, 2009 WL 900807 (E.D. Tex. March 31, 2009) (unpublished) (state court’s implicit finding that petitioner failed to establish significant adaptive deficits was not unreasonable in light of the evidence presented in the state court proceeding even though the warden presented no rebuttable to petitioner’s expert opinion finding the requisite adaptive deficits or his affidavits attesting to the deficits, and the state court relied solely on its findings concerning the Briseno factors; petitioner unsuccessfully argues that use of Briseno factors was an unreasonable application of Atkins); Rodriguez v. Quarterman, 2006 WL 1900630, *13 (W.D. Tex. July 11, 2006) (unpublished) (finding that “the Texas Court of Criminal Appeals' Briseno criteria represent an objectively reasonable application of what is admittedly a far-from-crystal-clear federal constitutional standard.”)

In Chester v. Quarterman, 2008 WL 1924245 (E.D. Tex. April 29, 2008) (unpublished), the petitioner had presented in state habeas proceedings what the Texas Court of Criminal Appeals characterized as “persuasive” evidence of mental retardation. It nevertheless ruled that it could not overturn the state habeas court's findings that the petitioner’s adaptive behavior deficits were related to factors other than his sub-average intellectual functioning, because that court's findings were based upon the Briseno evidentiary factors. In the federal habeas proceeding, the petitioner challenged the state court’s use of the Briseno factors but the federal district court held that the petitioner’s challenge was foreclosed by Woods v. Quarterman, supra. The district court also found, in accord with Moreno v. Dretke, 362 F.Supp.2d 773 (W.D. Tex. 2005), aff’d, 450 F.3d 158 (5th Cir. (Tex.) 2006), “that an affirmative finding as to the seventh and final Briseno evidentiary factor is sufficient by itself to uphold a denial of relief in a habeas corpus proceeding.” Chester v. Quarterman, 2008 WL 1924245, *7. Because the petitioner did not take issue with the state court’s finding that commission of the capital offense required forethought, planning, and complex execution of purpose, the state court’s rejection of the petitioner’s claim of mental retardation was not inconsistent with nor an unreasonable application of Atkins. Further, weighing the circumstances of the offense in this manner was not, according to the district court, contrary to or an unreasonable application of Tennard v. Dretke, 542 U.S. 274 (2004). The petitioner has appealed the denial of his federal habeas petition. Following oral argument on November 30, 2009, the Fifth Circuit Court of Appeals requested supplemental authorities from the parties addressing, inter alia, how states other than Texas define mental retardation and adaptive functioning.

Although the Supreme Court has yet to grant review in a case challenging the Briseno factors, counsel must nevertheless continue to press the issue. The AAIDD and The Arc submitted an amicus brief in the Supreme Court in support of Mr. Briseno (Briseno v. Hall, 08-6631), that clearly sets out the incompatibility of the Briseno factors with the clinical understanding of mental retardation. For further discussion of how the courts are utilizing the Briseno factors, see subsection 1.8, infra, on Evidentiary Issues, as well as the summaries of cases denying relief in the Direct Appeal, Post-Conviction Proceedings, and Federal Habeas subsections, 1.12, 1.13 and 1.14, infra.
Before the Oklahoma Legislature enacted a statute implementing *Atkins*, the Oklahoma Court of Criminal Appeals had adopted a definition of mental retardation that was applied to *Atkins* determinations made before the statute became effective on July 1, 2006. In *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006), the court held:

A person is “mentally retarded”: (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.

Id. at 567-68 (footnote omitted.)

The first part of the test is derived from the *Atkins* decision itself, where the Court observed that mentally retarded individuals “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Atkins v. Virginia*, 536 U.S. at 318. Neither DSM-IV nor the AAMR, however, include those criteria in their definitions of mental retardation. In practice, it has not appeared that courts applied the first prong of the test in a manner inconsistent with the accepted definitions of mental retardation.

As for prong three of the *Murphy* definition, in *Hooks v. State*, 126 P.3d 636, 640-41 (Okla. Crim. App. 2005), the court of criminal appeals acknowledged that the standard it had adopted was not identical to clinical definitions of mental retardation. It described the difference as “requiring proof of significant limitations in adaptive functioning in nine, rather than ten, areas (omitting the category of ‘leisure”).” *Id.* at 644. That omission did not prove to be significant, at least as reflected in the case law.

The Oklahoma Court of Criminal Appeals in the *Murphy* case made clear that the factual issue of whether or not a defendant is mentally retarded was not to be decided solely by looking at IQ scores. It explained,“[i]ntelligence quotients are one of the many factors to be considered, but are not alone determinative.” *Murphy v. State*, 54 P.3d at 568. It went on to hold, however, that “no person shall be eligible to be considered mentally retarded unless he or she had an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligence quotient test.” *Id.* (footnote omitted). This was described as a “threshold” requirement for establishing mental retardation in Oklahoma. *Hooks v. State*, 126 P.3d 636, 639 (Okla. Crim. App. 2005); *Lambert v. State*, 126 P.3d 646, 650 (Okla. Crim. App. 2005). 34

34 In both *Hooks* and *Lambert*, the court states that the IQ score must be under 70 in order to meet the
judge, not the jury, made the preliminary determination whether the prima facie showing had been made. *Pickens v. State*, 126 P.3d 612, 616 n. 7 (Okla. Crim. App. 2005). Notably, the fact that the petitioner had one or more IQ scores above 70 did not matter. A single score of 70 or below got the petitioner’s “foot in the door” to claim ineligibility for the death penalty. *Id.* at 616.

A “contemporary intelligent quotient test” was defined to mean that the test on which the score of seventy or below was registered “was administered some time after the capital crime was committed or is one that may be understood by contemporary standards.” *Murphy v. State*, 54 P.3d at 568 fn. 21. Following *Murphy*, there was some confusion about what constituted a “contemporary” IQ test. In *Snow v. State*, 87 P.3d 626 (Okla. Crim. App. 2004), the lower court had concluded that the petitioner was not eligible for a jury trial on the issue of mental retardation because there was no evidence of a post-crime IQ score of seventy or less. On appeal, the appellate court clarified that a group test taken by the petitioner when he was in the third grade that resulted in a score of 68 satisfied the *Murphy* requirement since the test was given under contemporary scientific standards. *See* subsection 1.3, infra, regarding other temporal issues.

Oklahoma’s statute barring execution of the mentally retarded defines mental retardation as “significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning.” Okla. Stat. Ann. § 21-701.10b(A)(1). “Significant limitations in adaptive functioning” is defined as “significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills.” Okla. Stat. Ann. § 21-701.10b(A)(2). Finally, “significantly subaverage general intellectual functioning” was defined as “an intelligence quotient of seventy (70) or below.” Okla. Stat. Ann. § 21-701.10b(A)(3). The statute further provides that

An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning . . . . In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account.

However, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.

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threshold requirement for raising an *Atkins* claim. There was no indication, however, that the court actually intended to depart for the 70 or below standard it had adopted in *Murphy*. *See also Blonner v. State*, 127 P.3d 1135, 1140 (Okla. Crim. App. 2006) (quoting *Murphy* requirement of IQ score of 70 or below).
Atkins v. Virginia

Okla. Stat. Ann. § 21-701.10b(C). In Smith v. State, ___ P.3d ___, 2010 WL 4397004, *4 (Okla. Crim. App. Nov. 5, 2010), the Oklahoma Court of Criminal Appeals interpreted the statute as follows: “By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on any scientifically recognized standardized test, the Legislature has implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70.” Thus, because the petitioner had earlier received two IQ scores of 76 and 79, and the court determined that the Legislature apparently intended to foreclose consideration of the Flynn effect, the petitioner’s mental retardation claim failed under the statute.

In Pruitt v. State, 834 N.E.2d 90, 108, (Ind. 2005), the Indiana Supreme Court rejected a constitutional challenge to the part of its mental retardation definition that requires proof of "significant impairment of adaptive behavior." I.C. § 35-36-9-2. The state supreme court observed that while the Indiana definition differed from that of DSM-IV, it was similar to AAMR’s revised definition which calls for “significant limitations in ... adaptive behavior as expressed in conceptual, social, and practical adaptive skills.” The court therefore concluded that the Indiana standard was “within the range of permissible standards under the Eighth Amendment.” Id. The court did go on to find, however, that the trial court had accepted too stringent a test in evaluating the adaptive functioning prong of the mental retardation test. It had utilized a mental health expert’s definition that embraced only persons in the bottom ten to twenty-five percent of those meeting the generally accepted clinical standards. The Indiana Supreme Court concluded that “‘[a]lthough variation is permissible, it cannot go to the point of excluding a majority of those who fit clinical definitions.’” Id. at 110.

At the time of publication, Mississippi, like Texas, is without a statute implementing Atkins. Faced with numerous death row inmates raising challenges to their convictions under Atkins, the Mississippi Supreme Court adopted both a definition of mental retardation for purposes of Atkins, as well as a procedure for implementing the decision. Looking to Atkins itself, it held that the appropriate definition is from the AAMR and/or from the APA, the author of the DSM manuals. Chase v. State, 873 So.2d 1013, 1028 (Miss. 2004); see also Doss v. State, 882 So.2d 176, 190 (Miss. 2004) (same); but see Gray v. State, 887 So.2d 158, 169 (Miss. 2004) (“this Court has adopted the definition of mental retardation as promulgated by the American Psychiatric Association . . .”); Wiley v. State, 890 So.2d 892, 849 (Miss. 2004) (“the standard or definition of mental retardation shall be that enunciated by the Supreme Court in Atkins, especially the American Psychiatric Association’s definition of mental retardation.); Russell v. State, 849 So.2d 95, 148 (Miss. 2003) (“the standard or definition of mental retardation shall be that enunciated by the Supreme Court in Atkins, especially the American Psychiatric Association's definition of mental retardation.”); Branch v. State, 882 So.2d 36, 50 (Miss. 2004) (“this Court has adopted the American Association of Mental Retardation definition” of mental retardation.)

In Chase, the court further ruled that a defendant cannot be adjudged mentally retarded under the Eighth Amendment without an opinion from a mental retardation expert that the defendant is not malingering, as demonstrated through administration of the Minnesota
Multi Phasic Personality Inventory-II (MMPI-II), “and/or other similar tests.” *Chase v. State*, 873 So.2d at 1028. 35; see also *Lynch v. State*, 951 So.2d 549, 557 (Miss. 2007) (“This Court neither endorses the MMPI-II as the best test nor declares that it is a required test, and decisions that state otherwise are expressly overruled.”) If a mental retardation expert concludes that the MMPI-II or other such “testing,” is unnecessary and/or inappropriate in order to render a diagnosis of mental retardation, counsel must challenge this judicially created testing requirement as unconstitutional under *Atkins*. 36 But see *Doss v. State*, 19 So.3d 690 (Miss. 2009) (in affirming denial of *Atkins* claim, Mississippi Supreme Court observed that it was appropriate for a post-conviction court to consider the failure of the defense expert to utilize a malingering instrument and to instead use the consistency of scores to rule out malingering.)

The court in *Chase* also held that a defendant may not receive a hearing on a claim of mental retardation unless he files a motion requesting such a hearing, attached to which is “an affidavit from at least one expert [who meets the qualifications set out by the court],” who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient (‘IQ’) of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined herein.” *Id.* at 660. In *Spicer v. State*, 973 So.2d 184 (Miss. 2007), an expert affidavit was found inadequate to satisfy *Chase* where the expert “did not state in his affidavit that Spicer meets the definition of mentally retarded as defined by the American Association on Mental Retardation or the American Psychiatric Association” and “did not discuss Spicer’s adaptive skills at all.” Instead, the affidavit opined only that “Spicer functions in the mildly-retarded-to-borderline range of intellectual ability.”

Another state currently lacking a statute implementing *Atkins* is Alabama. The Alabama Supreme Court adopted what it viewed as the broadest standard of mental retardation to be employed until the legislature mandates something different. *Ex parte Perkins*, 851 So.2d 453 (Ala.2002). “To satisfy the *Perkins* test the defendant must exhibit (1) significantly

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35 In an earlier decision, the Mississippi Supreme Court had expressly required that the MMPI-II be administered. *Foster v. State*, 848 So.2d 172, 175 (Miss. 2003). In *Chase*, the Mississippi Supreme Court “clarify[ed] its position by stating that the expert should use the MMPI-II, and/or any other tests and procedures permitted under the Mississippi Rules of Evidence, and deemed necessary to assist the expert and the trial court in forming an opinion as to whether the defendant is malingering.” *Chase v. State*, 873 So.2d 1013, 1028 fn. 19. In *Spicer v. State*, 973 So.2d 184 (Miss. 2007), the Mississippi Supreme Court found that an expert affidavit failed to satisfy the requirements of *Chase* where the expert stated that he had administered the MMPI-2 to Spicer but then failed to offer any opinion on whether Spicer, who had a history of malingering, had malingered during the evaluation. As discussed in the first chapter of this guide, the MMPI is not an appropriate instrument for any purpose in the assessment of persons who may be suspected of having mental retardation, a point accepted recently by a federal district court adjudicating the defendant’s claim that he was exempt from the death penalty due to mental retardation. *United States v. Hardy*, 2010 WL 4909550, *17 (E.D. La. Nov. 24, 2010) (unpublished).

36 Counsel in other jurisdictions should also consider how to address the question of malingering. In *Goodwin v. State*, 191 S.W.3d 20, 33 (Mo. 2006), for example, the post-conviction court concluded that the failure of petitioner’s post-conviction expert “to test for malingering and depression was below professional requirements for a thorough evaluation.” The post-conviction court’s findings were upheld on appeal.

37 “Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.” *Chase v. State*, 873 So.2d at 660.
subaverage intellectual functioning--an IQ of 70 or below; (2) significant or substantial deficits in adaptive behavior; and (3) these two deficiencies must have manifested themselves during the developmental years--before the defendant reached the age of 18.”


Yet another state without a post-Atkins statute is Pennsylvania. The Pennsylvania Supreme Court in Commonwealth v. Miller, 888 A.2d 624, 631 (Pa. 2005), held that a defendant could establish mental retardation for Atkins purposes if he or she met either the DSM-IV or AAMR definition. It reaffirmed this ruling in Commonwealth v. Crawley, 924 A.2d 612, 615 (Pa. 2007), and rejected the petitioner’s argument that it should adopt a broader definition. In Commonwealth v. Gibson, 925 A.2d 167 (Pa. 2007), the Pennsylvania Supreme Court upheld the finding by the post-conviction court that the petitioner had established his mental retardation where three defense experts opined that the petitioner met both the DSM-IV and AAMR standards. Even though the petitioner’s IQ was apparently above 70, both parties had agreed that it was possible for someone with an IQ between 70 and 75 to suffer from mental retardation depending upon the degree of adaptive deficits. The post-conviction court credited testimony from defense experts that the petitioner had severe deficits in functional academic skills, self-direction, and work skills, as well as in other areas.

New Jersey also had not passed legislation to implement Atkins before it abolished the death penalty entirely. In State v. Harris, 181 N.J. 391, 859 A.2d 364 (N.J. 2004), a case involving a post-conviction petition for relief, the New Jersey Supreme Court did not expressly adopt a definitive definition of mental retardation, but instead noted that the definitions utilized by other states generally conformed to the AAMR and DSM-IV definition. The court did, however, appear to fully embrace the AAMR and DSM-IV-TR understanding that an IQ score up to 75 could support a diagnosis of mental retardation. Id. at 529-31.

In State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002), the Ohio Supreme Court looked to the clinical definitions of mental retardation discussed in the Atkins decision and ruled that defendants had to establish: (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18.

In State v. White, 2005 WL 3556634, *2 n. 3 (Ohio App. Dec. 30, 2005) (unpublished), the Ohio appellate court noted that the AAMR updated the second prong of its mental retardation test in 2002 by regrouping the subtopics into three categories and taking the position that significant deficit in any one category would satisfy prong two. The potential discrepancy between the newer AAMR definition and the requirements of Lott proved inconsequential in the White case because both experts concluded the update was a “distinction without a difference” and that the petitioner met both definitions. Id. Courts and legislatures could avoid the potential problem of adopting a definition that is later altered by the author of the definition by defining mental retardation in terms of the most current definition of AAMR and/or APA. See, e.g., Ohio Rev. Code 5123.01(P) (Public
Welfare Code definition of “a person who is at least moderately mentally retarded” includes reference to “standard measurements as recorded in the most current revision of the manual of terminology and classification in mental retardation published by the American Association on Mental Retardation.”

Many states do have statutes that expressly deal with mental retardation and capital punishment. The definitions of mental retardation that have been adopted by the various states do vary to some degree. Some, like the Arizona Revised Statutes, § 13-703.02, include an IQ score that might function as a cut off. Under that law, mental retardation is generally defined as “a condition based on a mental deficit that involves significantly sub-average general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.” The statute then further defines “significantly sub-average general intellectual functioning” to mean “a full scale intelligence quotient of seventy or lower,” but “[t]he court in determining the intelligence quotient shall take into account the margin of error for the test administered.” See also Idaho Code § 19-2515A (1)(b) (“Significantly sub-average general intellectual functioning’ means an intelligence quotient of seventy (70) or below.”)

Arizona mandates that an IQ test be administered in every case where a notice to seek the death penalty is filed. 38 If the prescreening psychological expert determines that the defendant's IQ is higher than 75, “the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation.” If the prescreening psychological expert determines that the defendant's intelligence quotient is 75 or less, one or more additional experts are to be appointed in order to determine whether the defendant has mental retardation. If the subsequent examinations result in test scores above 70, taking into account the margin of error for the test administered, the notice of intent to seek the death penalty will not be dismissed.

If this statute, or ones like it, function to exempt from protection defendants who have viable claims of mental retardation, it must be challenged as irreconcilable with Atkins v. Virginia. See, e.g., In re Hawthorne, 105 P.2d 552, 557 (Cal. 2005) (“a fixed cutoff is inconsistent with established clinical definitions (citation omitted) and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing.”); Commonwealth v. Miller, 888 A.2d 624, 631 (Pa. 2005) (consistent with Atkins, Pennsylvania Supreme Court refuses to adopt any cut-off I.Q. score “since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”); State v. Gumm, 864 N.E.2d 133, 138 (Ohio App. 2006) (affirming grant of post-conviction relief on Atkins claims despite IQ scores of 73, 71, 70 and 79 prior to age 18 where expert found the 79 score to be “problematic” and the expert explained that the remaining scores were consistent with mental retardation when SEM is

38 In State ex rel. Thomas v. Duncan, 216 P.3d 1194, 1198 (Ariz. App. 2009), the appellate court ruled that appointment of an expert by the trial court to review defense expert’s findings and determine if the defense expert’s testing complied with the relevant standards or whether additional testing was needed did not comply with Arizona’s mental retardation statute. Rather, the court appointment expert was required by statute to administer independent IQ tests. After any testing required by the statute is performed, “a defendant may argue that the practice effect impacted the results.”
taken into account); but see Howell v. State, 151 S.W.3d 450, 459 (Tenn. 2004) (“[W]hile there appears to be no general national consensus regarding the use of numerical I.Q. scores as a factor in determining mental retardation, the use of such scores to establish a bright-line cutoff point for making this determination is not contrary to either the Supreme Court’s holding in Atkins v. Virginia or with those definitions of mental retardation adopted by several other states.”)\(^{39}\); Miller v. State, ___ S.W.3d ___, 2010 WL 129708 (Ark. Jan 7, 2010) (rejecting argument that Atkins provides a broader standard for determining mental retardation than Arkansas’s statute); Parrish v. Commonwealth, 272 S.W.3d 161 (Ky. 2008) (recognizing that in Kentucky an IQ of 70 is the cut-off for mental retardation); Cherry v. State, 959 So.2d 702 (Fla. 2007) (interpreting Florida's statute as requiring an IQ score of 70 or below even though both the defense and State experts acknowledged standard error of measurement (SEM) should be considered in every IQ analysis); Nixon v. State, 2 So.3d 137, 142 (Fla. 2009) (rejecting argument that adoption of cut-off score of 70 violates Atkins)\(^{40}\); Winston v. Warden, 2007 WL 678266, *15 (Va. March 7, 2007) (unpublished) (in rejecting claim that trial counsel was ineffective for failing to present evidence of mental retardation, court notes IQ scores of 77, 76 and 73 obtained prior to age 18 and notes that it had previously held that the maximum score for a classification of mental retardation is a score of 70); Larry v. Branker, 522 F.3d 356 (4th Cir. (N.C.) 2009) (requiring a defendant/petitioner to establish an IQ of 70 or below is not contrary to or an unreasonable application of Atkins); cf. State v. Williams, 22 So.3d 867 (La. 2009) (rejecting challenge to prosecution expert’s testimony that an IQ score above 70 precluded a diagnosis of mental retardation where defense counsel failed to object and did not question the expert about SEM).

Permission to file a successor petition was denied in In re Bowling, 422 F.3d 434, 439 (6th Cir. 2005), based in part on the fact that none of the petitioner’s IQ scores fell below the Kentucky cut-off of 70. Judge Moore dissented, observing that “there appears to be considerable evidence that irrefutable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation and that any IQ thresholds that are used should take into account factors, such as a test's margin of error, that impact the accuracy of a particular test score.” Id. at 442 (Moore J., dissenting.). For further discussion of how courts are addressing SEM, practice effect, Flynn effect, and other issues relating to the interpretation of intellectual functioning test results, see subsection 1.8, infra.

Another potential flaw with the Arizona statute lies in its definition of adaptive behavior. A.R.S. § 13-703.02(K)(1), (K)(2), requires a defendant to show “significant impairment” in “the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group.” In State v. Grell, 135 P.3d 696 (Ariz. 2006), the defendant argued that he had established the requisite significant impairment in adaptive behavior because he presented evidence showing deficits in two of the eleven areas listed in DSM-IV. The Arizona Supreme Court


\(^{40}\) At the time of publication, another challenge to the Florida Supreme Court’s adoption of a bright-line cut-off is pending in that court. Dufour v. State, SC09-262. In support of the petitioner is an amicus brief by AAIDD arguing, inter alia, that use of a cut-off IQ score violates Atkins.
rejected this argument, explaining: “The statute requires an overall assessment of the defendant's ability to meet society's expectations of him. It does not require a finding of mental retardation based solely on proof of specific deficits or deficits in only two areas.” *Id.* at 709. Again, if a statute is excluding defendants who are considered mentally retarded under accepted clinical definitions, the statute must be challenged as inconsistent with *Atkins*.

Arkansas’ statute defines mental retardation as:

(A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and

(B) Deficits in adaptive behavior.

Ark. Code Ann. § 5-4-618. In *Jackson v. Norris*, 615 F.3d 959 (8th Cir. (Ark.) 2010), the Eighth Circuit Court of Appeals observed that subpart (B) on the definition does not appear as part of the DSM-IV-TR definition. Nor does it appear in the definitions used by other states. Looking to Arkansas case law, the court found that “adaptive behavior” encompasses the same skill areas as adaptive functioning but without an age of onset requirement. Thus, the same evidence that satisfied Jackson’s burden of creating a genuine issue of fact as to the second prong also did so with respect to the third prong.

Some statutes do not include any specific IQ numbers, and instead rely on a more general definition of mental retardation. The California statute, for example, simply states that “‘mentally retarded’ means the condition of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of eighteen.” California Penal Code § 1376. In *In re Hawthorne*, 105 P.2d 552, 557 (Cal. 2005), the California Supreme Court rejected the State’s argument that the court should adopt an IQ of 70 as the upper limit for a prima facie showing of mental retardation. The court noted that “a fixed cutoff is inconsistent with established clinical definitions (citation omitted) and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing.” In *People v. Superior Court (Vidal)*, 155 P.3d 259 (Cal. 2007), the California Supreme Court also rejected the State’s argument that the trial court erred by failing to give primary consideration to the defendant’s full scale IQ scores in determining whether he had established mental retardation. That defendant’s full scale IQ scores on Wechsler tests had “been above the range considered to show mental retardation does not, as a matter of law, dictate a finding he is not mentally retarded. The legal definition of mental retardation for purposes of *Atkins*’s constitutional rule does not incorporate a fixed requirement of a particular test score. The trial court, therefore, did not commit legal error in giving less weight to Vidal’s Full Scale IQ scores and greater weight to other evidence of significantly impaired intellectual functioning, including Verbal Intelligence Quotient Scores on Wechsler IQ tests (Verbal IQ) in the mentally retarded range.” *Id.* at 260-261.
The Texas Court of Criminal Appeals was recently presented with an argument that in some instances alternative assessment measures can be substituted for full-scale IQ scores to establish the requirement of subaverage intellectual functioning. *Ex Parte Hearn*, 310 S.W.3d 424 (Tex. Crim. App. 2010). The petitioner had previously been diagnosed with Fetal Alcohol Syndrome and had neuropsychological deficits along with deficits in adaptive behavior. He did not have, however, significantly subaverage intellectual functioning as measured by standard IQ tests. In support of his contention that alternative assessment measures can be used to establish intellectual deficits, the petitioner relied on Dr. Stephen Greenspan who opined that substituting neuropsychological measures for full-scale IQ scores is “justified when there is a medical diagnosis of a brain syndrome or lesion, such as Fetal Alcohol Spectrum Disorder ... because it is well known that such conditions cause a mixed pattern of intellectual impairments that, while just as serious and handicapping as those found in people with a diagnosis of MR, are not adequately summarized” by full-scale IQ scores. Dr. Greenspan concluded that under a broader definition of mental retardation, the petitioner in this case could prevail. The court rejected the petitioner’s argument and held: “while applicants should be given the opportunity to present clinical assessment to demonstrate why his or her full-scale IQ score is within that margin of error, applicants may not use clinical assessment as a replacement for full-scale IQ scores in measuring intellectual functioning.” *Id.* at 431.41

In some states, the statutes require that an IQ test from an approved list be used to establish deficits in intellectual functioning. *See, e.g.*, Va.Code Ann. § 19.2-264.3:1.1(B)(1); Fla. R. Crim. Pro. 3.203. In *Bell v. True*, 413 F.Supp.2d 657, 696 (W.D. Va. 2006), an *Atkins* claim failed in part because the IQ test the petitioner was administered was not among those accepted by the Virginia statute. Any failure to adhere to such a statutory requirement obviously needs to have a persuasive explanation.

As discussed in the first section of the manual, IQ scores may be inaccurate for a number of reasons. Where the defendant has an IQ score that appears to disqualify him from a diagnosis of mental retardation, counsel has to investigate the reliability of the test that was given and the conditions under which it was administered. *See, e.g.*, *Walker v. True*, 399 F.3d 315, 323 (4th Cir. (Va.) 2005) (petitioner attacked reliability of IQ score where test was administered by an inexperienced intern who now conceded that she made errors in the administration and scoring of the test); *Allen v. Buss*, 558 F.3d 657 (7th Cir. (Ind.) 2009) (that petitioner received an IQ score of 104 did not conclusively refute his *Atkins* claim given that the score was obtained on a “Beta” test given in prison and the record did not establish whether such a score was reliable or if it was comparable to a similar score on accepted IQ tests); *Hughes v. Epps*, 694 F.Supp.2d 533 (N.D. Miss. March 3, 2010) (pretrial IQ score of 81, which was an outlier, did not undermine claim of mental retardation where the score could not be substantiated due to the loss of the underlying data); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. (Tex.) 2007) (district court gave minimal weight to IQ

scores of 85, 92 and 80 that were obtained from screening tests in the prison given the lack of information about the administration and scoring of the tests and the lesser reliability of such tests; *Ledford v. Head*, 2008 WL 754486, *5 (N.D. Ga. March 19, 2008) (unpublished) (district court disregards petitioner's score of 85 on the Shipley Scale and his score of 86 on the Culture Fair in light of expert testimony that neither test is a reliable measure of intellectual functioning); *cf. Conway v. Polk*, 453 F.3d 567 (4th Cir. (N.C.) 2006) (in affirming denial of *Atkins* claim, appeals court notes that petitioner failed to allege facts supporting a conclusion that any of petitioner’s childhood IQ scores of 79 and 80 were unreliable.)

In addition, counsel must consider the standard measurement error, practice effect and the “Flynn Effect.” Further discussion of how courts have been addressing these phenomena can be found in subsection 1.8, infra. Counsel must also be prepared to address and refute expert opinions that a defendant’s IQ score should be elevated for various reasons. In *United States v. Hardy*, 2010 WL 4909550 (E.D. La. Nov. 24, 2010) (unpublished), for example, a mental health expert had testified in a pre-*Atkins* proceeding that the defendant’s actual IQ was probably about 15 points higher than the full-scale score of 73 he received on the WAIS-R. The expert based this opinion on research showing that African Americans score about 15 points lower nationally than would be statistically expected. So the expert compensated for the anomaly by comparing the defendant only to the African American population. In a later *Atkins* hearing, the expert repudiated his prior approach and recognized the validity of the use of national norms. He explained that his earlier methodology was an attempt to be “more culturally sensitive” and was not a “sound diagnostic procedure.” *Hardy*, 2010 WL 4909550, *22. Even the prosecutor’s expert agreed that it was error to provide a race-based enhancement to the IQ score. *Hardy*, 2010 WL 4909550, *23. The use of “cultural factors” by prosecution expert Dr. George Denkowski to raise IQ and adaptive functioning scores has been an issue in quite a few Texas cases and is one of the reasons the Texas State Board of Examiners of Psychologists filed a complaint against Dr. Denkowski with the State Office of Administrative Hearings seeking to sanction him for intentionally misapplying psychiatric testing methods. *See, e.g., Maldonado v. Thaler*, 2010 WL 3155236 (5th Cir. (Tex.) Aug. 10, 2010) (unpublished) (granting certificate of appealability on *Atkins* claim where petitioner challenged the credibility of Dr. Denkowski and discussing the complaint filed against him); *Pierce v. Thaler*, 604 F.3d 197 (5th Cir. (Tex.) 2010) (discussing criticisms of Dr. Denkowski’s practices).

Utah has a rather unique statute, which defines mental retardation for purposes of an exemption from execution as:

> the defendant has significant sub-average general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and (2) the sub-average general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.
The constitutionality of this statute does not appear to have been tested yet.

The federal death penalty statute bars execution of the mentally retarded, but provides neither a definition nor procedures for determining whether a defendant is mentally retarded. In *United States v. Nelson*, 419 F.Supp.2d 891, 894-95 (E.D. La. 2006), a federal district court concluded “that both the AAMR and DSM-IV-TR definitions reflect a national consensus” so a defendant’s execution would be prohibited if he satisfied either definition. The court further noted that it did not believe the standards actually conflicted despite some variations. The district court in *United States v. Hardy*, 644 F.Supp.2d 749, 752 (E.D. La. 2008) agreed with the *Nelson* court’s approach. In applying those definitions, that same district court later found as a factual matter that a diagnosis of mental retardation requires an IQ score of 75 or less on one of the standard IQ tests. *United States v. Hardy*, 2010 WL 4909550, *5 (E.D. La. Nov. 24, 2010) (unpublished). In *United States v. Cisneros*, 385 F.Supp.2d 567, 570 (E.D. Va. 2005), the district court announced that it would use the AAMR definition that was cited by the Supreme Court in the *Atkins* decision.

In *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), the Kentucky Supreme Court rejected a constitutional challenge to the pre-*Atkins* Kentucky statute that bars execution of the mentally retarded. Bowling had argued the statute failed to comply with *Atkins* because it only exempted from execution defendants found to be “seriously” mentally retarded. Ky. Rev. Stat. 532.140(1). Thus, according to Bowling, the statute impermissibly allowed the execution of the mildly mentally retarded. Bowling’s assertion was found flawed in light of the definition in the statute of the “significantly subaverage general intellectual functioning” criterion as an IQ of 70 or below. This included the “mildly mentally retarded” per DSM-IV and the AAMR.

The Kentucky statute also refers to “substantial deficits in adaptive behavior” in its definition. Ky. Rev. Stat. 32.130. The Kentucky Supreme Court found that “[u]se of the word ‘deficits,’ as opposed to ‘deficit,’ reflects a legislative intent to require ‘two or more deficits,’ in accordance with the definitions formulated by the AAMR and the American Psychiatric Association.” Id. at 370 n.8.

In the mental retardation statutes, the age of onset required for a finding of mental retardation is usually before age 18. *See, e.g.*, Ariz.Rev.Stat.Ann.§ 13-703.02 (K)(2) (onset of conditions must have “occurred before the defendant reached the age of

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42 Another statute provides exemption from execution for those falling under a more commonly accepted definition of mental retardation but only where “the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.” Utah Code Ann. § 77-15a-101.

43 “A sentence of death shall not be carried out upon a person who is mentally retarded.” 18 U.S.C. § 3596(c)

44 “Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Atkins v. Virginia*, 536 U.S. at 308 n.3.
eighteen”); Ark. Code Ann. § 5-4-618 (a)(1)(A) (onset of condition must be “no later than age eighteen (18”).); Cal. Penal Code § 1376(a) (“‘mentally retarded’ means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18”); Conn. Gen. Stat. Ann. § 1-1g(b) (defining “developmental period” as the period of time between birth and the eighteenth birthday); 11 Del. Code Ann. § 4209(d)(3) (providing that the condition manifest itself before eighteen years of age); Fla. R. Crim. P. 3.203(b) (condition must have “manifested during the period from conception to age 18.”); Idaho Code Ann. § 19-2515A(1)(a) (onset of condition must occur prior to age eighteen); 725 Ill. Comp. Stat. 5/114-15(d) (“In determining whether the defendant is mentally retarded, the mental retardation must have manifested itself by the age of 18”); Kan. Stat. Ann. §§ 21-4623(e) & 76-12b01 (providing that age of onset of the condition must be prior to age eighteen); La. Code Crim. Proc. Ann. Art. 905.5.1(H)(1) (age of onset must be before the age of eighteen); Mo. Ann. Stat. §565.030.6 (condition must be manifested and documented before eighteen years of age); N.Y. Crim. Proc. Law §400.27(12)(e) (condition must have manifested before the age of eighteen); N.C. Gen. Stat. Ann. § 15A-2005(a)(1)(a) (condition must have manifested prior to age eighteen); 21 Okla. Stat. Ann. § 701.10b (condition must be manifested before age eighteen); S.D. Codified Law § 23A-27A-26.1-2 (condition must have been manifested and documented before the age of eighteen); Va. Code Ann. § 19.2-264.3:1.1 (disability must have originated before the age of eighteen); Wash. Rev. Code Ann. § 10.95.030(2)(a), (e) (condition must have manifested in the developmental period which is defined as the period of time between conception and the eighteenth birthday);.


The Tennessee statute requires a showing by the defendant that mental retardation manifested “during the developmental period, or by eighteen (18) years of age.” Tenn. Code Ann. § 39-13-203(a). In State v. Strode, 232 S.W.3d 1, 13 (Tenn. 2007), the Tennessee Supreme Court rejected an argument that this statute allowed for mental retardation to be manifested after the age of 18, finding: “Based on the legislative history it is clear that the Legislature did not intend for the term ‘developmental period’ to extend beyond eighteen years of age.” See also Murphy v. State, 66 P.3d 456, 460 (Okla. Crim. App. 2003) (prior to Oklahoma adopting a statute implementing Atkins, expressing view that “developmental period” ends prior to age 18.)


The federal death penalty statute does not define mental retardation at all, let alone provide

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45 This statute defines mental retardation for purposes of its consideration as a mitigating factor. In Franklin v. Maynard, 588 S.E.2d 604, 605 (S.C. 2003), the South Carolina Supreme Court adopted the definition for purposes of implementing Atkins.
for an age of onset that must be established. 18 U.S.C. § 3596(c) (“A sentence of death shall not be carried out upon a person who is mentally retarded.”) In light of this void, several federal courts have adopted the AAMR and DSM-IV definitions which include the before age eighteen onset requirement. See, e.g., United States v. Nelson, 419 F.Supp.2d 891, 894-95 (E.D. La. 2006); United States v. Cisneros, 385 F.Supp.2d 567, 570 (E.D. Va. 2005). Similarly, in states without statutes implementing Atkins, numerous courts have accepted the requirement that the condition manifest prior to age eighteen. Ex Parte Perkins, 851 So.2d 453, 456 ( Ala. 2002); Bowling v. Commonwealth, 163 S.W.3d 361, 368 (Ky. 2005); Lynch v. State, 951 So.2d 549, 556 (Miss. 2007); State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002); Commonwealth v. Miller, 888 A.2d 624, 630 n. 7 (Pa. 2005); Ex Parte Briseno, 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004).

The Nebraska statute contains no time limit on the age or time period during which the condition must have manifested. Neb. Rev. Stat. § 28-105.01(3). This is true as well for the New Mexico statute. N.M. Stat. Ann. § 31-20A-2.1. In State v. Vela, 777 N.W.2d 266, 307 (Neb. 2010), the Nebraska Supreme Court observed that the Legislature’s omission of an age of onset in the statutory definition of mental retardation made sense given that a defendant with clinically significant subaverage intellectual functioning and deficits in adaptive behavior as a result of, e.g., traumatic brain injury after the age of eighteen, would have the same reduced culpability for the capital offense that is the basis for the ban on executing the mentally retarded. Where a defendant/petitioner cannot meet the requisite age of onset requirement, it should certainly be argued that their execution would be just as cruel and unusual as the execution of a mentally retarded individual.

Where counsel has a client whose intellectual impairment arguably developed after age 18, but the relevant statute requires an onset before that age, counsel should look to recent scientific studies indicating that the developmental period in fact extends beyond age 18. If the client’s impairment falls within the newly recognized developmental period, this information can be utilized to argue that the client does fit an accepted definition of mental retardation, and the statutory limitation is therefore unconstitutional under Atkins. Cf. Rodriguez v. Quarterman, 2006 WL 1900630, *11 (W.D. Tex. July 11, 2006) (unpublished) (“In view of recent studies suggesting the human brain does not achieve full development until age twenty-five, this cut-off age of 18 for the initial manifestation of ‘mental retardation’ is subject to challenge as arbitrary.”); but see State v. Anderson, 996 So.2d 973, 988 (La. 2008) (rejecting equal protection challenge to age of on-set requirement in Louisiana’s definition of mental retardation; “A legislature may rationally treat [those with age of onset before 18 and those with age of onset after 18] differently for purposes of deciding who is and who is not exempt from capital punishment, according special treatment to mentally retarded persons because of the developmental nature of their disorder, while according those in the latter category the opportunity of demonstrating specifically why their disorders mitigate the moral culpability of their act.”).

Proving age of onset can be difficult, particularly where there are no reliable IQ tests from the developmental period. (See subsection 1.3, infra, for a full discussion of cases interpreting the documentation requirements contained in some statute.) That is why evidence of adaptive deficits throughout childhood may be critical to establishing mental retardation. In State v. Stallings, 2004 WL 1932869, *1 (Ohio App. Sept. 1, 2004)
(unpublished), the mental retardation claim foundered on the age of onset prong of the mental retardation test. Because Stallings had received IQ scores above 70 on several occasions, there was a presumption against mental retardation. He successfully rebutted the presumption, however, as to the intellectual and adaptive functioning prongs of the mental retardation test. Where he failed, in the trial court’s view, was in establishing that his condition occurred prior to age 18. The only test results from Stallings’ youth was an IQ score of 76 when Stallings was 16. One defense expert explained that the standard error of measurement for that particular test was six. Therefore, Stallings’s IQ could have been as low as 70 or as high as 82.46 When this same expert was asked whether mental retardation was present prior to the age of 18, 47 the expert responded, “there’s a lot of information that suggests that the deficits were present in the period of development.”  Id., 2004 WL 1932869, *2. The second defense expert testified that Stallings definitely suffered adaptive deficits before the age of 18. But during cross-examination, when asked about age of onset, the expert admitted that “[n]o one will ever know what [Appellant’s] IQ was at that point.”  2004 WL 1932869, *3.

In upholding the trial court’s denial of relief, the Ohio Court of Appeals acknowledged that both experts testified that Stallings met the mental retardation standard announced by the Ohio Supreme Court. Nevertheless, it offered the following somewhat confusing explanation:

[B]oth [defense experts] admitted that the only IQ test administered to [Stallings] before age 18 indicated that he was not mildly mentally retarded, returning an IQ ranging from 70 to 82 once a standard error measurement is included. Further, the experts indicated that [Stallings] was tested on three prior occasions; the testing when [Stallings] was 16 years old, the testing when [Stallings] was 21 years old, and the testing done at the time of [Stallings’s] trial in order to present evidence of mitigating factors. None of the three doctors who had tested [Stallings] prior to [the hearing experts] concluded that [Stallings] was mentally retarded. As a result, we cannot conclude that the trial court acted in an arbitrary, unreasonable or unconscionable manner. The only scientific evidence presented to the trial court indicated that [Stallings’s] IQ was above 70. Further, neither expert could state that the onset of [Stallings’s] mental retardation was before the age of 18.

2004 WL 1932869, *3; compare Branch v. State, 882 So.2d 36, 51 (Miss. 2004) (no prima facie case of mental retardation where defendant had an IQ score of 68 when he was 5-years-old, but had received an IQ score of 84 at the time of trial and showed no deficits in adaptive functioning; “Under the guidelines of the American Psychiatric Association, [defendant] only meets the third criterion, that consisting of an onset of the manifestation prior to age 18.”)

46 Stallings had also been tested at age 21 with the same results. When tested prior to the hearing, Stallings received an IQ score of 74, which the expert who administered the test explained meant that Stallings’s IQ could be as high as 78 or as low as 70. A second expert also tested Stallings. A score of 72 was obtained on that test, which represented an IQ score ranging from 68 to 76. 47 The question makes no sense because the diagnosis of mental retardation requires an onset before the age of 18, under Ohio law.
In *State v. White*, 885 N.E.2d 905, 912 (Ohio 2008), the Ohio Supreme Court ruled that the post-conviction court had abused its discretion in finding that the petitioner had failed to establish that his adaptive deficits began before age 18. In reaching its conclusion, the post-conviction court relied on the absence of adaptive-skills test results from the developmental period. (The results from the pre-hearing testing, which relied on part on interviews with family members, showed significant adaptive deficits.) The post-conviction court dismissed as “conjectural” the defense expert’s opinion that the petitioner would have attained a low score had he been tested before age 18. The Ohio Supreme Court pointed out that the defense experts had reviewed the petitioner’s school records which strongly supported the conclusion that the petitioner’s deficits had their onset before age 18. In addition, one of the expert’s interviews with family members “corroborated the picture” that emerged from the petitioner’s records. *Id.* at 916. Finally, there was no evidence to suggest that the petitioner’s present impairments could be explained by anything that happened to him after he turned 18.

A claim of mental retardation was rejected in *Conaway v. Polk*, 453 F.3d 567, 591-92 (4th Cir. 2006), despite presentation of an affidavit from an expert reporting that the petitioner recently received an IQ score of 68 and that the expert found him to be mentally retarded. The problem was that the petitioner had consistently achieved an IQ score of 79 or 80 on tests he took before age 18. Fatal to petitioner’s *Atkins* claim was the absence of documentary evidence or an expert opinion that petitioner had an IQ of 70 before he turned 18. It was also noted that the petitioner had never alleged facts calling the reliability of his juvenile IQ scores into question. *Id.* at 592 fn. 27.

In *Martinez v. State*, 80 P.3d 142 fn.2 (Okla. Crim. App. 2003), the Oklahoma Court of Appeals expressed the erroneous view that mental retardation must be present at birth, although that mistake was unimportant in that case where the issue was whether the intellectual deficits exhibited by Martinez were the result of brain surgery which took place when Martinez was an adult. *But see Murphy v. State*, 66 P.3d 456, 460 (Okla. Crim. App. 2003) (citing AAMR for proposition that mental retardation appears at birth or during childhood).

In some jurisdictions, such as Louisiana, there is a different definition of mental retardation in the statute implementing *Atkins* (La. Code Crim. Pro. § 905.5.1), than in the statutes that provide for government services for the mentally retarded (La. Rev. Stat. § 28:381.) While the *Atkins*-based statute requires that the condition manifest itself prior to age 18, the services-related statute recognizes the developmental period as lasting up to age 22. Counsel should be prepared to challenge the less protective standard as inconsistent with *Atkins*. *But see Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005) (assuming the definition offered in the Pennsylvania Mental Health and Mental Retardation Act is broader than the one adopted by the court for use with *Atkins* claims, “a broader definition may be appropriate when the diagnosis is for something other than penological interests.”); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (differences in definitions of mental retardation as applied in social services context and exempting defendants from execution “is indicative of a legislative intent to have a different, more restrictive, standard apply to defendants in capital prosecution.”)
1.2 BURDENS AND STANDARDS OF PROOF

A number of the statutes include some type of presumption. In Arizona, for example, there is a rebuttable presumption that the defendant has mental retardation if the trial court determines that the defendant’s IQ is 65 or lower. Ariz. Rev. Stat. § 13-703.02(G). See also Ark. Code Ann. § 5-4-618 (a)(2) (“There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.”); Ill. Rev. Statues, ch. 5, § 114-15(d) (“An intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation.”); Neb. Rev. Stat. § 28-105.01(3) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.”); New Mexico Stat. Ann. § 31-20A-2.1(A) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.”); South Dakota Codified Laws Ann. § 23A-27A-26.2 (“An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant sub-average general intellectual functioning.”); see also State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (A rebuttable presumption of the absence of mental retardation arises if the defendant’s IQ is above 70.); but see State v. Hughbanks, 823 N.E.2d 544 (Ohio App. 2004) (under Lott, an IQ score is only one measure of intellectual functioning and so IQ score of 82 did not necessarily preclude a finding of mental retardation.)

In State v. Arellano, 143 P.3d 1015 (Ariz. 2006), the Arizona Supreme Court ruled that a defendant may establish a rebuttable presumption of mental retardation through IQ scores alone prior to the evidentiary hearing.

Regarding burden of proof, statute and case law uniformly place the burden of proof on the defendant/petitioner. There is an argument that under Ring v. Arizona, 536 U.S. 584 (2002), the burden of proof must be on the state to prove beyond a reasonable doubt that the defendant is not mentally retarded. Although this argument has been rejected by the vast majority of courts48, until and unless this argument is rejected by the United States

48 See, e.g., State v. Grell, 135 P.3d 696, 702 (Ariz. 2006) (rejecting argument that it is unconstitutional to place burden of proving mental retardation on the defendant.); Ochoa v. State, 136 P.3d 661, 665 (Okla. Crim. App. 2006) (refusing to hold that State bears the burden of persuasion by the beyond a reasonable doubt standard that the petitioner is not mentally retarded); Howell v. State, 138 P.3d 549, 562 (Okla. Crim. App. 2006) (“the holdings in Ring and Apprendi . . . do not require the State to prove the lack of mental retardation beyond a reasonable doubt.”); Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005) (rejecting argument that after Atkins, the absence of mental retardation is now an element of capital murder that, under Ring, the jury must consider and find beyond a reasonable doubt.); Bowling v. Commonwealth, 163 S.W.3d 361, 379-80 (Ky 2005) (same); Winston v. Commonwealth, 604 S.E.2d 21, 50 (Va. 2004) (same); State v. Flores, 93 P.3d 1264, 1267 (N.M. 2004) (same); Morrison v. State, 583 S.E.2d 873, 878 (Ga. 2003) (same); In re Johnson, 334 F.3d 403, 405 (5th Cir.2003) (“neither Apprendi and Ring nor Atkins renders the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt.”); People v. Smith, 751 N.Y.S.2d 356 (N.Y.Sup.Ct.2002) (rejecting argument prosecution is required by Atkins and Ring to affirmatively prove defendant is not mentally retarded at sentencing phase of capital murder trial); State v. Williams, 831 So.2d 835, 860 n. 35 (La. 2002) (absence of mental retardation does not operate as functional equivalent of an element of a greater offense); Head v. Hill, 587 S.E.2d 613, 620 (Ga. 2003) (same); Howell v. State, 151 S.W.3d 450, 465 (Tenn. 2004) (same); State v. Laney, 627 S.E.2d 726, 731-32 (S.C. 2006) (same); Russell v. State, 849 So.2d 95, 148 (Miss. 2003) (“Ring
Supreme Court, it should continue to be pressed. The argument did prevail in at least one trial court (Commonwealth v. Turner, 2009 WL 6022139 (Pa. Ct. Common Pleas Dec. 14, 2009)) but it has yet to be seen whether or not that decision will survive.


The constitutionality of the clear and convincing evidence burden of proof must be challenged. See, e.g., Pruitt v. State, 834 N.E.2d 90 (although pre-Atkins statute – Ind. Code § 35-36-9-4 – requires defendant to prove mental retardation by clear and convincing evidence, this standard of proof cannot be applied post-Atkins); see also Cooper v. Oklahoma, 517 U.S. 348 (1996) (Oklahoma rule requiring criminal defendants to prove incompetence by clear and convincing evidence violates due process.); Amendments to Florida Rules of Criminal Procedure, 875 So.2d 563, 566-67 (Fla. 2004) (Pariente, J., concurring) (suggesting to Legislature that it amend the burden of proof in light of Atkins and explaining that potential constitutional problems with the statutory standard may have led the Florida Supreme Court to omit any burden of proof in rules governing mental retardation proceedings)51; but see State v. Grell, 135 P.3d 696, 705 (Ariz. 2006) (rejecting constitutional challenge to clear and convincing standard); People v. Vasquez, 84 P.3d 1019 (Colo. 2004) (same).

The Georgia statute, which preceded Atkins, is alone in requiring that the jury or judge find that mental retardation was established beyond a reasonable doubt. Ga. Code Ann. 17-7-131(c)(3). A constitutional challenge to this standard of proof was rejected by the Georgia

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49 After this statute was enacted, the Florida Supreme Court utilized its power to promulgate procedural rules to issue Fla. R. Crim. Pro. 3.203 to govern mental retardation proceedings in capital cases. This rule is silent on the issue of burden of proof. According to Justice Pariente, this leaves trial courts with the option of applying the clear and convincing evidence standard found in the statute, or declaring it unconstitutional. Amendments to Florida Rules of Criminal Procedure, 875 So.2d 563, 567 (Fla. 2004) (Pariente, J., concurring).

50 In both North Carolina and Oklahoma, the clear and convincing evidence standard applies only at a pre-trial mental retardation determination. If the trial court concludes that the defendant failed to meet this burden, the question of mental retardation goes to the jury during the sentencing phase. At that juncture, the burden is preponderance of the evidence. N.C.G.S. § 15A-2005(e)-(f); Okla. Stat. Ann. § 21-701.10b(F).

51 Constitutional challenges to Florida’s burden of proof have thus far been deemed moot because unsuccessful Atkins claims have routinely been rejected even assuming the burden was preponderance of the evidence.
Supreme Court. *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003); see also *Head v. Stripling*, 590 S.E.2d 122 (Ga. 2003), cert. denied May 24, 2004; *Ferrell v. Head*, 398 F.Supp.2d 1273, 1295 (N.D. Ga. 2005) (district court unpersuaded that burden of proof in Georgia wholly erodes the constitutional prohibition against execution of the mentally retarded); *Ledford v. Head*, 2008 WL 754486 (N.D. Ga. March 19, 2008) (unpublished) (rejecting argument that Georgia’s beyond a reasonable doubt standard is unconstitutional). The United States Court of Appeals for the Eleventh Circuit had recently ruled that Georgia’s burden of proof was unconstitutional. *Hill v. Schofield*, 608 F.3d 1272, 1273-74 (11th Cir. 2010) (“[B]ecause Georgia’s requirement of proof beyond a reasonable doubt necessarily will result in the execution of the mentally retarded, the Georgia Supreme Court’s decision [denying petitioner’s claim of mental retardation under that standard] is contrary to the clearly established rule of *Atkins*.”) That decision was vacated, however, when the full court granted the warden’s petition to rehear the case en banc. *Hill v. Schofield*, ___ F.3d ___, 2010 WL 4482075 (11th Cir. (Ga.) Nov. 9, 2010). Regardless of how the Eleventh Circuit ultimately rules, counsel must continue to mount constitutional challenges to both the clear and convincing and beyond a reasonable doubt burdens of proof.


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52 And although the burden of proof in post-conviction proceedings is generally clear and convincing evidence, the Tennessee Supreme Court ruled that the preponderance of the evidence standard should apply to *Atkins* claims raised in post-conviction where the petitioner had no earlier opportunity to establish his or her ineligibility for the death penalty. *Howell v. State*, 151 S.W.3d 450, 465 (Tenn. 2004).
retardation by preponderance of evidence; with successive post-conviction petitions, petitioners have to establish mental retardation by a preponderance of the evidence if Atkins claim was filed within 180 days of the Atkins decision; otherwise, clear and convincing evidence standard generally applicable to successor petitions would apply; United States v. Cisneros, 385 F.Supp.2d 567, 570-71 (E.D. Va. 2005) (in federal death penalty trial, burden was on defendant to prove to jury by a preponderance of the evidence that he was mentally retarded); United States v. Umana, 2010 WL 1052271, *2 n.9 (W.D. N.C. March 19, 2010) (unpublished) (defendant did not dispute that he had the burden of proving mental retardation by a preponderance of the evidence); United States v. Hardy, 644 F.Supp.2d 749, 750 (E.D. La. 2008) (burden on defendant to establish mental retardation by a preponderance of the evidence at the pretrial hearing and at trial should the district court find he did not meet his burden at the pretrial hearing); Morrow v. State, 928 So.2d 315, 323 (Ala.Crim.App. 2004) (in absence of statute implementing Atkins, petitioner must meet normal burden of proof required in post-conviction proceedings, i.e., he must prove Atkins claim by a preponderance of the evidence).


One important point to remember in regard to the burden of proof is that the prosecution should not be able to defeat a claim of mental retardation by showing that the defendant functions without substantial deficits in skill areas the defendant does not claim to have limitations in. As the Oklahoma Court of Criminal Appeals found in Lambert v. State, 126 P.3d 646, 651 (Okla. Crim. App. 2005):

Unless a defendant’s evidence of particular limitations is specifically contradicted by evidence that he does not have those limitations, then the defendant’s burden is met no matter what evidence the State might offer that he has no deficits in other skill areas.

The court in Lambert also rejected the notion that providing alternative explanations for why the defendant suffered significant limitations in adaptive functioning could rebut the defendant’s claim of mental retardation. “An alternative explanation for an agreed condition is not a negation of that condition. By accepting Lambert’s assertions that he had limitations in [four enumerated] skill areas, the State failed to contradict his claims.” Id. at 653. The Oklahoma Court of Criminal Appeals was crystal clear on this key point: “A defendant must show he has significant limitations in adaptive functioning, but is not required to show that mental retardation is the cause of his limitations in these skill areas.” Id. at 651.

Unfortunately, the inability or unwillingness of decision makers to accept that strengths co-exist with weaknesses in mentally retarded individuals, and the refusal to adhere to clinical understandings of how mental retardation is assessed has led to the rejection of many
Atkins claims. See, e.g., Larry v. Branker, 552 F.3d 356 (4th Cir. (N.C.) 2009) (because Atkins did not require states to adopt a specific method for determining mental retardation, the post-conviction court’s alleged focus on skills petitioner could perform rather than those he actually did perform in the real world environment was not contrary to or an unreasonable application of Atkins.) Counsel needs to continue educating juries and courts on the true meaning of mental retardation and how it is properly assessed and to raise in higher courts challenges to flawed mental retardation determinations.

Some states have threshold requirements that must be met in order to get a full hearing on a claim of mental retardation. These requirements may be statutory or judicially created. The statutes of New York and South Dakota, for example, require a showing that there is “reasonable cause to believe that the defendant [is][was] mentally retarded.” N.Y.Crim. Proc. Law § 400.27(12)(a); S.D. Codified Laws § 23A.27A-26.1. The Kansas statute requires a showing that “there is sufficient reason to believe that the defendant is mentally retarded.” Kan. Stat. Ann. § 21-4623(a). The Virginia statute governing habeas petitions by death row inmates requires a hearing unless the claim is deemed “frivolous.” Va.Code Ann. § 8.01-654.2. In California, a defendant cannot obtain a hearing on mental retardation unless he or she submits a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded. Cal. Penal Code § 1376(b)(1); see also Chase v. State, 873 So.2d 1013, 1029 (Miss. 2004) (defendant may not receive mental retardation hearing without providing affidavit from expert opining, inter alia, that defendant has combined IQ of 75 or below).

In Blonner v. State, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006), the Oklahoma Court of Criminal Appeals ruled that defendants not only were required to file a pre-trial notice of intent to raise mental retardation, this notice also had to be “accompanied by an averment that the defendant has at least one I.Q. test showing a score of 70 or below, within the margin of error, setting forth the score and date of testing, in order for the defendant to be eligible to raise the issue of mental retardation.” If the notice was missing such an averment, the trial court was required to enter an order finding that the defendant has failed to meet the threshold for establishing mental retardation and to deny the request to ban the prosecution from seeking the death penalty.

Importantly, however, a defendant/petitioner could meet this threshold requirement even where IQ scores above 70 existed. The court of criminal appeals explained:

For a defendant to claim he or she is ineligible for the death penalty by reason of mental retardation, the defendant must first show a score a 70 or below on a contemporary IQ test. (Citation omitted.) That more than one test was administered and/or that more than one score is above 70 does not matter; only one test score of 70 or below needs to be shown for a defendant to ‘get his foot in the door’ and claim ineligibility for the death penalty by reason of mental retardation.

Pickens v. State, 126 P.3d 612, 616 (Okla. Crim. App. 2005). The present Oklahoma mental retardation statute requires the defendant to provide notice to the state that he or she
intends to invoke the statute’s protections. Such notice is to be filed at least ninety days after formal arraignment or within ninety days of the filing of the bill of particulars, whichever is later. Okla. Stat. Ann. § 21-701.10(b)(D). As for what must be included in the notice, the statute provides: “The notice shall include a brief but detailed statement specifying the witnesses, nature and type of evidence sought to be introduced. The notice must demonstrate sufficient facts that demonstrate a good-faith belief as to the mental retardation of the defendant.”

Defense counsel must be sure to demand the resources necessary to make whatever threshold showing is required and to make a complete record of any impediments to meeting that threshold.

1.3 DOCUMENTATION AND TEMPORAL ISSUES

As discussed in the first part of this Guide, the clinical definitions of mental retardation require a showing that the condition manifested or originated during the developmental period, generally defined as prior to age 18. This has created some confusion about the relevance of evidence concerning IQ results obtained after age 18 and the significance of adult behavior. In addition, some of the states require the defendant to prove that he or she was mentally retarded at the time of the capital offense. See, e.g., Ark. Code Ann. § 5-4-618(b); Conn. Gen. Stat. § 53a-46a(h); Coleman v. State, 2010 WL 118696, *29 (Tenn. Crim. App. Jan. 13, 2010) (unpublished) (“we cannot ignore the mandate of Atkins and section 39-13-203(b), which provides that the defendant must be mentally retarded at the time of committing first degree murder.”), appeal granted (Tenn. June 17, 2010); In re Bowling, 422 F.3d 434, 436 (6th Cir. 2005) (in addressing Kentucky death row inmate’s request for permission to file a successor habeas petition raising an Atkins claim, court characterizes the issue as whether the inmate was mentally retarded at the time of the capital offense.); Pizzuto v. State, 202 P.3d 642, 653 (Idaho 2008) (“The issue is whether the offender was mentally retarded when he or she committed the murder and whether such mental retardation began prior to the offender's eighteenth birthday.”)

Other states define mental retardation by statute or case law as including current intellectual impairment and/or current significant deficits in adaptive functioning. A.R.S. § 13-703.02(K); see also State v. Grell, 135 P.3d 696, 707 (Ariz. 2006) (noting that assessments based on recent interviews with the defendant are persuasive because Arizona requires that the defendant suffer current impairments in adaptive functioning.); Smith v. State, ___ So.2d ___, 2007 WL 1519869, *8 (Ala. May 25, 2007) (“in order for an offender to be considered mentally retarded in the Atkins context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18.”); Jones v. State, 966 So.2d 319 (Fla. 2007) (the plain language of Florida’s mental retardation statute refuted the defense expert’s contention that only adaptive behavior prior to age 18 was relevant to the mental retardation determination; Atkins does not prohibit a determination of an individual’s current adaptive skills if that person is in prison.); Branch v. State, 882 So.2d 36, 51 (Miss.2004) (finding that defendant was not entitled to a hearing on his Atkins claim despite having received an IQ score of 68 at age five and a diagnosis of mild mental
retardation given that he had an IQ of 84 at age twenty-two and no apparent adaptive deficits as an adult); but see Pizzuto v. State, 202 P.3d 642, 653 (Idaho 2008) (“The issue in Atkins v. Virginia is not whether the offender is currently mentally retarded.”); Campbell v. Superior Court, 71 Cal. Rptr. 3d 594, 607 (Cal. App. 2008) (observing that California’s mental retardation statute “does not require a defendant to prove what his mental capacity was at the time of the commission of the offense.”)

Because adaptive functioning is meant to be considered “within the context of community environments typical of the individual’s age peers of cultures,” establishing such deficits when the defendant is either incarcerated or on death row is problematic. For a more complete discussion of cases involving reliance on jail or prison personnel in evaluating adaptive functioning, see subsection 1.8.

Also creating some confusion are requirements in some states that mental retardation be “documented” or otherwise recognized during the developmental period. See, e.g., Col. Rev. Stat. § 18-1.3-1101; Mo. Rev. Stat. § 565.030.6.

Courts have been expressing divergent views on some of these temporal issues. In State v. Strode, 2006 WL 1626919 (Tenn. Crim. App. June 8, 2006) (unpublished), for example, the Tennessee Court of Criminal Appeals reversed the trial court’s finding that Strode had established his mental retardation. Although the defense and prosecution experts had agreed that Strode had a full scale IQ of 69 when he was tested prior to trial, the four IQ scores Strode had received before he turned 18 were all above 70. This was deemed fatal to his claim of mental retardation. See also Black v. State, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005) (unpublished) (where IQ scores before age of 18 were above 70, mental retardation claim fails despite more recent IQ scores below 70.)

The court also criticized the trial court’s reliance on the recollections of Strode’s adoptive mother about Strode’s adaptive deficits from age eleven until fourteen. The court observed that few fourteen-year-olds are capable of living on their own, and many do not pay close attention to personal hygiene. The court appeared to find more probative that Strode had shown an “ability to care for himself, work and obtain a driver’s license as an adult.” State v. Strode, 2006 WL 1626919, *15.

Similarly, in Rodriguez v. Quarterman, 2006 WL 1900630, *14, the district court criticized the petitioner’s experts for looking at historical information and “disregarding virtually all available information regarding petitioner's mental health after petitioner reached age 18, including information regarding petitioner's current intellectual functioning and adaptive skills behavior.”

In Smith v. State, ___ So.2d ___, 2007 WL 1519869, *11 (Ala. May 25, 2007), the Alabama Supreme Court stated that implicit in the definition of mental retardation it adopted in the Perkins case was the requirement that the deficits in intellectual functioning and adaptive behavior both have manifested before age 18 and exist together at the time of the capital offense. The lower appellate court’s decision conflicted with state supreme court’s earlier decision “by placing great emphasis on new evidence that tended to show
deficits in [defendant’s] intellectual functioning and adaptive behavior before he reached the age of 18, while ignoring evidence that shows that [defendant’s] intellectual functioning and adaptive behavior as an adult places him above the mentally retarded range.”

On the flip side, Justice Rucker of the Indiana Supreme Court dissented from the majority’s rejection of a mental retardation claim in Pruitt v. State, 834 N.E.2d 90, 123-126. In Rucker’s view, the defendant had shown mental retardation by a preponderance of the evidence. He criticized the majority for relying on evidence of IQ scores that Pruitt received after the developmental period, defined as ending at age 22 in Indiana. Because a defendant must establish that his or her “significantly subaverage intellectual functioning” manifested before the person became twenty-two years of age, Rucker disregarded the later IQ scores. For the same reason Rucker concluded the majority erred in looking to adaptive behavior after age 22, such as job performance as an adult.

The petitioner in Ochoa v. State, 136 P.3d 661, 666 (Okla.Crim.App. 2006) argued that the trial court erred in refusing to instruct the jury that it had to determine whether he was mentally retarded at the time of the crime, rather than whether he was presently mentally retarded. Evidence at trial showed that Ochoa had lower IQ scores prior to incarceration. Having learned to read and write in prison likely contributed to his enhanced performance. The Oklahoma Court of Criminal Appeals rejected Ochoa’s argument, concluding that an increase in skills suggested that Ochoa was not mentally retarded in the first place. It further explained:

We do not dispute the fact that a mentally retarded person can learn. However, a person who can learn beyond the accepted clinical definitions of mental retardation do not fall within the definition of those persons who may avoid execution due to mental retardation. . . . The jury was properly instructed it must find Ochoa “is” mentally retarded, as opposed to finding that he “was” mentally retarded at the time of the crime.

Id; see also Ochoa v. Workman, 2010 WL 915826 (W.D. Okla. March 10, 2010) (Oklahoma’s requirement that a defendant/death row inmate establish that he or she is presently mentally retarded, as opposed to mentally retarded at the time of the capital offense, is not contrary to or an unreasonable application of Supreme Court precedent).

In Ex Parte Jerry Jerome Smith, ___ So.3d ___, 2010 WL 4148528 (Ala. Oct. 22, 2010), the defendant similarly argued that his adaptive functioning at the time of the capital offense was the proper focus under Atkins and it therefore was error for the lower courts to credit the State’s expert on the issue of adaptive deficits since that expert focused on present mental functioning. The court found that the defendant had failed to establish significant adaptive deficits either at the time of the offense or at the time of the hearing. Like many courts, the court here used the facts involved in the commission of the capital offense to establish the absence of adaptive deficits. See subsection 1.8 for further discussion of how courts are using crime-related information.

The Kentucky Supreme Court in Bowling v. Commonwealth, 163 S.W.3d 361 (Ky 2005),
rejected the argument that the critical issue under *Atkins* is whether the inmate is mentally retarded at the time of execution. The court observed: “If diminished personal culpability is the rationale for not executing a mentally retarded offender, logic dictates that the diminished culpability exist at the time of the offense, not necessarily at the time of the execution.” *Id.* at 376. It then found “nothing unconstitutional or contrary to *Atkins* in the requirement in KRS 532, 135 that mental retardation be determined prior to trial.” *Id.* at 377.

In *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004), the Arkansas Supreme Court repeatedly emphasized that the state statute barring execution of the mentally retarded, section 5-4-618, “clearly provides that no defendant with mental retardation *at the time of committing capital murder* shall be sentenced to death.” *Id.* at 356 (emphasis in original). It then criticized the defendant for presenting evidence of his IQ from an evaluation conducted when the defendant was age 15 instead of “submitting evidence demonstrating mental retardation *at the time of the offense* . . ..” *Id.*

The district court in *United States v. Hardy*, 2010 WL 4909550 (E.D. La. Nov. 24, 2010) (unpublished) engaged in a particularly thoughtful discussion of what should be looked at when assessing adaptive deficits. It found that:

> Unlike in a medical, educational, or social services context, the law is concerned with what was rather than what is. The point of an *Atkins* hearing is to determine whether a person was mentally retarded at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded and therefore in need of special services. Because of this, the diagnosis of mental retardation in the *Atkins* context will always be complicated by the problems associated with retrospective diagnosis.

> [W]hile the APA speaks of “concurrent deficits or limitations in present adaptive functioning,” and while some courts appear to have interpreted this language as directing consideration of how a person functions today rather than how he did at the time of the crime, it is clear that the assessment of mental retardation for purposes of *Atkins* looks backwards-past even the time of the crime and back into the developmental period. Certainly a person's level of adaptive functioning in the present might provide some information about his abilities during the developmental period as, all things being equal, a person without limitations in the present is less likely to have had limitations before, and a person with limitations today is more likely to have had them during the developmental period. But particularly with the mildly mentally retarded, who tellingly used to be labeled the “educable,” DSM-IV-TR at 43, the AAMR/AAIDD has been clear that a person's

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53 This was not the sole basis for affirming the denial of the defendant's mental retardation claim. The court also noted that the prosecution expert successfully rebutted the presumption that the defendant was mentally retarded, which had arisen as a result of an IQ score of 65 when the defendant was fifteen-years-old.
current strengths and weaknesses are not the best evidence of the relevant facts in an *Atkins* hearing.


The Colorado statute requires mental retardation to have been *documented* during the developmental period. Col. Rev. Stat. § 18-1.3-1101 (emphasis added). The precise meaning of this statutory requirement is not clear. It may be interpreted as simply requiring the defendant to document through a current evaluation that the condition was present during the developmental period. This is the interpretation that should be pressed. On the other hand, it could be interpreted as requiring counsel to obtain documentation that was actually prepared during the developmental period that indicates the presence of mental retardation, for example, an IQ score of 65 received by the defendant at age 11 or a school record reflecting a diagnosis of mental retardation. If the latter view prevails, counsel must be prepared to challenge the statute as inconsistent with *Atkins*, and be ready to proffer expert testimony showing that the mental health community does not recognize such a requirement prior to rendering a diagnosis of mental retardation.

The statute does allow the documentation requirement to be excused upon a showing of extraordinary circumstances. What constitutes “extraordinary circumstances” is not further described. Counsel without the required documentation should obviously seek to provide a persuasive explanation for the absence of the evidence, in addition to challenging the requirement as unconstitutional under *Atkins*. If the defendant is from a foreign country, for example, this might explain the absence of records documenting mental retardation during the developmental period. Alternatively, the defendant may have grown up in a jurisdiction where IQ testing was enjoined due to alleged biases in the testing. *See, e.g.*, *Larry P. v. Riles, et al.*, 793 F.2d 969 (9th Cir. 1984).

Missouri’s statute requires that the required deficits have both “manifested” and been “documented” before age eighteen. Mo. Rev. Stat. § 565.030.6. In finding that a Missouri death row inmate was not entitled to relief on his *Atkins* claim, the Missouri Supreme Court in *Goodwin v. State*, 191 S.W.3d 20 (Mo. 2006), noted, among other things, that all of the IQ scores received by Goodwin prior to the age of 18 indicated that he was not retarded. Given the absence of “documented evidence of retardation prior to age 18,” Goodwin could not establish mental retardation by a preponderance of the evidence. *Id* at 32. This was true even though Goodwin presented an expert opinion that he was mentally retarded. In finding Goodwin’s reliance on his post-conviction expert unavailing, the court observed that the expert’s “testimony results from his examination and diagnosis of Goodwin when he was 34 years old. He ignored that section 565.030.6 requires that mental retardation be ‘manifested and documented’ by the age of 18.” *Id*.54

In contrast, in *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523 (Mo. 2010), the State argued that the documentation requirement had not been met because the petitioner, who was found to have proven his mental retardation by an appointed master, had no IQ score

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54 Two additional reasons were given for discounting the new expert’s opinion: (1) his testimony was found by the motion court to be incredible; and (2) the motion court held that the new expert was not qualified.
prior to age eighteen and the existing school records were limited. The Missouri Supreme Court rejected the State’s contention, explaining:

Documentation, as with any other fact, is a matter of proof. In reaching his conclusion, the master was entitled to make reasonable inferences from the evidence. A purpose of requiring documentation is to diminish the possibility a defendant will fabricate or exaggerate the symptoms of mental retardation to avoid punishment. The records that Lyons presented and the testimony received are sufficient for the master to conclude that Lyons' conditions were not a recent fabrication and that they were documented prior to Lyons attaining 18 years of age.

Id. at 527.

In Nicholson v. Branker, 2010 WL 3672246 (E.D. N.C. Sept. 20, 2010), a federal district court found that the state post-conviction court’s analysis of the petitioner’s Atkins claim was legally flawed where the state court concluded the petitioner could not meet North Carolina’s definition of mental retardation because he had no IQ score before age 18. “While N.C. Gen. Stat. § 15A-2005 requires a defendant to show that mental retardation manifested before 18 years of age, there is no requirement that he show he had scored 70 or below on a test given prior to the age of eighteen. Thus, insofar as the MAR court denied petitioner’s claim because he failed to produce an I.Q. test score from a test administered prior to the age of eighteen, the court’s ruling is an unreasonable application of the law.”(Citations omitted.)

Even where there is no express requirement of documentation during the developmental period, many courts and jurors assume, as a practical matter, that mental retardation would have been identified at the very least by the schools. Counsel must always be prepared to explain why the condition went unrecognized if supporting documentation in the defendant’s background records does not exist. In Commonwealth v. VanDivner, 962 A.2d 1170 (Pa. 2009), for example, the majority upheld the trial court’s ruling that the defendant had failed to meet the age of onset prong of mental retardation definition. This was because, in part, the defendant had presented no IQ scores obtained during the developmental period, there were no childhood educational or psychological records reflecting a finding of mental retardation, and there was no evidence that the defendant had been placed in special education due to mental retardation as opposed to attendance or behavioral problems. Id. at 1185-86. In dissent, Justice Baer complained that the majority was creating an insurmountable barrier for defendants who were not fortunate enough to have attended a school where objective IQ testing was performed. The majority responded by pointing out that the record was silent as to why no IQ tests scores were available.55 See also Morris v. State, ___ So.3d ___, 2010 WL 415245 (Ala. Crim. App. Feb. 5, 2010) (in affirming lower court’s ruling that defendant had failed to prove mental retardation, fact that school records did not show that defendant was in special education was noted); Ex

55 In addition to the absence of any documentation of mental retardation prior to age 18, there was evidence of adult head injuries, as well as alcohol and substance abuse, that could have explained the defendant’s current cognitive impairment. The State’s expert also raised the question of malingering.
Parte Woods, 296 S.W.3d 587 (Tex, Crim. App. 2009) (defense expert’s speculation that petitioner was not classified in school as mentally retarded because the school systems may have been “loathe to classify a child as having mental retardation, or without funds to do the proper evaluation” was not evidence; a rational finder of fact could consider it significant that petitioner’s teachers did not consider him to be mentally retarded.; State v. Anderson, 996 So2d 973 (La. 2008) (jury’s unanimous finding that defendant failed to establish mental retardation upheld on appeal where, inter alia, school records did not indicate retardation); Woods v. Quarterman, 493 F.3d 580 (5th Cir. (Tex.) 2007) (in affirming denial of habeas relief, noting that most persuasive to state court on age of onset prong of the mental retardation definition was the absence of any record of petitioner being diagnosed as mentally retarded during his developmental years); Perkins v. Quarterman, 2007 WL 631294 (N.D. Tex. March 1, 2007), (unpublished), certificate of appealability denied by 2007 WL 3390953 (5th Cir. Nov. 15, 2007) (unpublished) (noting that petitioner was never diagnosed mentally retarded prior to age eighteen despite the fact that he attended various schools and received medical care as a child); Foster v. State, 929 So.2d 524, 533 (Fla. 2006) (in denying claim of mental retardation, post-conviction court noted that “[i]n school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded.”); Rodriguez v. Quarterman, 2006 WL 1900630, *13 n. 73 (district court finds that public schools at relevant time “had a pecuniary interest in identifying students who qualified for special education services or who were mentally retarded” and so “the failure of any of petitioner's teachers or school officials to refer petitioner for testing or evaluation to determine whether petitioner was either mentally retarded or eligible to receive special education services is highly significant.”); Ex Parte Briseno, 135 S.W.3d 1, 16-17 (Tex. Crim. App. 2004) (finding it “highly significant” that petitioner’s voluminous juvenile records contained no indication from any source that any person thought petitioner might be mentally retarded.); but see In re Morris, 328 F.3d 739, 741 (5th Cir. (Tex.) 2003) (Higginbotham, J., concurring) (“While now vital school records, scant as they are, do not use the term ‘retarded,’ that is not worth much, given the wide practice of social promotions and the reluctance of school officials’ use of the stigmatizing term ‘retarded.’”)

In Williams v. Dretke, 2005 WL 1676801 (S.D. Tex. July 15, 2005) (unpublished), the district court criticized the Texas Court of Criminal Appeals’ analysis of Williams’ Atkins claim. The state court had ruled that Williams failed to make a prima facie showing of mental retardation because Williams did not present a specific diagnosis of mental retardation prior to the age of 18. Williams had, however, “undeniably presented evidence of a full-scale IQ in the mildly retarded range that was so identified by testing before he turned 18, and of significant deficits in adaptive functioning before age 18.” Id. at 2005 WL 1676801, *6. According to the district court, “[t]he Court of Criminal Appeals' insistence on the incantation of the specific phrase ‘mentally retarded’ in light of substantial evidence that Williams met a clinical definition of mental retardation was simply unreasonable.” Id.\footnote{Although the district court granted the petitioner an evidentiary hearing on the Atkins claim, it ultimately denied relief and the Fifth Circuit affirmed. Williams v. Quarterman, 293 Fed.Appx. 298 (5th Cir. (Tex.) 2008) (unpublished). The petitioner’s certiorari petition was recently denied. Williams v. Thaler, ____ U.S. ___, 2010 WL 2917636 (Nov. 1, 2010).}
In *Hedrick v. True*, 443 F.3d 342, 367 n. 2 (4th Cir. (Va.) 2006), the Fourth Circuit reiterated that “a habeas petitioner is not required to submit an IQ score of 70 or less from a test taken before he turned the age of eighteen.” On the other hand, the petitioner “must allege that his intellectual functioning would have fallen below this standard before he turned the age of eighteen.” *Id.*, citing Va.Code Ann. §§ 19.2-264.3:1.1(A),(B)(3).

Part of the definition of mental retardation in Oklahoma, both in post-statutory case law and in the 2006 mental retardation statute, is manifestation before the age of 18. The Oklahoma Court of Criminal Appeals has explained that this poses

a fact question intended to establish that the first signs of mental retardation appeared and were recognized before the defendant turned eighteen. Lay opinion and poor school records may be considered. Thus, a defendant need not, necessarily, introduce an intelligent quotient test administered before the age of eighteen or a medical opinion given before the age of eighteen in order to prove his or her mental retardation manifested before the age of eighteen, although such proof would surely be the more credible of that fact.


Several complaints about how this prong has been interpreted have arisen since the *Murphy* decision. In *Hooks v. State*, 126 P.3d 636, 641 (Okla. Crim. App. 2005), the petitioner complained that the instructions given to the jury required him to prove that his subaverage intellectual condition was actually recognized as mental retardation and diagnosed prior to age 18. This, he argued, was more restrictive than *Murphy*’s requirement of showing that the mental disability was observed by someone when the defendant was a juvenile, and also a tougher standard than existed in other states. The Oklahoma Court of Criminal Appeals declined to reach the merits of the argument, pointing out that Hooks had in fact presented evidence that his disability was both recognized and diagnosed as mild mental retardation before he was eighteen.57

In *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005), the prosecution’s expert had attempted to make much of the fact that there was no documentation showing a “determination” that Pickens was mentally retarded when he was in school. The Oklahoma Court of Criminal Appeals dismissed the prosecution expert’s testimony on this point as “specious” given evidence presented by Pickens showing that he had been identified by the public schools as “EMH” – Educable Mentally Handicapped – the term that was used to identify mentally retarded students at the relevant time. *Id.* at 618. As this case demonstrates, a comprehensive investigation into the relevant school system’s practices may be necessary to develop the showing of mental retardation. School records on their face can be extremely misleading, as was the case in *Pickens*. They showed that Pickens

57 In spite of this evidence, and evidence that Hooks was placed in educable mentally handicapped classes by fifth grade, the jury found that Hooks had not proved his mental retardation. The Oklahoma Court of Criminal Appeals affirmed. Even where there is documentation of mental retardation at the relevant age, counsel obviously cannot rely on such evidence alone.
successfully graduated from high school with a GPA of 2.70. Former teachers explained, however, that the grades he received were based on his Individualized Education Program, not as compared to other students in mainstream classes. Also, Pickens’s class rank of 125 of 328 was not an accurate ranking as it included mainstream students who were graded in a complete different manner.

The petitioner in *Myers v. State*, 130 P.3d 262 (Okla. Crim. App. 2005), argued that the jury instructions created a higher burden than the state law standard by requiring that mental retardation have been “present and known” before age 18, as opposed to having “manifested” before that age. The court of appeals disagreed, stating:

> [T]he words “present and known” are words of common everyday understanding that do not require a level of proof above that required to prove that a condition “manifested” itself. “Known” as it relates to the jury instruction used in this case does not require a scientific finding or a medical diagnosis. (Citation omitted.) The retardation has only to have been perceived or recognized by someone before the defendant reached the age of 18. The court's instruction accurately stated the applicable law and therefore we find that the district court did not abuse its discretion in giving this uniform instruction.

*Id.* at 269.

To the extent that a court imposes a requirement on the defendant that is inconsistent with clinical definitions of mental retardation or accepted practices for rending a diagnosis, counsel must argued that the requirement violates *Atkins*.

### 1.4 DISCOVERY, FUNDING FOR EXPERT ASSISTANCE AND RIGHT TO APPOINTMENT OF COUNSEL

Some mental retardation statutes include discovery provisions. In Idaho, for example, the parties are required to turn over written synopses of expert witnesses’ findings, or a written report. The trial court is also authorized to order depositions of the experts. Idaho Code § 19-2515A(2)(b). In Louisiana, once the defendant raises mental retardation under La. Code Crim. Proc. art. 905.5.1, the defendant is required to turn over the following materials provided the state makes an appropriate request:

- any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any defense expert in forming the basis of his opinion that the defendant is mentally retarded.

La. Code Crim. Proc. art. 905.5.1(D). If the defendant fails to comply with an order requiring production of such materials, upon motion by the prosecution the court is not to hold a pretrial hearing on the question of mental retardation nor instruct the jury about the...
prohibition on executing mentally retarded defendants.

The Oklahoma Court of Criminal Appeals has ruled that both parties are entitled to complete discovery on the issue of mental retardation. *Blonner v. State*, 127 P.3d 1135, 1140 (Okla. Crim. App. 2006) (pre-trial jury determination). In *State v. Hughbanks*, 792 N.E.2d 1081 (Ohio App. 2003), the appellate court held that where a post-conviction petitioner demonstrated substantive grounds for relief on his *Atkins* claim, he was entitled to discovery to assist him in presenting the claim. See also *State v. Carter*, 813 N.E.2d 78, 82 (Ohio App. 2004) (“Carter was entitled to discovery to develop his claim, including the experts necessary to aid in that discovery and to assist in presenting the claim, if the petition and its supporting evidentiary material demonstrated substantive grounds for relief.”); *Pizzuto v. Hardison*, 2010 WL 1651670 (D. Idaho April 20, 2010) (unpublished) (where an evidentiary hearing had been ordered on an *Atkins* claim raised in an authorized successor petition, petitioner was required to provide respondent with discovery related to two mental health experts that petitioner did not intend to call at the hearing but who petitioner had earlier relied on extensively in state and federal court.); *Greene v. Norris*, 2009 WL 1653477 (E.D. Ark. June 10, 2009) (unpublished) (in preparation for hearing on petitioner’s *Atkins* claim, granting in part the warden’s request for subpoenas for petitioner’s employment and mental health records and directing the warden to apply for subpoena for school records in jurisdiction where schools are located.); *Brumfield v. Cain*, 2008 WL 2600140 (M.D. La. June 30, 2008) (unpublished) (granting evidentiary hearing on *Atkins* claim and noting that the State will be allowed to conduct discovery prior to the hearing); *State v. Vela*, 777 N.W.2d 266 (Neb. 2010) (when a defendant in a capital sentencing proceeding asserts mental retardation as a basis for precluding the death penalty, there is good cause for the prosecution to obtain access to the defendant's mental health records in the possession of the Department of Correctional Services.); *Commonwealth v. Turner*, 2009 WL 6022139 (Pa. Ct. Common Pleas Dec. 14, 2009) (prosecution entitled to report from defense expert which specifically identifies all materials the expert relied on in the mental retardation assessment but prosecution not entitled to order requiring defense counsel or the defense expert to produce the underlying materials.)

In federal habeas corpus proceedings, leave to conduct discovery will be granted to the petitioner if he establishes “good cause” for the discovery. Rule 6(a) of Rules Governing Section 2254 Cases. “Good cause” means that “if the facts are fully developed, [the petitioner may] be able to demonstrate that [he] is . . . entitled to relief.” *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). If, however, the federal court concludes that the petitioner failed to develop the factual basis for the claim in state court, discovery may be denied. See, e.g., *Isaacs v. Head*, 300 F.3d 1232, 1248 (11th Cir. (Ga.) 2002) (recognizing that limitations on the availability of evidentiary hearings under 28 U.S.C. § 2254(e)(2) also apply to availability for discovery). In *Pizzuto v. Hardison*, 2008 WL 5115054 (D. Idaho December 4, 2008) (unpublished), the petitioner had unsuccessfully asked the state court for additional testing and the opportunity to further develop the facts before his *Atkins* claim was dismissed. The district court concluded that the petitioner had shown “minimally reasonable diligence” while in state court and so was not at fault for the lack of development of the *Atkins* claim. *Id.* at 2008 WL 5115054, *5. Therefore, § 2254(e)(2) did not apply. Because the petitioner had submitted a partial IQ score near the cutoff for
significantly subaverage intellectual functioning, records and affidavits indicating serious deficits in adaptive functioning during his formative years, and an expert opinion that there were suggestions that the petitioner is mentally retarded but that further testing was needed, the district court concluded that discovery was warranted. The petitioner was granted discovery of records in the possession of the respondent, as well as access by a mental health expert for further testing.

The issue of the right to funding to develop a mental retardation claim comes up quite a bit in state courts as well. Certainly in jurisdictions like California and Mississippi where expert opinions are required before a hearing on the issue will even be ordered, funding will be necessary before the claim is even raised. In states with lower requirements for a prima facie case of mental retardation, expert assistance will certainly be required in order to prove the claim. Counsel must make a clear record where the court is denying the resources needed to establish the defendant’s mental retardation. Even where counsel is convinced that a request will be denied, the demand for resources must be made or the defendant may later find himself precluded from developing additional evidentiary support for the claim. See e.g., 28 U.S.C. § 2254(e)(2) (federal habeas petitioner not entitled to an evidentiary hearing in most instances if he or his counsel failed to develop the facts in state court.) By not requesting resources, later courts are likely to blame the defendant for the inadequate record.

That conflicting evidence exists concerning whether the defendant is mentally retarded should not preclude funding for assistance in developing the claim. In Morris v. State, 956 So.2d 431, 451 (Ala. Crim. App. 2005), for example, the Alabama Court of Criminal Appeals found that the defendant was entitled to “appointment of a mental-health expert who could assist Morris in the preparation and presentation of his claim of mental retardation” where the trial court’s experts offered conflicting opinions about whether or not Morris was mentally retarded. See also Burgess v. State, 962 So.2d 272, 290 (Ala. Crim. App. 2005) (acknowledging that following the Atkins decision, “there may be instances when a mental-health expert is necessary in a postconviction proceeding challenging a death sentence.”)

In State v. Bays, 824 N.E.2d 167 (Ohio App. 2005), a case involving an Atkins claim raised in a successor petition for post-conviction relief, the appellate court ruled that the trial court had abused its discretion when it denied the petitioner’s request for funding for a mental health expert. The trial court’s refusal to authorize funding was premised on the fact that the two mental health experts who testified at the penalty phase of Bays’s pre-Atkins capital trial had opined that his IQ was above 70, placing him in the borderline range of intelligence just above mental retardation. The court of appeals pointed out, however, that “[t]he expert testimony offered at Bays’s mitigation hearing was not presented or developed to establish Bays’s mental retardation status for purposes of Atkins, using the test adopted in Lott.” Id. at 171. Although there was a rebuttable presumption under Lott that Bays was not mentally retarded if his IQ was above 70, the court found that Bays “must be allowed access to the resources that might permit him to rebut the presumption, in view of the fact that he is an indigent defendant with significant, documented cognitive deficits, as shown by his school records and the testimony [of the experts at the penalty phase].” Id. at 171-172.
In *State v. Hughbanks*, 792 N.E.2d 1081 (Ohio App. 2003), the Ohio Court of Appeals found that the petitioner had demonstrated substantive grounds for relief on his *Atkins* claim despite the fact that at the pre-*Atkins* trial a mental health expert testified that the petitioner had a full-scale IQ of 82. The court of appeals pointed out that the trial testimony had been offered to probe the issue of mental illness, not mental retardation as an exemption to execution. In addition, petitioner now presented social security records showing that he received benefits as a result, among other things, of a diagnosis of mental retardation. This diagnosis emerged from a clinical interview and testing which disclosed adaptive deficits and a full-scale IQ of 73. On this record, the appeals court ruled that the petitioner was entitled to funding for a mental health expert to pursue his claim.

Another Ohio appellate court found that the trial court abused its discretion in denying the petitioner’s request for expert assistance for his *Atkins* claim. *State v. Lorraine*, 2005 WL 1208119 (Ohio App. 11 Dist. May 20, 2005) (unpublished). The appellate court criticized the lower court for relying on the petitioner’s pre-*Atkins* mitigation evidence in deciding that the petitioner was not now entitled to expert assistance to establish his ineligibility for the death penalty. The court pointed out that when the prior evidence was presented, it was for a different purpose. And although petitioner’s evidentiary showing included an IQ score of 73, which is above the rebuttable presumption score of 70 as pronounced by the Ohio Supreme Court, the score “provides only a singular piece of evidence as to Lorraine’s mental capacity, and is not dispositive of the issue of mental retardation for *Atkins* purposes.” *Id.* at 2005 WL 1208119, *3*; see also *State v. Waddy*, 2006 WL 1530117 (Ohio App. June 6, 2006) (unpublished) (petitioner was entitled to expert assistance in proving his mental retardation claim despite the fact that all known IQ scores were above 70 and the most recent score was 83; court looks to documentation suggesting below average intellectual functioning that was apparent prior to age 18, as well as evidence suggesting limitations in social and conceptual skills.); but see *King v. State*, 960 So.2d 413 (Miss. 2007) (defendant did not show “substantial need” for funds to retain an independent expert to assist in establishing his mental retardation where one expert already opined that defendant tested as mentally retarded with an IQ score of 69 but a second expert whose testing resulted in a score of 71 disagreed).58 *Woods v. State*, 863 N.E.2d 301 (Ind. 2007) (permission to file successor petition raising *Atkins* claim denied without allowing the hiring of experts where petitioner had received numerous evaluations over the years and no expert had suggested he was mentally retarded and although he had received IQ scores of 73 on partial tests, his lowest full-scale IQ score was 84 and his highest was 93.)

The Texas Court of Criminal Appeals has ruled that where a death row inmate failed to raise an *Atkins* claim in his initial post-*Atkins* habeas petition, he can only raise the claim in a successor petition if he makes a heightened showing of mental retardation. *Ex Parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007). See subsection 1.15, infra. Pro bono counsel for the petitioner in *Blue* complained about the heightened evidentiary burden given that Texas does not provide for appointment of counsel for litigating a successor.

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58 The Mississippi Supreme Court refused to revisit its ruling in subsequent post-conviction proceedings. *King v. State*, 23 So.3d 1067 (Miss. 2009). Justice Kitchens dissented, arguing that the court in its earlier ruling had failed to “fully develop the important interplay between *Atkins* and *Ake*.” In Kitchens’ view, King had demonstrated the requisite “substantial need” for additional expert assistance.
habeas petition or any resources whatsoever. In addition, the Fifth Circuit has held that state prisoners are not entitled to funding for investigation or experts to pursue unexhausted claims. See, e.g., In re Joiner, 58 F.3d 143 (5th Cir. 1995). That had prevented federal habeas counsel for the petitioner from having developed the claim. While the Texas Court of Criminal Appeals expressed sympathy for counsel’s dilemma, it was a dilemma the court felt unable to assist with. Rather, it was a dilemma that needed to be presented to the Legislature.

In federal habeas proceedings, funding for expert assistance is available where the petitioner shows that expert services are “reasonably necessary” for the representation of the petitioner. 18 U.S.C. § 3599(f) (formerly 21 U.S.C. § 848(q)(9)). In Lynch v. Hudson, 2009 WL 3497486 (S.D. Ohio Oct. 29, 2009) (unpublished), the federal court denied a request for funds to rehire the clinical psychologist who testified for Lynch in a state court Atkins proceeding where Lynch was provided a full and fair hearing on the claim and Lynch did not attempt to establish what more he reasonably expected to obtain by rehiring the expert. See also Guevara v. Quartermar, 2008 WL 4273208 (S.D. Tex. Sept. 17, 2008) (unpublished) (denying without prejudice request for funding for mental health expert where petitioner had not shown that a procedural bar did not prevent the court from reaching the merits of the Atkins claim, petitioner had not established that he did not fail to develop the facts while in state court, and petitioner had not shown why the appointment of a new expert was “reasonably necessary” given that petitioner was provided with a mental health expert in state court who was fluent in Spanish and who determined petitioner was mentally retarded); Commonwealth v. VanDivner, 962 A.2d 1170 (Pa. 2009) (rejecting argument that trial court erred in refusing to appoint a mental retardation expert who could have spoken to the Commonwealth’s contention that the defendant could not be mentally retarded because he had a commercial driver’s license and lived independently where additional testimony would have been cumulative given that both the defendant’s expert and the Commonwealth’s experts spoke at length about their opinions on adaptive deficits.)

After finding that the petitioner had made a colorable claim of mental retardation, and that the state court’s rejection of the claim was based on an unreasonable determination of the facts before it, a Texas district court granted funds to a death row inmate for expert assistance in proving mental retardation. Williams v. Dretke, 2005 WL 1676801, *6 (S.D. Tex. July 15, 2005) (unpublished); see also Sells v. Quartermar, 2008 WL 4264519 (W.D. Tex. Aug. 4, 2008) (unpublished) (where petitioner presented federal court with school records showing that petitioner had been referred for evaluation of his intellectual functioning, and state court had refused to provide petitioner with counsel, a mental health expert or an investigator to develop the Atkins claim, petitioner’s request for investigative funds is granted in part and petitioner is directed to identify and request the assistance of a qualified mental health professional, which does not include a professor of education). In contrast, the federal district court in Simpson v. Dretke, 2006 WL 887384 (E.D. Tex. March 27, 2006) (unpublished), denied funding to a Texas death row inmate who wanted to obtain expert assistance to support his Atkins claim. Simpson had previously presented the claim in state post-conviction proceedings although the state court declined to consider some of his supporting evidence on the ground that it was untimely. After refusing to give Simpson an evidentiary hearing on the claim, the state court denied the claim on the merits.
In light of that merits ruling, the federal district court concluded the claim fell under 28 U.S.C. § 2254(d)(2), which precluded any federal court from granting relief on the claim unless the state court adjudication of the claim resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Given that this statute limited the federal court to consideration of the same evidence that was in front of the state court, the district court found that Simpson was precluded from presenting new supporting evidence in federal court. Fifth Circuit precedent did leave open the possibility of consideration of new evidence if there were significant defects in the state court’s adjudicative process. Valdez v. Cockrell, 274 F.3d 941, 948 (5th Cir. (Tex.) 2001), cert. denied 537 U.S. 883 (2002); see also Bridgers v. Quarterman, 2008 WL 4500396 (E.D. Tex. Sept. 30, 2008) (unpublished) (finding that federal court was not constrained by 28 U.S.C. § 2254(d)(1) and could consider evidence that was not presented in state court where state court violated petitioner’s right to due process by granting request for necessary funding to prove Atkins claim but denying a request for a continuance that would have allowed petitioner to utilize the funds); but see Hall v. Quarterman, 2009 WL 612559, *3 (N.D. Tex. March 9, 2009) (unpublished) (where petitioner was denied full and fair hearing by state court and new evidence was presented at a federal evidentiary hearing, issue was whether petitioner could rebut the state court factual findings by clear and convincing evidence). Because the district court had yet to review the record or the arguments of the parties, it could not find at this time that funding was appropriate.

The United States Supreme Court has yet to decide whether the restrictions of § 2254(d) apply where new evidence has been introduced in the federal court. See, e.g., Holland v. Jackson, 124 S.Ct. 2736 (2004) (per curiam) (noting that some federal courts of appeals apply de novo review when new evidence is admitted in federal court and supreme court assumes arguendo that this approach is correct.) At the time of publication, a case is pending in the United States Supreme Court that may resolve this issue. Cullen v. Pinholster, 09-1088 (first question presented is whether a federal court may reject a state court adjudication as “unreasonable” under § 2254(d) based on facts that were not presented to the state court.) Unless the United States Supreme Court takes a contrary position, counsel should aggressively argue that funding is available in federal court in order to develop additional support for the Atkins claim whether or not the limitations on relief contained in § 2254(d) apply.

In cases where the Texas Court of Criminal Appeals summarily denied Atkins claims as an “abuse of the writ,” a ruling premised on the alleged failure to state a prima facie case, petitioners have been granted funding in federal court to further develop the claim. See, e.g., Morris v. Dretke, 413 F.3d 484, 489 (5th Cir. (Tex.) 2005) (district court granted petitioner’s request for funding for expert and investigative services for proving Atkins claim raised in successor petition); see also Rivera v. Dretke, 2006 WL 870927 (S.D. Tex. March 31, 2006) (unpublished) (district court considers evidence of mental retardation that was developed in federal court in finding that petitioner is mentally retarded).

On the other hand, where the Fifth Circuit had previously ruled the petitioner failed to make a prima facie showing of mental retardation, it concluded the district court did not

In *State v. Harris*, 181 N.J. 391, 859 A.2d 364 (N.J. 2004), a case involving a pre-*Atkins* trial, the trial court ruled that it would only hear testimony on the *Atkins* claim from its court appointed expert. The New Jersey Supreme Court found on appeal that “it would be violative of due process to deprive a capital defendant of the opportunity to present evidence, including expert testimony, to support a *bona fide* claim of mental retardation.” *Id.* at 527. No due process violation occurred here, however, because no *bona fide* showing of mental retardation had been made.

In the present matter, we combed the record for some evidence to support defendant's bare assertion that a psychological evaluation is needed to determine whether he has mental retardation. The record, including the opinion of defendant's own expert at the penalty phase, provides no support for his claim that a psychological examination is necessary; indeed, the record speaks against his claim.

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Indeed, defendant has not provided any affidavit from a qualified psychologist who reviewed defendant's childhood records and his letters and who concluded that it is even an open question as to whether defendant has mental retardation. Without a reasonable basis for defendant's request for a psychological examination, we conclude that he is not entitled to a hearing on his claim of mental retardation.

*Id.* at 533.

In *White v. Payne*, ___ S.W.3d ___, 2010 WL 3374318 (Ky. Aug. 26, 2010), the Kentucky Supreme Court ruled that the post-conviction court should decide whether the testimony of a mental retardation expert is reasonably necessary for the presentation of the petitioner’s *Atkins* claim before requiring him to submit to an evaluation conducted by the Kentucky Correctional Psychiatric Center. If it is reasonably necessary, funding should be provided to the petitioner. If not, the evaluation by the state facility should proceed.

The right to appointment of counsel to litigate *Atkins* claims is another issue that had been addressed by courts. As discussed above, Texas does not appoint counsel for purposes of raising claims in a successor habeas petition. In *State v. Lorraine*, 2005 WL 1208119, *7* (Ohio App. 11 Dist. May 20, 2005) (unpublished), an Ohio appellate court agreed with the petitioner’s contention that “capital defendant is entitled to the appointment of two certified attorneys when an *Atkins* claim is raised for the first time in a postconviction petition.” 2005 WL 1208119; see also *State v. Burke*, 2005 WL 3557641 *10* (Ohio App. Dec. 30, 2005) (unpublished) (reversing denial of successive petition raising *Atkins* claim where only one attorney had been appointed to represent petitioner at the hearing).

The Fifth Circuit, in *In re Hearn*, 376 F.3d 447 (5th Cir. (Tex.) 2004), held that a Texas death row inmate was entitled to the appointment of counsel under former § 848(q)(4)(B)
for purposes of preparing an application for authorization to file a successor federal habeas petition. Although the Atkins decision had been issued by the Supreme Court while Hearn’s initial federal habeas petition had been pending, then-existing state law effectively precluded Hearn from litigating the claim at that time. The appeals court ruled that appointment of counsel was warranted in such circumstances upon a “colorable” showing of mental retardation. Id. at 455. Hearn met this “modest evidentiary threshold” with the following: (1) “school records showing that he failed first grade, and that his marks often hovered in the 50s (or below) despite his regular attendance”; (2) a score on the WAIS-R Short-form test that fell within the upper ranges of scores indicating mild mental retardation, “taking into account its inherent band of error”; (3) a note from prior habeas counsel stating her belief that Hearn was “not very intelligent-maybe below normal”; and (4) trial testimony of a family member demonstrating Hearn’s “compromised social skills.” Id. Although the appeals court did not believe this evidence established a prima facie case of mental retardation, the threshold needed for authorization to file an actual petition, Hearn’s showing was sufficient to justify the appointment of counsel.

In contrast, in In re Nealy, 223 Fed.Appx. 366, 2007 WL 866647 (5th Cir. (Tex.) March 20, 2007) (unpublished), the appeals court ruled that the petitioner was not entitled to a stay of execution or the appointment of counsel to investigate evidence of possible mental retardation and prepare an application for permission to file a successive habeas petition. Because Texas abandoned its “two-forum” abstention rule while petitioner’s initial federal habeas petition was still pending, petitioner could have asked the federal court for a stay so that he could litigate an Atkins claim. In addition, federal habeas counsel continued to represent petitioner after his first federal petition was denied and until Texas Defender Services was substituted as counsel for petitioner. “Therefore, Nealy was not ‘unrepresented’ and an Atkins claim was not ‘unavailable’ to him, within the meaning of Hearn.” Further, Hearn did not apply because any Atkins claim would be time barred.

In Rosales v. Quarterman, 565 F.3d 308 (5th Cir. (Tex.) 2009), the Fifth Circuit affirmed the district court’s denial of Rosales’s motion for appointment of counsel and for a stay of execution. Because no habeas proceedings were pending, the district court and the circuit court lacked jurisdiction to enter a stay. (Adjudication was complete on both Rosales’s first and second federal habeas petition.) Harbison v. Bell, 129 S.Ct. 1481 (2009), did not require the appointment of new counsel for purposes of pursuing clemency in state court given that counsel appointed to represent Rosales for his successive Atkins petition had never withdrawn and so Rosales had appointed counsel available during the time for filing a state clemency petition which had since expired. Further, there was no assertion by Rosales that there was additional evidence of mental retardation that had not been presented in the successive habeas proceeding, but merely speculation that there “might” be evidence of pre-eighteen onset of mental retardation. On this record, the district court did not abuse its discretion in declining to appoint new counsel.

59 State prisoners are required to present claims of federal constitutional error to the state court before raising them in federal habeas proceedings. Texas law at the time Hearn’s first federal petition was pending precluded state courts from adjudicating claims if federal proceedings were ongoing. To give the state court the opportunity to address the Atkins claim, Hearn would have had to have his federal petition dismissed “without prejudice.” This would have resulted in a statute of limitations bar to all of his claims except the Atkins claim.
1.5 EXAMINATIONS BY PROSECUTION EXPERTS

Many of the statutes expressly permit the prosecution to request an examination of the defendant by his or her own expert. See, e.g., Fla. R. Crim. P. 3.203(c)(2) (“The court shall appoint an expert chosen by the state attorney if the state attorney so requests.”); La. Code Crim. Proc. Art. 905.5.1(F) (“When a defendant makes a claim of mental retardation under this Article, the state shall have the right to an independent psychological and psychiatric examination of the defendant.); Idaho Code § 19-2515A(2)(c) (“upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental retardation may be in issue.”) In the absence of statutory directives, some courts have ruled that the prosecution is entitled to have the defendant examined by an expert. See, e.g., State ex rel. Lane v. Bass, 87 P.3d 629, 633 (Okla. Crim. App. 2004), rev’d in part on other grounds, Blonner v. State, 127 P.3d 1135 (Okla. Crim. App. 2006); State v. Vela, 777 N.W.2d 266 (Neb. 2010) (when a defendant files a verified motion to preclude imposition of the death penalty on the basis of mental retardation, the trial court has inherent authority to grant a motion by the state to have the defendant evaluated by a mental health professional of the state's choosing); In Lizcano v. State, 2010 WL 1817772, *8 (Tex. Crim. App. May 5, 2010) (unpublished) (“when the defense demonstrates the intent to introduce evidence of the defendant's mental retardation through psychological examinations conducted by defense experts, the trial court may order the defendant to submit to an independent, state-sponsored psychological examination on the issue of mental retardation.”)

If the prosecution requests an examination by an expert of its choosing, counsel must be prepared to fight for appropriate limitations. In Centeno v. Superior Court, 11 Cal.Rptr.3d 533 (Cal. App. 2004), for example, the trial court indicated that the prosecution expert would be prohibited from probing the events of the charged crimes. In order to obtain a similar restriction, counsel may need to proffer an explanation from a mental retardation expert as to why an inquiry into the crime facts would not be necessary or appropriate in order to determine whether the defendant is mentally retarded. But see subsections 1.8, 1.12, 1.13, 1.14, recounting rulings permitting admission of crime-related evidence and decisions upholding denials of Atkins claims based in part on the facts of the capital offense.

What the trial court in the Centeno case would not do was restrict the tests the prosecution expert could administer. This was rightly found by the appellate court to constitute error. The appellate court explained:

[W]hen mental retardation for Atkins purposes is the issue, the tests to be conducted by prosecution experts must be reasonably related to a determination of whether the defendant has a “significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.” The mental retardation examination must be limited in its scope to the question of mental retardation. Therefore, if requested, the prosecution must, as it was required to do in this case, submit a list of proposed tests to be considered.
by the defendant so that any objections may be raised before testing begins. Then, upon a defense objection to specific proposed prosecution tests, the trial court must make a threshold determination that the tests bear some reasonable relation to measuring mental retardation, including factors that might confound or explain the testing, such as malingering. Otherwise, there is a danger that defendants will be improperly subjected to mental examinations beyond the scope of the precise issue they have tendered and their resulting waiver of constitutional rights.

Id. at 544-45 (citations omitted.) In Centeno, the case was remanded to the trial court for a determination of whether certain tests, such as those designed to assess psychopathic antisocial personality disorders, could properly be administered to the defendant by the government expert. Counsel will need to work closely with his or her mental retardation expert in order to successfully object to inappropriate and potentially harmful testing.

Counsel must also bear in mind “practice effect,” discussed in the first part of this Guide and discussed further in subsection 1.8 on Evidentiary Issues. It is well established that it is inappropriate for an expert to administer a test recently used on the defendant by another mental health expert. See e.g., Rivera v. Dretke, 2006 WL 870927, *12 (S.D.Tex. March 31, 2006) (unpublished) (acknowledging that “[c]ommonly accepted scientific principles preclude later testing” by another expert); Hall v. State, 160 S.W.3d 24, 30 n. 14 (Tex. Crim. App. 2004) (prosecution expert was unable to conduct his own IQ testing because of practice effect); Greene v. Norris, 2009 WL 1653477 (E.D. Ark. June 10, 2009) (unpublished) (refusing petitioner’s request to preclude the warden’s expert from evaluating petitioner before petitioner’s expert’s evaluation was completed but acknowledging that “practice effect” may then become an issue to be addressed by the experts in their testimony.); United States v. Hardy, 2010 WL 4909550, *6 (E.D. La. Nov. 24, 2010) (unpublished) (parties agree that IQ score on WAIS-R administered in February 1996 is a more reliable estimate of defendant’s IQ than the IQ score defendant received on the WAIS-R administered in March 1996 by government expert due to “practice effects”).

In preparing for the Atkins hearing, gaining an understanding of the tests utilized by the State’s expert(s) is of critical importance. This was evidenced dramatically in Salazar v. State, 126 P.3d 625 (Okla. Crim. App. 2005). In that case, the petitioner’s attorney received the prosecution experts’ test data during discovery. One test given by Dr. John Call was something called the “Blackwell Memory Test.” Petitioner’s counsel did not know what kind of test this was and conducted no inquiry about it. At the trial, Dr. Call opined that petitioner was malingering and viciously attacked the findings of petitioner’s experts. One expert was accused by Dr. Call of being unethical because he utilized a test with norms petitioner purportedly did not fall within. Another expert’s findings were dismissed by Dr. Call on the ground that the expert used a non-standardized malingering test, something Dr. Call claimed he would never do himself. This practice made all of the expert’s findings suspect, according to Dr. Call. The jury ultimately found that petitioner failed to prove he was mentally retarded.

While on appeal, petitioner’s attorneys discovered that the “Blackwell Memory Test”
administered by Dr. Call had been created by him and was non-standardized. Following a remand to determine whether information about the test was fairly characterized as newly discovered, the Oklahoma Court of Criminal Appeals ruled that petitioner’s attorney had rendered ineffective assistance in his handling of Dr. Call.

We cannot fathom, in a case which boiled down to a battle of experts, why Petitioner's counsel failed to research the tests Dr. Call performed on Petitioner to confirm the origins of and the scientific validity of those tests before Petitioner's mental retardation hearing. The raw data was provided to counsel prior to the mental retardation jury trial. The evidence was discoverable with due diligence--that is clear from another attorney's discovery of the information in a separate and unrelated proceeding. 

*Id.* at 634. Because Dr. Call’s testimony was critical to the government’s case, shown in part by responses on post-trial juror questionnaires, petitioner was prejudiced by counsel’s failure to expose Dr. Call’s use of a non-standardized test. Having lost confidence in the jury’s verdict, the Oklahoma Court of Criminal Appeals vacated the death sentence and modified the sentence to life imprisonment without the possibility of parole.

In overturning the jury’s finding that the petitioner was not mentally retarded in *Lambert v. State*, 126 P.3d 646, the Oklahoma Court of Criminal Appeals commented on the qualifications of Dr. Call, who was also the prosecution’s expert in that case. Dr. Call had not seen a mentally retarded patient in a clinical setting for fifteen years. Further, none of the classes, seminars or publications in his “extensive” CV related to the area of mental retardation. And yet Dr. Call since 2002 made a specialty of examining capital defendants for mental retardation. *Id.*, at 651-52 & n. 16. This is obviously extracting the type of information that counsel will want to elicit during cross-examination of the prosecution witnesses.

The prosecution expert’s testimony about malingering in *United States v. Nelson*, 419 F.Supp.2d 891 (E.D. La. 2006), was called into question by the district court given the fact that the expert administered the test designed to detect malingering one month after he had given the IQ test to the defendant. Further, the defense experts testified that malingering instruments are of limited use for individuals with lower IQs because they have never been tested on a normative sample of mentally retarded individuals. *Id.* at 902. Thus, in the experts’ view, a determination about whether the defendant was malingering had to be based on clinical judgment. Ultimately, the district court found that the weight of credible expert testimony suggested that the defendant had not been malingering. *Id; see also United States v. Hardy*, 2010 WL 4909550, *17 (E.D. La. Nov. 24, 2010) (unpublished) (where prosecution’s expert argued that results on MMPI-2 indicated malingering, district court accepted testimony from defense expert that the MMPI is not an appropriate instrument for any purpose in the assessment of persons who may be suspected to have mental retardation, a point conceded by the prosecution expert; therefore, the assessment of whether the defendant is mentally retarded had to be made without considering the MMPI results; for the same reasons, a score on the Million Clinical Multiaxial Inventory-II was found to be irrelevant).
In *Lewis v. Thaler*, 2010 WL 4119239 (E.D. Tex. Oct. 19, 2010), the petitioner attempted to rebut testimony by the state’s expert, Dr. Rosin, through an affidavit by the author of the Stanford-Binet-5 which had been utilized by Dr. Rosin. Dr. Rosin reported an IQ score of 79. Dr. Roid, who authored the Stanford-Binet-5, claimed that Dr. Rosin committed many procedural errors in administering the test. Looking to the entire record, however, the district court was unable to hold that Dr. Roid’s affidavit provided clear and convincing evidence such that it could rebut the state court’s finding that Lewis is not mentally retarded. Rather, the evidence showed that the state court’s finding was reasonable. Although the petitioner was unsuccessful in the *Lewis* case at least thus far, it is of critical importance to seek out rebuttal experts such as the one he utilized who have heightened credibility.

Some statutes expressly delineate the type of expert that must be used in the mental retardation determination. Counsel should be sure to investigate whether the prosecution’s expert satisfies the requirements. In *Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006), for example, the Virginia Supreme Court found prejudicial error in the admission of testimony by a prosecution expert who did not meet the statutory requirements. *Cf. State v. Grell*, 135 P.3d 696, 708 (Ariz. 2006) (on remand for mental retardation determination, trial court did not abuse its discretion in permitting testimony by a psychiatrist, rather than a psychologist as required by statute, where the expert appeared to be qualified to diagnosis mental retardation and the statute was enacted following the State expert’s evaluation of the defendant).

If the defendant refuses to cooperate with a prosecution expert, there may be sanctions. In *State v. Grell*, 135 P.3d 696, 707-08 (Ariz. 2006), the Arizona Supreme Court found no abuse of discretion in the trial court’s ruling precluding a defense expert from testifying about adaptive behavior where the defendant was interviewed by that expert but then refused to cooperate with the prosecution expert. See also *Fla. R. Crim. P. 3.203(c)(5)* (providing various options for trial court to employ should defendant refuse to cooperate with court-appointed experts or state experts).

The sanctions are especially severe in Louisiana. Under La. Code Crim. Pro. art. 905.5.1(G), if the defendant refuses to submit to or fully cooperate with prosecution experts, “upon motion by the district attorney, the court shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants.” In *State v. Turner*, 936 So.2d 89 (La. 2006), the Louisiana Supreme Court rejected a vagueness challenge to the mental retardation statute based on its failure to define “fully cooperate” in the sanctions section. Turner had complained that the language did not provide adequate notice of what behavior was prohibited. The court concluded that it was a premature challenge given Turner’s failure to

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60 A.R.S. § 13-703.02(K)(3) defines a “psychological expert” as “a psychologist licensed pursuant to title 32, chapter 19.1 with at least two years’ experience in the testing, evaluation and diagnosis of mental retardation.” Section 32-2071 requires a “doctoral degree” from an accredited program in any of several areas of psychology. The program must include hundreds of hours of supervised training. A.R.S. § 32-2071(D). Among the required subjects of study are “interviewing and the administration [,] scoring and interpretation of psychological test batteries for the diagnosis of cognitive abilities and personality functioning.” A.R.S. § 32-2071(A)(4)(g).
establish vagueness as it pertained to his conduct. The court also noted that prosecution experts under this section were required to be licensed by the Louisiana State Board of Examiners. Because of this, the court believed it could be “safely presumed such an expert can differentiate between an inability to cooperate, which may be expected from a person who is mentally retarded, from a failure to cooperate, which could be expected from a malingering attempting to use the mental retardation exclusion from capital punishment.” As for Turner’s complaint that the sanction was unduly severe and would result in the denial of the right to compulsory process, the court concluded the contention was not ripe for adjudication given that the sanction had not been invoked.

Idaho’s statute requires an examiner or expert to notify the court if an examination cannot be conducted because of the unwillingness of the defendant to cooperate. The expert or examiner is to opine, if possible, on whether the lack of cooperation is the result of mental retardation. A defendant’s lack of cooperation may be considered by the court in determining whether the claim of mental retardation is credible. Idaho Code § 19-2515A(2)(e).

1.6 PRIVILEGE AGAINST SELF-INCrimINATION/CONFIDENTIALITY OF STATEMENTS MADE DURING MENTAL RETARDATION EXAMINATIONS

At least one of the mental retardation statutes addresses the issue of whether a defendant may invoke the privilege against self-incrimination during a mental retardation examination. In Colorado, “[t]he defendant shall have a privilege against self-incrimination that may be invoked prior to or during the course of an evaluation under this section. A defendant's failure to cooperate with the evaluators or other personnel conducting the evaluation may be admissible in the defendant's mental retardation hearing.” Colo. Rev. Stat. § 18-1.3-1104 (3).

Other statutes address this potentially thorny issue in a different manner. They specify when, if at all, statements made by a defendant during a mental retardation examination may be admitted into evidence. The Kansas law, for example, provides: “No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.” Kan. Stat. Ann. § 21-4623 (b). The California statute, in contrast, provides that a statement made by a defendant during a court-ordered examination is inadmissible in the guilt phase of the trial. Cal. Pen. Code § 1376(b)(2). Idaho’s statute simply provides that “[r]aising the issue of mental retardation shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject . . . .” Idaho Code § 19-2515A(2)(c).

In Centeno v. Superior Court, 11 Cal.Rptr.3d 533 (Cal. App. 2004), an appellate court rejected the argument that a capital defendant was entitled to unqualified judicial immunity for statements made to an expert in a court-ordered examination. It concluded that an “application for a mental retardation hearing is a tactical voluntary decision made by a competent defendant with the advice of counsel.” Id. at 544. Thus, in the appellate court’s
view, the defendant voluntarily placed his mental state at issue, thereby waiving his Fifth and Sixth Amendment rights. The implication of this, of course, is that a mentally retarded defendant may choose whether or not to raise an *Atkins*-based defense to death eligibility. Indeed, the California appellate court stated “a defendant may withdraw the claim if he or she concludes it is in his or her best interest to do so.” *Id.; cf. Rogers v. State, 575 S.E.2d 879* (Ga. 2003) (petitioner who had raised genuine issue of mental retardation could not thereafter waive the issue). It is arguable, however, that an attorney has an absolute duty to raise mental retardation irrespective of the defendant’s wishes. And if it is counsel’s obligation to do so, irrespective of the defendant’s wishes, it is not correct to impute waivers of Fifth and Sixth Amendment rights. For further discussion of cases involving waiver or default of *Atkins* claims, see subsection 1.15, infra.

In *State v. Turner*, 936 So.2d 89 (La. 2006), the Louisiana Supreme Court reversed the trial court’s finding that the mental retardation statute violated due process by requiring a defendant to waive his Fifth Amendment right against self-incrimination in order to exercise his Eighth Amendment right not to be executed. The provision at issue, paragraph E of La. Code Crim. Proc. Art. 905.5.1, provides:

> By filing a notice relative to a claim of mental retardation under this Article, the defendant waives all claims of confidentiality and privilege to, and is deemed to have consented to the release of, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, expert opinions, and any other such information of any kind or other records relevant or necessary to an examination or determination under this Article.

The state supreme court found that “the trial court erred in its analysis by reading the statute broadly to interpret it as requiring a defendant to reveal privileged communications with his attorney as well as requiring him to waive his Fifth Amendment privilege against self-incrimination.” Instead, the court concluded the provision “was comparable to the waiver of the doctor-patient privilege by a defendant pleading not guilty by reason of insanity.” It further observed: “A fair reading of the article generally suggests it does not require a defendant to disclose any information subject to the attorney-client privilege or that may be admitted at trial on the issue of guilt. The trial court's finding that paragraph E could possibly cause a conflict with the defendant's Fifth Amendment rights is wholly speculative.” *See also State v. Vela, 777 S.W.2d 266* (Neb. 2010) (because defendant put his mental state at issue by moving to preclude imposition of the death penalty on the basis of mental retardation, the independent mental health evaluation ordered by the lower court did not violate defendant’s privilege against self-incrimination.)

In *White v. Payne*, ___ S.W.3d ___, 2010 WL 3374318 (Ky. Aug. 26, 2010), a death row inmate who had raised an *Atkins* claim sought a writ of prohibition to preclude a mental health evaluation the post-conviction court had ordered to be conducted at a state mental health facility. In response to the petitioner’s argument that such an evaluation would infringe on confidential defense communications, the Kentucky Supreme Court noted, “upon proper motion by trial counsel, safeguards may be implemented by the trial court to
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protect any confidential defense communications as due process may require.” *Id.* at *4. And as for the petitioner’s concerns about his right to remain silent, the court found that the right no longer existed for the capital offenses because the judgment of conviction had become final. It then stated: “If, as part of the evaluation and testing, it becomes necessary for White to discuss other crimes he may have committed (which is unlikely considering this will be an IQ evaluation), the trial court may impose appropriate safeguards to prevent [the state facility] from divulging this information to the Commonwealth.” *Id.*

In *Lizcano v. State*, 2010 WL 1817772, *8* (Tex. Crim. App. May 5, 2010) (unpublished), the Texas Court of Criminal Appeals rejected the defendant’s argument that the trial court violated his Fifth Amendment rights by ordering that the defendant submit to a state-sponsored psychological examination after the defendant announced an intent to introduce evidence of mental retardation. The court found this to be “particularly” true in light of prophylactic measures taken by the trial court, i.e., ordering the experts not to disclose underlying facts or data to the attorneys without prior judicial authorization, and ordering the state’s expert not to question the defendant regarding the offense.

Counsel should aggressively argue that any statements made in the course of a mental retardation examination may not be used by the prosecution for any purpose other than the mental retardation determination. *See, e.g., Simmons v. United States*, 390 U.S. 377 (1968) (finding it intolerable to require a defendant to surrender one constitutional right in order to assert another, and therefore ruling that a defendant’s testimony at a hearing to suppress evidence under the Fourth Amendment may not be admitted against him in the guilt trial).

### 1.7 Presence at Mental Retardation Evaluation

Many defense attorneys want to be present when the defendant is evaluated, whether by his or her own expert, a court-appointed expert, or a prosecution expert. Some statutes deal with this directly. In Florida, for example, attorneys for either side may be present during examinations conducted by court-appointed experts. Fla. R. Crim. P. 3.203(c)(4). *See also Arbelaez v. State*, 2008 WL 901423 (Fla. April 3, 2008) (quashing order by post-conviction court excluding defense counsel from the State expert’s psychological testing of petitioner). In South Dakota, defense counsel and the prosecutor have the right to be present at an examination of the defendant by the prosecution’s expert. S.D. Codified Laws § 23A-27A-26.5. Most often, however, there is no governing statute and defense counsel will have to litigate the right to be present. In deciding whether to pursue this, counsel must consider whether this will result in the prosecution seeking to be present at defense examinations.

There are a number of cases where physical presence has been disallowed but the defense has been offered the opportunity to have the examination videotaped. *See, e.g., United States v. Hardy*, 644 F.Supp.2d 749, 750 (E.D. La. 2008) (granting defense request that the interview and examination of defendant by the prosecution’s expert be videotaped and provided to defense counsel, subject to a confidentiality order agreed to by the parties).
See also S.D. Codified Laws § 23A-27A-26.5 (mandating videotaping of evaluation conducted by prosecution expert.) Where that is offered, defense counsel must carefully consider whether that is an acceptable substitute or whether videotaping poses dangers that outweigh the potential benefits. Jurors and judges often harbor stereotypes of mentally retarded individuals and a defendant’s appearance on a videotape or audiotape could be significantly misleading to a lay person if admitted in evidence. This is true also for an audiotape. See, e.g., State v. Johnson, 244 S.W.3d 144 (Mo. 2008) (in upholding jury finding that the defendant had not established his mental retardation, court notes that jury was able to view a State expert’s interview with defendant in which he discussed the crime and the efforts he made to avoid detection.)

In United States v. Nelson, 419 F.Supp.2d 891 (E.D. La. 2006), the administration of an IQ test by the prosecution expert was videotaped with positive results. The district court was able to view the actual testing which corroborated the defense experts’ opinions that the resulting IQ score was artificially inflated because of practice effect.

It is clear from the videotapes of Dr. Thompson's test administration that Nelson remembered the test, and there was absolutely no novelty for Nelson associated with certain sub-tests. For instance, Nelson, at different junctures, asked for blocks and cards, clearly anticipating the sub-tests. At one point, before instructions were given, Nelson looked at the test materials and then asked Dr. Thompson if he supposed to “do as many as I can in time, right?” Thompson, Tr. 136. This is significant because part of what is being tested in the WAIS-III is how the subject receives, perceives, and responds to instructions concerning a novel task, thus challenging the subject's ability to listen to the tester, process information, and perform accordingly. Swanson, Tr. 198. The length of time to process instructions is also being tested. Swanson, Tr. 199. Thus, the fact that Nelson clearly remembered certain sub-tests would have contributed to elevated scores, by perhaps six points. Swanson, Tr. 201. For this reason, Dr. Thompson’s credibility is somewhat undermined because he states in his report only that practice effect is not commonly found in mentally retarded individuals, and in his testimony, unequivocally denied that there were indications of a practice effect, in spite of the fact that Nelson unquestionably remembered parts of the test. Thompson, Tr. 34.

Id. at 898-99. In addition, the district court’s review of the videotape caused it to question the prosecution expert’s contention that the defendant had been malingering. Id. at 902; see also United States v. Hardy, 2010 WL 4909550, *18 (E.D. La. Nov. 24, 2010) (unpublished) (videotape of prosecution expert’s examination of defendant showed that defendant used his fingers in order to count backwards from 100 by sevens which explained how defendant was able to complete the task in that examination but was unable to do so when a defense expert precluded defendant from using paper and pencil or his fingers).

Who the finder of fact is will be a key consideration in deciding whether a videotape or audiotape would likely be helpful or harmful.
1.8 EVIDENTIARY ISSUES

What evidence may be presented at an Atkins hearing has been the source of numerous opinions and continuing litigation. One question that has come up is whether a fact-finder may only consider test scores in determining whether a defendant suffers from significantly subaverage intellectual functioning. In Pruitt v. State, 834 N.E.2d 90, 104, the Indiana Supreme Court held that the trial court did not err in considering other evidence of mental capacity, such as the defendant’s ability to support himself and fill out work applications, in finding that Pruitt had failed to establish that he suffered from significant subaverage intellectual functioning. Notably, however, some of Pruitt’s test scores supported a finding of mental retardation while others did not. The non-testing evidence was essentially used to determine which of the inconsistent scores was more likely accurate.

Also an issue is whether a fact-finder is bound by uncontested expert opinion. In Lizcano v. State, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (unpublished), the Texas Court of Criminal Appeals rejected the defendant’s argument that the jury’s finding that he had not proved mental retardation should have been set aside by the trial court because the State had failed to present its own expert witness to rebut the defendant’s expert witnesses. In State v. White, 885 N.E.2d 905, 915 (Ohio 2008), in contrast, the Ohio Supreme Court ruled that the post-conviction court had abused its discretion in ignoring the uncontradicted testimony of two qualified defense experts regarding the petitioner’s adaptive deficits. Instead, the post-conviction court focused on anecdotal evidence that was largely irrelevant, that the petitioner could drive for example. Further, to the extent anecdotal evidence was relevant, one of the experts took it into account in scoring the SIB-R, and there was no evidence calling into question the reliability of the SIB-R. Nor did the trial court make any finding that the defense experts either lacked credentials or were not credible. The Ohio Supreme Court ruled:

While the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave. Doing so shows an arbitrary, unreasonable attitude toward the evidence before the court and constitutes an abuse of discretion.

Id. at 915-16; cf. State v. Hill, 894 N.E.2d 108 (Ohio App. 2008) (no error in post-conviction court’s consideration of anecdotal evidence in addressing adaptive functioning given that two experts considered the same anecdotal evidence in determining that petitioner was not mentally retarded and the experts were not able to rely on an adaptive assessment instrument because of petitioner’s lack of effort).

A common issue is whether the defendant may present evidence of the “Flynn effect,” standard error of measurement (SEM), practice effect, etc., in contesting the accuracy of an IQ score. In one case, the Fourth Circuit expressly found that evidence of the Flynn effect should be considered. Walker v. True, 399 F.3d 315, 322-23 (4th Cir. (Va.) 2005) (district court erred in rejecting Atkins claim based on petitioner’s failure to show IQ scores of 70 or below where petitioner alleged that his score of 76 is a qualifying score when Flynn effect
and standard error of measurement are taken into consideration). It later explained, however, that neither Atkins nor Virginia law appears to require expressly that these theories be accounted for and to the extent that it required the district court in the Walker case to consider them, that case involved de novo consideration of the Atkins claim. Green v. Johnson, 515 F.3d 290 (4th Cir. (Va.)), cert. denied, 128 S.Ct. 2999 (2008); see also Winston v. Kelly, 592 F.3d 535 (4th Cir. (Va.)), cert. denied, ___ U.S. ___, 2010 WL 2101896 (2010) (remanding for further proceedings on petitioner’s claim that trial counsel was ineffective in failing to argue that Atkins barred his execution; because review was de novo, instructing district court to decide whether to consider petitioner’s proffered evidence concerning the Flynn effect and SEM and observing that if § 2254(d) applied and the Virginia Supreme Court had been unconvinced by Winston’s evidence concerning the Flynn effect and SEM, a federal court could not conclude that such a holding violated § 2254(d)); Maldonado v. Thaler, ___ F.3d ___, 2010 WL 4261980, *7 (5th Cir. (Tex.) Oct. 29, 2010) (because neither the Fifth Circuit nor the Texas Court of Criminal Appeals has recognized the Flynn effect as scientifically valid, petitioner did not show that the state court unreasonably applied federal law when it credited expert testimony that failed to take into account the Flynn effect); Thomas v. Quarterman, 335 Fed. Appx. 386, 2009 WL 1744489 (5th Cir. (Tex.) June 19, 2009) (unpublished) (where state court rejected defense expert’s contention that certain IQ scores should be adjusted downward in light of the Flynn effect, the determination that the Flynn effect should not be applied was not unreasonable and circuit precedent did not mandate that it be applied); Briseno v. Dretke, 2007 WL 998743 (S.D. Tex. March 29, 2007) (state court did not reasonably apply Atkins in not accepting the defense experts’ explanations for why petitioner’s IQ scores of 72 and 74 did not defeat a finding of significant subaverage intelligence given SEM and practice effect where state’s expert defended accuracy of the scores and there is no consistency among the States with regard to the cut-off line for mental retardation and application of SEM); In re Mathis, 483 F.3d 395 (5th Cir. (Tex.) 2007) (noting that the Flynn effect has not been accepted as scientifically valid in the Fifth Circuit); In re Salazar, 443 F.3d 430 (5th Cir. (Tex.) 2006) (although expert referenced possible score inflation due to Flynn effect, the expert failed to indicate what effect it would have had on petitioner’s score in particular or even whether it is appropriate to adjust an individual’s score based on this theory). Walton v. Johnson, 440 F.3d 160 (4th Cir. (Va.)) (en banc), cert. denied, 547 U.S. 1189 (2006) (petitioner’s argument that his IQ score of 77 should be adjusted downward to take into account Flynn effect and SEM was conclusory and speculative and did not preclude the district court from dismissing the Atkins claim).61

An Ohio appellate court concluded that a trial court must consider evidence presented about the Flynn effect, but the trial court would not be bound to conclude that the Flynn effect was a factor in the defendant’s IQ score. State v. Burke, 2005 WL 3557641 *13 (Ohio App. Dec. 30, 2005) (unpublished). In reaching this conclusion, the court observed that the AAMR “a leading authority on the definition of mental retardation, does not suggest that an IQ score must reflect adjustment for the Flynn effect.” Id. As for margin of error, the AAMR states that “any IQ score must be adjusted to account for measurement error depending on the test given.” Id. Thus, the Ohio appellate court found that “standard measurement error must be considered in determining an individual’s IQ score.” Id.; see

61 Percy Walton was subsequently granted clemency by former Virginia Governor Tim Kaine.
also Moore v. Quarterman, 342 Fed.Appx. 65, 2009 WL 2573295 (5th Cir. (Tex.) Aug. 21, 2009) (unpublished) (in case where Atkins claim was considered de novo and grant of relief affirmed, court references defense testimony explaining that two adjusted test scores were consistent with IQ score of 70 considering SEM); Sasser v. Norris, 553 F.3d 1121 (8th Cir. (Ark.)), cert. denied, 130 S.Ct. 397 (2009) (in granting evidentiary hearing on Atkins claim, court notes that IQ score of 79 placed petitioner in the mentally retarded range taking into account SEM); Thomas v. Allen, 607 F.3d 749 (11 Cir. (Ala.) 2010) (in affirming grant of relief on Atkins claim, court notes that SEM is a proper consideration and here the parties agreed on the appropriate SEM; district court’s application of the Flynn effect to lower scores was not clearly erroneous given that there is no uniform consensus regarding the application of the Flynn effect in determining a capital offender’s intellectual functioning and there is no Alabama precedent specifically discounting a court’s application of the Flynn effect); Holladay v. Allen, 555 F.3d 1346, 1350 n.4 (11th Cir. 2009) (crediting the psychologist that concluded the IQ scores needed to be adjusted for the Flynn Effect); United States v. Hardy, 2010 WL 4909550, *5-10 (E.D. La. Nov. 24, 2010) (unpublished) (experts agreed that IQ score of 75 should be used as upper bound of the IQ range describing mild mental retardation given SEM; experts also agree that practice effect impacted reliability of certain prior IQ score; district court found that in light of the substantial evidence supporting the existence of the Flynn effect, the defendant’s most reliable IQ score should be corrected to take it into account); United States v. Davis, 611 F.Supp.2d 472, 488 (D. Md. 2009) (“In conclusion, the Court finds the defendant's Flynn effect evidence both relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning.”); Hughes v. Epps, 694 F.Supp.2d 533 (N.D. Miss. 2010) (in case where habeas relief is granted on Atkins claim, SEM is acknowledged in discussion of petitioner’s IQ scores); United States v. Nelson, 419 F.Supp.2d 891, 898 (E.D. La. 2006) (defense expert explained inflated score by fact that IQ test was given in two sessions instead of one and there likely was practice effect because of similar test given to defendant shortly before IQ test); Ex Parte Chester, 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (noting testimony that IQ score of 77, which was inconsistent with petitioner’s three other pre-18 IQ scores, was likely inflated due to practice effect and finding that petitioner established significantly sub-average intellectual functioning). In re Hearn, 418 F.3d 444, 447 fn. 4 (5th Cir. (Tex.) 2005) (discussing measurement error); State v. Jimenez, 880 A.2d 468, 475 (N.J. Super. 2005) (“Because a measurement error of five points in assessing IQ is recognized, a score of 70 in actuality may represent a range of 65 to 75.”); State v. Dunn, 831 So.2d 862, 886 fn. 9 (La. 2002) (acknowledging that all IQ tests are “burdened with a range of plus/minus number of IQ points known as the standard error of measurement (SEM).”); Kilgore v. State, ___ So.3d ___, 2010 WL 4643043 (Fla. Nov. 18, 2010) (accepting testimony questioning reliability of one IQ score because of practice effect, the fact that a prorated test was used, and fact that petitioner had just entered “55 plus” category); State ex rel. Thomas v. Duncan, 216 P.3d 1194, 1198 (Ariz. App. 2009) (finding that multiple tests may be required by statute but noting that after such testing is completed, “a defendant may argue that the practice effect impacted the results.”)

In contrast, the Kentucky and Tennessee Supreme Courts have found that margin of error evidence or evidence about IQ score inflation is not admissible. Bowling v. Commonwealth,
163 S.W.3d 361, 375 (Ky 2005) (finding that General Assembly chose not to expand the mental retardation ceiling by requiring consideration of margin of error or “Flynn effect” and instead chose a bright-line cutoff ceiling of an IQ of 70); *Howell v. State*, 151 S.W.3d 450, 458 (statute with cutoff at 70 should not be interpreted to make allowances for measurement error or other circumstances where defendant with IQ over seventy could be considered mentally retarded.). At the time of publication, the Tennessee Supreme Court is revisiting its ruling in *Howell*. See *Coleman v. State*, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010) (unpublished) (rejecting arguments that Flynn effect and SEM must be considered when assessing IQ scores), *appeal granted* (Tenn. June 17, 2010.).

The Alabama Court of Criminal Appeals has also refused to adopt a margin of error when examining IQ scores. *Smith v. State*, ___ So.2d ___, 2008 WL 4369249 (Ala. Crim. App. Sept. 26, 2008). The court explained: “The Alabama Supreme Court in *Perkins* did not adopt any ‘margin of error’ when examining a defendant’s IQ score. If this Court were to adopt a ‘margin of error’ it would, in essence, be expanding the definition of mental retarded adopted by the Alabama Supreme Court in *Perkins*. This Court is bound by the decisions of the Alabama Supreme Court.” See also *Smith v. State*, ___ P.3d ___, 2010 WL 4397004, *12 n.6 (Okla. Crim. App. Nov. 5, 2010) (because Oklahoma’s mental retardation statute expressly requires consideration of SEM, “it seems that under the Oklahoma statutory scheme, the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants.”); *Ex Parte Woods*, 296 S.W.3d 587, 608 (Tex, Crim. App. 2009) (finding it “unnecessary in this case to attempt to resolve any controversy over the application of the Flynn Effect to IQ scores” given that acceptance of petitioner’s expert’s use of it to adjust scores would not change the result); *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008) (after noting defense expert’s testimony that IQ scores are lower if Flynn effect is considered, the court states: “We have previously refrained from applying the Flynn effect, however, noting that it is an ‘unexamined scientific concept’ that does not provide a reliable basis for concluding that an appellant has significant sub-average general intellectual functioning.”); *State v. Vela*, 777 N.W.2d 266 (Neb. 2010) (declining to address State’s argument that the lower court erred by considering measurement error because defendant failed to satisfy the adaptive deficits prong of the mental retardation definition.); *State v. Dunn*, 41 So.3d 454 (La. 2010) (in affirming trial court’s finding that defendant failed to prove by a preponderance of the evidence that he is mentally retarded, court accepted Flynn effect adjusted scores but in a footnote observed that it has not specifically accepted the Flynn effect.

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62 In federal habeas proceedings, the court of appeals rejected Bowling’s argument that a five-point margin of error should be applied to IQ scores because Bowling failed to explain the source for this methodology. *In re Bowling*, 422 F.3d 434, (6th Cir. (Ky.) 2005); see also *Walton v. Johnson*, 440 F.3d 160, 178 (4th Cir. (Va.) 2006) (en banc) (noting that petitioner failed to explain what “standard error of measurement” was and why it should reduce a particular score to 70 or less.); *cf. Woodall v. Simpson*, 2009 WL 464939, *44 (W.D. Ky. Feb. 24, 2009) (unpublished) (Kentucky Supreme Court did not unreasonably apply Atkins in deciding petitioner failed to produce evidence suggesting mental retardation where an expert opined his IQ was between 70 and 79 and Kentucky employs a bright-line cut-off of 70 and does not recognize SEM).

63 Regarding the bright-line cut-off that the Tennessee Supreme Court has found to be required in Tennessee, the Tennessee Court of Criminal Appeals has observed: “Unfortunately, by refusing to consider ranges of error, it is our view that some mentally retarded defendants are likely to be executed in Tennessee, particularly in a case similar to this one where the defendant's I.Q. is so close to the bright-line cutoff of 70.” *Cribbs v. State*, 2009 WL 1905454, *40 (Tenn. Crim. App. July 1, 2009).
effect theory as scientifically valid; Justice Knoll concurred, arguing that it “would be inappropriate to apply Dr. Flynn's recommended 0.3 point per year deduction to defendant's IQ scores for the purposes of La.C.Cr.P. 905.5.1.”

In Ex Parte Briseno, 135 S.W.3d 1, 14 fn. 53 (Tex. Crim. App. 2004), where the petitioner had obtained IQ scores of 72 and 74 in testing by the defense and prosecution experts, the Texas Court of Criminal Appeals refused to consider a letter explaining how the standard measurement of error applies because it was not properly admitted at the habeas hearing. It went on to note, however, that even considering the standard deviation, the trial court did not abuse its discretion in finding that Briseno had failed to prove that he suffered from significantly subaverage intellectual functioning. The court explained: “[E]ven if a factfinder applied the statistical standard deviation, there is not enough evidence in this record that proves, by a preponderance of evidence, that applicant's true IQ is lower than 72-74 rather than higher than 72-74.” Id. The flaw in this analysis is that it looks solely to the IQ test results rather than considering the petitioner’s actual behavior to shed light on where in the range of scores the petitioner likely fell. But see Briseno v. Dretke, 2007 WL 998743 (S.D. Tex. March 29, 2007) (even assuming SEM must be considered, a presumption of correctness attached to the state court’s finding that petitioner failed to establish by a preponderance of the evidence that the IQ scores overstated, rather than understated, petitioner’s actual intellectual abilities); Byrd v. State, ___ So.3d ___, 2009 WL 1164985 (Ala. Crim. App. May 1, 2009) (rejecting request that court presume that a capital defendant’s IQ falls at the bottom range of the confidence interval.); Pizzuto v. State, 202 P.3d 642 (Idaho 2008) (post-conviction court was entitled to infer that petitioner’s IQ was higher than the reported number due to SEM); Hedrick v. True, 443 F.3d 342 (4th Cir. (Va.)), cert. denied, 548 U.S. 928 (2006) (in finding that petitioner failed to meet his evidentiary burden with regard to his Atkins claim, noting that SEM could either raise or lower his IQ score of 76); cf. Lizcano v. State, 2010 WL 1817772 *11-12 (Tex. Crim. App. May 5, 2010) (unpublished) (rejecting State’s argument that defendant’s various IQ scores should be adjusted upward in light of SEM and also because of testimony that Spanish speakers tend to score about 7.5 points lower than Caucasians due to “culture and influence”).

There are also instances where courts have refused to consider adjustments to prior IQ scores where there were no indications that the original scorers had not already considered the adequacy and accuracy of the testing mechanisms at the time the scores were reported. See, e.g., Murphy v. Ohio, 551 F.3d 485 (6th Cir. (Ohio) 2009); United States v. Roane, 378 F.3d 382 (4th Cir. 2004), cert. denied, 126 S.Ct. 330 (2005). To refute an assumption that the original scorers considered all reasons why the score might be inflated, counsel will need to show that while the Flynn effect has been a recognized phenomenon for some time, its use to adjust scores is a relatively recent development. As for SEM, if the IQ was reported as a single number, rather than in a range, there is no reason to believe that measurement error was considered.

Counsel must argue that it violates Atkins to preclude consideration of evidence that is recognized as relevant to a mental retardation diagnosis by clinical experts.
Another recurring issue is who may provide expert testimony. Many statutes have specific requirements. As discussed above, in the subsection on prosecution experts, the Virginia Supreme Court in *Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006), found reversible error in the admission of testimony from a prosecution expert who did not meet the statutory qualifications. *Id.* at 99. Under Virginia’s mental retardation statute, Code § 19.2-264.3:1.2(A), a mental health expert had to be “skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior.” The prosecution expert conceded that he had never administered an adaptive behavior instrument and therefore it was error to permit him to testify. The court went on to clarify, however, that it was not holding that an expert meeting the statutory qualifications was required to actually administer a standardized measure of adaptive behavior to the defendant in order to testify about mental retardation. It explained:

> [I]f an expert, skilled in administering, scoring and interpreting standardized measures of adaptive behavior, determines in his or her opinion that such a test is not appropriate for a particular defendant or that administering a standardized measure of adaptive behavior is not feasible, the expert can still testify as to the defendant's mental retardation and explain why a measure of adaptive behavior was not administered to the defendant. The decision about which tests to administer to a defendant and the manner in which they are given goes to the weight to be accorded an expert's opinion regarding mental retardation, not to the admissibility of the opinion.

*Id.* at 98-99. For this reason, the fact that the prosecution expert failed to administer an IQ test in accordance with accepted professional norms would not have disqualified him from testifying. *Id.* at 99 n. 6.

The court also ruled in that case that the trial court did not abuse its discretion in precluding Atkins from calling an expert in the field of pediatrics and genetics. This was because

> the most that [the expert] could opine within a reasonable degree of medical probability was that Atkins’ physical abnormalities are risk factors that could lead to developmental and cognitive disabilities. Such an opinion was speculative and without an adequate factual foundation.

*Id.* at 101.

The Fifth Circuit in *In re Hearn*, 418 F.3d 444 (5th Cir. 2005), rejected the state’s argument that the opinion of one of the petitioner’s experts could not be relied upon in determining whether petitioner made a prima facie case of mental retardation. Texas had looked to the Texas Persons With Mental Retardation Act which provides that mental retardation may only be diagnosed by “a physician or psychologist licensed in this state or certified by the [Texas Department of Mental Health and Mental Retardation].” Tex. Health & Safety Code Ann. § 591.003(16). The court of appeals pointed out that when the Texas Court of Criminal Appeals set out procedures for litigating *Atkins* claims, it did not either expressly or implicitly incorporate the provisions of the statute above. *See also* *Ex Parte Lewis*, 223
S.W.3d 372, 374 (Tex. Crim. App. 2006) (concurring justices observe that findings by the lower court that were rejected by the Texas Court of Criminal Appeals concerned the defense expert’s lack of license or certification pursuant to Tex. Health & Safety Code Ann. § 591.003, a fact that was irrelevant to an Atkins claim).

What evidence may properly be considered, and how it should be weighed, when determining adaptive functioning has been and continues to be the subject of considerable litigation. The 2002 AAMR Manual contains assumptions that are to be included as part of the application of the definition of mental retardation. The one that many fact finders fail to appreciate is that:

“Within an individual, limitations often coexist with strengths.” This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

AAMR 2002 at 8. The federal district court’s understanding of this concept made all the difference in the district court finding that the defendant was mentally retarded in United States v. Davis, 611 F.Supp.2d 472 (D. Md. 2009); see also Wiley v. Epps, ___ F.3d ___, 2010 WL 4227405 (5th Cir. (Miss.) Oct. 27, 2010) (in affirming grant of habeas relief on Atkins claim, noting that all experts except for the warden’s expert agreed that the activities performed by petitioner that the Mississippi Supreme Court viewed as inconsistent with mental retardation could in fact be done by mentally retarded individuals); Thomas v. Allen, 607 F.3d 749 (11th Cir. (Ala.) 2010) (that petitioner was able to drive a tractor and perform menial jobs did not establish that the district court clearly erred in finding that petitioner had proved he suffered from substantial adaptive limitations); Holladay v. Allen, 555 F.3d 1346 (11th Cir. (Ala.) 2009) (court appointed expert’s reliance on the crime was misplaced because it failed to take into account that mentally retarded individuals have strengths in addition to weaknesses).

Strengths that do not directly undermine alleged deficits in a particular skill area cannot properly be used to defeat a claim of mental retardation. Where prosecutors or courts rely on irrelevant strengths, counsel must argue that this violates the clinical definition of mental retardation and Atkins. But see Walker v. Kelly, 593 F.3d 319 (4th Cir. (Va.)), cert. denied, 130 S.Ct. 3318 (2010) (appeals court unpersuaded by petitioner’s argument that reversal was required because mentally retarded individuals are capable of exhibiting many of the skills the district court relied on in finding that petitioner is not mentally retarded); Larry v. Branker, 552 F.3d 356 (4th Cir. (N.C.) 2009) (because Atkins did not require states to adopt a specific method for determining mental retardation, the state post-conviction court’s alleged focus on skills the petitioner could perform rather than on those he actually did perform in the real world environment was not contrary to or an unreasonable application of Atkins); Thomas v. Quarterman, 335 Fed. Appx. 386, 2009 WL 1744489 (5th
Frequently raised is the issue of what, if any, evidence about the capital offense or other crimes can be considered by the trier of fact in determining whether a defendant or petitioner is mentally retarded. This issue was of particularly relevance in the few jurisdictions that authorized separate jury trials on the mental retardation question.

In *Blonner v. State*, 127 P.3d 1135, 1141 (Okla. Crim. App. 2006), the Oklahoma Court of Criminal Appeals ruled:

Evidence relating to the crime with which the defendant is charged is not admissible unless that evidence is specifically relevant to refute the defendant's evidence of mental retardation. Evidence relating to other crimes is admissible only to the extent it is relevant to refute the defendant's evidence of mental retardation.

*See also* *Lambert v. State*, 71 P.3d 30, 31 (Okla. Crim. App. 2003) (“The jury should not hear evidence of the crimes for which Lambert was convicted, unless particular facts of the case are relevant to the issue of mental retardation. Any such evidence should be narrowly confined to that issue. The jury should not hear evidence in aggravation or mitigation of the murders for which Lambert was convicted, or any victim impact evidence.”); *Hooks v. State*, 126 P.3d 636, 644 (Okla. Crim. App. 2005) (“Reciting the facts of particular crimes will seldom be relevant to the issue of mental retardation, but may well confuse and inflame the jury.”); *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003) (“evidence of a defendant’s crimes in a mental retardation trial may be admissible as probative evidence of the defendant’s intelligence if that evidence demonstrates his mental ability and adaptive skills, or is otherwise relevant to the question of whether he is mentally retarded.”); *In re Hawthorne*, 105 P.2d 552, 559 (Cal. 2005) (“Evidence relating to the underlying crimes shall be admissible only to the extent relevant on [the] question [of mental retardation].”).

The Oklahoma Court of Criminal Appeals had found evidence of prior crimes to be relevant on some occasions. In *Hook v. State*, 126 P.3d 636, for example, evidence that Hooks had run a prostitution ring was deemed relevant to the question of whether he was mentally retarded. The court explained:
The State introduced evidence that Hooks employed several women as prostitutes. In the course of that employment, he rented apartments, purchased food and other supplies, oversaw the women's activities, required that they give him their earnings, took responsibility for that money, and enforced rules regarding behavior, housecleaning, and personal hygiene. All this directly bears on Hooks's mental abilities. While experts agree that mentally retarded people can commit crimes, categories of crime differ. On one hand, individual acts of violent crime, such as armed robbery or rape, require little or no abstract thought or complex planning. By contrast, running a prostitution ring over a period of several years resembles engagement in a continuing criminal enterprise. This requires a level of abstract thought, coupled with the ability to carry out plans, which might be beyond the capabilities of a mentally retarded person.

Id. at 644. In contrast, in Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005), the Oklahoma Court of Criminal Appeals found that the trial court erred by admitting extensive evidence about the petitioner’s criminal activities, some of which was not relevant to the question of mental retardation and some of which was more prejudicial than probative. The appeals court further explained that because a defendant is only required to show limitations in adaptive functioning in two of nine areas, the prosecution must attempt to negate the defendant’s evidence on the specific areas he claims to be deficient in. Id. at 656. Put another way, evidence that defendant functions well in areas other than those he or she has put at issue is irrelevant to the question of mental retardation. As noted earlier, this is a point that many courts and juries have failed to understand.

In Lambert, the appeals court rejected the prosecution’s contention that evidence of Lambert’s crimes was relevant because it showed that he had chosen a life of crime. The court of appeals responded:

This argument suggests that the prosecution itself was confused regarding the purpose of this proceeding. Lambert’s chosen profession would only be relevant to the issue of mental retardation if it were something a mentally retarded person could not do. However, all the experts testified that mentally retarded people can and do commit crimes. Lambert’s alleged choice of a life of crime shows he is a bad person, without resolving the

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64 A federal district court recently denied relief on the petitioner’s claim that this evidence should not have been admitted, ruling: “The evidence presented by the State, although partially involving possible prior activity involving prostitution, was directly relevant to counter Petitioner's claim of significant limitations in adaptive functioning by demonstrating the tasks in which Petitioner participated and his ability to perform those tasks on a routine basis. Petitioner has not demonstrated that the evidence was more prejudicial than probative, or that either the admission of this evidence or the [Oklahoma Court of Criminal Appeals”] determination was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.” Hooks v. Workman, 693 F.Supp.2d 1280, 1307-08 (W.D. Okla. 2010).

65 “When balancing a claim that particular facts of a crime are relevant to the issue of mental retardation, a trial court must still consider whether its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.'” Lambert v. State, 126 P.3d at 655, quoting 12 O.S.Supp.2003, § 2403.
issue of mental retardation. This argument could only confuse the issues in the case and mislead the jury.

Id. at 656. The Oklahoma Court of Criminal Appeals further condemned the prosecutor’s argument that the evidence of Lambert’s criminal history established that he was “street smart,” thereby precluding a finding of mental retardation. The court observed: “No evidence in the record supports the assertion that mildly mentally retarded persons cannot be ‘street smart’ and survive outside an institution.” Id.

The prosecutor in Lambert also sought to defeat the mental retardation claim by presenting evidence that Lambert had previously pled guilty to “home invasion” and that mental retardation had not been raised in those proceedings. The Oklahoma Court of Criminal Appeals responded: “Whether previous counsel entering a guilty plea in a noncapital case chose to bring up mental retardation is not relevant to any issue in these proceedings.” Id.

The Oklahoma Court of Criminal Appeals also condemned the admission of evidence by the prosecution concerning personality tests taken by Lambert and psychiatric diagnoses he had received other than mental retardation, such as “conduct disorder” and “dysocial disorder.” The court explained:

Mental retardation and mental illness are separate issues. It is possible to be mentally retarded and mentally ill. Lambert has not claimed to be mentally ill, and evidence of mental problems did not make the issue of his mental retardation more or less likely. Prosecutors used this information to argue that Lambert’s adaptive functioning limitations were caused by something other than mental retardation. However, in doing so, they accepted Lambert’s claims of adaptive functioning limitations. . . . This evidence, offered as an alternative to explain Lambert’s limitations, was irrelevant. Its only possible relevance could have been if prosecutors used evidence of mental problems to argue that Lambert had no limitations in adaptive functioning. The record suggests this was an argument prosecutors could not make. Evidence of mental problems and other psychological testing should not have been admitted.

Id. at 659; Holladay v. Allen, 555 F.3d 1346 (11th Cir. (Ala.) 2009) (in affirming grant of habeas relief on Atkins claim, appeals court find that district court did not clearly err in rejecting court-appointed expert’s reasoning about alternative explanations for petitioner’s low scores, i.e., learning disability or chaotic home life, as the literature established they were not mutually exclusive); but see State v. Burke, 2005 WL 3557641 *10 (Ohio App. Dec. 30, 2005) (defendant “must prove that significant adaptive limitations more likely than not result from mental retardation.”); In re Bowling, 422 F.3d 434, 438 (6th Cir. (Ky) 2005) (noting that deficits in adaptive functioning described by witnesses could be

66 But see United States v. Webster, 421 F.3d 308, 313 (5th Cir. 2005) (in affirming finding that petitioner failed to establish mental retardation, the appeals court noted that the evidence reflected that petitioner “adapted to the criminal life he chose and has illustrated the ability to communicate with others, care for himself, have social interaction with others, live within the confines of the ‘home’ he has been in since he was sixteen, use community resources within this home, read, write, and perform some rudimentary math.”)
explained by other known psychological diagnoses including attention deficit hyperactivity disorder, alcohol abuse, and a personality disorder.); *Murphy v. Ohio*, 551 F.3d 485 (6th Cir. (Ohio) 2009) (in finding state court’s determination that petitioner is not mentally retarded was not unreasonable application of federal law or unreasonable determination of the facts, appeals court notes, inter alia, that State expert opined that petitioner’s poor academic performance and poor scoring on adaptive behavior tests could be the result of many other conditions outside of mental retardation).

Counsel is likely to need strong expert testimony to convince the fact-finder why the *Lambert* analysis is clinically accurate and why rulings in cases like *Burke* and *Bowling* are erroneous.

In a case involving a post-conviction mental retardation trial, the Oklahoma Court of Criminal Appeals rejected an argument that is was error for the jury to have been informed that the petitioner had been convicted of an undisclosed crime and was presently in custody. *Ochoa v. State*, 136 P.3d 661, 667 (Okla. Crim. App. 2006). The court did not believe that knowledge of these facts would create the same prejudicial effect as information about the capital crime and death sentence. *And see Ochoa v. Workman*, 2010 WL 915826 (W.D. Okla. March 10, 2010) (unpublished) (state court’s determination that it was appropriate to inform the jury that petitioner was in custody and had been convicted of a crime was not contrary to or an unreasonable application of Supreme Court precedent.) The court did find error, however, in the trial court’s decision to have Ochoa wear a shock sleeve. The record indicated that the trial court was taking a precautionary measure rather than responding to actual behavior that needed control. Reversal was not required because Ochoa failed to establish prejudice. Even assuming the jury could see the shock sleeve, this would not have been more prejudicial than viewing Ochoa in jail clothes which occurred after Ochoa refused to wear civilian clothing. *And see Ochoa v. Workman*, 2010 WL 915826 (W.D. Okla. March 10, 2010) (unpublished) (the state court’s ruling that petitioner had not established prejudice from being forced to wear a shock sleeve during the *Atkins* trial was not contrary to or an unreasonable application of Supreme Court precedent; petitioner failed to establish prejudice from use of the shock sleeve given, inter alia, that the only evidence and testimony presented at the trial was that petitioner was not mentally retarded.)

The Oklahoma Court of Criminal Appeals found no error in *Howell v. State*, 138 P.3d 549 (Okla. Crim. App. 2006), another post-conviction case, when the prosecutor asked a police officer whether he had questioned Howell’s mental functioning at any time during his investigation, and whether it had ever occurred to the officer that Howell was mentally retarded. The appeals court found that the officer’s observations about Howell’s ability to communicate were relevant and his lay opinion was admissible.⁶⁷ Nor was there error

⁶⁷ This is not the only time investigating officers have been called in mental retardation proceedings. In *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005), a former sheriff testified that Pickens asked no questions when advised of his Miranda rights, lied during the interrogation, made up an alibi, and eventually provided a story that matched the evidence. In this witness’ view, Pickens had no difficulty with communicating. A former deputy testified that he transported Pickens on a number of occasions during which the two had “real intelligent conversation.” *Id.* at 619. The deputy further reported that Pickens had a neat appearance when being transported to court. Such evidence was deemed insufficient to refute the
when a witness who previously prosecuted Howell was asked if anyone had expressed concern before Howell testified in that proceeding. The jury could infer from this that Howell’s prior attorney concluded he was a competent witness, which was relevant to the questions of sub-average intellect and limitations in adaptive functioning. There was no abuse of discretion in the admission of letters written by Howell to his co-defendant and former spouse, which were offered to show Howell’s “ability to communicate, to understand and engage in logical reasoning, to show he understood the consequences of his actions and had the ability to learn from his mistakes, and to show he did not have deficits in social and interpersonal skills.”  *Id.* at 557.  As for evidence of Howell’s use of profanity, this was properly admitted since “the way he phrased his answers showed his contempt for the process and were demonstrative of his attitude and understanding of the proceedings.”  *Id.* Also properly admitted was Howell’s testimony from his capital trial about his involvement in a cocaine drug ring. The testimony “reflected his ability to respond directly to his counsel’s questions and his responses were coherent and showed he could think and respond logically.”  *Id.* at 559.  In addition, the testimony demonstrated Howell’s “ability to think rationally, to follow instructions, and to be responsible for large sums of money and drugs.”  *Id.*  On the other hand, Howell’s testimony about specific drug deals leading up to his meeting with the victim should not have been admitted since it suggested that “serious criminal conduct followed.”  *Id.*

Also admitted was a videotape of a portion of the prosecution’s cross-examination of Howell at his capital trial. The beginning of the videotape was deemed relevant by the Oklahoma Court of Criminal Appeals because it allowed the jury to see Howell’s demeanor as well as how he communicated with the prosecutor. This was important because Howell had waived his presence at the mental retardation trial so this videotape provided the only opportunity for the jury to view Howell. The court did find that some of the videotape should not have been shown to the jury in light of the direct examination it had heard. There was enough mention of the victim and Howell’s conduct after the killing for the jury to piece together what had happened, something it should not have been told about.  *Id.* at 560.

Finally, the Oklahoma Court of Criminal Appeals approved of the admission of Howell’s testimony from an *in camera* hearing where he expressed dissatisfaction with his attorneys and the manner in which the State was handling his court proceedings. This evidence was relevant in that it showed that Howell “could understand and process information, communicate, engage in logical reasoning and understand the reactions of others.”  *Id.*

The prosecution in *United States v. Nelson*, 419 F.Supp.2d 891 (E.D. La. 2006) was permitted to present testimony from past crime victims during the hearing on mental retardation. Their testimony was to illustrate Nelson’s purported leadership role in the crimes, suggesting adaptive functioning above the mentally retarded level. The district court responded to the evidence as follows: (1) some of it actually indicated that Nelson was not functioning at a high level; and (2) the court agreed with a defense expert’s explanation that the testimony had “limited relevance to the mental retardation diagnosis because it is isolated, in contrast to the recurring patterns which emerge from all of the significant evidence of adaptive deficits presented by Pickens.
records in this case and which indicate a low level of adaptive functioning.” *Id.* at 902. Needless to say, where the prosecution attempts to utilize criminal acts to defeat a claim of mental retardation, the defense experts must be prepared to address it in their testimony.

In *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003), the Georgia Supreme Court found no abuse of discretion in admission of evidence about the petitioner’s crimes where the evidence showed “an ability to plan, think and adapt in a manner inconsistent with Morrison’s claim that he is mentally retarded.” Further, a confession by the petitioner was “relevant to his intellectual abilities because it reveal[ed] that he can read and write, that he attended school until the ninth grade, and that he understood his rights.” *Id.* Further, in describing the crime and his plan to escape he used “language consistent with average intelligence.” *Id.* Crime scene photographs, which showed the restraints the petitioner attempted to use on a victim “illustrated the resourcefulness displayed by [Morrison] to accomplish his criminal purposes.” *Id.* at 877. Again, defense experts must be able to explain why these assumptions about what mentally retarded persons can and cannot do are false.

In the eight years since the *Atkins* decision, there are a substantial number of cases where the facts of the capital offense have been cited by appellate courts as a basis for upholding a finding that the defendant or petitioner was not mentally retarded. The defense experts must be prepared to explain why the criminal conduct is either not relevant to the mental retardation determination or that it does not preclude a finding of mental retardation. See ROBERT L. SCHALOCK, ET AL, USER’S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS-10TH EDITION (AAIDD 2007) at 22 (directing clinicians not to use past criminal behavior in assessing adaptive behavior). In *State v. Dunn*, 41 So.3d 454 (La. 2010), for example, in affirming the trial court’s finding that defendant failed to prove by a preponderance of the evidence that he is mentally retarded, important to the court’s analysis was “defendant's behavior during the planning and commission of the instant crime as it relates to his adaptive skills functioning.” Notably, “defendant engaged in the leadership and planning of a major bank robbery” and the one expert who found defendant to be mentally retarded did not consider defendant's actions during the commission of the crime in his diagnosis of defendant. See also *State v. Brown*, 907 So.2d 1, 32 (La. 2005) (claim of mental retardation is undermined by defendant’s “intact survival mentality,” as shown by his destruction of trace evidence, sanitizing his house, and successfully eluding police apprehension for 82 days.); *State v. Anderson*, 996 So.2d 973, 991 (La. 2008) (jury hearing defendant’s account of his behavior after the crime, which included washing blood from a glass and the murder weapon and disabling the telephone, could have found that such organized behavior to cover his tracks showed adaptive skills that were not retarded.); *Van Tran v. State*, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (unpublished) (in affirming denial of post-conviction relief, agreeing with lower court that facts of the crime “belie any assertion that the Petitioner suffered from any deficit in intellectual ability or adaptive skills.”); salient facts include that petitioner had been an employee of the victims and was aware jewelry was on the premises, he did the talking with one of the victims at the outset of the crime, he was the one who entered the office to get the jewelry, he escaped with the co-defendants to another state after the crime and made the arrangements to sell the jewelry, and he was the
one who paid the intermediary and his co-defendants from the proceeds); *Thomas v. Quarterman*, 335 Fed. Appx. 386, 2009 WL 1744489 (5th Cir. (Tex.) June 19, 2009) (unpublished) (in finding that petitioner did not establish the requisite adaptive deficits, state court looked at capital offense and concluded that petitioner’s disposal of the murder weapon and concealment of the crime demonstrated forethought, planning and rational behavior); *Perkins v. Quarterman*, 2007 WL 3390953 (5th Cir. (Tex.) Nov. 15, 2007) (unpublished) (in rejecting defense experts opinion regarding adaptive deficits, state court cited, inter alia, the steps petitioner took to conceal his involvement in the capital offense); *State v. Lee*, 976 So.2d 109, 147 (La. 2008) (“The complexity, scope, planning, and relative skill with which defendant committed a string of violent murders and evaded capture contradicts any claim he is somehow ‘slow’ and unable to grasp abstract concepts as [a defense expert] testified.”); *Coleman v. State*, 2010 WL 118696, *25* (Tenn. Crim. App. Jan. 13, 2010) (unpublished) (“the court cannot forget to examine the nature of the criminal conduct and the circumstances involved in that conduct when determining whether a person is mentally retarded.”); *Ex Parte Jerry Jerome Smith*, ___ So.3d ___, 2010 WL 4148528 (Ala. Oct. 22, 2010) (in finding that defendant had not demonstrated significant or substantial deficits in adaptive behavior, either at the time the murders were committed or at the time of the hearing, the court found especially persuasive Smith's behavior during the commission of these murders where defendant arrived at the house armed with a sawed-off rifle that he purposefully concealed, he systematically shot three victims, and he attempted to shoot a fourth victim and made an effort to stab that victim after the rifle jammed; in addition, he made the statement after the murders that he planned to eliminate witnesses.); *Ex Parte Taylor*, 2006 WL 234854 (Tex. Crim. App. Feb. 1, 2006) (unpublished) (in denying claim of mental retardation, trial court “also focused on [petitioner’s] actions in the days leading up to the murder, on the evening of the murder itself, and the days following the murder in assessing his level of adaptive functioning.”)

In *State v. Arellano*, 143 P.3d 1015 (Ariz. 2006), the Arizona Supreme Court reversed a ruling by the trial court precluding testimony by prison employees about the defendants’ adaptive behavior in prison. Looking to the Arizona statute, the Arizona Supreme Court ruled that “a trial court may consider post-age-eighteen adaptive behavior to evaluate mental retardation” even though the statute requires an onset of the defendant’s intellectual and adaptive behavior deficits prior to age eighteen. *Id.* at 1020. In the state supreme court’s view, “[e]vidence of post-age-eighteen adaptive behavior skills or deficiencies” could be relevant to a determination of mental retardation. *Id.* The Arizona Supreme Court noted two other courts that have permitted similar evidence: *Pickens v. State*, 126 P.3d 612, 617 (Okla.Crim.App.2005) (corrections personnel testified about defendant's communication deficits, noting that "things had to be explained to [him] more than once, in 'simpler' terms, and multi-syllabic words confused him"); *Ex parte Briseno*, 135 S.W.3d 1, 18 (Tex.Crim.App.2004) (four Texas Department of Criminal Justice officers testified at an *Atkins* hearing about Briseno's communication skills and that they ‘saw him reading magazines and filling out commissary forms appropriately’). The Arizona Supreme Court did acknowledge the warning by the AAMR, through its amicus brief, that “non-expert observations ‘receive little or no weight from clinical experts if they are made in the context of atypical environments (such as prison).’” *Arellano*, 143 P.3d at 1020 n.3 (quoting from AAMR Amicus Brief). But that goes to the weight of the prison employees'
testimony, not to admissibility. *See also Jones v. State*, 966 So.2d 319 (Fla. 2007) (while State expert administered ABAS to department of corrections staff members, the expert acknowledged that the test is not ideally suited to a prison environment and relied on other information in reaching an opinion about petitioner’s adaptive functioning.)

It is extremely common for prosecutors to utilize jail or prison employees in attempting to defeat claims of mental retardation. *See, e.g.*, *Jones v. State*, 966 So.2d 319 (Fla. 2007) (state expert administered ABAS to department of corrections staff members who were familiar with petitioner’s functioning on death row); *United States v. Webster*, 421 F.3d 308, 313 n. 15 (5th Cir. 2005) (court relies in part on testimony by prison guards and inmates in concluding that petitioner failed to establish mental retardation.); *Hall v. State*, 160 S.W.3d 24, 34-35 (Tex. Crim. App. 2004) (state presents affidavits from five prison guards in effort to refute claim of mental retardation); *Moore v. Quarterman*, 454 F.3d 484, 489 (5th Cir. (Tex.) 2006) (state calls four correctional officers who indicated that petitioner communicated well and successfully interacted with others); *State v. Hill*, 894 N.E.2d 108, 124 (Ohio App. 2008) (post-conviction court considered in assessing adaptive functioning consistent testimony of various prison officials that petitioner was an “average” prisoner with respect to his abilities in comparison with other death row inmates, and that he interacted with the other inmates, played games, maintained a prison job, kept a record of the money in his commissary account, and obeyed prison rules).

Counsel in most cases will want to keep the testimony out, making the arguments rejected in the *Arellano* case. If that is unsuccessful, counsel will need to both present expert testimony explaining why positive adaptation in prison is unremarkable, and be ready to challenge the reliability of the lay observations. *See, e.g.*, *United States v. Hardy*, 2010 WL 4909550, *40 (E.D. La. Nov. 24, 2010) (unpublished) (finding that prosecution’s expert’s findings on adaptive functioning were tainted by the expert’s use of evidence that the AAMR/AAIDD has cautioned against allowing into the assessment of adaptive behavior such as the defendant’s level of functioning in prison). Materials purportedly written by a defendant must also be carefully reviewed to determine whether another source may have been responsible for preparing them. Otherwise, they may be successfully used by the prosecution to demonstrate the absence of mental retardation. *See, e.g.*, *Hall v. State*, 160 S.W.3d 24, 32 (Tex. Crim. App. 2004) (court finds relevant an allegedly well drafted pro se motion to remove counsel that was filed at time of trial and the trial court believed showed that defendant was “pretty bright”); *but see Ex Parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004) (petitioner’s “coherent” pro se brief on direct appeal did not defeat claim of mental retardation; court notes it is common knowledge that there are “writ writers” in prison who will write pleadings for other inmates); *In re Hearn*, 376 F.3d 447, 455 fn. 9 (5th Cir. 2004) (majority of three-judge panel refuses to find petitioner’s colorable claim of mental retardation undermined by hearsay evidence of a long, personalized request for a pen pal on a web site.); *Brown v. State*, 982 So.2d 565, 605 (Ala. Crim. App. 2006) (court does not give weight to testimony that the defendant filed a federal lawsuit because it “acknowledges that this lawsuit may have been drafted by another inmate acting as a ‘jailhouse lawyer.’”); *Morrow v. State*, 928 So.2d 315 (Ala. Crim. App. 2004) (court rejects government’s contention that certain pro se filings established defendant’s ability to read, write and process information given that nothing in the record showed who actually drafted
the motions.); but see Eldridge v. Quarterman, 325 Fed.Appx. 322, 2009 WL 1143197 (5th Cir. (Tex.) April 28, 2009) (unpublished) (defense expert’s opinion about academic deficits not credible where, e.g., she claimed petitioner received assistance writing letters and a grievance with the State Bar of Texas but offered no support for that assertion.)

In Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005), for example, the prosecution presented testimony from prison employees who had frequent, albeit brief, contact with Lambert when they picked up his requisition slips. They opined that Lambert was not retarded. The defense was able to establish, however, that the prison employees did not know who actually filled out the forms or whether Lambert read the books he requested. In addition, the defense called former cellmates who explained that they had filled out the forms and that the books were intended for other inmates since Lambert did not read books. Prison employees also testified that they had little or no trouble communicating with Lambert and that he appeared to understand the prison routine and what was expected of him. The Oklahoma Court of Criminal Appeals observed, though, that none of the witnesses testified to “long or complex conversations which required an exchange of ideas or feelings.” Id. at 652. In addition, “all of the expert witnesses agreed that mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings.” Id.; State v. Gumm, 864 N.E.2d 133, 137 (Ohio App. 2006) (court appointed expert assigned little significance to “kites” or written inquiries addressed to prison personnel by petitioner during his imprisonment where the variety of handwriting on the kites had confirmed what prison records had noted: petitioner relied on staff and fellow inmates to write them for him); cf. Tarver v. State, 940 So.2d 312, 330 (Ala. Crim. App. 2005) (Cobb, J., concurring in part and dissenting in part.) (Justice dissenting on denial of Atkins claim criticizes circuit court’s reliance on testimony of prison guard about petitioner reading the sports page and his ability to read and write simple notes where experts explained that petitioner was functionally illiterate but might mimic reading a newspaper to mask his deficits.)

Even where writings were in fact produced by the defendant, they should be examined to determine whether they do show a level of functioning above mental retardation as claimed by the prosecution. In Pickens v. State, 126 P.3d 612 (Okla. Crim. App. 2005), the prosecution sought to refute the mental retardation claim in part by pointing to institutional forms filled out by Pickens requesting medical assistance, as well as letters he wrote to the trial court after his incarceration. The appellate court’s review of the forms revealed that they “used simple words and terms.” The court found it unsurprising that a person such as Pickens who was described as having communication skills at a third and sixth grade level was able to complete them. As for the letters to the court, they did include longer words and demonstrated an ability to express concern about his attorney and an understanding of the legal process. After noting the absence of evidence that the letters were prepared without some assistance, the court concluded:

While these letters and requests have some value and show Pickens could exercise the normal fluency expected of an early adolescent child, could print, could express concern over his health in the simplest of terms, could express concern about his pending legal matters, and could utilize services
available in a structured prison environment, this evidence did not disprove or diminish the other significant evidence of his sub-average intellectual functioning.

Id. at 618.

As discussed in the first part of the manual, there are a number of instruments designed to assess a person’s adaptive functioning. Their use in death penalty cases has been the subject of much litigation. In Doss v. State, 19 So.3d 690 (Miss. 2009), an Atkins claim had been rejected by the post-conviction court following an evidentiary hearing. The petitioner argued on appeal that the lower court had erred in crediting the opinions of the State hospital doctors over a defense expert, Dr. Daniel Grant, on the question of significant adaptive deficits. The petitioner pointed out that only Dr. Grant had administered adaptive functioning tests as required by the AAMR. In response, the Mississippi Supreme Court noted “that there is considerable, sincere disagreement among professionals and scholars in the field as to the best method for measuring adaptive functioning. The concept and measurement of adaptive functioning is an unsettled area without consensus among experts and therefore, we cannot find that the Whitfield doctors' opinions are baseless, or that the trial judge clearly erred in accepting their opinions.” The Mississippi Supreme Court further found evidence in the record to support the post-conviction court’s decision to credit the State hospital doctors over Dr. Grant. Notably, Dr. Grant had spoken to no family members or other persons. Rather, he relied solely on Doss and the test results. But literature stated that “[i]nterviews with family members, and others familiar with an individual's typical behavior over an extended period of time in various settings, can supplement or aid in the interpretation of test results.” The Mississippi Supreme Court also observed:

[T]esting instruments for assessing adaptive-functioning impairments can, for a variety of reasons, “be less than ideal for assessing adult criminal defendants who might be mentally retarded.” Klein, 72 Brooklyn L. Rev. at 1235 (citing certain problems such as the unavailability of caregivers or other reliable independent sources, the use of inappropriate norms, and the atypical environment of a prison); Knauss & Kutinsky, 11 Widener L. Rev. at 131 (“Few (if any) measures of adaptive functioning have been designed or normed for use with a correctional population. Thus, adaptive functioning prior to incarceration should be the target for assessment.”); Note, Implementing Atkins, 116 Harv. L. Rev. at 2576 (noting that an individual's environment may add a layer of uncertainty to diagnosing adaptive-skill deficits).

In fact, one of the hospital doctors testified that he was unaware of any studies that have normed an adaptive functioning test for death row inmates. Even Dr. Grant admitted that the tests he used had not been normed for a prison population. See also Walker v. Kelly, 593 F.3d 319 (4th Cir. (Va.)), cert. denied, 130 S.Ct. 3318 (2010) (in affirming denial of Atkins claim where district court credited Commonwealth’s expert over petitioner’s four experts, court notes, inter alia, statement by Commonwealth’s expert that petitioner’s
experts’ reliance on the ABAS-II to determine petitioner’s adaptive behavior was not “sound practice”); *Murphy v. Ohio*, 551 F.3d 485 (6th Cir. (Ohio) 2009) (where special educator administered a SIB-R to informants to retrodiagnose petitioner, court finds that special educator’s evaluation of adaptive skills was unreliable as it was culling information about behavior occurring 25 years earlier); *Butler v. Quarterman*, 576 F.Supp.2d 805, 820 (S.D. Tex. 2008) (it is noted that state habeas court did not consider results of ABAS and Independent Living Scale instruments that were administered to petitioner because neither test was designed to assess the abilities of a person who has been incarcerated for a substantial length of time); *but see Wiley v. Epps*, ___ F.3d ___, 2010 WL 4227405 (5th Cir. (Miss.) Oct. 27, 2010) (in affirming grant of habeas relief on *Atkins* claim, appeals court rules that district court did not clearly err in finding one expert’s retrospective use of the Vineland and ABAS-II to evaluate petitioner’s adaptive functioning was sufficiently reliable for consideration); *United States v. Hardy*, 2010 WL 4909550 (E.D. La. Nov. 24, 2010) (unpublished) (in finding petitioner established the requisite adaptive deficits, district court relies on defense expert who administered VABS-II to best possible informant on facts of this case, a woman who lived with defendant starting when he was either seventeen or eighteen and had three children with him, and the defense expert corroborated the test findings through additional interviews with other informants and review of records; prosecution expert is criticized for not selecting a new informant or attempting to employ a different instrument after the selected informant proved to have inadequate information to complete the chosen instrument); *Williams v. Quarterman*, 293 Fed. Appx. 298, 2008 WL 4280315 (5th Cir. (Tex.) Sept. 19, 2008) (unpublished) (in affirming denial of *Atkins* claim, court notes that in contrast to the defense expert’s subjection assessment of petitioner’s adaptive functioning, the State’s expert administered the Vineland); *Wood v. Allen*, 542 F.3d 1281 (11th Cir. (Ala.) (in affirming denial of habeas relief, noting that state court credited State’s experts regarding petitioner’s high level of adaptive functioning and the experts had administered the Vineland and SIB-R); *Ex Parte Blue*, 230 S.W.3d 151, 165 (Tex. Crim. App. 2007) (in dismissing successor habeas petition raising *Atkins* claim as an abuse of the writ, court notes, inter alia, that while petitioner presented declarations from lay witnesses with anecdotal evidence and opinions about petitioner’s adaptive deficits he did not include results from any of the available standardized scales for assessing adaptive deficits); *Ledford v. Head*, 2008 WL 754486 (N.D. Ga. March 19, 2008) (accepting results of ABAS administered by state’s expert on petitioner and rejecting score on Vineland administered to petitioner’s sister by one of petitioner’s experts given that many of the sister’s responses conflicted with evidence in the record).

In *State v. Hill*, 894 N.E.2d 108 (Ohio App. 2008), the Ohio Court of Appeals ruled that the post-conviction court did not abuse its discretion by excluding expert testimony under *Daubert* about the results of adaptive functioning tests. Prior to age eighteen, the petitioner had been administered the Vineland Social Maturity Scale (Vineland I) on four occasions but there was incomplete information about the results. On the test administered when the petitioner was 17 years old, he was found to be in the borderline category of mental development. The test’s administrator later testified, however, that the source of information was the petitioner’s mother and she may have overstated his abilities. The State’s expert used the available results to calculate approximate “social quotient” scores and concluded that the petitioner fell within the borderline range of social/adaptive
development. The petitioner responded by calling Dr. Sparrow, who had helped revise the Vineland I, renaming in the Vineland II. Based on a linkage study, Dr. Sparrow had developed a method of predicting what Vineland II scores would be obtained based on Vineland I scores. When she recalculated the petitioner’s scores, she was found to be in the mentally retarded range with respect to adaptive functioning. The State called a witness who testified that Dr. Sparrow’s recalculation was only 27% reliable, which made it scientifically unreliable. Based on the latter testimony, the testimony of Dr. Sparrow was ruled inadmissible.

The findings of defense experts on adaptive behavior instruments were also discounted in Van Tran v. State, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (unpublished). The Tennessee Court of Criminal Appeals agreed with the post-conviction court that petitioner’s score on the Independent Living Scale was entitled to little weight given petitioner’s unique circumstances, i.e., he was born in Vietnam, his social history revealed abuse, neglect, and social ostracism, he essentially “lived on the streets” until age seventeen when he came to the United States through the assistance of Catholic Charities, his formal schooling was limited to several years in Vietnam and about one year in this country, he had a history of drug and alcohol abuse, he has been diagnosed with paranoid schizophrenia, he has spent the majority of his time in this country incarcerated, and there were questions about his proficiency in the English language. Notably to the court, there was no indication that the testing questions took into account the petitioner's lifestyle in Vietnam or that he has spent the majority of his adult life incarcerated. Id, 2006 WL 3327828, *24. Further, the circumstance of the capital offense belied any assertion of adaptive deficits.

The findings of defense expert Dr. Susanna Rosin based on administration of the Vineland Adaptive Behavior Scale were discounted by a state habeas court because, inter alia, it concluded that Dr. Rosin did not administer the test properly in that she relied on the petitioner’s self-reporting rather than asking someone close to the petitioner to answer the questions. Matamoros v. Thaler, 2010 WL 1404368, *14 (S.D. Tex. March 31, 2010). (unpublished); see also Ex Parte Van Alstyne, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007) (results of Vineland test administered by prison shown to be unreliable because the underlying data came from the petitioner rather than third-party sources). The state habeas court also noted that Dr. Rosin’s findings indicated a person with borderline severe mental retardation, which was inconsistent with the petitioner’s behavior in court and his other documented behavior. Finally, the state habeas court found that some of the petitioner’s antisocial behaviors would not be credited on an adaptive skills test.

In Ex Parte Woods, 296 S.W.3d 587, 609-10 (Tex, Crim. App. 2009), the petitioner sought to relitigate his Atkins claim with a new expert who, inter alia, opined that a prior expert misused the SIB-R and who also criticized a different expert’s use of the SSSQ. The court responded: “We believe that these differing approaches and these criticisms of psychologists by other psychologists are for the fact finder to resolve and that a rational finder of fact could rely on [prior expert’s] SSSQ test results to find that applicant has no significant deficits in adaptive skills” and a rational fact finder could have rejected the new
expert’s claim that it was inadequate for the other prior expert administering the SIB-R to rely solely on petitioner’s grandmother.

The Pennsylvania Supreme Court recently upheld a finding that a death row inmate was mentally retarded. *Commonwealth v. Gibson*, 925 A.2d 167 (Pa. 2007). In that case, the post-conviction court had credited defense testimony about adaptive deficits over the testimony of the Commonwealth’s expert. It was mentioned that the petitioner had been evaluated, inter alia, with the ABAS. There was no indication in the decision that the Commonwealth had challenged the use of that instrument. In *State v. White*, 885 N.E.2d 905 (Ohio 2008), the defense experts administered the Scales of Independent Behavior-Revised (SIB-R) to family members and the petitioner and concluded that the petitioner had significant adaptive deficits in more than two of the ten areas identified in the AAMR definition. The post-conviction court nevertheless ruled that the petitioner had not proved he suffered from the requisite adaptive deficits. The post-conviction court was troubled by the possible bias of family members as well as the use of information provided by the petitioner. The post-conviction court was more persuaded by the testimony of a former girlfriend which, in the view of the court, established adaptive skills. The Ohio Supreme Court ruled that the post-conviction court had abused its discretion in rejecting the uncontradicted testimony of the defense experts. *Id.* at 915. In reaching this conclusion, the court noted that there was no evidence calling into doubt the reliability of the SIB-R. In fact, at the post-conviction court’s request, a co-author of the SIB-R testified about how the SIB-R was developed and how it is used to determine mental retardation.

Deciding whether or not to utilize standardized adaptive functioning instruments can be a difficult decision for defense counsel. The pros and cons of such tests must be carefully evaluated. Discussion with attorneys who are experienced in *Atkins* litigation is highly advised.

1.9  **Pre-trial Hearing**

Many statutes require a pretrial hearing where a judge determines whether the defendant is mentally retarded. *See, e.g.*, Ariz. Rev. Stat. § 13-703.02 (G) (“the trial court shall hold a hearing to determine if the defendant has mental retardation”); Ark. Code Ann. § 5-4-618 (d)(2) (“Prior to trial, the court shall determine if the defendant is mentally retarded); Colo. Rev. Stat. § 18-1.3-1102(2) (trial court to conduct a hearing on mental retardation motion no later than ten days prior to trial); Fla. R. Crim. Pro. 3.203 (defendant makes pretrial motion and trial court conducts hearing prior to trial); Ind. Code § 35-36-9-5 (same); Ky. Rev. Stat. § 532.135 (same); The Kentucky Supreme Court ruled in *Skaggs v. Commonwealth*, ___ S.W.3d ___, 2005 WL 2314073, *3 (Ky. Sept. 22, 2005) that both parties were entitled to appeal a ruling on mental retardation by the trial court. Okla. Stat. Ann. § 21-701.10b(D) & (E) (authorizing pretrial ruling on mental retardation and stating that the ruling shall not be the subject of an interlocutory appeal).

One statute allows a defendant to seek a pretrial judicial ruling on mental retardation, or receive a judicial ruling sometime after the guilty verdict. *N.Y. Crim. Pro. Consol. Law §*
400.27(12). Other statutes give the defendant the option of a pre-trial hearing before a judge or choosing to have a later jury determination. See, e.g., Cal. Pen. Code § 1376 (b)(1) (“At the request of the defendant, the court shall conduct the hearing without a jury prior to the commencement of the trial.”)\(^{68}\) Some statutes allow a pretrial judicial determination of mental retardation only if both parties agree. See, e.g., La. Code Crim. Pro. § 905.5.1 (C) (“If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.”); Mo. Rev. Stat. § 565.030, subsection 5 (“Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial . . . .”); N.C.G.S. § 15A-2005(c) (“Upon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded. The court shall order such a hearing with the consent of the State.”)

The Tennessee statute provides that the mental retardation decision is to be made by the trial court. Tenn. Code Ann. § 39-13-203(c). Although it is not absolutely clear from the statute that the decision is to be made pretrial, it appears that is what is intended and that is how it is being construed. See, e.g., State v. Strode, 232 S.W.3d 1, 9 (Tenn. 2007) (noting that if a trial court makes a pretrial finding that the defendant is not mentally retarded, the statute nevertheless permits the defendant to later offer evidence of diminished intellectual capacity as mitigation.) While the Tennessee statute precludes an interlocutory appeal of a finding that the defendant is not mentally retarded (Tenn. Code Ann. § 39-13-203(f)), the Tennessee Supreme Court has approved an interlocutory appeal from a finding that a defendant is mentally retarded. State v. Strode, 232 S.W.3d at 9.

Finally, some statutes do not provide the defendant with the option of a pretrial determination of the mental retardation question. See, e.g., Ga. Code Ann. 17-7-131; Conn. Gen. Stat. § 53a-46a(h); Va. Code Ann. § 19.2-264.3:1.1

Where there is no statute prescribing the procedures for deciding the question of mental retardation, some courts have announced rules. In State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002), the Ohio Supreme Court ruled that a judge, not a jury, is to decide the mental retardation issue whether it is raised before trial or post-conviction. And where it is raised in the trial context, the hearing should be conducted similarly to a competency determination.

Before Oklahoma enacted its statute, the Oklahoma Court of Criminal Appeals had held that where a defendant intended to claim mental retardation as a bar to a death sentence, he or she was required to file “Notice of Intent to Raise Mental Retardation as a defense to the imposition of the death penalty and Motion to Quash Bill of Particulars due to Mental Retardation within sixty (60) days from the date the State of Oklahoma files its Bill of Particulars or from the date of arraignment, whichever is later.” Blonner v. State, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). If the defendant made the required showing, see subsection 1.1, supra, a jury trial would be held on the mental retardation question within

\(^{68}\) Where a petitioner is found to be mentally retarded at such a hearing, the prosecution is permitted to appeal or petition for a writ of prohibition or mandamus. People v. Superior Court (Vidal), 155 P.3d 259, 265 (Cal. 2007)
60 days of the defendant’s notice. *Id.* at 1140. A defendant did have the option, however, of having the trial court decide the mental retardation issue pre-trial. Choosing that option waived the right to a jury trial on mental retardation. *State ex rel. Lane v. Bass*, 87 P.3d 629, 633 (Okla. Crim. App. 2004), *rev’d in part on other grounds, Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006).

In *Morrow v. State*, 928 So.2d 315, 324 (Ala.Crim.App.2004), the Alabama Court of Criminal Appeals encouraged “trial courts to resolve[ ] mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial.”

The South Carolina Supreme Court announced in *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003), that the trial judge is to make the mental retardation pretrial.


Pennsylvania is without an *Atkins*-related statute. Although the Pennsylvania Supreme Court has not mandated a procedure for determining mental retardation when raised at trial, it did not criticize the trial court’s handling of a mental retardation claim in *Commonwealth v. VanDivner*, 962 A.2d 1170 (Pa. 2009), where the defendant sought and was granted a pretrial hearing on this issue.

If counsel believes that a pre-trial judicial hearing would be preferable to a determination by a judge or jury that has found the defendant guilty of capital murder, counsel should argue that a hearing is constitutionally required. *See, e.g., Jackson v. Denno*, 378 U.S. 368 (1964) (issue of voluntariness of confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence); *but see State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004) (rejecting argument that pretrial determination is constitutionally required, but reading statute “flexibly” and concluding a pretrial hearing is permitted by statute and then ordering it for all cases.); *State v. Turner*, 936 So.2d 89 (La. 2006) (rejecting argument that Louisiana statute violates due process and the Eighth Amendment by requiring jury finding on mental retardation.); *Lizcano v. State*, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (unpublished) (finding no due process violation in having jury make mental retardation determination during punishment phase); *Hunter v. State*, 243 S.W.3d 664, 672 (Tex. Crim. App. 2007) (“In the absence of legislation or a constitutional requirement directing when the determination of mental retardation is to be made or by whom, the trial

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69 This overruled *Murphy v. State*, 66 P.3d 456 (Okla. Crim. App. 2003) and *State ex rel. Lane v. Bass*, 87 P.3d 629 (Okla. Crim. App. 2004) to the extent they held a jury determination of mental retardation was to occur during the sentencing stage of the capital trial.
court committed no error in denying appellant a pretrial determination of mental retardation by a judge or jury separate from that determining guilt.

Where a pre-trial hearing is conducted, and the ruling is adverse to the defendant, counsel may still argue that the defendant retains the right to a jury ruling on mental retardation either as a matter of state or federal law or under Ring v. Arizona, 536 U.S. 584 (2002) (a defendant is entitled to a jury finding on any fact that increases the maximum authorized punishment) and/or the Eighth Amendment requirement of heightened reliability in capital cases. See, e.g., United States v. Hardy, 644 F.Supp.2d 749, 750 (E.D. La. 2008) (in federal death penalty case, if district court concludes that defendant failed to establish his mental retardation at the pretrial hearing, defendant may still present evidence and argue his mental retardation to the jury); Franklin v. Maynard, 588 S.E.2d 604, 606 (S.C. 2003) (where trial court makes pre-trial ruling that defendant is not mentally retarded, jury is not to be informed of this finding and if jury finds mental retardation mitigating factor during sentencing phase, a death sentence may not be imposed.); State v. Flores, 93 P.3d 1264, 1267 (N.M. 2004) (defendant is entitled to submit mental retardation question to jury even after adverse finding by trial court); People v. Smith, 193 Misc.2d 538, 753 N.Y.S.2d 809 (N.Y. S.Ct. 2002) (although state statute provides for judicial determination of mental retardation, portion of statute that states that mental retardation at time of crime is a mitigating factor was unconstitutional after Atkins and remedy was to instruct jury during sentencing proceeding that a sentence of death was precluded if jury found defendant mentally retarded by a preponderance of the evidence). Any purported waiver of that right should be challenged as unconstitutional. See, e.g., Simmons v. United States, 390 U.S. 377.

But see Schriro v. Smith, 126 S.Ct. 7 (2005) (per curiam) (summarily reversing federal court of appeals decision ordering Arizona to have jury resolve mental retardation question, noting that Arizona has not yet had the opportunity to apply its chosen procedure); Commonwealth v. Bracey, 986 A.2d 128, 130 (Pa. 2009) (there is no federal constitutional right to a jury trial for Atkins claims presented in collateral proceedings.”); State v. Grell, 135 P.3d 696, 702 (Ariz. 2006) (Ring v. Arizona does not require that a jury determine beyond a reasonable doubt that the defendant is not mentally retarded, and there is no constitutional requirement that the jury revisit the question of mental retardation after there has been a pretrial ruling on the question by a judge); Russell v. State, 849 So.2d 95, 148 (Miss. 2003) (“[w]e find that not being mentally retarded is not an aggravating factor necessary for imposition of the death penalty, and Ring has no application to an Atkins determination.”); United States v. Webster, 392 F.3d 787, 792 (5th Cir. 2004) (“Ring, even if retroactive, does not render the absence of mental retardation an element of the sentence that is constitutionally required to be determined by a jury”); Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005) (defendant “has no right under Ring and Atkins to a jury determination of whether he is mentally retarded.”); State v. Laney, 627 S.E.2d 726, 731-732 (S.C. 2006) (threshold mental retardation determination need not be made by jury under Ring); Head v. Hill, 587 S.E.2d 613, 620 (Ga. 2003) (“the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under Ring”); Howell v. State, 151 S.W.3d 450, 465 (Tenn. 2004) (mental retardation does not have to be decided by jury); Walker v. True, 399 F.3d 315, 326 (4th Cir.2005) (rejecting claim that Ring requires a jury determination of mental retardation); State v. Were, 2005 WL 267671, *9 (Ohio App. Feb. 4, 2005) (rejecting arguments that a jury finding on mental retardation is required under Blakely and that jury should have been instructed that a death sentence was precluded should it find defendant was mentally retarded.); Beckworth v. State, ___ So.2d ___, 2005 WL 2046331, *16 (Ala. Crim. App. 2005) (capital defendant not entitled to jury determination on question of mental retardation); Pruitt v. State, 834 N.E.2d 90, 113 (“the Sixth Amendment is not in play with regard to the pretrial determination of mental retardation in death sentence cases.”); Ex Parte Briseno, 135 S.W.2d 1, 11 (Tex.Crim.App. 2004) (habeas petitioner not entitled to jury determination of mental retardation).
(1968) (it is intolerable to require a defendant to surrender one constitutional right in order to assert another.)

1.10  FINDING DURING OR AFTER TRIAL

Where there is a pretrial finding that a defendant is not mentally retarded, some statutes expressly permit the defendant to raise the issue anew in front of the sentencing jury. Ark. Code Ann. § 5-4-618(d)(2)(A) (“If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial.”); La. Code Crim. Pro. § 905.5.1 (C) (2) (“Any pretrial determination by the judge that a defendant is not mentally retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury pursuant to this Section.”); Mo. Rev. Stat. § 565.030, subsection 5 (“Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.”); N.C.G.S. § 15A-2005(e) (if trial court makes pretrial determination that defendant is not mentally retarded, defendant may still seek a jury determination of mental retardation during the sentencing hearing); Okla. Stat. Ann. § 21-701.10b(F) (providing for jury determination of mental retardation question if trial court resolves issue adversely to defendant in pretrial hearing). This statute overrules Blonner v. State, 127 P.3d 1135, 1144 (Okla. Crim. App. 2006) (ruling prior to Oklahoma’s enactment of a statute implementing Atkins that a defendant could not relitigate the mental retardation determination during the penalty phase where a pretrial jury resolved the question adversely to the defendant.)

As discussed in the prior section, some courts in other jurisdictions have ruled that revisiting the mental retardation finding in the sentencing phase is allowed. But see Bowling v. Commonwealth, 163 S.W.3d 361, 380-81 (Ky. 2005) (Kentucky statute exempting mentally retarded defendant’s from execution requires pretrial judicial determination and does not afford a death-eligible defendant the right to present the issue to a jury in the event of an adverse determination by the trial judge.); State v. Were, 890 N.E.2d 263, 295 (Ohio 2008) (trial court did not err by failing to instruct the jury that the death penalty was not an option if it concluded that defendant was mentally retarded because the trial court, not the jury, determines mental retardation in Ohio).

In Georgia, the mental retardation question is resolved by the jury during the guilt phase. Ga. Code Ann. 17-7-131. Other statutes require that the mental retardation determination be made by the jury at the time of sentencing, unless a jury is waived. See, e.g., Conn. Gen. Stat. § 53a-46a(h); Va. Code Ann. § 19.2-264.3:1.1. In Louisiana, the jury decides the question of mental retardation during the sentencing hearing unless the parties agree to a pre-trial judicial determination.71  La. Code Crim. Pro. § 905.5.1 (C) (1). Maryland's

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71 In State v. Dunn, 974 So.2d 658 (La. 2008), the Louisiana Supreme Court ruled that post-conviction mental retardation determinations are not governed by the statute and that the post-conviction court rather than a jury
intermediate appellate court has construed a Maryland rule of court to require that the issue be decided by the sentencing jury. *Richardson v. State*, 598 A.2d 1, 3-4 (1991) (construing Md. Rule 4-343(h)), *aff’d*, 630 A.2d 238 (1993). Before the death penalty was abolished in New Jersey, the New Jersey Supreme Court ruled that the mental retardation determination was to be made by the jury at the close of the guilt phase of the trial, after the jury convicts the defendant and finds a capital trigger. *State v. Jimenez*, 908 A.2d 181, 191-192 (N.J. 2006). There is one except to this rule and that is in cases where reasonable minds could not differ as to the existence of mental retardation. In such cases, the trial court should decide the *Atkins* issue pre-trial, thereby avoiding a capital prosecution altogether. *Id.*

Because the federal death penalty statute is silent on the timing of the mental retardation determination, in *United States v. Cisneros*, 385 F.Supp.2d 567, 571 (E.D. Va. 2005), the district court determined that the mental retardation decision would be made by the jury during its sentencing deliberations. As noted in the prior section, many other federal district courts have opted for a pretrial determination, largely for reasons of judicial economy. In Texas, a state without a governing statute, the Texas Court of Criminal Appeals has rejected the argument that a separate jury should be empaneled to decide the issue of mental retardation. *Neal v. State*, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008). It also was unpersuaded by the defendant’s claim that the absence of statutory guidelines violated his equal protection rights in that different defendants are subject to different trial procedures. *Id.* Finally, it found no merit to the defendant’s argument that the jury’s mental retardation finding, which came during the sentencing phase, was tainted because the jury was predisposed to find he was not mentally retarded after finding him guilty of the capital offense. The court explained:

> We have found no authority for the proposition that mental retardation may not be determined by a jury that has already determined guilt, and appellant cites none. Indeed, we have noted that the nature of the offense itself may be relevant to a determination of mental retardation; thus, a jury already familiar with the evidence presented at the guilt stage might be especially well prepared to determine mental retardation.


Recently, in *State v. Ward*, 694 S.E.2d 729 (N.C. 2010), a case involving a sentencing retrial, the North Carolina Supreme Court addressed whether a trial court could or must bifurcate the mental retardation proceeding from the sentencing proceeding, something the statute was silent on. In finding that trial courts have discretion to order bifurcation the court observed that a trial court faced with a strong case of mental retardation could determine that judicial efficiency favored bifurcation in that a second proceeding would

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*Atkins v. Virginia*
likely prove unnecessary. *Id.* at 732. Or, “when the evidence of aggravation is especially gruesome or heinous, the judge could conclude that viewing or hearing such evidence might unduly prejudice the jury in its determination of the issue of mental retardation” given that “the State's evidence of aggravating circumstances will focus on the worst aspects of the offense itself, much of which may be entirely irrelevant to the issue of mental retardation.” *Id.* at 732-733. On the facts of this case, however, the North Carolina Supreme Court ruled that the trial court did not abuse its discretion in denying the defendant’s bifurcation request.

As noted above, in subsection 1.9, where a pre-trial judicial hearing is not mandated by statute or case law counsel may wish to argue that a pre-trial determination by a judge is constitutionally required and/or preferable for reasons of judicial economy. *But see State v. Turner*, 936 So.2d 89, 96-97 (La. 2006) (rejecting argument that Eighth Amendment requires judge rather than jury to decide mental retardation issue), *cert. denied*, 549 U.S. 1290 (2007); *State v. Holmes*, 5 So.3d 42 (La. 2009) (where state refused to acquiesce in pre-trial determination of mental retardation, trial court lacked authority to quash the indictment).

A number of states require the judge to make the finding on mental retardation either following the conviction of capital murder or as part of the sentencing process. *See, e.g.*, Kan. Stat. Ann. § 21-4623; Del. Code Ann. § 4209(d); Neb. Rev. Stat. § 28-105.01(4). In Delaware, evidence of mental retardation is presented during the sentencing phase but it is the judge that makes the finding on the existence or non-existence of mental retardation prior to imposing sentence. Del. Code Ann. tit. 11, § 4209(d). Again, counsel may wish to argue for a pre-trial determination under *Jackson v. Denno* and/or a jury determination pursuant to *Ring v. Arizona* and/or the Eighth Amendment.

In *Lizcano v. State*, 2010 WL 1817772, *15-16* (Tex. Crim. App. May 5, 2010) (unpublished), the appellate court rejected the defendant’s argument that because he bore the burden of proving mental retardation, he should have been permitted to open and close the arguments at the punishment phase with respect to the issue of mental retardation. Although the rules of civil procedure require that the party with the burden of proof be allowed to open and close, these rules were inapplicable in a criminal case.

1.11 JURY ISSUES

In *Blonner v. State*, 127 P.3d 1135, 1140 (Okla. Crim. App. 2006), prior to Oklahoma’s enactment of a statute governing mental retardation proceedings, the Oklahoma Court of Criminal Appeals ruled that juries empanelled to make findings on mental retardation were not to be death qualified. Further, in post-conviction jury trials on mental retardation, the jury was not to be told about the facts of the capital case. In *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005), the appeals court observed that “[r]etrospective mental retardation proceedings in a capital case are unlike any other jury proceedings, and require great care in order to avoid overwhelming prejudice to the defendant.” *Id.* at 653. In that case, the Oklahoma Court of Criminal Appeals found that the trial court’s rejection of
defense counsel’s request for individualized voir dire led directly to a tainted jury panel given a prospective juror’s revelation of the facts of the capital crime in the presence of the venire.

Where a post-conviction jury trial on mental retardation is held in Georgia, death qualification has been found to be unnecessary except for perhaps in exceptional circumstances. *State v. Patillo*, 417 S.E.2d 139, 141 fn. 1 (Ga. 1992).

In contrast, in *Atkins v. Commonwealth*, 631 S.E.2d 93, 100 fn. 8 (Va. 2006), the Virginia Supreme Court found that death qualification is proper for a jury in a post-trial mental retardation proceeding. It arrived at this conclusion because the jurors would be informed that Atkins had previously been convicted of capital murder and that a death sentence would be precluded if the jury found him to be mentally retarded. These revelations were themselves deemed appropriate because of the structure of Virginia’s mental retardation statute, whereby jurors normally make the mental retardation finding during sentencing and learn through the verdict forms the significance of their finding on the sentence. *But see State v. Patillo*, 417 S.E.2d 139, 141 fn. 1 (Ga. 1992) (in post-conviction mental retardation trial, jury is not to be told that death sentence will be vacated if the jury returns with a finding of mental retardation.) The Virginia Supreme Court did find error, however, in the trial court informing the jury that Atkins had been sentenced to death by a prior jury. “The fact that the jury knew a prior jury had sentenced Atkins to death prejudiced his right to a fair trial on the issue of mental retardation.” *Atkins v. Commonwealth*, 631 S.E.2d at 99. The Virginia Supreme Court ordered that the new venire be informed as follows:

> Daryl Atkins had been convicted of the offense of capital murder during the commission of a robbery. The United States Supreme Court and the General Assembly of Virginia have determined that a defendant convicted of capital murder, but who is mentally retarded, is not subject to the imposition of the death penalty. It is your duty to determine whether Atkins is mentally retarded.

*Id.* at 100.

In jurisdictions where a jury decides the question of mental retardation, in many instances it is unclear what is to happen if the jury cannot reach a unanimous decision. The Oklahoma Court of Criminal Appeals first addressed that issue in *Lambert v. State*, 71 P.3d at 72, a case in post-conviction posture, and ruled: “If there is no unanimous verdict either finding or rejecting mental retardation, the trial court will resentence Lambert to life imprisonment without parole.” This holding was reaffirmed in *Blonner v. State*, 127 P.3d 1135, 1142 (Okla. Crim. App. 2006).72 Oklahoma subsequently adopted a statute implementing *Atkins* that provides that non-unanimity on the question of mental retardation does not require imposition of a life without parole sentence. Rather, the jury proceeds to the sentencing decision where evidence of mental retardation can be considered as mitigation. Okla. Stat.

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72 The Oklahoma Court of Criminal Appeals had rejected, however, the argument that jurors should be provided with non-unanimous verdict forms or informed what would happen if they were not unanimous. *Myers v. State*, 130 P.3d 262, 269 (Okla. Crim. App. 2005); *see also Hooks v. State*, 126 P.3d 636, 642 (Okla. Crim. App. 2005).
Ann. § 21-701.10b(G). The New Mexico Supreme Court, prior to abolition of the death penalty in that state, ruled that a defendant will receive a life sentence if the jury is unable to unanimously agree on whether the defendant is mentally retarded. *State v. Flores*, 93 P.3d 1264 (N.M. 2004); *see also State v. Jimenez*, 924 A.2d 513 (N.J. 2007) (if a single juror finds defendant has met his burden of proving mental retardation by a preponderance of the evidence, defendant is not eligible to receive a death sentence); *cf. State v. Williams*, 22 So.3d 867 (La. 2009) (jury instructed that if it does not unanimously find that defendant has established mental retardation, it is to deliberate on sentence).

In *United States v. Cisneros*, 385 F.Supp.2d 567 (E.D. Va. 2005), a federal death penalty case, the district court held that the mental retardation determination was to be made by the jury during the penalty phase. A special verdict form would require the jurors to specify the number of jurors, if any, who found that the defendant had established his mental retardation by a preponderance of the evidence. If the jury unanimously found mental retardation, the district court would rule that the defendant was not eligible for the death penalty. If not all jurors agreed, however, the jurors who found mental retardation would be instructed to consider that finding in deciding whether to sentence the defendant to death. *Id.* at 571.

Where a jury is split on the question of mental retardation, counsel will want to argue that the Eighth and Fourteenth Amendments’ requirements of a heightened degree of reliability in capital cases require that a sentence less than death be imposed.

In *Rogers v. State*, 653 S.E.2d 31 (Ga. 2007), the Georgia Supreme Court ruled that the trial court did not abuse its discretion by not submitting to the jury special interrogatories based on *Atkins*, along with related jury instructions and a verdict form utilizing the statutory definition of mental retardation. The Georgia statute requires that the jury at trial be informed that a finding of mental retardation will result in the defendant being given over to either the Department of Corrections or the Department of Human Resources. O.S.C.A. § 17-7-131(b)(3)(C). In cases that do not fall under the statute, the Georgia Supreme Court has found that the same information should be provided to the jury. *Morrison v. State*, 583 S.E.2d 873, 877 (Ga. 2003). Otherwise, the jury could erroneously conclude that a finding of mental retardation will mean the defendant will escape penal consequences. The court found no error, however, in the refusal of the trial court to further instruct the jury that a finding of mental retardation would result in a life sentence for the defendant. *Id.* at 877-78.

In *State v. Locklear*, 681 S.E.2d 293, 310 (N.C. 2009), the North Carolina Supreme Court ruled that the trial court erred in refusing to instruct the jury that a verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without the possibility of parole. In reaching this conclusion, the court first observed that “[i]dentifying mentally retarded offenders can be an inherently difficult task requiring particular attention to procedural safeguards.” *Id.* at 312. It then noted that speculation over the defendant’s fate if he is found mentally retarded could cause the jurors to fall prey to their fears and render a finding on the issue based on an overriding fear for the community’s safety rather than on the clinical evidence. The court then concluded that the
defendant was prejudiced. Although the jury did not find his mentally retarded, it found as mitigating circumstances many facts that would also tend to establish mental retardation on the part of the defendant. The court rejected the State’s argument that prejudice could not be shown because defense counsel during argument informed the jurors of the sentence the defendant would receive if the jurors found him to be mentally retarded. Not only are arguments by counsel generally viewed as advocacy, the State argued to the jury that the defendant’s mental retardation claim was about “avoiding punishment.”

In *Hooks v. State*, 126 P.3d 636, 645 (Okla. Crim. App. 2005), the Oklahoma Court of Criminal Appeals rejected the petitioner’s argument that the trial court erred in excusing a prospective juror who was a counselor and who had seen mentally retarded clients. The prospective juror was unable to assure the court that she would follow a legal definition of mental retardation if it conflicted with the clinical definition that she had been taught and used in practice. On appeal, the petitioner argued that the trial court should have provided the prospective juror with the legal definition to determine if there was an actual conflict before excusing her. The Oklahoma Court of Criminal Appeals found no abuse of discretion. Although it acknowledged there was little likelihood of a conflict given that there was almost no difference between the legal definition and the clinical one, that was not the issue. The issue was that the prospective juror would not agree to follow the law, whatever it was.

1.12 DIRECT APPEAL

When *Atkins* was first issued, courts and legislatures had to address how to implement the decision in cases pending on direct appeal from pre-*Atkins* trials. The cases below are illustrative of the procedures that were adopted, as well as revealing about the type of evidence courts were initially placing emphasis on in addressing mental retardation claims. Factors such as unruly conduct during trial, a marital history, and having had children have been cited as reasons for finding that no issue about mental retardation exists. In appeals from post-*Atkins* trials, courts unfortunately continue to rely on factors that clinicians deem irrelevant in affirming findings that defendants are not mentally retarded. Counsel must be prepared to refute false assumptions made by courts (and jurors) about the significance of evidence purportedly undermining a finding of mental retardation.

For cases that were pending on direct appeal at the time the Supreme Court announced the *Atkins* decision, some courts decided to remand for evidentiary hearings in the trial court where there was significant evidence of mental retardation in the trial record. In Louisiana for example, in *State v. Williams*, 831 So.2d 835, 857 (La. 2002)74, the Louisiana Supreme Court remanded the case for a hearing on mental retardation in light of the following: (1) Williams was 16 years of age at the time of the murder75, still within the “developmental

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74 The Louisiana Supreme Court also set forth procedures for post-*Atkins* mental retardation determinations, and adopted a definition of mental retardation from an existing statute that was unrelated to capital trials. Following the *Williams* decision, the Louisiana legislature enacted new statutes implementing *Atkins* that replaced the *Williams* procedures and definition for cases pre-trial.

75 The subsequent Supreme Court decision in *Roper v. Simmons* exempted Williams from execution based on
stage” by any definition of that term; (2) Williams would not be 22 years of age until 2003, still within the development stage by a Louisiana statutory definition of mental retardation; (3) Williams had an IQ within the range used in the diagnosis of mental retardation; (4) Williams suffered from lead poisoning as an infant and had numerous mental health commitments prior to the age of 15; (5) Williams was enrolled in “special ed” classes; and (6) the issue of mental retardation had not been put before the fact finder in light of the Atkins restriction on the death penalty. See also State v. Scott, 921 So.2d 904 (La. 2006), overruled in part, State v. Dunn, 974 So.2d 658 (La. 2008) (on direct appeal from a pre-Atkins trial, record contained reasonable grounds to doubt whether defendant is mentally retarded requiring remand for hearing on the issue; record showed that defendant received special education services throughout his education and consistently performed below grade level, he failed the fourth grade twice before being administratively promoted to the fifth grade, IQ tests over his lifespan ranged near the borderline range of intellectual functioning, defendant had never been employed and had minimal and vague career aspirations, school records and expert evaluations had a range of opinion as to the defendant’s correct diagnosis, school classification for the purpose of receiving special educational services, his strengths, weaknesses, and level of functioning; although the State argued that defendant’s behavior on video during the crime was inconsistent with mental retardation, something that can be relevant to a mental retardation determination, it was premature to rule on mental retardation based on the trial record.); State v. Dunn, 831 So.2d 862 (La. 2002) (where defendant presented uncontradicted expert testimony that he was mentally retarded at his pre-Atkins trial, case is remanded for evidentiary hearing on the issue despite evidence in record that defendant received college credits for courses taken in prison and had been successfully employed for a period of time)76; Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004) (remand for an evidentiary hearing on mental retardation where record included IQ scores of 64 and 67 during developmental period, screening test administered at time of trial indicated mental retardation, and expert testimony suggested adaptive deficits in a number of areas; that defendant had a history of employment and the circumstances surrounding the capital offense suggested no mental retardation did not defeat need for hearing); Skaggs v. Commonwealth, ___ S.W.3d ___, 2005 WL 2314073 (Ky. Sept. 22, 2005) (remand for evidentiary hearing where certified clinical psychologist opined at trial that defendant was mentally retarded and prosecution expert came to a contrary conclusion; although 1991 IQ score of 73 is above the maximum of 70 required by state law, school records indicated that defendant’s IQ was measured at 64 on an unspecified date.)

In Florida, the state supreme court adopted a new court rule following Atkins that permitted defendants who were appealing the denial of a post-conviction relief petition to raise an Atkins claim. Fl. R. Crim. Proc. § 3.203(d)(4)(E).77 In Thomas v. State, 894 So.2d 126,

76 The Louisiana Supreme Court had observed that the record did not indicate the content of the college course or what Dunn’s responsibilities were at his job. Counsel litigating a mental retardation claim needs to carefully investigate educational and employment history to ensure that what might appear to rebut a finding of mental retardation might actually support it. Counsel will need to know what was required of the defendant and what the defendant was actually able to achieve.

77 “If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in
137 ( Fla. 2004), the defendant raised mental retardation in his direct appeal. The Florida Supreme Court interpreted this as an invocation of § 3.203(d)(4)(E), and remanded to the circuit court for a determination of mental retardation. The Arizona Supreme Court remanded cases for mental retardation determinations even where the trial court, pre-Atkins, expressly found that mental retardation had not been established. State v. Grell, 66 P.3d 1234 (Ariz. 2003); State v. Canez, 74 P.3d 932 (Ariz. 2003). The state supreme court explained in the Grell case:

 Although Grell presented testimony from two experts, and the State responded in kind, the adversarial procedure by which Grell's mental retardation was considered differed in nature and scope from the process created by the legislature in A.R.S. § 13-703.02, which contemplates a more thorough examination by experts selected by the trial judge, in consultation with the parties. Under the statute, mental retardation is considered individually, and not as one variable among many in the mitigation formula. Due process demands that Grell's mental retardation claim receive a hearing at which the court considers the constitutional principles announced in Atkins. Thus, we remand to the trial court to redetermine whether Grell is mentally retarded and therefore ineligible to receive the death penalty.

State v. Grell, 66 P.3d at 1240.

In many more instances, courts looked to the trial record and found that no remand was necessary or rejected post-Atkins arguments that the record established mental retardation. See, e.g., State v. Campbell, 983 So.2d 810 (La. 2008) (record did not show a reasonable likelihood that defendant is mental retarded despite preliminary full-scale IQ score of 67 given that the expert who administered the IQ test questioned the accuracy of the score, defendant was never diagnosed as mentally retarded while in school, his placement in special education appeared related to behavioral and emotional problems and testimony by family and friends did not mention possible mental retardation; records also contained evidence of adaptive skills negating a reasonable likelihood of mental retardation: defendant's self-report of work at a saw mill, on diesel trucks, and at a paper mill, his claim to have had girlfriends, his claim to be working on his G.E.D. in prison, and his claim to have spent his time in jail reading law books); State v. Manning, 885 So.2d 1044 (La. 2004) (on direct appeal from pre-Atkins conviction and sentence, the record failed to show the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.”

During the penalty phase, Thomas had presented a mental health expert who testified that Thomas had a full scale IQ of 61, which fell in the range of mild mental retardation. The expert also testified that Thomas had been placed in special education classes and had occupational impairments and speech problems. Thomas v. State, 894 So.2d at 131.

Justice Johnson dissented, stating, inter alia, that the case should be remanded to the trial court for a determination of mental retardation.
a reasonable likelihood that defendant is mentally retarded and so request for remand denied; although a report indicated that defendant had been diagnosed as “mildly retarded or at least a slow learner” and testimony established that defendant had received a score of 50 out of 100 on his Global Assessment of Functioning test, the State’s rebuttal witness testified that defendant’s IQ was between 70 and 80, and that he did not consider defendant mentally retarded, but rather concluded that defendant functioned in the “just below average” range; the Uniform Capital Sentence Report placed defendant’s IQ in the medium range of between 70 and 100; defendant’s conduct and demeanor during the capital murder investigation did not support his contention that he is mentally retarded); State v. Tate, 851 So.2d 921, 942 (La. 2003) (no remand where defense expert testified at trial that defendant with IQ of 75 was not mentally retarded under state definition.); Ex parte Perkins, 851 So.2d 453 (Ala. 2002) (on remand from United States Supreme Court for reconsideration in light of Atkins, no hearing necessary where record showed the defendant had a full-scale IQ of 76 as an adult, he had obtained his GED in prison and completed community college courses there, his intellectual functioning had declined as he aged due to alcohol abuse, he had been married for ten years, and he had maintained a job as an electrician for a short period.); Snyder v. State, 893 So.2d 488 (Ala. Crim. App. 2003) (finding no evidence in the record of mental retardation and noting that defendant even owned his own business at the time of the capital offense); Adams v. State, ___ So.2d ___, 2003 WL 22026043, *56 fn.9 (Ala. Crim. App. 2003), rev’d in part on other grounds, 2005 WL 3506662 (Ala. Dec. 23, 2005) (record did not support finding of mental retardation where defendant was in high school at time of murders, had held several jobs prior to arrest, and had told probation officer that he had been a camp counselor); Bryant v. State, ___ So.2d ___, 2003 WL 1424026 (Ala. Crim. App. 2003) (no evidence of mental retardation where record showed IQ score of 85); Turner v. State, 924 So.2d 737, 784 fn. 12 (Ala. Crim. App. 2003) (Atkins not implicated where defendant denied mental problems and he appeared to be educated and reasonably articulate); Stephens v. State, ___ So.2d ___, 2005 WL 1925720 (Ala. Crim. App. 2005), rev’d on other grounds, 2006 WL 2089894 (Ala. July 28, 2006) (defendant not mentally retarded where record showed defendant had an IQ of 77, he completed high school, he had a commercial driver’s license and had performed successfully as a qualified truck driver, he was married, he had fathered three children, and he was a caring father.); Peraita v. State, 897 So.2d 1161, 1207 (Ala.Crim.App. 2003) (trial record did not demonstrate defendant was exempt from execution where it showed only an IQ score of 75 obtained at age 19, defendant had been in several learning disability classes, and defendant had a history of criminal activity.); Yeomans v. State, 898 So.2d 878, 901-02 (Ala.Crim.App. 2004) (mental retardation not established where record showed IQ scores of 67, 78, 83, 72, testimony by an expert that the defendant was functioning in borderline level of intelligence, grades of A’s and B’s during the year defendant was not in special education, enrollment in shop and driver’s education in eleventh grade, steady employment as an adult, more than one marriage, fathering and raising of several children, and efforts to teach his children right from wrong.80); McGowan v. State, ___ So.2d ___, 2003 WL 22928607, *57-58 (Ala.Crim.App.2003), (remand not required where record showed the

80 That the defendant knew right from wrong clearly does not defeat a claim of mental retardation. See, e.g., Atkins v. Virginia, 536 U.S. 304, 318 (2002) (noting that mentally retarded individuals “frequently know the difference between right and wrong”). Further, mentally retarded individuals often marry and procreate. Thus, reliance on marriage and having children to show adaptive functioning is questionable.
defendant had a full-scale IQ of 76 as an adult, he had been married twice, he had fathered a child, he had maintained construction jobs in numerous states, he owned a mechanic shop, and he took classes in prison in order to obtain his high school diploma.); Lewis v. State, 889 So.2d 623 (Ala.Crim.App. 2003) (remand not necessary where record showed an IQ score of 58 received when the defendant was 33 years old but the expert who administered the test in question concluded the scores achieved were below defendant’s actual abilities, another expert testified that defendant’s intellectual functioning was actually above average, earlier testing placed defendant in the average range of intelligence and showed he had a 12th grade reading level, defendant had received a GED and completed some college, defendant had been married and fathered a child, defendant had held various jobs including working as a mechanic, and the nature and circumstances of the capital offense, including defendant’s articulate and detailed police statement, did not support a finding of mental retardation.); Calhoun v. State, 932 So.2d 923, 978 (Ala.Crim.App. 2005) (no finding of mental retardation where record showed defendant had received IQ scores of 66 and 58 on two different tests but in each instance the expert who had administered the test opined that the defendant had been malingering, defendant had a four year marriage and continued relationship with his son after he divorced, defendant was employed throughout his adult life, and defendant held a job as a concrete finisher at the time of the capital crime.); Stallworth v. State, 868 So.2d 1128 (Ala.Crim.App. 2001) (remand not required where record showed that although defendant received a verbal IQ score of 78 on the WAIS-R at the time of trial, the expert who evaluated defendant specifically stated he was not mentally retarded but was instead in the upper range of borderline intelligence, defendant received a full scale IQ score of 77 when the complete WAIS-R was administered two months later, an expert opined that defendant was in the borderline range of mental retardation even though he had qualified for special education services in school, as well as vocational rehabilitative services, defendant had worked most of his adult life, being employed as a cook, a brick mason and as a landscaper, defendant had maintained a long-term relationship, as well as fathered a child, and although defendant was unemployed at the time of trial, he had qualified for food stamps.); Ex Parte Smith, ___ So.2d ___, 2003 WL 1145475 (Ala. 2003) (defendant not entitled to remand for evidentiary hearing even though record included expert testimony that defendant was mildly mentally retarded with an IQ of 72 and his IQ had been measured at 66 at age 12 where the defense expert failed to take into consideration significant facts that undermined his opinion, the state’s expert was unable to diagnosis mental retardation, defendant had an ongoing year-long relationship with his girlfriend and they planned to have children, defendant was working a construction job at the time of the murders and had been able to hold various other jobs, defendant was involved in an interstate illegal-drug enterprise, and circumstances surrounding the capital offense indicated that defendant did not suffer from deficits in his adaptive behavior.); Brown v. State, 982 So.2d 565 (Ala.Crim.App. 2006) (defendant not exempt from execution based on record showing IQ score of 76, extremely unruly conduct during trial, evidence indicating defendant suffered from psychotic and delusional episodes, expert opinion that defendant’s intellectual functioning was higher at the time of trial than indicated by the 76 IQ score, a report describing the defendant as a likeable child who enjoyed sports, board games and playing cards, evidence that defendant had maintained successful relationships

81 There is no mention in the decision of practice effect.
with foster parents and with an aunt, receipt of B’s and one C in 8th grade, expert testimony 
that defendant exhibited malingering behavior, evidence that the defendant could pick the 
locks of his handcuff and jail cells, reports that defendant had learned to swallow and 
regurgitate razor blades without injury to himself, testimony by prison guards that 
defendant could control himself when he wanted to, testimony that defendant bragged that 
he got away with things by getting sent to mental facilities, and evidence that defendant 
had maintained a number of jobs and had one significant relationship with a female.; Scott 
v. State, 878 So.2d 933 (Miss. 2004) (trial record did not support a remand for a hearing on 
mental retardation where expert testified that although defendant obtained an IQ score of 
60 on the test he administered, he further opined that defendant functioned in the range of 
borderline retardation.)\(^82\); Emmett v. Commonwealth, 569 S.E.2d 39, 47 fn. 2 (Va. 2002) 
(sua sponte reviewing pre-Atkins record to determine whether the new bar to execution had 
been implicated and finding it had not given evidence that defendant received a high school 
equivalency diploma, attended a community college, and was regularly employed during 
his adult life.); Johnson v. Commonwealth, 591 S.E.2d 47, 75 (Va. 2004), vacated on other 
grounds, 544 U.S. 901 (2005) (defendant’s claim of mental retardation was “frivolous”\(^83\) 
where record showed that defendant had received IQ scores of 75 and 78 and his own 
expert witness at trial had testified that he was not mentally retarded.; Morrisette v. 
Commonwealth, 569 S.E.2d 47, 56 fn. 8 (Va. 2002) (rejecting an Atkins claim where 
petitioner’s IQ scores were 77 and 82 and where the evaluating psychiatrist opined that 
petitioner’s intelligence was “roughly below average.”)

Pennsylvania took another approach. The state supreme court deferred addressing claims 
of mental retardation raised in direct appeals from pre-Atkins trials. The court ruled that 
the claims were better suited for resolution in post-conviction proceedings. Commonwealth 
(Pa. 2004).

In direct appeals from post-Atkins trials, the findings made in the lower court regarding 
mental retardation are almost always upheld. This is unsurprising given the standards of 
review applied by the appellate court. See, e.g., Morris v. State, ___ So.3d ___, 2010 WL 
State, 163 S.W.3d 333, 356 (Ark. 2004) (“a circuit court's finding that a defendant is not 
mentally retarded under § 5-4-618 will be affirmed if it is supported by substantial 
evidence.”); Rodgers v. State, 948 So.2d 655 (Fla. 2006) (does competent, substantial 
evidence supported the trial court’s finding); State v. Williams, 22 So.3d 867 (La. 2009) 
(“to sustain a sentence of death in which mental retardation is at issue pursuant to La. Code 
Crim. Proc. Art. 905.5.1, the court, viewing the evidence in a light most favorable to the 
prosecution, must determine that a rational trier of fact could have concluded that the 
defendant did not prove by a preponderance of the evidence that he is mentally retarded

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\(^{82}\) The court did hold, however, that Scott would be entitled to a hearing if he submitted an affidavit meeting 
the requirements of Chase v. State, 873 So.2d 1013 (Miss. 2004), with an application for post-conviction 
relief.

\(^{83}\) The defendant had been resentenced to death prior to the Atkins decision. A statute in effect at the time of 
his appeal required him to present his claim of mental retardation in the appeal along with factual allegations 
supporting the claim. 8.01-654.2. The Virginia Supreme Court was required to review the claim and remand 
it to the circuit court unless it concluded the claim was frivolous.
under Art. 905.5.1”; *State v. Johnson*, 244 S.W.3d 144 (Mo. 2008) (appellate court views the evidence in the light most favorable to the judgment); Okla. Stat. Ann. § 21-701.10b(1) (standard of review on appeal is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the defendant not mentally retarded, giving full deference to the finder of fact); *State v. Strode*, 232 S.W.3d 1, 16 (Tenn. 2007) (“On appeal the trial court’s findings of fact must be reviewed with a presumption of correctness and reversed only when the preponderance of the evidence is contrary to the findings of the court.”); *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007) (“In evaluating the sufficiency of the evidence to support a jury's determination that a defendant is not mentally retarded, we must consider all of the evidence relevant to the issue and evaluate whether ‘the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust.’”)

The following cases are illustrative of how appellate courts are addressing appeals from the denial of *Atkins* claims that had been litigated in the trial court. *State v. Dunn*, 41 So.3d 454 (La. 2010) (affirming trial court’s finding that defendant failed to prove by a preponderance of the evidence that he is mentally retarded; Flynn effect adjusted IQ scores left a diagnosis of mental retardation possible but defendant failed to establish significant adaptive functioning deficits; although a defense expert administered the ABAS to defendant’s brother and a former supervisor and obtained scores of 69 and 65, when the brother testified much of what he said either could not be confirmed or was contradicted by other evidence such as evidence that defendant had been employed as a fork lift operator and had been able to deal with the necessary paperwork and negotiation to purchase a car; court appointed expert administered the Vineland Adaptive Behavior Scale to defendant’s brother resulting in a score of 79, which is above the range for a mentally retarded person; regarding the planning and commission of the capital offense, “defendant engaged in the leadership and planning of a major bank robbery” and the one expert who found defendant to be mentally retarded did not consider defendant's actions during the commission of the crime in his diagnosis of defendant.); *State v. Williams*, 22 So.3d 867 (La. 2009) (in affirming sentence of death, finding “[a] rational jury could have concluded that defendant exhibited some measure of intelligence and sufficient adaptive skills to survive in the environment of his choice. Defendant's testimony, particularly with respect to his adaptive skills, if accepted by the jury, tended to negate a reasonable likelihood that he qualified as mentally retarded.”); *Morris v. State*, ___ So.3d ___, 2010 WL 415245 (Ala. Crim. App. Feb. 5, 2010) (affirming trial court’s finding that defendant is not mentally retarded despite opinion by defense expert that defendant is mildly mentally retarded where there was evidence defendant was malingering, defendant failed to prove that any of the alleged deficits in his adaptive behavior that might indicate retardation had manifested before the age of 18, testimony by defendant’s sister about certain adaptive deficits was contradicted by other evidence, defendant’s school records did not show that he attended special education, and there was evidence that defendant had worked in lawn care and in assembly work and had engaged in drug dealing and gambling, and that defendant used his brother's name, address, and date of birth when he was arrested and again in a statement to the police); *Commonwealth v. VanDivner*, 962 A.2d 1170, 1185-86 (Pa. 2009) (upholding finding that defendant failed to meet age of onset prong of mental retardation definition); *Byrd v. State*, ___ So.3d ___, 2009 WL 1164985 (Ala. Crim. App. May 1, 2009) (trial court
correctly determined that defendant was not mentally retarded where, inter alia, his pre-trial evaluation produced an IQ score of 72 and the administrator of the test opined that defendant had not performed optimally on the test; defendant also failed to meet the age of onset requirement given an IQ score of 75 at age 17); *Ex Parte Jerry Jerome Smith, ___ So.3d ___, 2010 WL 4148528 (Ala. Oct. 22, 2010) (in finding that defendant had not demonstrated significant or substantial deficits in adaptive behavior, either at the time the murders were committed or at the time of the hearing, the court found especially persuasive Smith's behavior during the commission of these murders where defendant arrived at the house armed with a sawed-off rifle that he purposefully concealed, he systematically shot three victims, and he attempted to shoot a fourth victim and made an effort to stab that victim after the rifle jammed; in addition, he made the statement after the murders that he planned to eliminate witnesses.); *Williams v. State, 270 S.W.3d 112 (Tex. Crim. App. 2008) (given conflicting evidence by defense and prosecution witnesses, a finding that defendant was not mentally retarded was not so against the great weight and preponderance of the evidence so as to be manifestly unjust); *State v. Anderson, 996 So2d 973 (La. 2008) (jury’s unanimous finding that defendant failed to establish mental retardation upheld on appeal where school records did not indicate retardation, there was evidence of malingering during testing, and defendant’s attempts to cover his tracks after the murder could be viewed as showing adaptive functioning inconsistent with mental retardation); *State v. Lee, 976 So.2d 109 (La. 2008) (upholding jury finding that defendant was not mentally retarded despite opinions by two defense experts that defendant was mildly mentally retarded where State’s experts reached contrary conclusion, there was testimony about defendant’s skills as a pipefitter, and defense expert’s opinion that defendant had significant deficits in communication was rebutted by his ability to place assault victim at ease prior to attack, his maintaining two separate households, his asking law enforcement for court order authorizing a subpoena served on him, and his ability to dodge questions and formulate answers during his interrogation; that defendant had been placed in special education as a child is not necessarily indicative of mental retardation); *King v. State, 960 So.2d 413 (Miss. 2007) (over dissent of two justices, rejecting challenge to procedures used by trial court in determining defendant was not mentally retarded); *King v. State, 23 So.3d 1067 (Miss. 2009) (over dissent of at least one justice, again rejecting challenge to procedures used by trial court in determining defendant was not mentally retarded); *Rodgers v. State, 948 So.2d 655 (Fla. 2006) (competent, substantial evidence supported the trial court’s finding that defendant is not mentally retarded where three of four experts opined that defendant was not mentally retarded and the defense expert’s finding that defendant had “significant difficulties living independently” was based solely on the fact that defendant had lived with his family or girlfriends most of his life; this did not establish “difficulty in independent functioning” especially in light of testimony that defendant had operated a restaurant and had run a lawn irrigation business; there was also testimony that defendant cut his hair regularly, was concerned about his physical appearance, could cook, and bet on dogs at the track for recreation.); *Lizcano v. State, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (unpublished) (although defendant clearly met the intellectual functioning prong of the mental retardation definition with IQ scores of 48, 53, 60, 62 and 69, and he presented evidence of limitations in adaptive functioning, there was significant evidence admitted that supported a finding that defendant did not have the requisite adaptive deficits, i.e., evidence that (1) defendant maintained continuous employment and was recognized by
his employers as a hard and reliable worker; (2) defendant made regular payments on a vehicle he purchased as a co-buyer; (3) defendant maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be “bright”; and (4) defendant reliably sent significant amounts of money and other items to assist his family); State v. Johnson, 244 S.W.3d 144 (Mo. 2008) (viewing the evidence in the light most favorable to the judgment, there was sufficient evidence from which a reasonable juror could have found that defendant did not prove by a preponderance of the evidence that he suffered from mental retardation; although defendant presented two experts who opined that he was mentally retarded, other experts found otherwise and one of the two defense experts had not diagnosed defendant as mentally retarded during earlier assessments; a prosecution expert testified that defendant was malingering during post-Atkins testing that resulted in an IQ score of 67; prior to the Atkins decision, defendant had received IQ scores of 77, 63, 95, 78 and 84; there were legitimate concerns about the qualifications of defense expert Keyes and potential bias by both Keyes and the other defense expert who testified frequently in death penalty cases and always for the defendant; Keyes relied on anecdotes and stories in assessing defendant’s adaptive functioning but the sources – siblings -- presented a concern about bias; there was conflicting opinions about whether defendant was unable to hold a job or simply lacked the motivation to stay employed; the jury was able to view a State expert’s interview with defendant in which he discussed the crime and the efforts he made to avoid detection.); State v. Were, 890 N.E.2d 263 (Ohio 2008) (upholding finding that defendant not proved mental retardation by a preponderance of the evidence where the trial court credited the testimony of the State’s expert over the defense experts; State’s expert opined that defendant’s scores of 69 on the Stanford-Binet were not indicative of mental retardation; school records completed at the time of the first IQ test stated that defendant was functioning in the “slow learner” range of mental ability, not that he was mentally retarded; regarding adaptive behavior, the State’s expert noted that defendant was an active member of a Muslim prison gang, was able to comprehend the impact of his statements, and was involved in writing motions to the court; trial court’s finding that the Stanford-Binet was culturally biased at the time it was administered to defendant and more likely than not resulted in a lower score was not erroneous); Neal v. State, 256 S.W.3d 264, 275 (Tex. Crim. App. 2008) (affirming jury’s finding that defendant failed to prove mental retardation where defendant failed to establish the onset before age 18 of either significant sub-average general intellectual functioning or limitations in adaptive functioning; while there was much evidence that defendant struggled in coping with society throughout his life, his underlying problems seemed to be primarily behavior- and personality-related rather than related to low intellectual capacity; four out of five expert witnesses concluded that defendant is not mentally retarded; his acts in abducting and killing the victim, as well as running a prostitution ring that included his own daughter, show that he was capable of planning elaborate criminal ventures and attempting, albeit unsuccessfully, to conceal the evidence.); Gallo v. State, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007) (affirming jury’s finding that defendant failed to prove mental retardation; case involved dueling experts and evidence both in favor of and against a finding of mental retardation; defendant’s IQ score was above 70 prior to the age of 18 and below 70 at the age of 27; State expert Denkowski explained that defendant’s lack of motivation, serious depression, and moderate anxiety served to lower his score; in school, defendant was in resource classes and had achievement
scores that were below his grade level but Denkowski theorized that defendant’s poor academics were due to a lack of motivation rather than a lack of ability; defendant excelled as a short-order cook in his high school culinary class, a multi-tasked job that required thinking and timing skills; one high school teacher described him as a leader and a good communicator, while another testified that he struggled in her resource class; evidence also showed that defendant worked in fast food restaurants, passed safety and procedure tests for his job at Hydroblast, had friends and relationships with women, was involved in a gang, and sold drugs; the jury was ultimately in the best position to make credibility determinations and evaluate this conflicting evidence; Brisen factors lend further support to the jury's determination: although defendant was in resource classes in school, his mother and his juvenile probation officer did not think that he was mentally retarded during his developmental phase and his mother and his high school culinary-class teacher both stated that he had leadership skills; while some witnesses noted some communication problems, the State's witnesses all described defendant as a good communicator who had no trouble understanding and answering their questions; although defendant’s commission of the instant offense may have been impulsive, his subsequent conduct showed his ability to lie in his own interest; and while in the county jail awaiting trial, defendant admitted to a fellow inmate that he beat the victim to death and “tried to clean her up,” adding that “he failed the IQ test” and “he’d probably beat the case because he was retarded.”); Hunter v. State, 243 S.W.3d 664 (Tex. Crim. App. 2007) (affirming jury’s finding that defendant failed to prove mental retardation in case involving expert opinions and evidence both in favor of and against a finding of mental retardation; defendant’s IQ was scored below 70 before the age of 18 and above 70 at the age of 33 and state expert Denkowski theorized that defendant’s uneven acquisition of knowledge served to artificially lower his IQ score in third grade; defendant attended special-education classes in school and had an average or below-average class ranking but excelled in marching band, which required a great deal of concentration and timing to perform complicated maneuvers; one high-school teacher described defendant as a good conversationalist, provided that he was discussing a subject about which he was knowledgeable, while another high-school teacher described defendant as “low functioning”; members of defendant’s family, as well as women with whom he had close relationships, did not even know defendant was in special-education classes and did not have any trouble communicating with him; the evidence showed that defendant held several jobs, passed a written test to become a certified forklift-operator, and took measurements and did mathematical calculations for his job at Vanguard Plastics; the jury was ultimately in the best position to make credibility determinations and evaluate this conflicting evidence.)

There are occasions, however, where the lower court’s finding on the mental retardation question is reversed. In State v. Strode, 232 S.W.3d 1 (Tenn. 2007), for example, the Tennessee Court of Criminal Appeals reversed the trial court’s pretrial finding that the defendant had established his mental retardation and the Tennessee Supreme Court affirmed. The Tennessee Supreme Court began by looking to the defendant’s IQ scores from before he turned eighteen, scores of 88, 75, 78 and 78. When he was first admitted to prison, he received an IQ score of 84. It was not until he was twenty-three years old that he received an IQ score of 69 which both the defense and prosecution expert agreed met Tennessee’s definition of “significantly subaverage intellectual functioning.” On this
record, the Tennessee Supreme Court ruled that “the trial court's finding that the Defendant was mentally retarded at the time of the crime is not supported by a preponderance of the evidence.” *Id.* at 17. Having found that defendant failed to establish that he suffered from significantly subaverage intellectual functioning before age eighteen, the Tennessee Supreme Court found moot the question of whether he had established the requisite adaptive deficits in his childhood.

1.13 STATE POST-CONVICTION PROCEEDINGS

Where capital convictions were final at the time of *Atkins*, courts unanimously found that the decision had retroactive effect. *But see* Va. Code Ann. § 8.01-654.2 (inmates having already completed direct appeal and state habeas proceedings have no remedy for *Atkins* claim in state court.) Post-*Atkins*, courts had to address the procedures to be applied and how to handle cases where post-conviction proceedings were in progress or yet to be initiated when *Atkins* was decided. As with the direct appeal cases, the cases below set forth the procedures that were developed, and also provide some insight into how the courts have been weighing different types of evidence in implementing *Atkins*.

In Arizona, the post-*Atkins* mental retardation statute applies to all capital sentencing and resentencing proceedings. The state supreme court found that includes post-conviction proceedings. *State v. Arellano*, 143 P.3d 1015 (Ariz. 2006). In contrast, California’s post-*Atkins* statute does not include procedures for litigating post-conviction mental retardation claims. In *In re Hawthorne*, 105 P.2d 552 (Cal. 2005), the California Supreme Court ruled that most of the statutory procedures for determining mental retardation pre-trial apply equally when an *Atkins* claim is raised in a state habeas petition. The exception is the provision allowing a defendant to have the capital jury resolve the issue. The California Supreme Court ruled that a judge will decide whether a defendant has proven mental retardation. To state a prima facie claim for relief, the habeas petition must contain “a declaration by a qualified expert stating his or her opinion that the [petitioner] is mentally retarded ....” Cal. Penal Code § 1376, subd. (b)(1). Further, the expert’s declaration “must explain the basis for the assessment of mental retardation in light of the statutory standard.” *Id.* at 556. Having satisfied this standard, Hawthorne’s case was transferred to the trial court for a hearing on his *Atkins* claim.

In *Johnson v. State*, 102 S.W.3d 535 (Mo. 2003), the Missouri Supreme Court addressed an *Atkins* claim raised in a state post-conviction petition. Although the Missouri statute exempting the mentally retarded from execution was technically inapplicable to Johnson’s case because his crime occurred before its effective date, the court held “as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty.” *Id.* at 540. Looking to the record, the court found “that reasonable minds could differ as to Movant’s mental abilities.” *Id.* at 540. Even though Johnson had IQ scores of 84, an expert who did not testify at his pre-*Atkins* trial indicated that Johnson’s IQ was as low as 70. This same expert found defective adaptive skills “such as communication, self-care, social life, social and interpersonal development, self-direction, and use of community resources.” *Id.* at
Because “incomplete evidence of Movant’s mental capacity was presented” at trial, and “because Movant’s mental capabilities are questionable,” the Missouri Supreme Court remanded to the lower court with orders to set aside the death sentence and order a new penalty phase hearing.

In In re Competency v. Parkus, 219 S.W.3d 250 (Mo. 2007), the Missouri Supreme Court elaborated on the procedures to be followed for those who claimed to be mentally retarded but were not covered by Missouri’s mental retardation statute. It held:

The defendant shall file a petition for writ of mandamus in this Court. The respondents shall be the director of the department of corrections and the attorney general. The defendant shall state specific facts indicating his mental retardation as defined in section 565.030.6. If factual issues are in dispute, the Court will appoint a master. If the Court determines the defendant is mentally retarded as defined in section 565.030.6, it will make peremptory its alternative writ of mandamus, recall its mandate in the direct appeal, and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor.

Id. at 254 (citations and footnotes omitted.) Regarding the standard of review to be applied, the court ruled:

The decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

Id. at 255 n.9.

In Howell v. State, 151 S.W.3d 450 (Tenn. 2004), the Tennessee Supreme Court ruled that a death row inmate seeking to reopen post-conviction proceedings could receive an evidentiary hearing on his claim of mental retardation provided he asserted a “colorable claim,” which is defined as “a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.” Tenn.Sup.Ct.R. 28 § 2(H). This was true even though normally a petitioner seeking to reopen could receive a hearing only if it appeared that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner was entitled to have his sentence reduced. Tenn.Code Ann. § 40-30-117(a)(4). Because the mental retardation claim had not been available to Howell during trial or his initial post-conviction proceedings, the Tennessee Supreme Court found that applying the higher standard “would be fundamentally unfair and a violation of due process.” Howell v. State, 151 S.W.3d at 463.

The court went on to find that Howell had made a colorable claim, despite the fact that his scores on the WAIS-III were above the cutoff score of the Tennessee mental retardation statute. The court observed that the statute “does not provide a clear directive regarding
which particular test or testing method is to be used.” *Id.* at 459. Although the WAIS-III was recognized as the standard instrument in the *Atkins* decision, there was nothing in the record to indicate that the other tests administered to Howell, which resulted in lower scores, were not accurate I.Q. tests.\(^8^4\)

The Pennsylvania Supreme Court in *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005), reversed a grant of post-conviction relief on an *Atkins* claim where the trial court failed to hold an evidentiary hearing. In the decision, the court announced the procedures that would apply in post-conviction proceedings involving *Atkins* claims. The state supreme court ruled that the Post Conviction Relief Act (PCRA) judge would be the one to decide whether the petitioner had proved mental retardation by a preponderance of the evidence. An evidentiary hearing was deemed necessary here because the evidence of mental retardation was equivocal and had been developed in a different context.

As a matter of statutory construction, the Virginia Supreme Court ruled that a death row inmate who raised mental retardation in his state habeas petition pursuant to a transitional statute\(^8^5\) was entitled to a jury trial on the issue. *Burns v. Warden*, 609 S.E.2d 608 (Va. 2005). The court looked to the provision clearly allowing for a jury trial in cases where mental retardation was raised for the first time on direct appeal and found it applied equally where the claim was raised in a habeas petition.

The Oklahoma Court of Criminal Appeals in *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002), limited the circumstances under which a death row inmate could raise an *Atkins* claim. It held:

> For pending capital appeals and inmates who may file applications for post-conviction relief to address this issue, the issue of mental retardation is preserved in the following circumstances: in those cases where evidence of the defendant's mental retardation was introduced at trial and/or the defendant either (1) received an instruction that his or her mental retardation was a mitigating factor for the jury to consider, (2) appealed his death sentence and therein raised the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution (or a substantially similar claim relating to his or her mental retardation), or (3) raised a claim of ineffective assistance of counsel, on appeal or in a previous post-conviction application, in which he or she asserted trial counsel or appellate counsel failed to raise the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. In such cases, the defendant's counsel shall file either an application for post-conviction relief, if the defendant's case is not pending in this Court, or an application with this Court in a pending appeal seeking a remand to the

\(^8^4\) The other tests were the Stanford-Binet and the Comprehensive Test of Nonverbal Intelligence.  
\(^8^5\) Va. Code § 8.01-654.2 (providing vehicle to raise mental retardation claim for those inmates on direct appeal or in state habeas proceedings at the time the new law barring execution of the mentally retarded was enacted.)
appropriate District Court for an evidentiary hearing to determine whether or not sufficient evidence of the defendant's mental retardation exists in order for the matter to be remanded for resentencing, as ordered below.

Id. at 569. At Murphy’s pre-Atkins trial, evidence had been presented that he had scored in the mildly mentally retarded range on an IQ test and his school records indicated he was “educable mentally handicapped,” which was described as being the equivalent to being mildly mentally retarded. The court found this evidence justified a remand to the lower court.

Following the remand, the Oklahoma Court of Criminal Appeals in Murphy v. State, 66 P.3d 456, 458 (Okla. Crim. App. 2003), explained that the question of “sufficient evidence” to justify a jury trial on mental retardation “is essentially the legal equivalent of a defendant making a prima facie showing of mental retardation with his or her evidence.” The appellate court then ruled that the lower court’s finding that Murphy had not made such a showing was not clearly erroneous.86 Murphy subsequently filed another petition for post-conviction relief, again alleging that he was mentally retarded. The Oklahoma Court of Criminal Appeals reversed itself and ruled that sufficient evidence had been presented by Murphy to raise a fact question to be resolved by a jury. Murphy v. State, 124 P.3d 1198, 1208 (Okla. Crim. App. 2005); see also Martinez v. State, 80 P.3d 142 (Okla. Crim. App. 2003) (“Sufficient evidence” for the issue to be decided by a jury simply means enough evidence to create a fact question. “[I]n most instances, when the State feels obligated to bring forth contradicting and rebutting evidence in a Murphy remanded evidentiary hearing, a question of fact has already been established.” Concluding that the petitioner had met this test, the case was remanded for a jury trial on mental retardation.)

In Bowling v. Commonwealth, 163 S.W.3d 361, 384 (Ky. 2005), a case in post-conviction posture, the Kentucky Supreme Court held that “to be entitled to an evidentiary hearing on a claim of entitlement to the mental retardation exemption provided by KRS 532.140(1), a defendant must produce some evidence creating a doubt as to whether he is mentally retarded.” Because Bowling’s various IQ scores showed he could not meet the “significantly subaverage intellectual functioning” prong of the Kentucky mental retardation test, he was not entitled to an evidentiary hearing.87 The petitioner in Ex Parte Elizalde, 2006 WL 235036 (Tex. Crim. App. Jan. 30, 2006) (unpublished), failed to make a prima facie showing of mental retardation, according to the Texas Court of Criminal Appeals. Although he had received a score of 60 on a Beta II screening test given by the prison, he also received a score of 96 on the Culture Fair test, which was given to Elizalde to verify the screening test score. Elizalde did allege that he received poor grades in school but, according to the court, he “failed to present even a

86 The lower court found, among other things, that Murphy’s alcoholism directly impacted the IQ score of 67 he received before trial; that the test administered was not reliable due to the jail conditions, its incompleteness, recent alcohol use, and lack of confidence in the test expressed by the test administrator; a later complete IQ test which was given to Murphy demonstrated an IQ of 80; and elementary school testing did not demonstrate mental retardation.

87 The IQ scores from Bowling’s childhood were 84 and 79. At the time of trial, his IQ was measured at 86 and 87. Even if the court were permitted to apply a five-point margin of error and a three-point “Flynn effect,” which it earlier concluded it could not, Bowling’s claim of mental retardation failed.
minimal case of adaptive behavioral deficits.” In *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004), where significant evidence of mental retardation had been presented at Hall’s pre-*Atkins* trial, and additional affidavits supporting an *Atkins* claim were presented in habeas proceedings, Hall was still not provided with an evidentiary hearing on his claim. Instead, the trial court resolved the claim against Hall on a paper record and the Texas Court of Criminal Appeals affirmed. Justice Price, joined by Justice Cochran concurred, noting that generally a trial court will need to hold a live hearing to resolve a contested *Atkins* claim. *Id* at 40 (Price, J., concurring.) Justices Johnson and Holcomb dissented, concluding that an evidentiary hearing was necessary to properly adjudicate the claim. Similarly, in *Ex Parte Simpson*, 136 S.W.3d 660 (Tex. Crim. App. 2004), substantial evidence of mental retardation had been presented at the pre-*Atkins* trial and the *Atkins* claim raised in a habeas petition was resolved adversely to the petitioner without an evidentiary hearing. The appeals court explained why this was proper as follows:

Applicant's habeas writ relies almost exclusively upon that extensive testimony. Although it is advisable to have an evidentiary hearing to determine mental-retardation claims raised for the first time in post-*Atkins* habeas applications, it is not necessary where, as here, the habeas applicant relies primarily upon trial testimony. In this case, both sides had an opportunity to fully develop the pertinent facts at trial, and the habeas judge had an opportunity to assess the credibility and demeanor of the witnesses when he presided over the trial. Although the discrete fact of mental retardation was not an ultimate issue at the capital-murder trial, the punishment phase testimony fully developed that contested fact. *Id* at 663 (footnotes omitted).

If a death row inmate had previously filed a state habeas petition, a successor petition raising an *Atkins* claim would be denied as an abuse of the writ if the Texas Court of Criminal Appeals concluded that the petition failed to state a prima facie case for relief. *Moreno v. Dretke*, 450 F.3d 158, 162 (5th Cir. 2006). Federal courts have been split on the issue of whether this is a procedural or merits ruling, a distinction that is important for purposes of the review available in federal court. *Id* at 165 n.3.

A number of death row inmates in Arkansas were sent back from federal courts to exhaust mental retardation claims that were raised in federal habeas proceedings for the first time after the *Atkins* decision. The prisoners were unsuccessful in getting merits review of the claim in state court. In *Coulter v. State*, 227 S.W.3d 904 (Ark. 2006), for example, the petitioner moved in the Arkansas Supreme Court for recall of the mandate or, in the alternative, for a writ of coram nobis. The recall of the mandate would have permitted Coulter to raise his *Atkins* claim in a new petition for post-conviction relief. In denying Coulter’s request, the Arkansas Supreme Court noted, among other things, that Coulter had the opportunity during his state post-conviction proceedings to raise mental retardation under a pre-*Atkins* statute which barred the execution of the mentally retarded. Coulter failed to do so. In addition, the court pointed out that Coulter failed to meet the rebuttable presumption of mental retardation, which is an IQ score of 65 or less. Further, during his
trial, there was testimony that his IQ was 94, which was substantially above the “statutory threshold.”

In *Engram v. State*, 200 S.W.3d 367 (Ark. 2004), the Arkansas Supreme Court also denied a motion to recall the mandate for purposes of asserting an *Atkins* claim given that Engram could have availed himself of the Arkansas statute exempting the mentally retarded from execution. The Arkansas Supreme Court also noted that during pre-trial competency proceedings Engram had offered no evidence indicating mental retardation. And the expert called by the State testified that Engram’s I.Q. was between 76 and 86 and offered the opinion that Engram was not mentally retarded.

Following the *Atkins* decision, the Mississippi Supreme Court allowed a number of death row inmates to proceed with *Atkins* claims in post-conviction proceedings. See, e.g., *Russell v. State*, 849 So.2d 95 (Miss.2003) (in pre-*Chase* decision, petitioner was entitled to proceed on *Atkins* claim where he was found by one doctor to have a full scale IQ of 68, even though another doctor testified that petitioner’s IQ was 76, and that he was not retarded.); *Goodin v. State*, 856 So.2d 267, 277-78 (Miss.2003) (in pre-*Chase* case, allowing petitioner to proceed on *Atkins* issue where pre-trial IQ scores ranged from 50-65 despite evidence that petitioner had not done as well as he was capable of doing on the IQ tests and argument that his behavior during the capital crime and on the witness stand undermined his claim of mental retardation.); *Foster v. State*, 848 So.2d 172, 174 (Miss.2003) (petitioner granted leave to proceed on *Atkins* claim where he provided evidence of a recent IQ score of 62 and a psychiatrist stated that the score was “consistent with a diagnosis of mental retardation.”)

In 2004, the Mississippi Supreme Court added a new requirement for death row inmates seeking a post-conviction hearing on an *Atkins* claim. In *Chase v. State*, 873 So.2d 1013 (Miss. 2004), it held that a petitioner may not receive a hearing on a claim of mental retardation unless he files a motion requesting such a hearing, attached to which is “an affidavit from at least one expert [who meets the qualifications set out by the court88], who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient (“IQ”) of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined herein.” *Id.* at 660. The Mississippi Supreme Court in the *Chase* decision also held that a defendant/petitioner could not ultimately be adjudged to be mentally retarded without an expert stating that some type of instrument was administered that showed the defendant/petitioner was not malingering. While the court did not expressly state that a non-malingering opinion was a prerequisite to obtaining a hearing, in some subsequent cases where a hearing was denied the absence of a malingering test was noted.

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88 “Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.” *Chase v. State*, 873 So.2d at 660.
Numerous hearings have been ordered under Chase. See, e.g., Thorson v. State, 994 So2d 707 (Miss. 2007) (petitioner entitled to a hearing on his Atkins claim where there was expert testimony at his pre-Atkins trial that he was “borderline retarded” with an IQ score of 77 on the WAIS-R and a score of 74 on the Shipley, and petitioner presented a new expert affidavit opining that he was mentally retarded with an IQ score of 70 on the WAIS-III and adaptive deficits in functional academic skills, work, self-direction, and social/interpersonal skills and that it was documented that the onset of these deficits occurred before the age of eighteen; a malingering instrument had also been administered to petitioner); Lynch v. State, 951 So.2d 549 (Miss. 2007) (without significant discussion, finding that petitioner who presented a report that his IQ is 72 was entitled to a hearing, which the State conceded); Scott v. State, 938 So.2d 1233 (Miss. 2006) (petitioner was entitled to an evidentiary hearing on his Atkins claim based in part on affidavit from Dr. Marc Zimmerman opining that petitioner is mentally retarded under AAMR and DSM-IV-TR definitions despite fact that MMPI-II had not been administered due to Dr. Zimmerman’s explanation that the test would have limited value in light of petitioner’s inability to read beyond the third grade level)89; Conner v. State, 904 So.2d 105 (Miss. 2004) (finding petitioner entitled to an evidentiary hearing after he submitted an affidavit from Dr. Marc Zimmerman opining that petitioner had a combined IQ of 65, and that there was a reasonable basis to believe that upon further testing petitioner would be found to be mentally retarded.); Doss v. State, 882 So.2d 176 (Miss. 2004) (petitioner entitled to an evidentiary hearing on Atkins claim where he submitted an evaluation from Dr. Gelbort finding his full-scale IQ to be 71, which qualified him for a diagnosis of mental retardation as to intellectual functioning, and an affidavit from Dr. Merikangas opining that a prior report suggested mental retardation)90; Brown v. State, 875 So.2d 202 (Miss. 2004) (petitioner granted permission to file successor post-conviction petition raising Atkins claim where he provided an affidavit from Dr. Marsha Little, who recalled that petitioner had an IQ in the lower 70's and opined that petitioner was mentally retarded at the time of the crime and further testing would support her conclusion.); Snow v. State, 875 So.2d 188 (Miss. 2004) (petitioner allowed to pursue Atkins claim where he presented an affidavit from Dr. Goff reporting that petitioner has received scores of 70, 67, and 73, and 65 on various IQ tests, and opining based on his review of records that petitioner had sub-average intellectual functioning and significant deficits in adaptive functioning; further opining to a reasonable degree of psychological certainty that petitioner is mentally retarded.); Carr v. State, 873 So.2d 991 (Miss. 2004) (where expert testified in pre-Atkins trial that petitioner was mildly mentally retarded, petitioner was entitled to raise an Atkins claim in post-conviction proceedings); Smith v. State, 877 So.2d 369, 385 (Miss. 2004) (in decision issued same day as Chase, petitioner granted permission to raise Atkins claim where petitioner had obtained an IQ score of 75 at age 13 and he presented affidavit from psychologist who stated that the “limited educational records available for review at this

89 The court did state, however, that petitioner would be required to take the MMPI-II prior to adjudication of the Atkins claim. The court subsequently overruled the requirement that an MMPI-II be administered in every case. See Lynch v. State, 951 So.2d 549 (Miss. 2007).

90 Although there is no indication that Doss was given the MMPI-II to test for malingering, Dr. Gelbort’s evaluation did note that the IQ score he obtained was consist with prior scores, thereby indicating that Doss put forth appropriate effort on the IQ test. That the family history Dr. Merikangas relied upon differed from that previously reported by the family was something to be explored at the evidentiary hearing, not grounds for summarily denying the claim.
time indicate that Mr. Smith's IQ has been found in the borderline mentally retarded range. This finding combined with his poor school performance support a hypothesis of the presence of neuro-cognitive or mental impairments in Mr. Smith.”); Neal v. State, 873 So.2d 1010 (Miss. 2004) (petitioner entitled to a hearing on his Atkins claim raised in a successor petition, not relief, even though record showed petitioner was declared to be mentally retarded as early as ten years of age by the Lawrence County Youth Court; he was again diagnosed as mentally retarded at ages 12 and 15; and affidavits from family members, teachers, and employees at state institutions discussed his lack of adaptive functioning.)

In quite a few other cases, Mississippi death row inmates were denied permission to proceed with claims of mental retardation. See, e.g., Ross v. State, 954 So.2d 968, 1007-08 (Miss. 2007) (rejecting request for remand for determination of mental retardation where defendant was given an IQ test and MMPI for purposes of assessing competency to stand trial and although the IQ score was within the range of mental retardation, there was expert testimony opining that defendant had been malingering and was not in fact mentally retarded); Jordan v. State, 918 So.2d 636, 661 (Miss. 2005) (denying petitioner’s request for an evidentiary hearing on Atkins claim where petitioner failed to submit affidavit or records showing an IQ of less than 76 and provided no evidence that he completed the MMPI-II.); Branch v. State, 882 So.2d 36, 51 (Miss.2004) (defendant with an IQ of 84 at age twenty-two and no apparent adaptive deficits failed to make a prima facie showing that he was mentally retarded even though assessment at age five had shown an IQ of 68); Gray v. State, 887 So.2d 158, 169 (Miss. 2004) (petitioner not entitled to an evidentiary hearing on claim of mental retardation brought in petition for post-conviction relief where petitioner “provide[d] neither affidavits of experts opining his mental retardation, nor [was] there any qualified opinion contained in the trial record” and school records and affidavits failed to demonstrate mental retardation); Mitchell v. State, 886 So.2d 704 (Miss. 2004) (court summarily rejects Atkins claim brought in petition for post-conviction relief where petitioner served four years in the military, attended college at Mississippi Valley State University for one semester, a clinical psychologist previously opined that petitioner “had at least average intellectual,” and petitioner failed to produce an expert opinion that he has an IQ of 75 or below and that there is a reasonable basis to believe that further testing would show he is mentally retarded.); Bishop v. State, 882 So.2d 135 (Miss. 2004) (denying hearing where petitioner supported Atkins claims with school records and affidavits from family members but there was no evidence of a qualified opinion that petitioner was mentally retarded); Berry v. State, 882 So.2d 157 (Miss. 2004) (denying hearing where petitioner failed to provide the required expert affidavit and instead relied on: (1) affidavits from family and friends about his intellectual deficits and placement in special education; (2) standardized test scores from when petitioner was 13 years old showing an IQ of 72; and (3) Department of Corrections records noting that he was considered to be mentally retarded during a certain period. Testimony from the first and second sentencing proceedings contained opinions that petitioner was not mentally retarded.)

Even where a petitioner had technically complied with the requirements for an evidentiary hearing set forth in Chase, a hearing will not necessarily be granted. In Wiley v. State, 890
So.2d 892 (Miss. 2004), the Mississippi Supreme Court expanded on the procedure it would use in determining whether further proceedings were in order concerning an Atkins claim and announced that it would consider the entire record before deciding whether to grant an evidentiary hearing. Id. at 897. In support of his Atkins claim, Wiley had presented an affidavit from Dr. Daniel Grant. Dr. Grant had tested Wiley and obtained a full scale IQ score of 68, satisfying the subaverage intellectual functioning prong of the mental retardation test. Dr. Grant further opined that Wiley met the other two diagnostic criteria. Prior testing of Wiley, also when he was an adult, had resulted in IQ scores of 73 and 78. The expert who administered those tests concluded that Wiley was within the borderline mentally retarded range.

The court was also presented with school records showing poor performance, which Wiley asserted established an onset of mental retardation prior to age 18. The Mississippi Supreme Court scrutinized the records and found that Wiley’s poor performance was correlated with his attendance, observing that he did better in school when he was not frequently absent. In addition, the court observed that the records provided no indication that Wiley had been placed in special education classes.

Perhaps more troublesome to the claim of mental retardation were affidavits and reports that had previously been submitted to the court in support of different claims for relief. These affidavits by Wiley’s friends and relatives asserted that Wiley

was a good husband, father, son and grandson, that he was a good, reliable worker with steady employment at various employers, that he performed household maintenance, repaired automobiles, babysat children, ran errands, supported his family and did numerous other things. Wiley was also in the Army until injuring his leg and getting honorably discharged

Id. at 896. The court agreed with the State’s argument that the depiction of Wiley from his family and friends was inconsistent with mental retardation. Also problematic was Wiley’s failure to assert that he was given any type of malingering test at the time of his evaluation by Dr. Grant. The court ultimately concluded:

We find that Wiley’s school records are not sufficient to establish mental retardation. Further, we find that the overwhelming weight of the evidence resolves the issue of borderline intelligence and shows that Wiley was not mentally retarded before age 18. The record shows that Wiley was a normal, productive citizen, who was never characterized as “mentally retarded” until such time as being mentally retarded became critically important in the realm of post-conviction.

Id. at 898.91

91 When Wiley raised his Atkins claim in federal district court he received an evidentiary hearing and de novo review because of the state court’s unreasonable denial of a hearing. Wiley v. Epps, 668 F.Supp.2d 848 (N.D. Miss. 2009). The district court ruled that Wiley established his mental retardation, a finding that
Similarly, in *Hughes v. State*, 892 So.2d 203 (Miss. 2004), the Mississippi Supreme Court conceded that the *Chase* criteria had been met. Nevertheless, a hearing was denied because “the evidence in the record . . . overwhelmingly belies the assertions that Hughes is mentally retarded.” *Id.* at 216. Like Wiley, Hughes had supported his claim of mental retardation with an affidavit from Dr. Daniel Grant. Dr. Grant had tested Hughes post-trial and obtained a full scale IQ score of 64. Dr. Grant opined that Hughes lacked normal adaptive skills and that his condition set in prior to age 18. As support for the latter proposition, Dr. Grant relied on Hughes’s failing grades in high school. In finding this showing insufficient, the Mississippi Supreme Court noted: (1) Hughes had received a full scale IQ score of 81 at the time of trial; (2) the record did not show that Hughes was ever in special education classes; and (3) the record indicated that Hughes was “a conscientious and reliable employee.” *Id.* at 215. The court also noted that Dr. Grant had previously submitted a similar affidavit for Wiley.\(^{92}\) *Cf. Howell v. State*, 151 S.W.3d 450 (Tenn. 2004) (petitioner made a colorable claim of mental retardation through an affidavit by Dr. Daniel Grant.)

The Missouri Supreme Court also denied an evidentiary hearing on an *Atkins* claim in *Goodwin v. State*, 191 S.W.3d 20 (Mo. 2006). Despite the post-conviction allegations, the Missouri Supreme Court concluded that the claim was refuted by the trial record where three mental health experts opined that Goodwin was of borderline intelligence, not mentally retarded. It also pointed out that none of the eight IQ scores Goodwin received on intelligence tests administered over a period of twenty years indicated mental retardation. In fact, only one of the scores, a 72, was within the five-point margin of error attributed to the Wechsler scale.

In contrast, in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), a case involving a post-conviction motion to vacate, the Ohio Supreme Court remanded for an evidentiary hearing on mental retardation despite the fact that only one out of six available IQ scores received by Lott placed him in the mentally retarded range. The court found that “[w]hether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court. The defense should have the opportunity to present additional evidence on Lott’s mental retardation before a final decision is made.” *Id.* at 1014; *see also State v. Lorraine*, 2005 WL 1208119 (Ohio App. 11 Dist. May 20, 2005) (petitioner entitled to hearing on *Atkins* claim based on evidence at sentencing phase of an IQ score of 73 when petitioner was in sixth grade and testimony concerning his lack of personal and social skills.); *Pickens v. State*, 126 P.3d 612, 616 (Okla. Crim. App. 2005) (a defendant need show only one IQ score of 70 or below on a contemporary IQ test to “get his foot in the door” and claim ineligibility for the death penalty by reason of mental retardation; additional scores above 70 are irrelevant.)

Shortly after the *Atkins* decision, the Illinois Supreme Court *sua sponte* remanded a case the Fifth Circuit Court of Appeals recently affirmed. *Wiley v. Epps*, ___ F.3d ___, 2010 WL 4227405 (5th Cir. (Miss.) Oct. 27, 2010).

\(^{92}\) As with Wiley, Hughes received an evidentiary hearing in federal district court and *de novo* review of his claim. And, again like Wiley, the federal district court ruled that Hughes was entitled to relief on his *Atkins* claim. *Hughes v. Epps*, 694 F.Supp.2d 533 (N.D. Miss. 2010). In fact, the State’s expert joined Hughes’ experts in opining that Hughes was mentally retarded.
for an evidentiary hearing on mental retardation. *People v. Pulliam*, 794 N.E.2d 214 (Ill. 2002). At the pre-*Atkins* trial, the defense and prosecution experts had disagreed about whether Pulliam was mildly mentally retarded. Even though there was no claim in Pulliam’s post-conviction relief petition claiming that mental retardation barred her execution, and Pulliam did not request supplemental briefing after *Atkins* was announced, the state supreme court concluded that interests of judicial economy favored an immediate remand to address the issue.

In some appeals from pre-*Atkins* denials of post-conviction relief, the Alabama Court of Criminal Appeals *sua sponte* considered whether the evidence in the record implicated *Atkins*. See, e.g., *McWilliams v. State*, 897 So.2d 437, 457 (Ala. Crim. App. 2004), overruled on other grounds by *Ex Parte Jenkins*, 2005 WL 796809 (Ala. April 8, 2005) (*Atkins* no bar to execution where record showed petitioner had been married and fathered two children; high school personnel remembered petitioner as being intellectually capable; petitioner held various jobs in the food industry and had worked on an oil rig; and petitioner had been in the United States Army); *Jenkins v. State*, ___ So.2d ___, 2004 WL 362360 (Ala. Crim. App. 2004), rev’d in part on other grounds, 2005 WL 796809 (Ala. April 8, 2005) (death sentence did not violate *Atkins* where record indicated petitioner had an IQ of 76 and there was evidence that petitioner maintained relationships with other individuals and that had been employed by three different companies.)

In a similar procedural posture, the petitioner in *Clemons v. State*, ___ So.2d ___, 2003 WL 22047260 (Ala. Crim. App. 2003) invoked *Atkins* on appeal, relying on evidence he had presented in support of his claim that trial counsel was ineffective at the sentencing phase of the trial. The record showed Clemons may have received an IQ score of 58 when he was in the fifth or sixth grade. Other testing showed that Clemons had a full scale IQ of 51, although the accuracy of that assessment was questioned. In addition, a clinical psychologist who had evaluated Clemons before his trial estimated that his intelligence was probably in the range of mildly retarded or borderline. Clemons also alleged the circuit court erroneously refused to admit testimony from a clinical neuropsychologist who, according to Clemons’s offer of proof, would have testified that Clemons’s IQ scores showed his low mental functioning and that due to his poor performance, it had been recommended that Clemons be placed in classes for mentally retarded students. Given this record, the appellate court remanded for further proceedings on both the *Atkins* and the ineffective assistance of counsel claims.93

93 On remand, the circuit court concluded that Clemons was not mentally retarded, a finding that was upheld by the Alabama Court of Criminal Appeals. *Clemons v. State*, ___ So.2d ___, 2003 WL 22047260 (Ala. Crim. App. 2003), rev’d in part on other grounds, ___ So.2d ___, 2007 WL 1300722 (Ala. May 4, 2007). Although Clemons had widely divergent IQ scores ranging from 51-84, the circuit court found that when Clemons made an effort, he consistently tested in the 70-80 range which does not meet the test for significantly subaverage intellectual functioning. The circuit court also held that Clemons failed to establish the required deficits in adaptive functioning. His lack of significant employment history was attributed by the court to lack of motivation. He claimed to have had numerous relationships with women, which showed he was able to form interpersonal relationships. In addition, his post-crime conduct showed that he was a crafty criminal. That he had committed three prior carjackings also refuted the notion that he had significant limitations in adaptive behavior, according to the court. Finally, by fleeing the city after the capital offense via bus, Clemons showed he was able to utilize community resources.
The petitioner in *Tarver v. State*, ___ So.2d ___, 2004 WL 362352 (Ala. Crim. App. Feb. 27, 2004), was also found to be entitled to a post-*Atkins* hearing on his mental retardation claim where substantial evidence of retardation had been presented in the post-conviction proceedings related to a claim of ineffective assistance of counsel. In addition, in sentencing Tarver to death, the trial court had found as nonstatutory mitigation that Tarver was mentally retarded. Although Tarver had an IQ score of 76, the experts at the earlier post-conviction hearing, including the prosecution’s expert, did not believe this defeated a diagnosis of mental retardation.94

In a number of other cases where the post-conviction proceedings had preceded the *Atkins* decision, the Alabama Court of Criminal Appeals found no need for a remand for further proceedings. See, e.g., *Lee v. State*, 898 So.2d 790 (Ala. Crim. App. 2003) (no remand required where record showed IQ of 67 when petitioner was 23 years old, an expert concluded petitioner was actually in the low average range with school records suggesting an even higher level of functioning, malingering was suspected, former employer indicated petitioner was a capable and responsible employee who could follow instructions, high school principal claimed that petitioner had been on the advanced track preparing for college and passed the high school exit examination the first time he took it, and family members indicated that any deficits defendant suffered from may have resulted from substance abuse.)

The refusal of a post-conviction court to hold a hearing on an *Atkins* claim post-*Atkins* was upheld in *Bush v. State*, ___ So.3d ___, 2009 WL 1496826 (Ala. Crim. App. May 29, 2009). The post-conviction court had relied on the absence of evidence of significant adaptive deficits in denying the claim. In affirming, the appellate court first noted that the petitioner had IQ scores of 69, 74 and 75. It then looked at the direct appeal record which showed the petitioner: (1) testified at the suppression hearing and appeared articulate; (2) acquired technical skills while he was in the federal penitentiary, completed a six-month mechanics course, and worked as a mechanic and on various construction-type jobs; and (3) had several long-term relationships and one child. Therefore, in the court’s view, the record affirmatively showed that the petitioner could not meet the definition of mental retardation adopted by the Alabama Supreme Court. See also *Ferguson v. State*, ___ So.2d ___, 2008 WL 902901 (Ala.Crim.App. April 4, 2008) (affirming denial of *Atkins* claim without an evidentiary hearing where the record showed: (1) petitioner had full-scale IQ scores of 77 and 71 as a child but the administer of the second test questioned petitioner’s effort; (2) although the latter score resulted in petitioner being placed in classes for educable mentally retarded, he was removed from the classes three years later after receiving a full-scale IQ score of 87; (3) a school official noted a discrepancy between petitioner’s ability and his achievement; (4) petitioner did receive a full-scale IQ score of 69 following the capital offense but the administrating expert believed petitioner failed to give a good effort, opined that petitioner’s true IQ would be in the mid to upper 70’s, and

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94 The circuit court ultimately found that Tarver was not mentally retarded and the Alabama Court of Criminal Appeals affirmed in an unpublished memorandum. See 2004 WL 362352, *7 (Ala. Crim. App. Nov. 23, 2005) (Cobb, J., concurring in part and dissenting in part.) Justice Cobb dissented from this ruling, arguing that the circuit court abused its discretion in making many of its factual findings, particularly when it rejected the testimony of the expert retained by the Alabama Attorney General who found Tarver to be mentally retarded.
expressed the opinion that petitioner was not mentally retarded; (5) petitioner’s own expert at the penalty phase of trial agreed that petitioner was not mentally retarded but thought his intellectual ability was in the borderline range; (6) petitioner had held many jobs, including one in which he was promoted from loading trucks to operating machinery; (7) petitioner had been married for five years and supported his wife while she was in nursing school; and (8) petitioner’s actions before, during, and after the crime support the conclusion that he is a street-wise criminal intent on minimizing his culpability and establishing a defense to his crime.

Ohio appellate courts have on several occasions remanded for evidentiary hearings on Atkins claims raised in petitions for post-conviction relief. See, e.g., State v. Waddy, 2006 WL 1530117 (Ohio App. June 6, 2006) (unpublished) (petitioner was entitled to expert assistance and an evidentiary hearing on his Atkins claim despite the fact that all known IQ scores were above 70 and the most recent score was 83; court looks to documentation suggesting below average intellectual functioning that was apparent prior to age 18, as well as evidence suggesting limitations in social and conceptual skills.); State v. Carter, 813 N.E.2d 78 (Ohio App. 2004) (petitioner entitled to a hearing and expert assistance where petitioner’s full scale IQ was found to be 76 at time of trial, the mitigation expert had concluded that petitioner was borderline mentally retarded, Social Security records indicated petitioner received benefits due to mental retardation, and a psychologist with expertise in mental retardation opined that strong indications of mental retardation warranted further testing); State v. Hughbanks, 792 N.E.2d 1081 (Ohio App. 2003) (petitioner was entitled to expert assistance, discovery and an evidentiary hearing on Atkins claim despite testimony at pre-Atkins trial that he had a full-scale IQ of 82, and the Ohio Supreme Court on direct appeal found “no evidence that Hughbanks [was] mentally retarded,” where petitioner presented records showing that he received social security benefits based on a diagnosis of mental retardation supported by a full-scale IQ score of 73 and indications of adaptive deficits.)

In State v. Harris, 859 A.2d 364 (N.J. 2004), a case involving a petition for post-conviction relief, the New Jersey Supreme Court provided the following explanation about the showing required to be entitled to further development of an Atkins claim:

[W]e are not requiring that a defendant on post-conviction review make a prima facie showing of mental retardation to warrant a psychological examination and a hearing; we are fully aware that cases arising on post-conviction review will vary in respect of the records developed in prior proceedings. However, we will require that defendant present a reasonable basis to be permitted a hearing to explore further the possibility of mental retardation.

On the record before it, the New Jersey Supreme Court found that the petitioner failed to provide a reasonable basis for believing he was mentally retarded. Although he had received IQ scores of 72 and 75 on two tests taken during childhood, he had been tested on numerous other occasions and received higher scores. Further, his records reflected a finding by one psychologist that petitioner’s intellectual potential was higher than revealed
on a test resulting in a 78 IQ score. And a school social worker had written that petitioner’s placement in an educable class was because of his “disturbing influence” in regular class, as well as his inability to function on the same level as others. Importantly to the court, the social worker had opined that petitioner could function at a low average level. Perhaps most damning to petitioner’s claim was testimony by a defense expert at the pre-Atkins penalty phase. The expert, a child psychologist, strongly disagreed with any diagnosis of mildly mentally retarded made when petitioner was a child. He opined that during the relevant time period mentally retarded classes were dumping grounds for children with any kind of behavioral or underachievement problem.

Florida has a pre-Atkins statute that does not apply to persons sentenced to death before it was enacted in 2001. In response to Atkins, the Florida Supreme Court adopted Florida Rule of Criminal Procedure 3.203, which applies to both pre-trial and post-conviction cases. Unlike the statute, which requires defendants to prove mental retardation by clear and convincing evidence, the rule does not include a burden of proof. What the appropriate burden should be in post-conviction has not yet been resolved by the Florida Supreme Court because post-conviction courts routinely find that petitioners have failed to establish mental retardation under either the clear and convincing evidence standard or by a preponderance of the evidence. See, e.g., Kilgore v. State, ___ So.3d ___, 2010 WL 4643043 (Fla. Nov. 18, 2010). The Florida Supreme Court has rejected the argument that death row inmates are entitled to a jury determination of mental retardation under Ring v. Arizona, 536 U.S. 584 (2002). See, e.g., Nixon v. State, 2 So.3d 137, 145 (Fla. 2009).

One issue that has come up in the post-conviction setting is whether the State can appeal from a finding that a death row inmate is mentally retarded. In In re Competency of Parkus, 219 S.W.3d 250 (Mo. 2007), the Missouri Supreme Court rejected the petitioner’s argument that such an appeal was not allowed. It found that the proceeding was civil in nature and, therefore, the State was free to appeal the lower court’s ruling. Id. at 254.

In Burns v. Commonwealth, 688 S.E.2d 263 (Va. 2010), whether or not a post-conviction Atkins determination was civil or criminal was also addressed. The lower court had found that the proceeding was neither wholly criminal nor wholly civil. Because of this finding, the lower court concluded that the petitioner’s present competence was not relevant and that summary judgment could be entered in favor of the Commonwealth. The Virginia Supreme Court reversed, ruling that the proceeding was criminal in nature and that the petitioner had the right to be competent during the proceeding. The court also held that the Commonwealth could not move for summary judgment.

As is true with mental retardation findings made at the trial level post-Atkins, rulings on claims of mental retardation made in post-Atkins post-conviction proceedings are almost always upheld on appeal. This is true for prevailing Atkins claims as well as losing ones. See, e.g., Ex Parte Cockrell, 2009 WL 1636528 (Tex. Crim. App. June 10, 2009) (unpublished) (without discussion of facts, accepting convicting court’s conclusion that petitioner established mental retardation by a preponderance of the evidence and granting relief on successor habeas petition.) ; State ex rel. Lyons v. Lombardi, 303 S.W.3d 523
(Mo. 2010) (master’s finding that petitioner established his mental retardation was supported by substantial evidence; regarding intellectual functioning, petitioner had four IQ scores ranging from 61-84 but petitioner’s expert, who was the most credible, explained the variation leading the master to conclude that petitioner’s IQ fell within the range of 61-70; evidence supported the master’s finding that petitioner had substantial deficits in communication, shown in part by the difficulty petitioner’s attorneys and expert had communicating with him and by testimony by family about his being quiet and withdrawn and unable to read, write or spell; evidence also supported the master’s finding that petitioner had substantial deficits in functional academics, including limited school records demonstrating failing or incomplete grades and attending 10th grade for three consecutive years, placement in the bottom two percent on the Iowa Basic Skills Test, and family testimony that petitioner was “slow” and in special education; the records presented by petitioner and the testimony received at the hearing was sufficient for the master to conclude that petitioner’s conditions were not a recent fabrication and that they were documented prior to petitioner attaining the age of eighteen); In re Competency of Parkus, 219 S.W.3d 250, 255 (Mo. 2007) (affirming post-conviction court’s finding that petitioner established his mental retardation; findings of mental retardation were included in examinations of petitioner at ages 8, 10 (2 reports), 11, 13, 15, and 17; the post-conviction court also found limited adaptive behaviors documented at ages 8 (2 reports), 10 (2 reports), 13 (3 reports), and 15 (2 reports), including limitations in social skills, self-direction, functional academics, health and safety, and home living; although there was conflicting evidence, the post-conviction court found that petitioner’s evidence had superior evidentiary weight; the appellate court could not say “that there is no substantial evidence to support the judgment or that the judgment is against the weight of the evidence.”); Ex Parte Plata, 2008 WL 151296 (Tex. Crim. App. Jan. 16, 2008) (unpublished) (finding by lower court that petitioner established his mental retardation is adopted and relief granted on successor petition); Ex Parte Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) (accepting recommendation of habeas court that relief be granted on Atkins claim); State v. Gumm, 864 N.E.2d 133 (Ohio App. 2006) (rejecting state’s appeal of post-conviction court’s finding that petitioner is mentally retarded even though petitioner’s IQ scores above 70 gave rise to a rebuttable presumption that petitioner was not mentally retarded).

The standard of review makes obtaining reversal of a lower court’s decision extremely difficult. See, e.g., State v. White, 885 N.E.2d 905, 912 (Ohio 2008) (abuse of discretion standard applies to Atkins claims raised in post-conviction proceedings meaning that the reviewing court should not overrule the lower court’s finding if it is supported by competent and credible evidence); State v. McManus, 868 N.E.2d 133 (Ohio App. 2006) (post-conviction court’s findings on intellectual functioning and adaptive behavior prongs of mental retardation definition are factual determinations that are subject to review under the clearly erroneous standard); Myers v. State, 130 P.3d 262, 267 (Okla. Crim. App. 2005) (“When the defendant challenges the sufficiency of the evidence following a jury finding that he is not mentally retarded, this Court will review the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same
conclusion.”)\textsuperscript{95}; \textit{Van Tran v. State}, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (unpublished) (question of whether a petitioner is mentally retarded is mixed question of fact and law and lower court’s factual findings are presumed to be correct and can be overcome only when the preponderance of the evidence is contrary to the lower court’s finding); \textit{Ex Parte Cockrell}, 2009 WL 1636528 (Tex. Crim. App. June 10, 2009) (unpublished) (“In cases in which the evidence could support both a finding that the habeas applicant has shown by a preponderance of the evidence that he is mentally retarded and a finding that he has failed to show he is mentally retarded to that level of confidence, we typically defer to the recommendation of the convicting court.”)

The following are examples of denials of \textit{Atkins} claims raised in post-conviction proceedings that have been affirmed. \textit{Kilgore v. State,} \textit{___ So.3d ___}, 2010 WL 4643043 (Fla. Nov. 18, 2010) (competent, substantial evidence supported post-conviction court’s finding that petitioner failed to establish significantly subaverage intelligence under either a clearly convincing standard of proof or preponderance of the evidence; although two experts opined that petitioner was mentally retarded, the most reliable IQ scores were 74, 75 and 76 which were above the cut-off of 70 under Florida law, and there was ample evidence discrediting the one qualifying score of 67); \textit{Turner v. State}, 2010 WL 3802538 (Fla. Sept. 28, 2010) (unpublished) (post-conviction court did not err in summarily denying \textit{Atkins} claim where appointed experts reported IQ scores of 98 and 108); \textit{Thompson v. State}, 2010 WL 1851473 (Fla. May 6, 2010) (unpublished) (competent, substantial evidence supported the post-conviction court’s factual findings that petitioner is not mentally retarded based on the definition of the term set forth in \textit{Cherry} given that petitioner’s full-scale IQ scores on standardized tests administered from 1987 through 2009 were generally over 80); \textit{Phillips v. State}, 984 So.2d 503 (Fla. 2008) (competent, substantial evidence supported the post-conviction court’s finding that petitioner failed to establish he was mentally retarded; post-conviction court credited State expert’s opinion that petitioner did not have significantly subaverage intellectual functioning over defense experts because the defense experts failed to test for malingering; also, majority of IQ score exceeded statutory cut-off of 70; defense expert who conducted retrospective adaptive functioning assessment failed to determine current adaptive functioning as required by the Florida statute; also, the record contained competent substantial evidence that petitioner does not suffer from deficiencies in adaptive functioning given that he supported himself, worked as short-order cook, garbage collector, and dishwasher, paid the bills and did the majority of housework when living with his mother, was described as a “great son, brother, and uncle,” bought a car for his mother and a typewriter for his sister, and drove his nephews and nieces places; the planning and execution of the murder in a cold, calculated and premeditated manner, as well as the cover up were inconsistent with mental retardation; finally, petitioner was healthy, well nourished and well-groomed; petitioner also failed to meet the age of onset requirement; poor grades in school could be attributed to his truancy); \textit{Jones v. State}, 966 So.2d 319 (Fla. 2007) (the plain language of

\textsuperscript{95} In \textit{Hooks v. Workman}, 693 F.Supp.2d 1280, 1299 (W.D. Okla. 2010), a federal district court recently rejected a challenge to this standard of review as applied to mental retardation determinations, finding: Petitioner has not demonstrated that the [Oklahoma Court of Criminal Appeals'] use of this standard to review his sufficiency of the evidence claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.”
Florida’s mental retardation statute refuted the defense expert’s contention that only adaptive behavior prior to age 18 was relevant to the mental retardation determination; to the extent petitioner was arguing that the issue was not one of statutory interpretation but rather interpretation of the DSM-IV, the argument also failed given DSM-IV’s clear reference to “present” adaptive functioning; *Atkins* does not essentially prohibit a determination of an individual’s current adaptive skills if that person is in prison; although the state’s expert admitted the adaptive skills test he administered to department of corrections employees was not ideally suited to a prison environment, the test was not his sole source of information; the evidence demonstrated that petitioner understood and managed his life both in and out of prison; substantial evidence supported the post-conviction court’s finding that petitioner does not suffer deficiencies in adaptive functioning; petitioner’s claim that mental retardation could be diagnosed with IQs between 70 and 75 failed under the plain language of Florida’s mental retardation statute, which requires an IQ score of 70 or below; petitioner’s WAIS scores of 72, 70, 67, 72 and 75 did not indicate “significantly subaverage general intellectual functioning” and substantial evidence supported the post-conviction court’s finding that petitioner did not meet the first prong of the mental retardation definition.); *Johnston v. State*, 960 So.2d 757 (Fla. 2006) (post-conviction court did not err in finding that petitioner was not mentally retarded based on testimony by the court appointed experts who only considered the first prong of the mental retardation definition; competent, substantial evidence supported the post-conviction court’s ruling; although petitioner did have IQ scores below 70 on tests taken early in his life, the test administrators had noted that the scores were probably inaccurate due to behavioral and emotional problems at the time, observations that were apparently proved correct as later scores consistently placed petitioner in the upper borderline intellectual range to low average functioning range well above “the determinative line for retardation.”); *Cherry v. State*, 959 So.2d 702 (Fla. 2007) (petitioner’s IQ score of 72 does not fall within the statutory range for mental retardation, and thus the post-conviction court's determination that petitioner is not mentally retarded is affirmed.); *Brown v. State*, 959 So.2d 142 (Fla. 2007) (competent, substantial evidence supported the post-conviction court’s finding that petitioner is not mentally retarded where only one of the three evaluating experts, Dr. McClain, opined that petitioner is mentally retarded and the post-conviction court criticized Dr. McClain in part because she looked only to petitioner’s adaptive functioning prior to the age of 18 and failed to report on petitioner’s current adaptive functioning; post-conviction court was also troubled by the fact that recent IQ scores placed petitioner in the mildly mentally retarded range while Dr. McClain’s report of petitioner’s adaptive functioning indicated that he would be classified in the severely mentally retarded range; Dr. McClain’s report “was contradictory to the evidence that Brown was engaged in a five-year intimate relationship prior to the crime, that he had his driver’s license and drove a car, and that he was employed in numerous jobs including as a mechanic.”); *Commonwealth v. Gibson*, 925 A.2d 167 (Pa. 2007) (substantial evidence supported determination that petitioner was mentally retarded where post-conviction court credited defense experts over Commonwealth’s expert); *Commonwealth v. Crawley*, 924 A.2d 612 (Pa. 2007) (given that the petitioner’s own expert acknowledged that the petitioner’s IQ was not within the range of IQ for mental retardation under either the DSM-IV or the AAMR, it was not error for the post-conviction court to focus on the petitioner’s intellectual functioning in finding that the petitioner failed
to prove he was mentally retarded); *Dunaway v. State*, ___ So.3d ___, 2009 WL 4980320 (Ala. Crim. App. December 18, 2009) (trial and post-conviction record established that petitioner failed to meet his burden of proving by a preponderance of the evidence that he was mentally retarded; evidence discussed was: (1) IQs score of 75 or 76 before the capital offense and 67 pre-trial; (2) after petitioner’s release from prison he completed an auto-mechanics program, obtained his certification, and was employed as a lube technician; (3) petitioner fathered a child and had a relationship with one of the victims; and (4) petitioner testified at trial and his testimony appeared articulate); *Nixon v. State*, 2 So.3d 137 (Fla. 2009) (upholding finding that petitioner failed to establish mental retardation where trial court credited the State’s expert, who found petitioner’s IQ to be 80, over petitioner’s expert); *Burns v. State*, 944 So.2d 234 (Fla. 2006) (competent, substantial evidence supported post-conviction court’s determination that petitioner is not mentally retarded; although petitioner received an IQ score of 69 on the test administered by one expert, the expert called by the State explained why low IQ scores did not necessarily mean that petitioner was mentally retarded, noting that scores on some subtests were well above about the range typically associated with mental retardation; this led him to theorize that petitioner has a significant intellectual deficit that is circumscribed and related to his visual and spatial skills, a finding found credible by the post-conviction court; competent, substantial evidence also supported the post-conviction court’s determination that petitioner failed to prove the adaptive deficit prong where the court referenced, among other things, evidence that: (1) petitioner was always able to support himself; (2) petitioner co-owned a watermelon hauling operation with his sister and served as a crew leader and driver; and (3) petitioner had worked as a cab driver and on an assembly line; additionally, much of the testimony presented at petitioner’s resentencing directly conflicted with the evidence presented in support of the mental retardation claim; regarding the age of onset requirement, it was observed that petitioner had graduated from high school and never failed a grade; the court deferred to the lower court’s rejection of petitioner’s contention that his apparent academic success was the result of a silent policy of social promotion.); *Trotter v. State*, 932 So.2d 1045 (Fla. 2006) (competent, substantial evidence supported the post-conviction court’s finding that petitioner failed to meet any of the three prongs for determining mental retardation by either a preponderance of the evidence or by clear and convincing evidence; no expert who tested petitioner’s IQ as an adult found that he met the definition of mental retardation (his scores ranged from 72 to 91); the variance between the scores was explained by his delay in starting school and the deficient environment in which he grew up; rejecting petitioner’s argument that testimony from the only expert who examined petitioner in his youth should be essentially determinative especially since the post-conviction court found that this expert’s testimony was unreliable; even accepting the expert’s new 8 point downward adjustment in petitioner’s old IQ score, from 88 to 80, the score was still above the mental retardation level and there was no basis in the expert’s own testimony to support his new opinion, which was contradicted by all of the other experts who did examine petitioner.); *Doss v. State*, 19 So.2d 690 (Miss. 2009) (upholding finding that petitioner failed to establish mental retardation by preponderance of the evidence where post-conviction court credited opinions of State hospital doctors over petitioner’s experts regarding adaptive deficits); *Commonwealth v. Romero*, 938 A.2d 362 (Pa. 2007) (affirming denial of *Atkins* claim where post-conviction court credited testimony that petitioner was not mentally retarded; although there was testimony that
petitioner’s intelligence was in the borderline range, his adaptive functioning was not significantly deficient given evidence that he had an ex-wife with whom he’d had children and purchased a house, he was able to diagnose and repair problems with cars, and he was able to travel to New Jersey with a cousin and assist the cousin find employment; Commonwealth v. Crawley, 924 A.2d 612, 615 (Pa. 2007) (substantial evidence supported post-conviction court’s finding that petitioner had not proved mental retardation where petitioner’s own expert acknowledged that petitioner’s IQ was not within the range of mental retardation under either DSM-IV or AAMR); Davis v. State, 9 So.3d 514 (Ala.Crim.App. 2006), rev’d in part on other grounds, 2007 WL 2216893 (Ala. Aug. 3, 2007) (affirming denial of claim that petitioner was ineligible for the death penalty under Atkins because of mental retardation and frontal-lobe brain damage; while petitioner scored 74 on the "WISC-R" IQ test in eighth grade, accompanying evaluation indicated petitioner was above grade level expectancy in all areas; IQ test administered prior to petitioner’s trial resulted in full-scale IQ score of 77, and one later administered by the department of corrections similarly produced a score in the high 70’s; there was testimony that petitioner learned brick masonry in Job Corps where he also acquired a GED; state’s expert opined that petitioner merely had borderline intellectual functioning.); Coleman v. State, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010) (unpublished) (upholding finding that petitioner failed to establish significantly substandard intellectual functioning under Tennessee’s statute which requires an IQ score of 70 or below and does not permit consideration of Flynn effect or SEM; petitioner also failed to establish required adaptive deficits; given petitioner’s IQ score of 80 at the time of his incarceration, he failed to establish by clear and convincing evidence that he was mentally retarded at the time of the capital offense), appeal granted (Tenn. June 17, 2010); Cribbs v. State, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009) (unpublished) (appellate court unable to find that post-conviction court erred in concluding that petitioner failed to establish by a preponderance of the evidence that he satisfied the first prong of the mental retardation definition where post-conviction court found that IQ scores of 73 were most reliable and Tennessee Supreme Court prohibits consideration of standard rates of error); Van Tran v. State, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (unpublished) (affirming lower court’s denial of relief on Atkins claim; although the petitioner satisfied the first prong of the mental retardation definition with IQ scores of 65, 70 and 68, the lower court found that he did not establish the requisite adaptive deficits notwithstanding the testimony of petitioner’s two experts and the fact that the State presented no affirmative evidence; agreeing with lower court that score on Independent Living Scale was entitled to little weight given that there was no indication that the testing questions took into account petitioner's lifestyle in Vietnam or that he has spent the majority of his adult life incarcerated; further, the “circumstances of the Petitioner's crime belie any assertion that the Petitioner suffered from any deficit in intellectual ability or adaptive skills.”); Pizzuto v. State, 202 P.3d 642 (Idaho 2008) (affirming grant of summary judgment to State on Atkins claim raised in successive post-conviction petition where there was no evidence showing that petitioner had an IQ of 70 or below prior to this eighteenth birthday; post-conviction court could have reasonably inferred that the verbal IQ score of 72 that petitioner received when twenty-eight was actually higher due to SEM, and not necessarily lower; post-conviction court was not required to infer that petitioner’s IQ had not decreased over time especially in light of expert testimony that petitioner’s long history of drug abuse and his epilepsy would have
negatively impacted his mental functioning; expert opinion that petitioner had mild mental retardation in 1996 is not an opinion that he had an IQ of 70 or below twenty-two years earlier; post-conviction court was not required to sua sponte infer that expert’s statement in supporting affidavit that petitioner likely met Idaho’s standard for mental retardation constituted as an opinion that petitioner likely had an IQ of 70 or below prior to his eighteenth birthday; *Rogers v. State*, 653 S.E.2d 31 (Ga. 2007) (rational trier of fact could have found that Rogers failed to prove mental retardation by a preponderance of the evidence where the jury heard: (1) Rogers received IQ scores during his lifetime of 78, 84, 85, 68, 70 and 89; (2) expert testimony establishing that IQ scores between 70 and 84 do not indicate mental retardation; (3) testimony that Rogers checks out prison library books on a regular basis and is able to use a computer; (4) testimony by three State experts disagreeing with the mental retardation finding by three defense experts; and (5) testimony that Rogers’s brain dysfunction did not establish he was mentally retarded.); *State v. Hill*, 894 N.E.2d 108 (Ohio App. 2008) (although petitioner satisfied the intellectual functioning prong of the mental retardation definition, he failed to establish the requisite adaptive deficits where his lack of effort during administration of adaptive behavior instruments rendered the results unreliable and anecdotal evidence was found by the post-conviction court to be insufficient to meet the petitioner’s burden of proof); *Ex Parte Woods*, 296 S.W.3d 587 (Tex. Crim. App. 2009) (rejecting petitioner’s attempt to relitigate mental retardation in a successor habeas petition where petitioner’s “additional evidence does not compellingly or dramatically undermine the previously considered substantial evidence that supports a finding that applicant is not mentally retarded. Even with a consideration of [petitioner’s] additional evidence, a rational finder of fact could still find that [petitioner] is not mentally retarded and that [petitioner] manufactured a mental-retardation claim in an attempt to escape the ultimate punishment for the brutal murder of an eleven-year-old girl.”); *Ex Parte Chester*, 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (although rejecting lower court’s finding that petitioner had failed to establish significantly sub-average intellectual functioning, and despite a score of 57 on a Vineland adaptive functioning instrument, denying relief on *Atkins* claim based on lower court’s findings on the Briseno factors); *Ex Parte Riley*, 2007 WL 2660319 (Tex. Crim. App. Sept. 12, 2007) (unpublished) (after finding that successor petition raising *Atkins* claim satisfied statutory requirements and remanding to the convicting court for consideration of the claim, lower court’s finding that petitioner failed to show he is mentally retarded is adopted, with no discussion of the facts, and relief is denied.); *Ex Parte Matamoros*, 2007 WL 1707193 (Tex. Crim. App. June 13, 2007) (unpublished) (following evidentiary hearing on *Atkins* claim raised in successor habeas petition, rejecting the lower court’s finding that petitioner failed to show by a preponderance of the evidence that he has significant sub-average general intellectual functioning and its findings and conclusions regarding the effect bilingualism may have had on either petitioner's general intellectual functioning or his adaptive functioning, but holding that petitioner failed to demonstrate by a preponderance of the evidence that he has sufficient deficiencies in adaptive functioning for a diagnosis of mental retardation or that there was an onset of mental retardation during petitioner’s developmental period.) *Ex Parte Lewis*, 223 S.W.3d 372 (Tex. Crim. App. 2006) (adopting lower court’s finding that petitioner failed to establish his mental retardation where there were dueling expert opinions and the lower court placed greater reliance on the prosecution’s expert).
Denials of relief are occasionally reversed, however. See, e.g., Jackson v. State, 963 So.2d 150 (Ala. Crim. App. 2006) (reversing lower court’s rejection of Atkins claim where lower court refused stipulation by the parties that petitioner was mentally retarded, the two State’s experts agreed that petitioner was mentally retarded, and the lower court’s statement that the evidence of mental retardation as being conflicting was not plausible); State v. White, 885 N.E.2d 905 (Ohio 2008) (reversing denial of Atkins claim where post-conviction court abused its discretion in rejecting the uncontradicted testimony by the defense experts regarding adaptive deficits and abused its discretion in determining that the petitioner had failed to establish that his adaptive deficits manifested prior to age eighteen); State v. Williams, 847 N.E.2d 495 (Ohio App. 2006) (reversing post-conviction court’s dismissal of petition raising Atkins claim without evidentiary hearing and/or granting of summary judgment in favor of respondent due to errors in the analysis of evidence in light of the proper standards for dismissal and summary judgment).

And grants of post-conviction relief can sometimes be reversed. See, e.g., State v. McManus, 868 N.E.2d 778 (Ind. 2007) (post-conviction court’s finding that petitioner established significantly subaverage intellectual functioning was clearly erroneous where petitioner’s IQ had been tested five times throughout his life and three of the scores were above to 70-75 cut-off and the record demonstrated that the two remaining scores were suppressed either because petitioner was not working at his full potential or because he was suffering from severe depression and anxiety; post-conviction court’s finding that petitioner established substantial impairment of adaptive behavior was also not supported by the record given that none of petitioner’s composite scores on the ABAS II fell more than one standard deviation below the mean and it was apparent that his scores on the VABS II were inconsistent with the record and were “suppressed by the affection of the relatives who supplied the input” on that instrument).

1.14 FEDERAL HABEAS PROCEEDINGS

In the first few years after the Atkins decision, the most pressing question for federal courts was whether an inmate who previously presented a federal habeas petition was entitled to file a second petition raising a claim of mental retardation under Atkins. And as with the state courts, the federal courts had to determine when a claim of mental retardation was strong enough for further pursuit. In In re Holladay, 331 F.3d 1169 (11th Cir. (Ala.) 2003), the Eleventh Circuit held that “in order to make a prima facie showing that he is entitled to file a second or successive petition based on [the] Supreme Court's decision in Atkins, [the petitioner] . . . must demonstrate that there is a reasonable likelihood that he is in fact mentally retarded.” Id. at 1173. The court further explained: “[I]f petitioner's proofs, when measured against the entire record in this case, establish a reasonable likelihood that he is in fact mentally retarded, then we are required to grant him leave to file a second or

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96 Where a state prisoner has had a federal habeas corpus petition adjudicated on the merits, the prisoner can only file a second petition is he or she is granted authorization to do so by the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). The permissible grounds for filing a second petition are extremely narrow, but do include where the United States Supreme Court announces a new rule of constitutional law that is retroactively applicable to cases on collateral review.
successive habeas petition on the basis of *Atkins.*” *Id.* at 1174.

The court ultimately concluded that Alabama death row inmate Glen Holladay was entitled to file a successor petition raising a claim of mental retardation. Holladay had taken numerous IQ tests, with results ranging from a score of 49 to 73. He presented evidence from his early school years that indicated he was considered a slow learner and a Department of Human Resources report that denoted him as “barely educable with a Wechsler IQ of 54.” *Id.* at 1175. Notably, the trial judge had instructed the jury at the pre-*Atkins* sentencing that it could consider Holladay’s mental retardation as a mitigating circumstance. *Id.* The trial court even stated in its judgment that it found Holladay to be “slightly mentally retarded.” This evidence sufficed to establish a reasonable likelihood that Holladay was mentally retarded.97

In contrast, in *In re Hicks,* 375 F.3d 1237 (11th Cir. (Ga.) 2004), the Eleventh Circuit held that a Georgia death row inmate was not entitled to file a successor federal petition raising an *Atkins* claim. When Hicks had previously raised the claim in state court under a pre-*Atkins* statute banning execution of the mentally retarded, he had presented evidence of an IQ score of 94. Hicks had also presented evidence of a mental health evaluation where the psychiatrist concluded that Hicks had a low average level of intelligence. When a neurologist examined Hicks, he made no finding of mental retardation. In fact, the neurologist noted that Hicks had obtained his GED and college credits while incarcerated. *Id.,* at 1240-41.

Judge Birch dissented from the court’s refusal to permit Hicks to raise the *Atkins* claim. Birch pointed out that Hicks had not been able to get a post-*Atkins* mental health evaluation because the state court had refused to grant an expert access to Hicks. *Id.,* at 1241-42 (Birch J., dissenting); see also *Hicks v. Schofield,* 599 S.E.2d 156, 160 (Fletcher, C.J., dissenting) (“A state law procedure that allows a habeas court to deny access to an expert and then dismiss the petition for lack of an expert fails to provide adequate protection for the federal constitutional right.”) Birch further noted that the majority ignored an affidavit from a mental health expert explaining why the IQ score of 94 was unreliable. *Id.* at 1242. And the finding that Hicks merely had low intelligence was based on an expert’s estimate, not on the results of an IQ test. Finally, Hicks himself was the source for the alleged GED and college credits received while in custody, information that was not corroborated.98

In *In re Hearn,* 418 F.3d 444 (5th Cir. (Tex.) 2005), the appeals court granted Hearn permission to file a successor petition raising an *Atkins* claim. In support of his claim, Hearn had presented an expert report providing the etiology of Hearn’s mental retardation, Fetal Alcohol Syndrome, although not independently diagnosing mental retardation. A second expert addressed only Hearn’s intellectual functioning and made no conclusions regarding whether Hearn was mentally retarded. The final expert interpreted the second expert’s findings and offered the opinion that Hearn has significant limitations in

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97 Holladay ultimately was found to be mentally retarded. *Holladay v. Allen,* 555 F.3d 1346 (11th Cir. (Ala) 2009).

98 Robert Hicks was executed in Georgia on July 1, 2004.
intellectual functioning. Based on this expert’s own testing, he also found significant limitations in adaptive behavior and that the onset of Hearn’s limitations occurred prior to age 18. The expert finally opined that Hearn meets the criteria of mental retardation set forth by the AAMR. Although allowing Hearn to proceed with the claim, the court did note that it found only “slight merit” to Hearn’s request given that he received an IQ score of 74. *Id.* at 447.

The Fifth Circuit denied authorization to file a successor petition in *In re Salazar*, 443 F.3d 430 (5th Cir. (Tex.) 2006), where the applicant failed to present evidence that any professional who ever evaluated him had labeled him mentally retarded. See also *In re Johnson*, 334 F.3d 403 (5th Cir. 2003) (petitioner failed to make prima facie showing of mental retardation with a seventh grade transcript showing he failed all academic course as well as letters from a forensic psychologist referring to “multiple areas of concern,” a prior evaluation that “did not clearly reflect mental incapacitation,” a “belief” that Johnson's verbal intelligence level may be as low as 62-65 and as high as 72-75, and recommending further testing.); *In re Campbell*, 82 Fed. Appx. 349 (5th Cir. (Tex.) 2003) (unpublished) (evidence showing petitioner fit within the four risk factors for mental retardation identified by the AAMR was insufficient to state a prima facie case of mental retardation.)

One issue that has come up where an *Atkins* claim was denied by the state court is what effect the state court’s ruling should have on the federal court’s decision whether to allow the claim to proceed. In granting authorization to file a successor petition in *In re Wilson*, 442 F.3d 872, 878 (5th Cir. (Tex.) 2006), the Fifth Circuit observed that “the state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether Wilson has made a prima facie showing of entitlement to proceed with his federal habeas application, which is an inquiry distinct from the burden that Wilson must bear in proving his claim in the district court.” See also *In re Woods*, 155 Fed. Appx. 132 (5th Cir. (Tex.) 2005) (unpublished) (granting permission to file successor petition raising *Atkins* claim despite state court finding that petitioner is not mentally retarded).

A Virginia death row inmate received permission to file a successor habeas petition raising an *Atkins* claim only to have the petition dismissed by the district court without an evidentiary hearing. The Fourth Circuit in *Walker v. True*, 399 F.3d 315, 324 (4th Cir. (Va.) 2005), ruled that this was error where the petitioner had “received IQ scores above and two standard deviations below the mean and where uncontested expert opinion suggests that he is mentally retarded under the [Commonwealth of Virginia’s] definition .. .”

The Fourth Circuit did reject Walker’s argument that he was entitled to a jury trial on his mental retardation claim. Walker had attempted to invoke a transitional Virginia statute that provided for a jury trial on mental retardation where the defendant was on direct appeal at the time Virginia enacted its statute implementing *Atkins*. The Virginia Supreme Court has found that the right to jury trial also applies to the inmates who were in post-conviction proceedings at the relevant time. The transitional statute made clear, however, that petitioners such as Walker, who had completed state habeas proceedings at the time the statute became effective, had no remedy at all in state court for an *Atkins* claim.

*Atkins v. Virginia*
Walker argued that he had a right to a jury trial in federal court under the Equal Protection Clause. The Fourth Circuit disagreed, finding the statute’s differentiation between inmates who had completed state habeas review and those who had not was reasonably related to the state’s interest in efficiently utilizing its judicial resources. Nor did Ring v. Arizona establish an entitlement to a jury trial on mental retardation. Id. at 325-26.

Where there was no hearing in state court, there are many instances where federal courts have ordered evidentiary hearings on Atkins claims. See, e.g., (Alvin) Jackson v. Norris, 615 F.3d 959 (8th Cir. (Ark.) 2010) (vacating grant of summary judgment to respondent and remanding for evidentiary hearing on Atkins claim; petitioner was entitled to a hearing based on the following evidence from the trial record: (1) at almost seven years of age petitioner was referred for analysis because of poor schoolwork, emotional outcries, and disruptive behavior and was tested at the borderline range of mental ability; (2) a 1978 evaluation concluded that he “was unable to function physically or emotionally in a classroom setting at the present time.” His verbal IQ was 60, his performance IQ was 90, rendering his full scale IQ as 70. The thirty point discrepancy indicated some organicity as well as the severeness of his learning problems; (3) When petitioner was eight years old, his school principal wrote his mother a note, stating that it was necessary to keep petitioner out of school because of his behavior, e.g., wandering over the building upsetting furniture, yelling into other classrooms, and hitting or kicking anyone who is within reach; (4) at age 11, petitioner had “a mental age of seven years eight months, an IQ of 70[,] and classified[ed] [as a] very slow learner [with] poor receptive language development. A 23 point discrepancy at that time between his verbal and performance scores rendered the full scale score irrelevant. He was deemed to have mental retardation.”; (5) at age 12, petitioner was placed on Ritalin, but the dosage level was apparently insufficient to control his hyperactivity; his academic skills were at the second and third grade levels and he was placed in a home schooling program; (6) at age 15, petitioner had difficulty in the visual motor area and expressive and receptive language skills; concerns with regard to his behavior were “significant”; (7) a neurologist testified that he had examined petitioner and concluded that he had ADHD and ASPD and further determined that petitioner abused alcohol and drugs and had “borderline intellectual functioning”; (8) a child and adolescent psychiatrist testified about the characteristics of ADHD, noting, inter alia, that the more severe forms influence almost everything a person does, that some persons afflicted with it exhibit antisocial behavior as they mature, and that if they have borderline mental retardation it makes their lives more difficult; and (9) petitioner's older brother testified that petitioner “had a difficult time growing up, having been picked on a lot,” and “witnessed a number of confrontations between [his] mother and ... stepfather[.]” The two IQ scores of 70 received by petitioner before age 18 were sufficient to create a genuine issue of fact as to the first prong of Arkansas’s mental retardation definition. (In a footnote, the court acknowledges SEM, which makes it possible to diagnosis mental retardation in an individual with an IQ between 70 and 75.) Regarding the second prong of Arkansas’s definition, deficits in adaptive functioning before age 18, the district court found that petitioner only alleged deficits in functional academics. The appeals court concluded, however, that the evidence described above also indicated deficits in social/interpersonal skills. Regarding the third prong of Arkansas’s definition, deficits in adaptive behavior, the appeals court noted it is not part of the DSM-IV-TR definition, nor
does it appear in definitions of other states. Looking to Arkansas case law, the court find that “adaptive behavior” encompasses the same skill areas as adaptive functioning but without an age of onset requirement. Thus, the same evidence that satisfied petitioner’s burden of creating a genuine issue of fact as to the second prong also did so with respect to the third prong;); Sasser v. Norris, 553 F.3d 1121 (8th Cir. (Ark.)), cert. denied, 130 S.Ct. 397 (2009) (petitioner was entitled to an evidentiary hearing on Atkins claim raised in authorized successor petition; petitioner’s failure to raise state law mental retardation defense pre-Atkins did not result in a procedural default of the Atkins claim; the following allegations were adequate to require an evidentiary hearing: (1) petitioner met the DSM and AAMR diagnostic criteria for mental retardation; (2) petitioner’s IQ is 79 which places him in the mentally retarded range taking into account SEM; (3) petitioner was incapable of graduating from high school although he was enrolled in school for 12 years; (4) petitioner was never able to live independently and was living with his mother, at age 29, at the time of the capital offense; (5) petitioner was incapable of paying bills or maintaining a checking account; (6) petitioner was capable of only the simplest manual labor jobs; and (7) petitioner manifests significant deficits in intellectual and adaptive functioning. That the claim was raised in a successor petition, rather than in an initial habeas petition, had no bearing on petitioner’s right to an evidentiary hearing. That petitioner had failed to file a motion for evidentiary hearing as ordered by the district court did not disentitle him to a hearing given that he had already requested a hearing in his petition. Nor was he required to expand the record with additional evidence showing entitlement to a hearing because he was already entitled to one based on the allegations in his petition. Because the State did not raise the statute of limitations defense until the appeal, it was forfeited.)

Few death row inmates have succeeded on Atkins claims in federal court where a state court earlier rejected the claim. Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), in order to obtain federal review of a claim once a state court has adjudicated the claim on the merits, a petitioner must demonstrate that the adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2). In addition, 28 U.S.C. § 2254(e)(1) provides that “a determination of a factual issue made by a State court shall be presumed to be correct” in a subsequent federal habeas proceeding and that the petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” The precise nature of the relationship between § 2254(d)(2) and § 2254(e)(1) has caused confusion and has not yet been definitely resolved. The federal courts of appeals have divided over whether § 2254(e)(1)’s presumption of correctness and clear-and-convincing standard of proof govern every challenge to a state-court factual determination or only those challenges that are based on evidence that was not presented to the state court. The
Supreme Court has held that the clear-and-convincing evidence standard of § 2254(e)(1) pertains only to a state court's determinations of particular factual issues, not a state court's decision as a whole. See Miller-El v. Cockrell, 537 U.S. 322, 341-42 (2003).

Another troublesome issue is when, if ever, a federal court can consider evidence that was not first presented to the state court. Under 28 U.S.C. § 2254(e)(2), a state prisoner is not entitled to an evidentiary hearing if he or she failed to develop the evidence in state proceedings unless the prisoner can meet one of two exceptions that will rarely be applicable.

Where an applicant failed to develop the facts in state court, a federal evidentiary hearing is nevertheless permitted if the applicant shows that –

“(A) the claim relies on -
   (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
   (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

If a petitioner diligently investigated the claim in state court and was nevertheless unable to develop it, there is no “failure to develop” and § 2254(e)(2)’s restrictions should not apply. See, e.g., Williams v. Taylor, 529 U.S. 420, 437 (2000). But putting aside the ability to receive an evidentiary hearing, there may still be an exhaustion problem if the petitioner’s newly developed facts fundamentally alter the claim. In general, a state prisoner may not receive relief on a claim in federal habeas proceedings unless that claim was previously raised and rejected by the state courts. 28 U.S.C. § 2254(b). The Fifth Circuit Court of Appeals has ruled that evidence that merely “supplements” an Atkins claim does not render the claim unexhausted and the federal court may properly consider the evidence when ruling on the claim. Morris v. Dretke, 413 F.3d 484 (5th Cir. (Tex.) 2005); see also Gray v. Epps, 2008 WL 4793796, *32 (S.D. Miss. Oct. 27, 2008) (unpublished) (mental health records presented for the first time in federal court merely supplemented issues that were raised in state court concerning behavioral factors that supported the petitioner’s claim of mental retardation).

As observed earlier, it is presently unclear how the limitations on relief contained in 28 U.S.C. § 2254(d) apply, if at all, where the federal court considers evidence that was not available to the state court. This is likely to be resolved in Cullen v. Pinholster, 09-188, pending in the United States Supreme Court. In Winston v. Kelly, 592 F.3d 535 (4th Cir. (Va.), cert. denied, ___ U.S. ___, 2010 WL 2101896 (2010), the Fourth Circuit Court of Appeals concluded that if new evidence properly before the federal court does not render the claim unexhausted, but the evidence is nevertheless “material” to resolution of the claim, § 2254(d) should not apply.
If a claim is found to be unexhausted, and an available state remedy still exists, the petitioner will need to seek a stay of federal proceedings while he or she exhausts the claim in state court. See, e.g., *Crump v. McDaniel*, 2008 WL 4660137, *3-4* (D. Nev. Oct. 17, 2008) (unpublished) (granting request to hold federal proceedings in abeyance so that petitioner can present his *Atkins* claim to the state court where prior counsel failed to develop the claim, it was not plainly meritless and there was no indication in the record that the petitioner had engaged in intentionally dilatory litigation tactics) *cf. Brunfield v. Cain*, 2008 WL 2600140 (M.D. La. June 30, 2008) (unpublished) (even if petitioner’s new evidence fundamentally alters his *Atkins* claim, he has “cause” to overcome his failure to present the evidence to the state court given the state court’s failure to provide him with the funding he requested in order to investigate the claim and retain expert assistance).

There are a number of cases where flaws in the state court process resulted in *de novo* review in the federal court and victory. See, e.g., *Wiley v. Epps*, ___ F.3d ___, 2010 WL 4227405 (5th Cir. (Miss.) Oct. 27, 2010) (affirming district court’s finding that petitioner established his mental retardation by a preponderance of the evidence); *Hughes v. Epps*, 694 F.Supp.2d 533 (N.D. Miss. March 3, 2010) (granting relief on *Atkins* claim where state court’s rejection of the claim without an evidentiary hearing despite petitioner’s *prima facie* showing of mental retardation deprived the state’s decision of the deference normally due under § 2254(d)); *Moore v. Quarterman*, 342 Fed. Appx. 65, 2009 WL 2573295 (5th Cir. (Tex.) Aug. 21, 2009) (unpublished) (applying clear error standard to district court’s findings, affirming grant of habeas relief on *Atkins* claim); *see also Holladay v. Allen*, 555 F.3d 1346 (11th Cir. (Ala.) 2009) (affirming grant of habeas relief on *Atkins* claim that was considered *de novo* by district court because it was not adjudicated in state court but state waived exhaustion). And there are other cases where the petitioner satisfied § 2254(d) and then prevailed. See, e.g., *Thomas v. Allen*, 607 F.3d 749 (11th Cir. (Ala.) 2010) (affirming grant of habeas relief on *Atkins* claim where district court found state court determination unreasonable under § 2254(d) and that petitioner established his mental retardation); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. (Tex.) 2007) (finding that state court unreasonably applied *Atkins* when it determined that petitioner had failed to make a *prima facie* showing of mental retardation and affirming district court’s ruling that petitioner is mentally retarded but remanding to determine whether equitable tolling applies); *Nicholson v. Branker*, 2010 WL 3672246 (E.D. N.C. Sept. 20, 2010) (unpublished) (finding that petitioner is mentally retarded and that state court’s contrary determination was based on an unreasonable application of the law and was unreasonable in light of the evidence before it.); *Simpson v. Norris*, 2009 WL 2985837 (E.D. Ark. Sept. 16, 2009) (unpublished) (following remand for evidentiary hearing on petitioner’s *Atkins* claim, petitioner received an IQ score of 59 on the WAIS-IV and the parties then filed a joint stipulation stating that petitioner met Arkansas’s mental retardation definition).

There are also denials of relief even where flaws in the state court process allowed the federal court to consider the *Atkins* claim *de novo*. See, e.g., *Walker v. Kelly*, 593 F.3d 319 (4th Cir. (Va.)), *cert. denied*, 130 S.Ct. 3318 (2010) (affirming denial of *Atkins* claim raised in authorized successor petition where the district court applied Virginia’s definition of mental retardation *de novo* in determining whether petitioner proved by a preponderance of the evidence that he is mentally retarded; appeal resolved by affirming the district court’s...
finding that petitioner failed to establish the requisite adaptive deficits; although four experts testified that petitioner's skills limitations are significant, basing their conclusions on school and medical records, clinical interviews, prior psychological evaluations, declarations from individuals familiar with Walker, and other records concerning his background, as well as the results of the ABAS-II, the district court apparently credited the Commonwealth’s expert over Walker's experts' testimony and found: “Petitioner has committed various crimes requiring the ability to relate to others, associated himself with women on a personal and intimate level, engaged in homemaking activities, seduced under-aged girls, used others to help him avoid authorities, independently invoked his Miranda rights, used his brother's identity to obtain a driver's license, and obtained goods for himself while in prison. Therefore, while [P]etitioner has below average mental intelligence and some limitations in adaptive behavior, the Court finds that Petitioner has not shown by a preponderance of the evidence that he is mentally retarded as defined by Virginia law.”; although this result was not compelled by the record, the appeals court was not able to find that the district court clearly erred in its finding; the appeals court was unpersuaded by petitioner’s argument that reversal was required because mentally retarded individuals are capable of exhibiting many of the skills the district court relied on in finding that petitioner is not mentally retarded); Eldridge v. Quarterman, 325 Fed.Appx. 322, 2009 WL 1143197 (5th Cir. (Tex.) April 28, 2009) (unpublished opinion) (petitioner not entitled to certificate of appealability on Atkins claim where IQ test results were consistent with district court’s finding that petitioner did not suffer from substandard intelligence and district court’s findings regarding adaptive functioning were not clearly erroneous; in 1994, petitioner received a full-scale IQ score of 112 on a version of the WAIS administered in prison and later, on another version of the WAIS, he received a full-scale score of 84; only on a test administered by a defense expert, which resulted in a score of 72, did petitioner fall within the mildly mentally retarded range; although the defense expert concluded petitioner was mentally retarded, the district court found her opinion unreliable because “she failed to consider or test for the possibility of malingering or lack of effort, failed to consider explanations or possibilities other than mental retardation for the test results she obtained, and relied only on limited information about [petitioner’s]. Further, before testing [petitioner], [the expert] reviewed no school or work records, prior IQ scores, or psychological evaluations and did not interview [petitioner’s] family and friends.”; regarding adaptive functioning, petitioner’s grades in high school, seventieth percentile graduation ranking, and the fact that he passed the pipe-fitters exam all support the district court’s finding that petitioner was not deficient in academic functioning; further, petitioner’s conduct in prison, letters, and oral comments made during trial lend support to the district court’s findings; district court found the defense expert’s opinions on academic deficits not to be credible because she dismissed evidence without an adequate basis for doing so, such as where she claimed petitioner received assistance writing letters and a grievance with the State Bar of Texas but offered no support for that assertion; petitioner’s claim that his brother had taken the pipe-fitters exam for him was rebutted by the State; finding that petitioner was not deficient in the area of work was not clearly erroneous given that he “was regularly employed, received good performance reviews, worked over forty hours per week at times, received regular pay raises and, at one point, earned about four times the minimum wage.”; not clearly erroneous was the district court’s finding that petitioner did not have an adaptive deficit in social functioning given evidence
that he had some friends during his school years, he was socially confident in school until a knee injury, he had girlfriends in high school and subsequent relationships with other women including a common-law wife, he left socially appropriate messages on one of the victim’s answering machine, and, since being in prison, he had “pen pals” from around the world with whom he corresponded; district court’s finding that petitioner was not deficient in the area of home life was not clearly erroneous in light of evidence showing that he cashed his paychecks, shared expenses when he lived with girlfriends, shopped for groceries, performed some household chores, held a job, had a bank account, drove and knew how to repair cars; it was not improper for the district court to give weight to petitioner’s brother’s testimony that petitioner was not mentally retarded given that Texas includes such opinions as an evidentiary factor to be considered in making the mental retardation determination; that petitioner did not suffer from the requisite deficits prior to the age of 18 was shown by his performance on standardized tests and his academic performance -- in the second grade, he performed within the “normal” range on the Peabody Picture Vocabulary Test which showed his mental age as only one month behind his chronological age, he had been a peer tutor for kindergartners when he was in the third grade, he was not in special education classes, was not held back a grade and he graduated from high school in the seventieth percentile of his class; “Finally, none of his friends or family, nor any medical professional, gave any indication before [petitioner] turned eighteen that they believed [petitioner] was mentally retarded.”); Simpson v. Quarterman, 593 F.Supp.2d 922 (E.D. Tex. 2009) (finding that petitioner is “borderline” and does not have significantly subaverage intellectual functioning where he had three WISC-III scores from age fourteen to twenty with full scale IQ scores of 71, 78 and 71 and the score of 65 he received on the WAIS-III prior to the evidentiary hearing “was not statistically so far below the consistent range Petitioner had previously obtained as to call those earlier tests and scores into question”; in addition, the administrator of the pre-hearing test noted that less than ideal testing conditions could partly account for the low IQ score and petitioner had a very strong incentive to malinger; petitioner’s academic grades and test results further supported the conclusion that petitioner did not have significantly subaverage intellectual functioning; petitioner failed to establish adaptive deficits in the area of functional academics to the extent that would support a finding of mental retardation given school records showing passing grades at times, evaluations finding that petitioner did not meet the eligibility criteria for a handicapping condition and that he was above the mentally retarded range, and letters written by petitioner and his actions after being imprisoned; a preponderance of the evidence did not support a finding of deficits or limitations in adaptive behavior in home living, money handling, or work to an extent that would support a finding of mental retardation; the academic records and testimony of his family did not indicate the onset of significant deficits or limitations in adaptive behavior or functioning before age 18); Ledford v. Head, 2008 WL 754486 (N.D. Ga. March 19, 2008) (unpublished) (de novo review of Atkins claim where record did not support state habeas court’s findings on mental retardation and the state court excluded relevant expert opinions but rejecting claim on the merits using the preponderance of the evidence standard of proof; results on Shipley Scale and Culture Fair not considered by district court in light of agreement by experts that neither test is a reliable measure of intellectual functioning; IQ scores of 66 and 69 obtained by petitioner’s post-conviction expert are also disregarded because of the expert’s failure to properly document the questions and
responses thereby precluding review for accuracy; IQ score of 79 obtained by state’s expert is credited, as well as IQ score of 77 that court appointed expert reported prior to the capital trial; even if the district court accepted petitioner’s argument about why the Flynn effect should be used to lower the two accepted scores, the adjusted scores of 73 and 75 are still above the score of 70 that is generally considered to demonstrate significantly subaverage intellectual functioning under Georgia law; and even taking SEM into consideration, petitioner failed to establish significantly subaverage intellectual functioning by a preponderance of the evidence; based on petitioner’s problems functioning in school, the court assumes that petitioner demonstrated deficiencies in functional academics, although the court would not make this finding if functional academics is actually meant to refer to basic literacy and numeracy skills sufficient to function in the world; petitioner failed to establish that his problems holding a job were related to intellectual functioning rather than his drug and alcohol abuse; given that petitioner was only 21 years old when he was incarcerated, petitioner’s expert’s testimony about petitioner’s lack of direction was inadequate to establish significant deficits in the area of self-direction; score on Vineland administered to petitioner’s sister by one of petitioner’s experts did not provide a reliable assessment of petitioner’s adaptive functioning given that many of the sister’s responses conflicted with evidence in the record; score on ABAS administered by state’s expert on petitioner, which resulted in a score that corresponded with the IQ scores accepted by the court, showed that petitioner functioned in the low-average range).

In other cases, § 2254 and/or the presumption of correctness were found to preclude a grant of relief on an Atkins claim. See, e.g., Pierce v. Thaler, 604 F.3d 197 (5th Cir. (Tex.) 2010) (affirming denial of Atkins claim without an evidentiary hearing where the five reasons offered by petitioner for discounting the state court’s rejection of the Atkins claim were without merit; any impropriety by state’s expert Dr. Denkowski in stating that petitioner’s IQ score was probably lowered due to anxiety and depression was irrelevant given that the IQ score obtained by petitioner on the SB-5 was 80, above the mental retardation range; petitioner failed to challenge the district court’s finding that even if Dr. Denkowski overstated the impact of sociocultural factors on adaptive deficits, the evidence supported a finding that petitioner did not suffer from significant adaptive deficits); Maldonado v. Thaler, ___ F.3d ___, 2010 WL 4261980 (5th Cir. (Tex.) Oct. 29, 2010) (even discounting Dr. Denkowski’s testimony, state court’s finding that petitioner did not meet his burden of establishing significantly subaverage intellectual functioning was not unreasonable given, inter alia, his failure to produce a full-scale IQ score on a recognized instrument; even discounting Dr. Denkowski’s findings on the ABAS, the record contained insufficient evidence to rebut the presumed correctness of the state habeas court's factual findings that petitioner “formulated and carried through plans for living, i.e., panhandling as a child; coming to the United States from Mexico; working at a car dealership, an apartment complex, and a factory; transporting marijuana to the United States; and engaging in robbery and murder, albeit criminal activities.”; nor did evidence rebut the presumed correctness of the state habeas court's conclusion that petitioner “fail[ed] to show adaptive deficits in adaptive behavior based, in part, on the applicant's history of driving, procuring and transporting drugs, sometimes working in legitimate jobs, attempting to escape detection during his criminal offenses, his interactions with others [in prison], his correspondence with others, his maintaining his commissary account [in prison], and his
use of the grievance system [in prison].”); *Lewis v. Thaler*, 2010 WL 4119239 (E.D. Tex. Oct. 19, 2010) (looking to entire record, district court was unable to hold that affidavit from the author of the SB-5 exposing procedural errors by the state’s expert in administering the SB-5 provided clear and convincing evidence such that it could rebut the state court’s finding that petitioner is not mentally retarded; in addition to IQ scores, the state court relied on the following in finding that petitioner is not mentally retarded: (1) petitioner was in regular classes until age 10; (2) he was placed in special education at age 10 but the record did not establish that the placement was because of mental retardation and there was no IQ score in the records; (3) petitioner was later tested and designated as language learning disabled and removed from special education, indicating that he’d been tested with an IQ higher than 70; (4) petitioner had an extensive criminal history that required planning and deliberate execution; (5) none of petitioner’s medical/mental health reviews or incarceration records contain a diagnosis of mental retardation; (6) petitioner’s incarceration records contain documents which include legal argument, coherent complaints, requests for relief and medical treatment, and visitation scheduling requests; (7) petitioner can read and write and has an academic record of about third grade; (8) petitioner filed a pro se Civil Rights Action in which he filed motions which were responsive to the respondent's pleadings; (9) petitioner appeared pro se before a federal magistrate judge who commented that petitioner was doing a good job representing himself; and (10) during his capital trial, petitioner was able to understand the proceedings and converse intelligently with his trial attorney); *Hines v. Thaler*, 2010 WL 3283062 (N.D. Tex. Aug. 18, 2010) (unpublished) (petitioner failed to carry his burden of proving that the state court's resolution of his *Atkins* claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence petitioner presented to the state court; a state court's decision to give more weight to a petitioner's childhood IQ test scores than to scores obtained on tests conducted during the pendency of post-conviction litigation is typically a reasonable one under AEDPA; it was not unreasonable for the state court to conclude that petitioner does not display significantly subaverage intellectual functioning despite receiving adult scores of 69 on the WAIS-III, a 70 on the WAIS-IV and a 71 on the Reynolds given the state court’s finding that petitioner had a strong motivation to underperform [notwithstanding the fact that he passed several tests of simple effort and the state’s expert testified that there was zero chance someone who was malingering could achieve such consistent scores] and the IQ score of 69 was consistent with an IQ as high as 74; petitioner also could not overcome the state court’s finding that he did not suffer from significant deficits in adaptive behavior); *Carroll v. Secretary, DOC*, 574 F.3d 1354 (11th Cir. (Fla.) 2009) (state court’s finding that petitioner is not mentally retarded and has an IQ above 75 was not unreasonable in light of the evidence before the state court; petitioner had received IQ scores above 75 on numerous tests and several mental health experts opined his intelligence was above the mentally retarded range; although petitioner did receive some IQ scores below 70, they had been discounted either because of malingering or psychosis at the time the test was administered; the factual record from the state court was sufficient for the court of appeals to conclude that the state court's adjudication of the *Atkins* claim was not “contrary to” or “an unreasonable application of” clearly established federal law or “based on an unreasonable determination of the facts.”); *Brown v. Secretary, Dept. of Corrections*, 2009 WL 4349320 (M.D. Fla. Nov. 25, 2009) (unpublished) (“The state court's credibility determination (that the
defense's expert witness was not credible compared to both the State's expert witness and the court's appointed expert witness) and the factual determination (Brown's IQ score) bind this court."; petitioner’s expert opined that petitioner’s adaptive functioning placed him in the severely mentally retarded range which meant he needed extensive or continuous support, and this conflicted with evidence that petitioner was in a five-year intimate relationship prior to the capital offense, that he had a driver’s license and drove a car, and that he had been employed in numerous jobs, including as a mechanic; Wilson v. Quarterman, 2009 WL 900807 (E.D. Tex. March 31, 2009) (unpublished) (denying Atkins claim raised in authorized successor petition where petitioner’s evidence did not clearly and convincingly rebut the state court’s implicit findings that his IQ was above “about 70 or below” and that his general intellectual functioning was not significantly below average; although petitioner had received a score of 61 on the WAIS-III, the last IQ test administered to him, he had previous IQ scores of 73, 75, 75 and 79; although petitioner argued that the prior scores were on less accurate tests and pointed out that the warden had presented no expert testimony to counter his expert’s opinion that petitioner met the diagnosis for mild mental retardation, the state court, however, had apparently discounted the 61 score because the test had been administered by an intern and no notes were provided showing whether the intern observed whether petitioner might be malingering; regarding adaptive functioning, while petitioner had presented evidence that he scored in the mentally retarded range on the Vineland Adaptive Behavior Skill Test and also had presented affidavits from friends and family members attesting to various adaptive deficits in the skill categories identified by the AAMR, the state court made no explicit findings regarding adaptive behavior and instead addressed the Briseño factors and appeared to determine either that petitioner did not have the requisite adaptive deficits or that his deficits were attributable to a personality disorder; petitioner’s argument that the planning and execution of the capital offense was not, in fact, inconsistent with mental retardation failed to clearly and convincingly rebut the state court’s findings; in light of its prior findings, the state court's implicit finding that significant subaverage intellectual functioning with related limitations in adaptive functioning did not occur before age eighteen was not unreasonable; Woodall v. Simpson, 2009 WL 464939 (W.D. Ky. Feb. 24, 2009) (unpublished) (state court’s rejection of petitioner’s Atkins claim was not contrary to or an unreasonable application of Atkins where at least three of the IQ tests given to petitioner over the years placed his IQ at or above 70); Butler v. Quarterman, 576 F.Supp.2d 805 (S.D. Tex. 2008) (finding that petitioner failed to overcome by clear and convincing evidence the state court’s finding that petitioner had not established significantly subaverage intellectual functioning, which was based on the state court crediting the testimony of the state expert Dr. George Denkowski, even though Denkowski’s application of Flynn effect was without scholarly support and was contradicted by petitioner’s experts and Denkowski appeared to lack a reliable basis for discounting qualifying IQ scores; state court’s findings rejecting alleged adaptive deficits were reasonably supported by the record and there was ample evidence that the standardized test results obtained by petitioner’s expert, Dr. Dennis Keyes, did not accurately reflect Butler's abilities and that his opinions were heavily biased in favor of Butler); Cole v. Branker, 2008 WL 5999766 (4th Cir. (N.C.) Nov. 3, 2008) (unpublished) (affirming denial of Atkins claim; although state post-conviction court’s conclusions were perfunctory, that did not render §2254(d) inapplicable; the state court's conclusion that
petitioner did not prove significantly subaverage intellectual function was not objectively unreasonable where petitioner’s score exceeded 70 on two of three individually administered intelligence tests (the scores were 79, 81 and 68); while petitioner attempted to impeach the credibility of the two higher scores by pointing to practice effect and the Flynn effect, this did not render the state court’s conclusion objectively unreasonable; notably, his lowest score barely met North Carolina’s cut-off of 70 and the other two scores were nearly ten points above it; moreover, petitioner “offered no evidence to show that the practice effect of taking one prior I.Q. test could have accounted for an increase in his score nine months later by as much as eleven points, or sixteen percent.”; the state court’s finding that petitioner was not mentally retarded was not contrary to or involving an unreasonable application of *Atkins*; nor was it based on an unreasonable determination of the facts, which were more than “minimally consistent with a determination that [petitioner] had an I.Q. greater than 70.”; *Chester v. Quarterman*, 2008 WL 1924245 (E.D. Tex. April 29, 2008) (unpublished) (state court’s denial of relief was not contrary to or an unreasonable application of *Atkins* despite its reliance on the *Briseno* evidentiary factors); *Stallings v. Bradshaw*, 561 F.Supp.2d 821 (N.D. Ohio 2008) (state court’s finding that petitioner could not meet the age of onset prong of the mental retardation definition was not unreasonable given that the expert originally retained by the state opined only that he could not rule out that petitioner was mildly mentally retarded at age 16 and petitioner’s expert failed to address that prong entirely in his report); *Wooten v. Quarterman*, 2007 WL 3037057, *9* (E.D. Tex. Oct. 18, 2007) (unpublished) (“[b]ecause all but one of Wooten's IQ test scores were greater than 70 and the mean of those scores is above 79, the Court finds that the state court's finding—that Wooten failed to establish by a preponderance of the evidence presented in the state proceedings—was not unreasonable, based upon the evidence presented in the state proceedings.”)

### 1.15 PROCEDURAL BARS TO RELIEF

Left unaddressed in the *Atkins* decision was whether a defendant could be precluded from raising a claim of mental retardation as a bar to execution because he failed to present it in accordance with applicable procedural rules or otherwise waived the claim. A number of courts in the years since *Atkins* have found *Atkins* claims procedurally defaulted, barred by a statute of limitations, or somehow waived. Counsel must make every effort to comply with relevant procedural rules or make a clear record of why compliance is not possible. Counsel should also be prepared to argue that *Atkins* claims are not subject to waiver or default because they provide a complete exemption to execution.

In *State v. Holmes*, 5 So.3d 42 (La. 2009), defense counsel sought to quash the indictment on the ground of mental retardation. Although the prosecution refused to acquiesce in a pre-trial determination of mental retardation, it did not object to a hearing on the issue in order to obtain discovery of the evidence that would be presented at trial. After hearing the evidence, the trial court found it had no authority to rule on the issue pursuant to Louisiana’s mental retardation statute. On appeal, the Louisiana Supreme Court affirmed, ruling that without the prosecution’s agreement, state law required that the jury decide whether or not the defendant was mentally retarded. Further, because the defendant did
not submit the issue to the jury, the Atkins claim was summarily rejected on appeal. Chief Justice Calogero, in dissent, argued that the case should be remanded to the trial court for a determination of whether trial counsel’s failure to preserve the Atkins claim constituted ineffective assistance of counsel and/or whether the defendant is mentally retarded. Justice Johnson also dissented, agreeing that the case should be remanded because “it is incumbent upon the trial court judge to insure that when the issue of a defendant's mental retardation is raised, the issue is determined by the jury as legislatively mandated.” Id. at 88.

In State v. Frazier, 873 N.E.2d 1263, 1291 (Ohio 2007), where trial counsel pre-trial withdrew the claim that the defendant was mentally retarded after two experts opined that the defendant was not mentally retarded, the claim was waived absent plain error. And plain error was not shown on the record before the court. The defendant’s argument that his IQ score of 72 placed him in the range of mental retardation given SEM was unavailing given testimony by the test’s administrator acknowledging SEM but opining that the score the defendant received was a pretty accurate number. Moreover, the second expert reported with a 95% confidence level that the defendant’s IQ tests were accurate within a range of 71 and 80. The defendant’s claim that his mental retardation was established by having been awarded Social Security benefits due to a diagnosis of mental retardation failed because the defendant presented neither the IQ score nor the criteria that was used in making the diagnosis. Finally, the defendant presented no evidence supporting his allegations of certain adaptive deficits and neither of the experts found significant limitations in adaptive functioning in at least two skill areas. A related ineffective assistance of counsel claim was rejected on the record before the court. See also Winston v. Commonwealth, 604 S.E.2d 21 (Va. 2004) (challenges to statute implementing Atkins are waived because defendant deliberately declined to raise a claim of mental retardation under the statute.)

In Pizzuto v. State, 202 P.3d 642 (Idaho 2008), the post-conviction court had summarily dismissed the petitioner’s successive post-conviction motion that raised an Atkins claim after finding the claim to be untimely since it had not been filed within forty-two days of the Atkins decision. The Idaho Supreme Court found that the post-conviction court erred in its calculation of when the petition should have been filed and clarified when a successive motion should be filed under Idaho law. Although petitioner’s successive application was still untimely under the clarified rule, the Idaho Supreme Court declined to apply the rule in this case because the petitioner was deprived of advance notice of it.

In Hill v. State, 921 So.2d 579, 584 (Fla. 2006), the Florida Supreme Court ruled that the petitioner’s Atkins claim was procedurally defaulted because he had failed to bring it within sixty days of October 1, 2004, as required by Florida Rule of Criminal Procedure 3.203. The court further found that the claim was barred by Rule 3.851(e)(2)(B) as there was no reason why it could not have been included in a successive petition filed by the petitioner in 2003. Notably, the psychological evaluation that the petitioner primarily relied on to establish his mental retardation was conducted in 1989. Although the petitioner also alleged that a 2005 evaluation supported his claim, this evaluation failed to provide truly new evidence. While the evaluation did opine that the petitioner was “mildly mentally retarded,” it also reported an IQ score that was sixteen points above the level.
required to establish mental retardation in Florida. See also State v. Poindexter, 608 S.E.2d 761 (N.C. 2005) (finding that petitioner could not bring mental retardation claim in motion for appropriate relief because the one-year window for post-conviction consideration of such a claim had expired.).

The Texas Court of Criminal Appeals in Ex Parte Blue, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007) addressed a successor habeas petition raising an Atkins claim where the claim was available at the time the petitioner filed his initial habeas petition but he failed to include it. The court rejected the petitioner’s argument that an Atkins claim can never be subject to default or the abuse of the writ doctrine. Instead, it held that the petitioner could proceed with his Atkins claim only if he demonstrated to the court “that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded.” Id. at 154. If such a showing was made, he would have the opportunity to prove his claim by clear and convincing evidence. Because the petitioner was not able to satisfy the heightened threshold burden, the court denied him leave to proceed with the claim. (The petitioner had presented an expert’s opinion that the petitioner’s poor academic performance might be attributable to mental retardation but additional assessment methods needed to be employed. And while there were declarations from lay witnesses providing anecdotal evidence of adaptive deficits, there were no results from a standardized scale. While the expert stated that the deficits were “strongly suggest[ive]” of mental retardation, the petitioner presented little to indicate that any of the deficits were related to significantly subaverage general intellectual functioning.)

The Kentucky Supreme Court in Parrish v. Commonwealth, 272 S.W.3d 161, 167 (Ky. 2008), found that an Atkins claim was not properly raised in a post-conviction motion where the petitioner at his pre-Atkins trial had unsuccessfully invoked Kentucky’s statute providing an exemption from the death penalty for the mentally retarded and then failed to raise the issue on direct appeal. The Kentucky Supreme Court went on to note that the claim was clearly refuted by the records. But see Woodall v. Simpson, 2009 WL 464939, *43 (W.D. Ky. Feb. 24, 2009) (unpublished) (addressing Atkins claim on the merits where state court noted that claim should have been raised on direct appeal but did not clearly enforce the procedural bar).

A claim of mental retardation was also found to be procedurally defaulted in Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) because the petitioner had failed to invoke the pre-Atkins Kentucky statute barring execution of the mentally retarded that had been available to the petitioner at the time of trial. Similarly, in Engram v. State, 360 S.W.3d 140 (Ark, 2004) the Arkansas Supreme Court denied the petitioner’s request to recall the mandate in order to raise an Atkins claim. The court pointed out that the petitioner could have, but did not, move for exemption from execution at the time of trial under the pre-Atkins state statute. The court rejected the petitioner’s argument that Atkins was somehow different from the state statute, which was subject to traditional waiver rules. In contrast, in Simpson v. Norris, 490 F.3d 1029 (8th Cir. (Ark.) 2007), the Eighth Circuit remanded for an evidentiary hearing on the petitioner’s Atkins claim after finding that the district court erred in holding that the petitioner failed to develop the claim in state court by not invoking
Arkansas’ pre-Atkins statute barring execution of the mentally retarded. The appeals court concluded that the Atkins claim was distinct from the state law exception and it was newly available to the petitioner. Because there was no mechanism for presenting the Atkins claim to the state court, an evidentiary hearing in federal court was appropriate. In State v. McManus, 868 N.E.2d 778 (Ind. 2007), the Indiana Supreme Court was faced with an Atkins claim raised in post-conviction by a petitioner who had failed to allege mental retardation at the time of trial under Indiana’s pre-Atkins statute. Noting that the court had found post-Atkins that Indiana’s statute did not fully comply with Atkins given its inclusion of a clear and convincing evidence standard, the court held that the petitioner’s Atkins claim had not ripened until the 2005 decision when the Indiana Supreme Court judicially modified the statutory scheme. Therefore, although the petitioner clearly waived review under the statutory scheme as originally written, his current claim of mental retardation was properly before the post-conviction court.

In Smith v. State, ___ P.3d ___, 2010 WL 4397004, *4 (Okla. Crim. App. Nov. 5, 2010), the petitioner’s mental retardation claim was found to be waived because the supporting evidence was available at the time he filed his earlier post-conviction petition or because it was not presented within sixty days of its discovery. (The claim was also found without merit, however, when considered in connection with petitioner’s allegation that his post-conviction counsel was ineffective in not presenting the claim, thereby providing cause for the delayed presentation.) Similarly, an Atkins claim was found not to be cognizable in post-conviction proceedings where mental retardation could have been raised at trial and on direct appeal. Winston v. Warden, 2007 WL 678266, *14 (Va. March 7, 2007) (unpublished). The court then went on to find meritless the petitioner’s contention that trial counsel were ineffective in failing to present evidence of mental retardation.

The failure of trial counsel to assert mental retardation as a bar to the death penalty was the basis for a claim of ineffective assistance of counsel in Smith v. State, 2010 WL 3638033 (Tenn. Crim. App. Sept. 21, 2010) (unpublished). The post-conviction court found that the petitioner had proved by a preponderance of the evidence that he suffered from adaptive deficits manifested prior to age eighteen, a finding that the State did not challenge on appeal. The post-conviction court ruled, however, that the petitioner did not meet the intellectual functioning component of Tennessee’s mental retardation definition. It discounted the petitioner’s adult IQ scores and looked to testing prior to age eighteen where the petitioner received an IQ score of 80. In so doing, it refused to interpret the score using the Flynn effect or SEM. (It did accept the defense expert’s testimony that the Ammons Quick Test did not provide accurate results and did not consider scores that the petitioner received on that instrument.) The Tennessee Court of Criminal Appeals accepted the post-conviction court’s findings, ruling: “[C]ontrary to the argument presented by the Petitioner on appeal, our supreme court determined in Howell that the legislature intended for seventy (70) to be a “bright-line” cutoff score for purposes of satisfying the first prong of the statutory test with no consideration given to medically accepted standard errors of measurement.” The appellate court did go on to note its agreement with an observation made in another case that “by refusing to consider ranges of error, it is our view that some mentally retarded defendants are likely to be executed in Tennessee.”
An interesting procedural issue came up in a Texas death penalty case, Moore v. Quarterman, 533 F.3d 338 (5th Cir. (Tex.) 2008) (en banc), concerning exhaustion and procedural default. When Moore had presented his Atkins claim to the state court in a successor petition, it was summarily denied under Texas’ abuse of the writ rule. After Moore received authorization to file a successive federal habeas petition, the district court conducted an evidentiary hearing and ruled that Moore was entitled to relief. A three-judge panel reversed, finding that the evidence presented for the first time rendered the claim unexhausted and therefore barred from consideration in federal court. En banc review was granted and the full court declined to decide the exhaustion question. It assumed this was true, rendering the claim procedurally defaulted, but that Moore met the cause and prejudice exception to the procedural default doctrine. The cause was Moore’s legitimate confusion about the requirements for filing a successive petition in Texas raising his Atkins claim because, at the time Moore was acting, the Texas Court of Criminal Appeals had yet to set forth what inmates had to plead and Texas lacked a statute implementing Atkins. As for prejudice, this was clearly established given that Moore’s mass of evidence presented a substantial Atkins claim. The case was remanded to the three-judge panel to consider the merits of the State’s appeal from the district court’s grant of relief. The panel ultimately affirmed. Moore v. Quarterman, 342 Fed.Appx. 65, 2009 WL 2573295 (5th Cir. (Tex.) Aug. 21, 2009) (unpublished opinion). A claim of mental retardation was found to be procedurally defaulted in Hedrick v. True, 443 F.3d 342 (4th Cir. (Va.)), cert. denied, 548 U.S. 928 (2006). There, the petitioner had filed a pre-Atkins state habeas petition. His petition from rehearing from the denial of that petition was filed post-Atkins, however, and in that pleading he raised his alleged mental retardation. This was deemed inadequate to exhaust the claim because state law had required instead that he file a motion to amend the petition, and because a Virginia law precluded consideration of a second habeas petition, the Atkins claim was procedurally defaulted. (The court of appeals also ruled in the alternative that it failed on the merits.) See also Green v. Quarterman, 2008 WL 442356 (S.D. Tex. Feb. 15, 2008) (unpublished) (finding Atkins claim unexhausted and, because petitioner would no longer be able to raise the claim in state court, procedurally defaulted); cf Rivera v. Quarterman, 505 F.3d 349 (5th Cir. (Tex.) 2007) (state court’s determination that the petition containing the Atkins claim constituted an abuse of the writ did not prevent the federal courts from hearing the claim because the procedural rule was not an independent state law ground.)

In Davis v. Norris, 423 F.3d 868 (8th Cir. (Ark.) 2005), the appeals court denied the petitioner’s request for a remand to the district court to add an Atkins claim because the claim could have been added while the case was still pending in the district court.

Since the Atkins decision, a number of death row inmates have had their motions for authorization to file a successive federal habeas petition denied as untimely under the statute of limitations which gave the inmates one year from the decision to request relief.99 (A state petition or application raising the claim would toll the one-year limitation period for as long as the state petition or application was pending.). David Lewis, a death row inmate in Texas, was found to have been one day late and, therefore, his Atkins claim was barred by the statute of limitations absent equitable tolling. In re David Lewis, 484 F.3d

The appeals court conceded that a former Texas rule had prevented Lewis from raising the claim in state court until nine months of the federal statute of limitations had expired. But this left Lewis with three months to present the claim to the state court. Instead, Lewis raised the claim in state court on the one-year anniversary of the Atkins decision. When the state court denied relief, Lewis mailed his motion for authorization to file a successive federal habeas petition the following day. It was filed in the federal appeals court two days later, which was one day after the federal limitations period expired. That counsel from the initial federal habeas proceedings had notified Lewis after those proceedings terminated that the attorney intended to do no further work for Lewis was not a basis for equitable tolling given that Lewis was able to obtain assistance from pro bono counsel almost immediately thereafter. In addition, Lewis’ mental capacity had been at issue since his first trial in 1987. Any error or neglect by pro bono counsel in filing in state court at the last minute did not justify equitable tolling. See also In re Johnson, 325 Fed.Appx. 337, 2009 WL 1158812 (5th Cir. (Tex.) April 30, 2009) (last-minute motion for authorization to file a successive habeas petition and for stay of execution denied because the Atkins claim was time-barred and petitioner was not entitled to equitable tolling given his failure to provide any reason for missing the deadline by years); Beaty v. Schriro, 554 F.3d 780 (9th Cir. (Ariz.) 2009) (denying request for permission to file a successor petition raising Atkins claim where claim was unexhausted and barred by the statute of limitations); In re Hill, 437 F.3d 1080 (11th Cir. 2006) (application for authorization to file a successive habeas corpus petition raising Atkins-based claims is denied on timeliness grounds because petitioner did not file the application until 29 months after Atkins was decided and there was insufficient statutory tolling to place the application within the limitation period); In re Hill, 437 F.3d 1080 (11th Cir. 2006) (denying untimely request for authorization to file successor petition raising Atkins claim). In In re James Henderson, 462 F.3d 413 (5th Cir. (Tex.) 2006), in contrast, the Fifth Circuit authorized the filing of a successor habeas petition based on petitioner’s prima facie case of mental retardation despite the fact that the petition would be time barred absent equitable tolling. The court of appeals determined that the district court should decide the timeliness issue in the first instance. The district court ultimately found, however, that the petitioner had not acted diligently in pursuing his Atkins claim. Henderson v. Quarterman, 2008 WL 906259 (E.D. Tex. March 31, 2008) (unpublished).

Although Texas’ former two-forum rule had prevented the petitioner from raising the claim before January 26, 2004, the petitioner could not justify his subsequent delay of almost two month before bringing the claim to the state court. The explanation that the state petition was filed a mere five days after petitioner’s counsel received an expert report on mental retardation was unpersuasive given the failure of petitioner to explain why there had not been an evaluation of petitioner until January of 2004. In addition, petitioner failed to file anything in federal court after the two-forum rule was abandoned and the state successor petition was pending. There was also no explanation why the petitioner waited five weeks after the state court denied the Atkins claim before moving for authorization to file a successor federal habeas petition. cf. In re Wilson, 442 F.3d 872 (5th Cir. (Tex.) 2006) (petitioner entitled to equitable tolling where: (1) Texas’ former “two-forum” rule caused petitioner to delay filing his Atkins claim until the last possible day; and (2) filing errors.

Fortunately for Lewis, he prevailed in the Texas Court of Criminal Appeals on a Penry claim raised in a successor state petition.
that led to the application to file a successor petition being untimely were unimportant given that the appeals court had previously ruled that petitioner had made a prima facie case for proceeding and so the second motion for authorization was a mere formalism.). On appeal, the Fifth Circuit Court of Appeals remanded the case to the district court for consideration of whether the petitioner is entitled to equitable tolling under *Holland v. Florida*, 130 S.Ct. 2549 (2010), which had not been issued at the time the district court performed its analysis. *Henderson v. Thaler*, ___ F.3d ___, 2010 WL 4616876 (5th Cir. (Tex.) Nov. 16, 2010).

In a number of other cases, *Atkins* claims have failed due to the statute of limitations. See e.g., *Hernandez v. Thaler*, 2010 WL 4068968 (5th Cir. (Tex.) Oct. 18, 2010) (denying request to stay federal habeas proceedings so that petitioner could exhaust an *Atkins* claim where the claim was barred by the federal statute of limitations and counsel’s failure to timely file the claim did not provide a basis for equitable tolling); *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. (Tex.) 2010) (although petitioner established that he diligently attempted to raise his *Atkins* claim in state and federal court, extraordinary circumstances did not prevent him from timely filing his claim where Texas’ former two-former rule informed his litigation strategy but did not present the “Hobson’s choice” found to exist in some other Texas cases); *Ramirez v. Schriro*, 2008 WL 5220936 (D. Ariz. Dec. 12, 2008) (denying request to amend federal habeas petition to include *Atkins* claim and assorted claims challenging the state post-conviction court’s adjudication of the claim where claims were barred by statute of limitations, did not relate back to claims included in the original petition and there is no recognized exception in the Ninth Circuit to the statute of limitations for “innocence of the death penalty); *Bell v. Epps*, 2008 WL 2690311 (N.D. Miss. June 20, 2008) (unpublished) (observing that court previously denied a motion to amend the petition to include an *Atkins* claim because the claim was unexhausted and otherwise time-barred); *but see Sasser v. Norris*, 553 F.3d 1121 (8th Cir. (Ark.)), cert. denied, 130 S.Ct. 397 (2009) (because the State did not raise the statute of limitations defense until the appeal, it was forfeited.)

An open question is whether another untimely *Atkins* claim is subject to merits consideration because a finding of mental retardation would establish that the petitioner is innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (a state prisoner can overcome a procedural default by establishing by clear and convincing evidence that but for constitutional error no reasonable juror would have found the prisoner to be eligible for the death penalty). The Fifth Circuit Court of Appeals recently addressed this issue and ruled that innocence of the death penalty does not provide a basis for overlooking a violation of the statute of limitations. *Henderson v. Thaler*, ___ F.3d ___, 2010 WL 4616876 (5th Cir. (Tex.) Nov. 16, 2010); *but see Bowling v. Commonwealth*, 163 S.W.3d 361, 372-73 (Ky. 2005) (although mental retardation claim was waived due to petitioner’s failure to invoke Kentucky’s pre-*Atkins* statute barring execution of the mentally retarded, if he could establish his mental retardation he would establish innocence of the death penalty and thus the “miscarriage of justice” exception to procedural default would apply.)

Complying with the statute of limitations is not all the only procedural requirement for death row inmates seeking to raise *Atkins* claims in successive federal habeas petitions.
The inmates are also required to show that the claim was not available during the initial federal habeas proceedings. The petitioner in *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. (Tex.) 2010) was found to have violated that requirement in addition to failing to meet the statute of limitations. At the time *Atkins* was decided, Mathis had not yet filed his initial federal habeas petition and had nine months remaining to do so. Thus, Mathis could have sought to exhaust his *Atkins* claim without running the risk of having it dismissed under Texas’ former two-forum rule. In addition, Fifth Circuit precedent at the time established that a state successor petition would toll the federal statute of limitations even if the state court ultimately dismissed the petition under Texas’ abuse of the writ rule.

The successor petition rule for federal prisoners has also presented problems for at least one federal death row inmate. Bruce Webster unsuccessfully raised mental retardation as a bar to execution at his federal capital trial and on direct appeal. In post-conviction proceedings, he again sought relief under *Atkins*, and again did not prevail. He then obtained governmental and school records, as well as additional testimony and moved for permission to file a successive § 2255 motion. (The new evidence included that more than one year before Webster was indicted for capital murder he had applied for Social Security benefits and was found to be mentally retarded by three separate government physicians. In addition, there was evidence that Webster had been placed in special education classes which refuted the government’s position at trial.) In the motion Webster alleged that no reasonable fact finder could conclude he was not mentally retarded in light of the newly discovered evidence. The Fifth Circuit ruled, however, that because the new evidence went to eligibility for the death penalty rather than to Webster’s innocence of the capital offense, the new evidence did not provide a basis for filing a successor petition under § 2255. Judge Wiener authored a concurring opinion finding the majority’s statutory construction was correct but emphasized the absurdity of the Kafkaesque result.

In one case, a state prisoner was allowed to waive further federal habeas review even though one of the claims in his federal petition was an *Atkins* claim and his appointed counsel believed that he was mentally retarded. *Simpson v. Quarterman*, 341 Fed.Appx. 68, 2009 WL 2462248 (5th Cir. (Tex.) Aug. 12, 2009) (unpublished). Because Simpson was competent, and his decision to waive his appeal was knowing and intelligent, the appeal was dismissed and Simpson was executed on November 18, 2009. There is nothing in the Fifth Circuit’s unpublished decision that indicates his attorneys raised the argument that an *Atkins* claim cannot be waived. *Compare Rogers v. State*, 575 S.E.2d 897 (Ga. 2003) (in cases like this one where petitioner was sentenced prior to Georgia’s enactment of a statute barring execution of the mentally retarded, once it was determined that the petitioner was entitled to a jury trial on mental retardation, the trial could not be waived.)

101 The two-forum rule would have required the state court to dismiss the state successor petition if Mathis had a federal habeas petition pending.
102 The statute authorizes the filing of a successor § 2255 motion where there is newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.
1.16 COLLATERAL ESTOPPEL/RES JUDICATA

After the Atkins decision was issued, a question arose about the significance of pre-Atkins findings about whether a defendant was mentally retarded. Appellate courts were nearly unanimous in finding that government was not bound by pre-Atkins proceedings and findings. See, e.g., Commonwealth v. Miller, 888 A.2d 624, 632-33 (Pa. 2005) (post-conviction court erred in granting relief on Atkins claim based on testimony about mental retardation at pre-Atkins hearing); Smith v. State, ___ So.3d ___, 2007 1519869 ( Ala. May 25, 2007) (reversing finding by court of criminal appeals that defendant is mentally retarded as a matter of law and ordering the case remanded to the trial court to make explicit findings on defendant’s Atkins claim where trial court never expressly ruled on defendant’s Atkins claim and sentenced defendant to death after finding as a non-mitigating circumstance that defendant is “mildly mentally retarded”; the court of criminal appeals erred by, inter alia, giving great weight to the trial court’s finding that defendant is “mildly mentally retarded” because that was made in the context of mitigating circumstances which has a lower burden of proof than with a claim of exemption from the death penalty under Atkins.); State v. Hill, 894 N.E.2d 108 (Ohio App. 2008) (collateral estoppel did not bar relitigation of whether petitioner is mentally retarded since State did not have full and fair opportunity to litigate the issue at pre-Atkins trial, and Atkins and Lott established a new standard for determining what constitutes mental retardation within the context of the Eighth Amendment.)

The United States Supreme Court validated these decisions, in Bobby v. Bies, 129 S.Ct. 2145 (2009). In Bies, the death row inmate sought to preclude relitigation of mental retardation based on pre-Atkins findings that Bies was mentally retarded. Bies unsuccessfully argued that the Double Jeopardy Clause precluded the State from challenging the earlier findings. The United States Supreme Court ruled that “mental retardation for purposes of Atkins, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues.” Id. at 2149; see also Dunaway v. State, ___ So.3d ___, 2009 WL 4980320 (Ala. Crim. App. December 18, 2009) (trial court’s finding that petitioner was mentally retarded in pre-Atkins sentencing order did not bar the state under the collateral estoppel doctrine from arguing that petitioner was not mentally retarded in post-Atkins post-conviction proceedings.); Coleman v. State, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010) (State was not collaterally estopped from disputing that petitioner’s IQ was below 70 because of pre-Atkins report prepared by trial judge stating that petitioner’s IQ was 70 or below), appeal granted (Tenn. June 17, 2010).

In Allen v. Buss, 558 F.3d 657 (7th Cir. (Ind.) 2009), it was the State that sought to preclude relitigation of the question of mental retardation. The state court found that the petitioner had a full and fair opportunity to litigate whether he was mentally retarded when the trial court pre-Atkins weighed the petitioner’s mental retardation as mitigation. This ruling was contrary to Atkins, according to the Seventh Circuit. In addition, the appeals court found that the petitioner’s pre-Atkins argument that he had been misdiagnosed as mentally retarded had no bearing on his Atkins claim. See also State v. Grell, 66 P.3d 1234, 1240 (Ariz. 2003) (defendant entitled to a remand for an Atkins hearing despite trial court’s pre-Atkins finding that defendant was not mentally retarded where evidence of mental retardation had been presented as mitigation, not to establish an exemption from the death penalty.)
There have also been questions about whether a death row inmate can relitigate an actual Atkins claim. In Branch v. State, 961 So.2d 659 (Miss. 2007), the Mississippi Supreme Court ruled that its decision on direct appeal finding that Branch had not established mental retardation was res judicata and could not be raised again with additional evidence in post-conviction proceedings. (Branch’s trial was pre-Atkins. Because he received new counsel on appeal, under then-existing state law his appellate attorney was required to raise the newly available Atkins claim and present the court with evidence in support of the claim. Appellate counsel did so but the claim was denied without a remand for an evidentiary hearing.) Presiding Justice Diaz dissented, arguing that Branch had complied with the requirements of Chase and was entitled to a hearing. Diaz accused the majority of ignoring important evidence. First was an affidavit submitted by Branch by an expert who contended that an assessment of Branch that the court relied on when denying relief on direct appeal was not appropriately considered as ruling out mental retardation. This was because it was a competency evaluation and Branch had been given only an abbreviated WAIS which merely estimates IQ. In addition, there were some abnormalities in the test scores and the assessment failed to reconcile the new score with an IQ score of 68 that Branch received on the Stanford-Binet at age five. The expert further opined that Branch had an IQ below 75 and was mentally retarded. Also ignored by the majority was a second expert opinion that Branch was mentally retarded based on a 2005 evaluation. In Diaz’s view, Branch clearly met the requirements for an evidentiary hearing on the claim. As for the procedural posture of the case, Diaz argued that Branch had not been given the opportunity to comply with Chase at the time of his appeal and so it was appropriate for him to raise the claim in the post-conviction proceeding. (Chase, which set out the requirements for receiving an evidentiary hearing on an Atkins claim for those who were tried pre-Atkins, was issued shortly before Branch’s direct appeal decision was issued. His attempt to comply with Chase by moving for rehearing with an attached expert affidavit was unsuccessful because the Mississippi Supreme Court struck the affidavit.)

Another issue that has arisen is whether a finding that a defendant is exempt from execution due to mental retardation binds another jurisdiction in a separate capital proceeding. In State ex rel. Johns v. Kays, 181 S.W.3d 565 (Mo. 2006), the Missouri Supreme Court held that the mental retardation finding in Pulaski County, which was not appealed, barred the prosecution in Camden County from seeking death for an independent homicide. On the flip side, the Oklahoma Court of Criminal Appeals ruled in Myers v. State, 133 P.3d 312 (Okla. Crim. App. 2006), that because the defendant’s mental retardation claim was resolved against him in a post-conviction jury trial related to a separate capital conviction, defendant could not relitigate his Atkins claim in the pending capital case.

See the preceding subsection for cases involving a defendant/petitioner who failed to invoke a pre-Atkins state prohibition on execution of the mentally retarded and whether that resulted in a waiver of an Atkins claim.
2 COMPETENCE TO STAND TRIAL

The Due Process Clause of the Fourteenth Amendment precludes the trial of a person “whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” Drope v. Missouri, 420 U.S. 162, 171 (1975). The test is “whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-- and . . . a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 375, 402 (1960); see also Odle v. Woodford, 238 F.3d 1084, 1089 (9th Cir. 2001) (competency “requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.”) “Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.” Riggins v. Nevada, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring).

If the evidence in the record establishes a bona fide doubt in regard to the defendant’s competence, the trial court has a sua sponte duty to conduct a hearing on the issue. Pate v. Robinson, 383 U.S. 375 (1966). Although the defendant’s demeanor may be relevant to the ultimate competency determination, it cannot be relied upon to dispense with a hearing if other evidence raises doubts about the defendant’s ability to understand the charges and/or assist counsel. Id. at 386.

While the Constitution permits a state to place the burden on the defendant to establish competency by a preponderance of the evidence (Medina v. California, 505 U.S. 437 (1992)), it precludes a state from requiring a defendant to prove incompetence by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996). Some jurisdictions have more defendant-protective rules than required by the Constitution. See, e.g., State v. Garfoot, 558 N.W.2d 626, 628 (Wisc. 1997) (where defendant places competency to stand trial at issue, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is capable of understanding the fundamental nature of the trial process and of meaningfully assisting his or her counsel.)

It is well recognized that mental retardation may impair a defendant’s ability to meet the competency requirements. Although the mere fact that a defendant has significantly sub-average intelligence is generally deemed insufficient to establish incompetence to stand trial103, “a defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.” State v. Garfoot, 558

103 See, e.g., Commonwealth v. Melton, 351 A.2d 221 (Pa. 1976) (IQ of 69 alone did not give rise to reason to doubt defendant's competency); People v. McNeal, 419 N.E.2d 460 (Ill. App. 1981) (IQ of 61 reported in the context of expert testimony that defendant was competent did not give rise to bona fide doubt of defendant's competence); People v. Jackson, 414 N.E.2d 1175 (Ill. App. 1980) (IQ of 51 and the defendant's refusal to talk to counsel or appear in court was insufficient to raise bona fide doubt as to competence).
N.W.2d at 632 (Wisc. 1997). With less extreme mental retardation, the traditional competency test is employed.

Even where a mentally retarded defendant is able to comprehend the charges against him and convey relevant information to counsel during out-of-court discussions, the trial process itself often is too complicated for a mentally retarded defendant to keep pace with. Counsel with a client who has significant intellectual deficits must ensure that the competency examiners take into consideration the defendant’s capacity to assist in his own defense during an actual trial. Additionally, where a mentally retarded defendant is determined to be competent before the start of trial, counsel should be alert to indications during trial that the pretrial ruling was in error. Courts recognize that competency is an ongoing process. See, e.g., Drope v. Missouri, 420 U.S. at 181 (“a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”)

There are a number of special instruments designed to assess competency to stand trial. For example, there is a 13-point checklist known as the "McGarry Scale" or "Competency to Stand Trial Instrument." See, e.g., State v. Benton, 759 S.W.2d 427, 430 n.2 (Tenn. Crim. App. 1988) (noting that expert utilized a version of the McGarry Scale); State v. Garfoot (observing that many courts and experts rely on the McGarry Scale). There is at least one standardized instrument designed to assess whether a mentally retarded defendant is competent to stand trial: the Competence Assessment to Stand Trial for Defendants with Mental Retardation (CAST*MR). The CAST*MR is “widely-used.” Stanley v. Lazaroff, 2003 WL 22290187 (6th Cir. Oct. 3, 2003). Counsel litigating the competency of a mentally retarded defendant needs to be conversant with all of the relevant tests in order to ensure that an appropriate examination is conducted. Counsel should also insist that the competency evaluation take into account the likely complexity of a capital trial.

There are numerous instances where courts have recognized that mentally retarded defendants were not competent to stand trial. In State v. Rogers, 419 So.2d 840 (La. 1982), for example, the Louisiana Supreme Court reversed a trial court’s finding that a mentally retarded defendant, who had been charged with aggravated rape, was competent to stand trial. Although the three psychiatrists who evaluated Rogers agreed that he was mentally retarded, they disagreed about the severity of his disability. Two of the psychiatrists opined that Rogers was not competent to proceed. In finding to the contrary, the trial court relied entirely on the testimony of the third psychiatrist who found, somewhat equivocally, that Rogers had the mental capacity necessary for trial.

After reviewing the record, the Louisiana Supreme Court concluded that the trial court’s ultimate ruling was clearly erroneous. Notably, the third psychiatrist provided little factual support for his opinions about the defendant’s abilities. Further, the basis for his opinion was simply his “interaction” with Rogers during a one-hour interview, and that Rogers was able to recall the following: his phone number; the city block number at his mother's house where he resided; his place of employment; his involvement in an automobile accident in 1970 or 1971; and that he had dropped out of school in the eighth grade. In contrast, one of the other two psychiatrists administered an intelligence test to Rogers, and also questioned him using a judicial commitment check list and another check list...
recommended by the Academy of Law and Psychiatry. This led him to conclude that Rogers was unable to comprehend that nonconsensual sex was wrong. Further, Rogers could not understand the defenses of alibi or insanity, and could not grasp his legal rights. Rogers’ memory problems, according to this expert, impaired his ability to provide relevant information to defense counsel. In addition, the expert commented on Rogers’ appearance during court proceedings, where he seemed to be listening for only one tenth of the time. The third expert had, among other things, asked indirect questions of Rogers in order to estimate his judgment and intelligence. She ultimately concluded that Rogers was unable to recall facts to assist in his defense, to maintain a consistent defense, to make critical decisions during trial or to testify effectively in his own defense.

On this record, the Louisiana Supreme Court concluded that Rogers had not been competent to proceed. As this case demonstrates, the proper focus of the competency examination must be on the concepts and tasks relevant to the capital trial, rather than on abstract skill levels or knowledge.

In *State v. Benton*, 759 S.W.2d 427 (Tenn. Crim. App. 1988), an appellate court found that a mentally retarded defendant, who had been convicted of aggravated rape and aggravated sexual assault, had been incompetent to stand trial. The defendant, who had a full-scale IQ of 47, was described by the Tennessee Court of Criminal Appeals as an individual “whose body functions as a forty-three-year-old man and whose mind functions as a five-year-old child . . ..” *Id.* at 429. Shockingly, he had been found competent by the trial judge despite unanimous expert testimony indicating that he was unable to comprehend the charges against him or to assist in his defense. See also *State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (trial court erred in finding defendant competent to stand trial where all three mental health experts consistently testified that, because of her moderate mental retardation, the defendant possessed no appreciable understanding of the judicial proceedings. The mere fact that the defendant was able to appreciate that the charged behavior was wrong did not render her competent to stand trial.); *State v. Garfoot*, 558 N.W.2d 626 (Wisc. 1997) (affirming finding by trial court that a defendant with an IQ of 64 could not meaningfully assist counsel); *State v. Caralluzzo*, 49 N.J. 152 (N.J. 1967) (defendants with mental age of about six years old were incompetent to stand trial.)

At least one commentator has speculated that when dealing with mentally retarded defendants, “forensic and judicial practice probably tilt toward findings of competence in marginal cases.” Richard J. Bonnie, “The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense,” 81 J.Crim. L. & Criminology 419, 422 (1990). This is because, according to Bonnie, a mentally retarded defendant who is found incompetent to stand trial is unlikely to be later “restored” to competency. Thus, an incompetency finding would be, in essence, a definitive bar to adjudication. This possibility of bias in the competency determination may be enhanced in a capital case, where the severity of the crime provides pressure for a conviction and harsh punishment. Counsel should be sure to investigate the prior histories of the examiners, as well as the judge, regarding competency findings. A prior finding of incompetence in a less serious

104 For additional cases finding mentally retarded defendants incompetent to stand trial, see “Competency to Stand Trial of Criminal Defendant Diagnosed as ‘Mentally Retarded’ Modern Cases,” 23 ALR4th 493.
case with a similarly impaired defendant could be used to show bias if the capital defendant is deemed competent.
3 **WAIVER OF RIGHTS/GUILTY PLEAS**

In order for a defendant to effectively waive his or her constitutional rights, the defendant must be competent, and the waiver must be intelligent and voluntary. Further, under *Miranda v. Arizona*, 384 U.S. 436 (1966), a statement of a defendant may not be admitted at trial if it was taken during custodial interrogation, and the defendant had not first been warned of his right to remain silent and his right to have counsel present during the questioning. If the defendant challenges the admissibility of a statement, the burden is on the prosecution to prove, by a preponderance of the evidence, that the waiver of rights was knowing, intelligent and voluntary. *Lego v. Twomey*, 404 U.S. 477 (1972).

3.1 **CUSTODY AND INTERROGATION**

The determination of whether a defendant is “in custody” for Miranda purposes involves “[t]wo discrete inquiries . . . : first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (emphasis added); see also *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (“the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.”)

In *People v. Braggs*, 810 N.E.2d 472 (Ill. 2003), *cert. denied*, 543 U.S. 1049 (2005), a homicide case involving a mentally retarded defendant, the Court determined that the appropriate inquiry was whether a reasonable person suffering from similar limitations as the defendant would have felt free to leave. The Court explained:

> If, as is the case, we are concerned with what a reasonable person “in the defendant's shoes” (citation omitted) would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise, we ought to simply abandon the legal charade that the defendant's characteristics, perspective and perception matter at all.

*Id.* at 483..

Unfortunately, this holding relied heavily on a Ninth Circuit decision involving a juvenile defendant that was subsequently reversed by the United States Supreme Court. *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir.2002), reversed, *Yarborough v. Alvarado*, 541 U.S. 652 (2003). The reversal, however, was largely premised on the Ninth Circuit’s failure to properly apply the standards of the AEDPA, which limits federal habeas relief in cases where the state court reasonably applied existing Supreme Court precedent. The Supreme Court did reject the Ninth Circuit’s conclusion that the juvenile defendant's lack of prior law enforcement experience was relevant to the custody determination. The Supreme Court noted, among other things, that in
few instances would the interrogating officer be aware of the suspect’s history. In the Braggs decision, however, the Illinois Supreme Court recognized that the interrogating officer needed to be aware of the suspect’s mental deficiencies in order for it to be a factor in the custody determination, thereby distinguishing Braggs from Alvarado. Braggs, 810 N.E.2d at 482; see also United States v. Erving L., 147 F.3d 1240, 1248 (10th Cir. 1998) (limited capacity to understand, and other particular personality traits, may be relevant to custody questions where officers are aware of those traits and they influence the actions of the officers.); but see United States v. Macklin, 900 F.2d 948, 949-951 (6th Cir. 1990) (a reasonable person test, rather than a subjective test, is appropriate to determine whether a mildly mentally retarded suspect was in custody.)

The second requirement for Miranda to apply is that “interrogation” occur. Interrogation for purposes of Miranda includes “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301 (1980). If the police are aware of a suspect’s “unusual susceptibility to a particular form of persuasion” (id. 302 n.8), that is relevant to determining whether interrogation occurred. See also People v. Hardy, 636 N.Y.S.2d 459 (Supreme Court App. Div. 1996) (noting defendant’s “limited mental capacity” in finding that mentally retarded defendant was interrogated within meaning of Miranda.) If “interrogation” is at issue, counsel will need to investigate whether the officers who questioned the defendant had reason to know of his intellectual disabilities.

3.2 COMPETENCE

For many years there was a debate over whether a finding of competence to stand trial necessarily resolved the question of whether a defendant was competent to plead guilty and/or waive his or her right to counsel. The Supreme Court addressed that question in Godinez v. Moran, 509 U.S. 389 (1993), and rejected the view that a higher competence standard applies for waiving rights than for simply standing trial.

For further discussion of competence, see the section above on competency to stand trial.

3.3 VOLUNTARINESS

In Colorado v. Connelly, 479 U.S. 157 (1986), a case not involving mental retardation, the Supreme Court ruled that a waiver of Miranda rights was not involuntary under the Due Process Clause simply because the defendant’s mental state precluded the exercise of free will. The Court explained: “The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.” Id. at 170.
Although mental retardation probably cannot itself render a waiver “involuntary,” it can impact the determination of whether or not the police actions were coercive. “In considering the voluntariness of a confession, [a] court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.” *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980) (en banc). A mentally retarded defendant may not be able to withstand the same types of interrogation techniques against which a defendant of average intelligence would be expected to hold his own. As one commentator explained, “[b]y virtue of their cognitive limitations, individuals with mental retardation tend to be more ‘suggestible,’ and therefore are more vulnerable to the pressures that interrogating police officers can be expected to exert in their efforts to obtain confessions.” Suzanne Lustig, “Searching for Equal Justice: Criminal Defendants With Mental Retardation,” New Jersey Lawyer, 35 (July 1995). Further, “[w]hen a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession into question.” *United States v. Brown*, 66 F.3d 124, 126-127 (6th Cir. 1995), quoting *United States v. Sablotny*, 21 F.3d 747, 751 (7th Cir.1994); see also *State v. Mortley*, 532 N.W.2d 498, 502 (Iowa 1995) (in a case involving a defendant with an IQ of 66, the court notes that the knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion is considered in determining whether waiver or rights was voluntary); *State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (in finding a confession involuntary, the court notes the presence during interrogation of government agent who should have been aware of mentally retarded defendant’s limitations).

See the next section on Coerced Confessions for a complete discussion of confessions that are involuntary due to coercion.

### 3.4 Knowing and Intelligent


Even where a confession is not coerced, it may still be subject to suppression if the defendant’s waiver of rights prior to the incriminating statements was not knowing and intelligent. See, e.g., *People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990); Berger, “Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections,” 49 U.Pitt.L.Rev. 1007, 1018-19, 1042-54 (1988) (intelligent knowledge remains separate Miranda waiver requirement in addition to voluntariness); Note, “Constitutional Protection of Confessions Made by Mentally

It has been observed that the mentally retarded are “less likely to understand their Miranda rights and the consequences of waiving them, giving rise to concerns about the knowing intelligence of their waivers.” Paul T. Hourihan, “Earl Washington’s Confession: Mental Retardation and the Law of Confessions,” 81 Va. L.Rev. 1471, 1492 (1995); see also State v. Rosales, 2002 WL 31516389, (Ohio App. May 07, 2002) (“lack of mental acuity can interfere with an accused's ability to give a knowing and intelligent waiver of his Miranda rights.”)

While there may be a level of deficiency so profound that the defendant is simply unable to make a knowing and intelligent waiver, the defendant’s mental retardation is almost always simply one of the factors to be considered as part of the totality of the circumstances. See, e.g., Fairchild v. Lockhart, 744 F.Supp. 1429, 1453 (E.D.Ark.1989) (“no single factor, such as IQ, is necessarily determinative in deciding whether a person was capable of knowingly and intelligently waiving, and do [sic] so waive, the constitutional rights embraced in the Miranda rubric.”); Harner v. State, 997 S.W.2d 695, 699 (Tex. App. - Texarkana 1999) (“Evidence of mental retardation and mental impairment is a factor to be considered by the court in determining from the totality of the circumstances whether the accused voluntarily and knowingly waived his rights prior to confessing.”); State v. Benton, 759 S.W.2d 427, 431 (Tenn. Crim. App. 1988) (“no single factor such as age, education, or even mental retardation is conclusive on the waiver issue.”); State v. Rossiter, 623 N.E.2d 645 (Ohio App. 1993) (an accused who is mildly mentally retarded is not per se incapable of waiving constitutional rights); cf. State v. Mortley, 532 N.W.2d 498, 503 (Iowa 1995) (“when it is clear the mental deficiency deprives the defendant of the ability to comprehend the meaning and effect of confessing, the confession is inadmissible.”)

In determining whether a waiver of rights was knowing and intelligent, an interrogating officer’s ignorance of the defendant’s impairments is irrelevant. Commonwealth v. Daniels, 321 N.E.2d 822, 827 n.5 (Mass. Supreme Judicial Court 1975) (a defendant’s “capacity to make a knowing and intelligent waiver of his rights is unrelated to the existence or absence of police knowledge of his mental capacity.”); cf. Rice v. Cooper, 148 F.3d 747, 750 (7th Cir. 1998) (waiver of Miranda rights would not be valid if it should be apparent to officers that mental retardation precludes the suspect from understanding the rights); State v. Rossiter, 623 N.E.2d 645, 650 (Ohio App. 1993) (“Law enforcement officers questioning suspects they find to be "slow" must take extra precautions to ensure that any waiver of rights is done knowingly and with a full awareness both of the nature of the right being waived and of the consequences of the decision to abandon it.”)

There are numerous cases where it was recognized that a mentally retarded defendant could not have executed a valid waiver. For example, in State v. Raiford, 846 So.2d 913 (La. App. 2003), a mentally retarded defendant’s waiver of Miranda rights was found to be
invalid due to his likely inability to understand his constitutional rights. As one expert explained, the defendant, whose IQ was found to be somewhere between 55 and 72, lacked the necessary working memory to absorb information and the abstract reasoning ability to think about the information he did retain. Notably, two of the experts who evaluated the defendant believed it was possible for him to understand and effectively waive his rights if they were presented in a simpler fashion. However, because the interrogating officer persisted in utilizing legal jargon, even when the defendant indicated confusion, the defendant was not able to comprehend what he was being told and asked to do. As this case demonstrates, it is important to look at the precise language used by the interrogators, as well as the defendant’s responses, in assessing whether the defendant actually understood his rights and what he was agreeing to forego.

The Tennessee Supreme Court has recognized that mentally retarded defendants “present additional challenges for the courts because they may be less likely to understand the implications of a waiver.” *State v. Blackstock*, 19 S.W.3d 200, 208 (Tenn. 2000), citing *United States v. Murgas*, 967 F.Supp. 695, 706 (N.D.N.Y.1997). In *Blackstock*, the state supreme court reversed the lower courts’ rulings that the mentally retarded defendant’s waiver of his Miranda rights was knowing and intelligent. In reaching this conclusion, the court looked both to testimony about the defendant’s mental limitations, as well as to the circumstances of the interrogation where the defendant had difficulty in expressing himself, misspelled his own name on the waiver form, and was unable to provide his social security number. The fact that the defendant had not comprehended his rights was further shown by his continued detention in jail for two weeks following his arrest, even though his conservator was an attorney, and the defendant had the funds to post bail. See also *People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990) (trial court properly suppressed confession of defendant after finding that the defendant’s “subnormal intelligence” precluded a knowing and intelligent waiver of his Miranda rights.); *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) (defendant with IQ between 65 and 69 did not knowingly and intelligently waive his rights); *State v. Benton*, 759 S.W.2d 427, 432 (Tenn. Crim. App. 1988) (defendant with full scale IQ of 47 “was unable to rationally and intelligently grasp the concept of waiver as posing a profoundly critical choice”); *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972) (district court erred in finding valid waiver of rights where uncontradicted testimony by teachers and others indicated that mentally retarded defendants were incapable of understanding their options or the consequences of their choices); *State v. Anderson*, 379 So.2d 735 (La. 1980) (mentally retarded 17-year-old with an IQ between 50 and 69 did not understand his rights and did not appreciate the possible consequences of waiving them, and thus was incapable of knowingly and intelligently waiving his Miranda rights, and his confession should have been suppressed.) *State v. Rossiter*, 623 N.E.2d 645 (Ohio App. 1993) (record supported lower court’s finding that defendant with IQ of 65 did not have an awareness both of the nature of his rights, and of the consequences of waiving those rights).

The importance of expert testimony on the issue of a mentally retarded defendant’s ability to understand his rights was highlighted in *Commonwealth v. Daniels*, 321 N.E.2d 822 (Mass. Supreme Judicial Court 1975). Although the record in the case did not provide a basis for finding that the defendant’s confession should have been suppressed as a matter of constitutional law, the appellate court nevertheless used its state law powers to reverse the
conviction after concluding that a new trial was required as a matter of justice. It explained:

We have arrived at our view that there should be a new trial because no evidence was presented at the voir dire or at the trial to aid the trier of fact in evaluating the impact of custodial interrogation on Daniels in these circumstances. He might be more suggestible and subject to intimidation than a person of normal intelligence. He might not be able to understand the consequences of his right to a lawyer or his right to remain silent. He might be inclined to state that he understands even when he does not. Many of Daniels's statements that he understood his rights were simple 'yes's' or 'yeah's,' and not reassuring explanations of his asserted comprehension. (Citation omitted.) Furthermore, the police officers testified that Daniels had difficulty understanding their explanations of his rights. On this record, in which the only evidence that Daniels committed the crime came from his confession and his admissions, a substantial injustice may have been done to him because of the absence of expert testimony on the crucial issues of voluntariness and waiver. We do not know enough about intelligence quotients (I.Q.) and mental retardation to rule conclusively on this question. Yet we do know enough to believe the matter needs further analysis.

(Footnote omitted.)

.Id. at 827-828. For examples of expert testimony on this issue, see State v. Mortley, 532 N.W.2d 498, 502 (Iowa 1995) (in finding Miranda waiver invalid, court relied on testimony of psychologists who had substantial familiarity with mentally retarded defendant’s intellectual development over the years); People v. Bernasco, 562 N.E.2d 958 (Ill. 1990) (psychologist testified that defendant could not understand certain Miranda terminology, and that he would probably have agreed to almost anything said to him if doing so would end his interrogation); Henry v. Dees, 658 F.2d 406 (5th Cir. 1981) (record contained uncontradicted testimony of a psychologist that it was unlikely Henry could have understood the complex waivers and their consequences.)

Oftentimes the waiver process involves the defendant first expressing confusion about his rights as they are read to him. After receiving additional explanations from the officer, the defendant then claims to understand. It is extremely common, however, for mentally retarded individuals to feign comprehension.105 Thus, as recognized by the Iowa Supreme Court, the fact that Miranda warnings were “exhaustively” laid out fails to establish that the defendant “understood the basic concept of waiver and the immediate and ultimate consequences of confessing.” State v. Mortley 532 N.W.2d at 503.

105 See, e.g., State v. Mortley 532 N.W.2d at 502, where the treating psychologist stated: “When [the defendant] is asked if he understands something, he will almost automatically respond affirmatively--‘Yes, I understand that.’ And a lot of times the case is that he doesn't understand that, and he's kind of embarrassed to admit a lack of knowledge....”
In a recent empirical study of how well mentally retarded persons are able to comprehend Miranda warnings, the authors found that “[f]or mentally retarded people, the Miranda warnings are words without meaning.” Morgan Cloud, “Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects,” 69 U. Chi. L. Rev. 495 (2002). The data from the study provided the disturbing following suggestion:

that the number of people to whom the Miranda warnings are meaningless is much larger than previously acknowledged within the criminal justice system. The warnings are incomprehensible not merely to those suffering the most severe retardation, as many judicial opinions assume. They also are incomprehensible to people whose mental retardation is classified as mild, as well as some people whose "intelligence quotient" (IQ) scores exceed 70, the number typically used to demarcate mental retardation.

Id. at 501. Further, the data suggested that the “‘totalities’ analysis employed by the courts is incapable of identifying suspects competent to understand the Miranda warnings.” Id. at 502.

Counsel should carefully review and utilize studies, such as the one conducted by Cloud, in order to effectively challenge the validity of a waiver of rights by a mentally retarded defendant.

For a more complete list of cases where mental retardation has been found to preclude a valid waiver of rights, see “Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession,” 8 A.L.R.4th 16 (1981 & Supp.1999).

3.5 GUILTY PLEAS

As noted above, the Supreme Court in Godinez v. Moran, 509 U.S. 389 (1993), rejected the view that a higher competence standard applies for pleading guilty than for standing trial. It acknowledged, however, that a valid guilty plea requires more than simply competence:

A finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. Parke v. Raley, 506 U.S. 20, 28 -29 (1992) (guilty plea); Faretta, supra, at 835 (waiver of counsel). In this sense, there is a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

Id. at 401-402.
It is constitutional error for a trial court to accept a guilty plea without an affirmative showing that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is not considered intelligent where the accused does not understand the nature of the constitutional protections that he is waiving, *see Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938), or because he has such an incomplete understanding of the charges that the plea cannot constitute an intelligent admission of guilt. *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13 (1976).

Regarding the defendant’s understanding of his constitutional rights, see the section above on knowing and intelligent waivers. As for the second situation, the *Henderson* case is illustrative. *Henderson* involved a mentally retarded defendant who was charged with first degree murder. The defendant had entered the bedroom of his employer intending to collect his wages. When the employer awoke and began screaming, the defendant stabbed her with the knife he had brought with him. After Henderson’s attorneys unsuccessfully attempted to have the charge reduced to manslaughter, Henderson accepted their advice to plead guilty to second degree murder. In habeas corpus proceedings, the guilty plea was found to be involuntary because no one had explained to the defendant that intent was an element of second degree murder. The Court acknowledged that it was probably fair to presume in a typical case, defense counsel had explained the nature of the offense to the defendant in sufficient detail to provide the accused with notice of what he was being asked to admit. Here, however, the attorneys testified that they had not informed the defendant of the intent element of second degree murder, having decided that the defendant would not be interested in such details. This oversight by defense counsel was apparently due to the defendant’s “unusually low mental capacity.” Because intent was a critical element of the crime to which the defendant had pleaded guilty, the plea could not stand.

Similarly, in *Gaddy v. Linahan*, 780 F.2d 935 (11th Cir. 1986), the federal court was concerned that a mentally retarded defendant had not been adequately informed about the elements of malice murder prior to pleading guilty. The court explained that while “a rote reading of the indictment or charging document may be sufficient to put a defendant on notice of the elements of the charge in some circumstances (citation omitted), it is inadequate *when the defendant has minimal intelligence*, the charge is complex, and the sentence to be imposed is substantial.” *Id.* at 945 (emphasis added). In addition, “conclusory responses by a defendant and his counsel to a court's inquiry into whether the defendant ‘understands’ the charge is not sufficient to establish that the defendant actually has knowledge and understanding, *particularly when he possesses minimal intelligence*.” *Id.* (emphasis added); *see also United States v. Masthers*, 539 F.2d 721, 728-29 (D.C. Cir. 1976)\(^{106}\) (recognizing that the standard colloquy for determining whether a guilty plea is knowing and voluntary may be inadequate in cases where the defendant is mentally retarded.) On the record before it, the court in *Gaddy* was unable to find that the plea was knowing and intelligent. While the defendant did discuss the facts of the crime with his attorney, and the attorney then arrived at the conclusion that the defendant was liable for malice murder based on his presence at the time of the killing, it was unclear what

\(^{106}\) *Masthers*’ holding that the competency standard for pleading guilty is more exacting than the standard for competency to stand trial was overruled in *Godinez v. Moran*, 509 U.S. 389, 395 n. 5, 396-402 (1993).
information about the charges was conveyed to the defendant. At the time of the plea, there was no discussion about the elements of malice murder. Given the defendant’s “lack of intelligence, his expressed confusion [during the plea colloquy], the complexity of the case, and the extraordinary consequences of pleading guilty to malice murder,” the court found that “a more thorough explanation of the nature of the crime and its elements was required to satisfy the tenets of due process.” *Id.* at 946. The case was remanded for an evidentiary hearing to determine “what, if any, information [defendant] received and understood, prior to pleading guilty, concerning the elements of malice murder.” *Id.*

These cases demonstrate a frequent problem with representing mentally retarded defendants. Because of their limitations, counsel may withhold information rather than taking the extra time needed to ensure that the defendant is fully apprised of, and able to comprehend, the nature of the charges and the legal options.

Another danger with mentally retarded defendants is that a plea will be arranged on the basis of an attorney’s misunderstanding about the facts of the crime. It is well documented that mentally retarded individuals tend to bias their responses towards what they believe an authority figure wants to hear. *See, e.g.*, James W. Ellis and Ruth A. Luckasson, “Mentally Retarded Criminal Defendants,” 53 Geo. Wash. L. Rev. 414, 428 (1985). In the most extreme situation, this may result in a completely false confession, a topic discussed in more detail below. In a less dramatic situation, a mentally retarded defendant may confirm a version of the crime that defense counsel hypothesizes, rather than provide his own account of what happened. The distorted story may be devoid of defenses that would be available had the interviewer been more practiced in questioning mentally retarded individuals.

Because mentally retarded individuals are often predisposed to answer questions in a way that is designed to conceal their lack of understanding, “even when [their] language and communication abilities appear to be normal, the questioner should give extra attention to determining whether the answers are reliable.” *Id.* at 428. “[I]n cases involving defendants with subnormal intelligence, special precautions are required to offset the many factors which propel the system toward efficient outcomes rather than reliable ones.” Bonnie, “The Competence of Criminal Defendants With Mental Retardation to Participate in Their Own Defense,” 81 J. Crim. L. & Criminology 419, 439 (1990).
4 COERCED CONFESSIONS

A criminal conviction founded in whole or in part upon an involuntary confession violates the Due Process Clause. Rogers v. Richmond, 365 U.S. 534. This is true regardless of the truth or falsity of the confession. Id. “A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.” Jackson v. Denno, 378 U.S. 368, 380 (1964). Where an involuntary confession was admitted at trial, reversal is required unless the government can establish that the jury’s consideration of the confession was harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279 (1991).

In assessing whether a confession was coerced, thereby rendering it involuntary, courts look to the totality of circumstances, consideration being given to both the details of the interrogation and the characteristics of the accused. One unquestionably relevant characteristic is mental retardation. See, e.g., Fikes v. Alabama, 352 U.S. 191, 198 (1957) (considering low intelligence of defendant as one factor supporting finding that confession was involuntary); Smith v. State, 779 S.W.2d 417, 429 n. 8 (Tex. Crim. App. 1989) (evidence of mental retardation and mental deficiency is a factor, but not determinative, in ascertaining the voluntariness of a confession); State v. Davis, 780 P.2d 807 (Ore. 1989) (intelligence of accused is one factor to consider in determining whether confession was voluntary); People v. Cipriano, 429 N.W.2d 781 (1988) (recognizing intelligence level as one factor that a trial court should consider in determining whether a statement is voluntary).

On the other hand, “while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry.” Colorado v. Connelly, 479 U.S. 157, 165 (1986). Instead, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” Id. at 167.

Although mental retardation does not in and of itself prevent voluntary interrogations and confessions, it is well known that “mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive.” Van Tran v. State, 66 S.W.3d 790, 806 (Tenn. 2001), quoting Lyn Entzeroth, “Putting the Mentally Retarded Criminal

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107 See, e.g., Vasquez v. State, 163 Tex.Crim. 16, 288 S.W.2d 100, 108-09 (1956) (a confession is not inadmissible merely because the defendant, who is not insane, is of less than normal intelligence); State v. Davis, 780 P.2d 807 (1989), rev. den. 787 P.2d 888 (1990) (trial court's reliance on defendant's "dull normal" intelligence level to find confession involuntary was misplaced); State v. Hickam, 692 P.2d 672 (1984) (court concluded that defendant's statements were voluntary and rejected his argument that, "because he is mentally retarded, his will to resist was overcome by the mere fact of questioning itself"); Flowers v. State, 461 S.E.2d 533 (Ga. 1995) (expert testimony that defendant’s mental age was eight years was insufficient in and of itself to establish that confession was involuntary).
Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty,” 52 Ala. L.Rev. 911, 917 (2001); see also Mary D. Bicknell, “Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts,” 43 Okla. L.Rev. 357, 362 (1990) (“[T]he mentally retarded individual is particularly vulnerable to any police coercion used in obtaining confession.”); United States ex rel. Rush v. Ziegele, 474 F.2d 1356 (3rd Cir. 1973) (low mental capacity is important in determining what amount of coercion would render a confession involuntary); Roark v. State, 644 N.E.2d 565 (Ind. 1994) (recognizing that a person’s mental condition is relevant to the issue of susceptibility to police coercion).

There are many cases where confessions have been found to be involuntary in part because of the defendant’s limited intelligence. In Reck v. Pate, 367 U.S. 433 (1961), for example, the defendant’s “youth, his subnormal intelligence, and his lack of previous experience with the police” were important considerations in assessing whether “overbearing police tactics” were coercive. Id. at 442 (emphasis added). The fact that the defendant had “at least borderline mental retardation,” (id. at 443) made the totality of coercive circumstances even more aggravated. Similarly, in Culombe v. Connecticut, 367 U.S. 568, 625 (1961), a mentally retarded defendant’s confession was found to be involuntary. Justice Frankfurter, who announced the judgment of the Court, noted that the defendant’s “mental equipment,” which rendered him “suggestible and subject to intimidation,” lessened his powers of resistance to the prolonged, systematic interrogation. The fact that Culombe had a criminal record was not seen to add to his ability to withstand coercive behaviors given his mental limitations. Rather, the “value” of Culombe’s “considerable criminal experience . . . as a school for toughening his resistance, [had to] be duly discounted in light of his subnormal mental capacities.” Id. at 625 fn. 85.

In State v. Kelly, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002), the following set of circumstances were found to render a confession involuntary: an employee of Department of Children’s Services was present during the interrogation, the mentally retarded defendant trusted this employee, the employee should have been aware of defendant’s limitations, the questions posed to defendant were suggestive, and one officer offered defendant a cookie during the interview. See also State v. Benton, 759 S.W.2d 427, 432 (Tenn. Crim. App. 1988) (confession of mentally retarded defendant found involuntary where the defendant was taken into custody, transported in a law enforcement vehicle to the Sheriff’s Department, and subjected to questioning in spite of his retardation and the expressed desire of his father to be with him during the interrogation.); Aguilar v. State, 751 P.2d 178 (N.M. 1988) (in finding that a confession was involuntary, court took into consideration that defendant, due to subnormal intelligence (IQ of 70) and mental illness, unquestionably had difficulty in appreciating the meaning of the assurances given to him by the interrogator and in distinguishing whether a deal had been made.); Prince v. State, 584 So.2d 889 (Ala. Crim. App. 1991), abrogated in part on other grounds, McLeod v. State, 718 So.2d 727 (Ala. 1998) (where defendant’s initial statements were deemed involuntary due to police officer’s improper inducements and false statements, the Court found that a three day interval before defendant’s next inculpatory statements did not negate the effect of the officer’s previous actions in part because of testimony concerning defendant’s limited intellectual functioning.)
For additional cases on coerced confessions, see “Mental Subnormality Of Accused As Affecting Voluntariness Or Admissibility Of Confession,” 8 ALR4TH 16.
5 FALSE CONFESSIONS

In *Atkins v. Virginia*, 536 U.S. at 320 (2002), one of the justifications for banning the execution of mentally retarded defendants was the heightened risk such defendants face of having their underlying conviction premised on a false confession. There are many documented cases of mentally retarded individuals confessing to crimes they in fact did not commit. See, e.g., Richard Leo & Richard Ofshe, “The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,” 88 J. Crim. L. & Criminology 429 (1998); see also Richard Conti, “The Psychology of False Confessions,” 2 J. of Credibility Assessment and Witness Psychology 14, 25 (1999) (observing that mentally retarded individuals, like children, are likely more at risk for providing false confessions.)

In any case with a defendant of sub-average intelligence who has confessed, counsel must take special care in assessing the accuracy of the defendant’s statements.

In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court held that criminal defendants have the right to present to the trier of fact evidence concerning the circumstances in which a confession was made in order for the jury to be able to judge the credibility of the confession. This right exists even where the confession has been found to be “voluntary.” In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002), the Kentucky Supreme Court found a violation of *Crane* where a mentally retarded defendant was precluded from presenting evidence that he confessed only after being informed that he had failed a polygraph examination. Although state law generally precluded references to polygraph results, the Kentucky Supreme Court found that “the defendant's right to present a defense trump[ed] [the court’s] desire to inoculate trial proceedings against evidence of dubious scientific value.” *Id.* at 39.

The crux of Appellant's defense is that he was coerced and coached into a confession by the interrogation techniques—including the use of a polygraph examination—employed by Lt. Payton and Det. Kearney. Appellant contends that when the investigating officers informed him that he had failed the polygraph examination and that he had lied to Lt. Payton in the process, he—*in large part because of his limited intellectual capabilities . . .*—confessed to a crime he did not commit. By preventing Appellant from making any reference to the polygraph examination, the trial court pulled the proverbial rug out from under Appellant's defense and left Appellant unable to present the jury with the factual circumstances that he alleged caused him to confess falsely.

*Id* (emphasis added.)

In addition, the Kentucky Supreme Court concluded that the trial court erred in excluding testimony from a mental health expert as to her opinion that the defendant’s limited mental capacity could have caused him to confess falsely to a crime that he did not commit. The
trial court erroneously excluded the testimony on the ground that it went to the ultimate issue in the case, that is, the defendant’s guilt or innocence. The court remanded the case for reconsideration of whether the testimony was sufficiently relevant and reliable for admission. See also Holloman v. Commonwealth, 37 S.W.3d 764, 767 (Ky. 2001) (evidence that defendant was prone to manipulation, suggestion, and intimidation because of his mental retardation "should not have been excluded on the basis of relevancy because it was permissible evidence bearing directly on the reliability of his statements."); Pritchett v. Commonwealth, 557 S.E.2d 205, 208 (2002) (psychiatric testimony connecting mental retardation and false confessions "presented information on subjects unfamiliar to jury that would assist it in determining the reliability of [the defendant's] confession.")

Similarly, in Miller v. State, 770 N.E.2d 763 (Ind. 2002), a murder case involving a mentally retarded defendant who had confessed to the crime, it was found that the defendant’s right to present a defense was violated by the trial court’s exclusion of expert testimony on false confessions. Among the expert’s assertions, which were made outside the presence of the jury, was that the “mentally handicapped are more suggestible and more likely to give a false confession,” stating that they are “easier to manipulate,” less able to appreciate long-range consequences, easier to persuade to see the facts as asserted by the interrogator, and easier “to get to give both true and false confessions.” Id. at 772. In finding reversible error, the Indiana Supreme Court determined that the excluded testimony “would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience.” Id. at 774. The error was found to be prejudicial in light of the prosecutor’s heavy reliance on the defendant’s videotaped statement, and despite evidence that the defendant’s fingerprint was found in what appeared to be blood on a plastic bag at the crime scene.

For further cases discussing this topic, see “Admissibility Of Expert Testimony Regarding Reliability Of Accused's Confession Where Accused Allegedly Suffered From Mental Disorder Or Defect At Time Of Confession,” 82 ALR5th 591.
6 CRIMINAL RESPONSIBILITY

Under early common law, it was debated whether mentally retarded defendants, or “idiots” as they were then sometimes described, should be fully culpable for criminal actions. One approach to retarded individuals is reflected by In re State v. Richards, 39 Conn. 591 (1873), where the court adopted in part Lord Hale’s famous rule which was to the effect that to be responsible for a crime, a defendant must have the capacity and understanding of a normal child of fourteen years. Under this system, attempts were made to equate mentally retarded adult defendants with children, who were not deemed criminally culpable.

In time, this approach yielded to, and was largely replaced by, guilty but mentally ill and insanity defenses, each of which is described below. Thus, in modern times, the mere fact that a defendant harbors a mental age commensurate with that of a child does not absolve a defendant of criminal responsibility. See, e.g., Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987) (“Mental retardation does not constitute insanity or incapacity to know the difference between right and wrong. It is only the latter disability, not the former, that serves as a defense to conviction and also to punishment.”); State v. Schilling, 112 Atl. 400 (N.J. 1920) (“The responsibility of an adult charged with commission of a crime is not to be measured by a comparison of his mental ability with that of an infant of twelve years, or in any other way. The true test is, does he appreciate the nature and quality of his act, and that it is wrong? and if he does, he is responsible to the law, without regard to his other mental deficiencies.”); People v. Farmer, 87 N.E. 457 (N.Y. 1909) (“That the defendant had an inferior and untrained intellect is indisputable, and that her moral perceptions were of a low order is clear. The jury were not required to pass upon the quality and strength of her intellect, or upon her moral perceptions, except as such questions affect the general question of the defendant’s knowledge, at the time of the homicide, of the nature and quality of the act she was doing. A weak and disordered mind is not excused from the consequences of crime.”)

Under modern law, mental retardation remains important to many complete or partial defenses.

6.1 INSANITY DEFENSE

Most states retain an insanity defense, even though the Supreme Court has not held that such a defense is constitutionally mandated. Foucha v. Louisiana, 504 U.S. 71, 88-89 (“The Court does not indicate that States must make the insanity defense available.”) In Leland v. State, 343 U.S. 790 (1952), the Supreme Court ruled that the Constitution does not prohibit placing the burden on a defendant to prove insanity beyond a reasonable doubt. It reached this conclusion despite the fact that the majority of jurisdictions employed a more defendant-protective burden of proof.
In jurisdictions that do permit an insanity defense, mental retardation may be the basis for a finding that the defendant was insane, and therefore not criminally culpable, at the time of the crime. See, e.g., United States v. Jackson, 553 F.2d 109 (D.C. Cir. 1976) (“It is accepted in this jurisdiction that mental retardation is a mental defect that will support an insanity defense.”)

The definition of insanity varies among the states. The traditional M’Naghten insanity test asks whether the accused party “was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” M’Naghten’s Case, 8 Eng. Rep. 718 (1843). In England, the M’Naghten test has been clarified to mean knowledge that an act is legally wrong. In the United States, it is not clearly resolved whether knowledge that an act is morally wrong suffices to defeat an insanity defense. State v. Morgan, 863 So.2d 520, 524 fn. 5 (La. 2004). Some jurisdictions utilizing the M’Naghten test have supplemented it with what is known as the “irresistible impulse” rule, under which a defendant whose mental disease or defect prevents him from controlling his conduct is also not criminally responsible.

The Model Penal Code contains a more defendant-friendly version of the M’Naghten test. First, it changed the requirement of “knowing” to “appreciating.” Second, rather than demanding a complete lack of capacity, it required only that the defendant lack a “substantial capacity” to appreciate the criminality of his conduct. Finally, it added a volitional prong which exonerated defendants who lacked substantial capacity to control their conduct. Model Penal Code § 4.01 cmt. 3 (1985). In the late 1980s, in response to dissatisfaction with highly publicized insanity verdicts, some jurisdictions that had followed the Model Penal Code amended their statutes to eliminate the volitional requirement. According to a recent law review article, seventeen jurisdictions include volitional capacity in their insanity defense. John H. Blume, “Killing the Non-willing,” 55 S.C. L. Rev. 93, 109 (2003). Compare Kennedy v. Commonwealth, 2004 WL 41717 (Ky. App. Jan. 9, 2004) (“A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or mental retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.”) and People v. Jackson, 2003 WL 22439719 (Mich. App. Oct. 28, 2003) (a jury can find a defendant legally insane, if he is mentally retarded, and lacks the capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law.) with State v. Kelly, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (mental retardation “must render the appellant unable to appreciate the nature or wrongfulness of her acts” in order for an insanity defense to succeed).

6.2 ABSENCE OF REQUISITE MENS REA

The Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). Thus, the burden is on the state to establish that the defendant possessed any mens rea element of the charged crime. Further, the defendant’s right to due process includes “the right to a fair opportunity to defend against the State's accusations,” Chambers v. Mississippi, 410 U.S. 284, 294 (1973), including on the issue of mens rea.

Mental retardation is often relevant to the question of whether or not the defendant harbored the mental state necessary for conviction of the alleged crime. Impulsivity, for example, is a common characteristic of the mentally retarded. Testimony about the defendant’s mental retardation could establish reasonable doubt on elements such as premeditation and deliberation, and specific intent.

Model Penal Code Section 4.02(1) reads as follows: “Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.” Similarly, American Bar Association Standards for Criminal Justice, Standard 7-6.2 states: “Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible.”

Jurisdictions differ as to what evidence may be presented to demonstrate that the defendant did not have the requisite mental state for conviction of the charged crime. In United States v. Childress, 58 F.3d 693, 726 (D.C. Cir. 1995), the exclusion of evidence concerning a defendant’s mental retardation was found to constitute error, since such evidence was “potentially material as to whether [the defendant] entertained the specific intent to further the purposes of the [charged] conspiracy . . . .” See also Becksted v. People, 292 P.2d 189, 194 (Colo. 1956) (“A defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency as bearing upon his capacity to form the specific intent essential to first degree murder.”); State v. Clokey, 364 P.2d 159, 165 (Idaho 1961) (a jury may consider evidence tending to show an abnormal mental or nervous condition in determining whether or not the defendant, at the time of the alleged offense, had the specific intent which is an essential ingredient of the crime charged); People v. Saille, 820 P.2d 588 (Cal. 1991) (if a crime requires a particular mental state, the Legislature may not deny the defendant the opportunity to prove he did not actually possess that state.); Hoey v. State, 536 A.2d 622, 632 n.5 (Md. App. 1988) (disapproving opinion which indicated that a criminal defendant is not entitled to present evidence of his impaired mental condition for the limited purpose of showing the absence of mens rea.); State v. Hines, 455 A. 2d 314 (Conn. 1982) (evidence with regard to mental capacity is relevant in any case where specific intent is an essential element of the crime charged.)

Some jurisdictions, on the other hand, preclude expert testimony about a defendant’s mental state unless the defendant raises an insanity defense. See, e.g., People v. Carpenter,
627 N.W.2d 276, 285 (Mich. 2001) (“the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent.”); Kight v. State, 512 So.2d 922 (Fla. 1987) (evidence of mental retardation was inadmissible during the guilt phase of a first-degree murder case in the absence of a defense of insanity); Brown v. Trigg, 791 F.2d 598 (7th Cir. 1986) (trial court did not abuse discretion by excluding evidence of defendant’s IQ score, which defendant argued supported her defense that she did not act knowingly); Funk v. Commonwealth, 2003 WL 21524686 (Va. App. July 8, 2003) (where defendant sought to establish that his mental retardation rendered him incapable of fully comprehending the fragility of the victim, or the consequences of his conduct, the trial court could not consider expert opinion of the defendant's mental state.); Stamper v. Commonwealth, 324 S.E.2d 682, 688 (Va. 1985) (the use of expert testimony to show by circumstantial evidence that the requisite specific intent did not in fact exist, infringes upon the factfinder’s prerogative to determine the ultimate fact in issue.); see also State v. Wilcox, 436 N.E.2d 523 (Ohio 1982) (finding psychiatric evidence inadmissible on the mens rea issue); State v. Wade, 375 So.2d 97 (La.1979), cert. denied 445 U.S. 971 (1980) (due process is not offended by the Louisiana rule that a defendant cannot rebut evidence of specific intent by presentation of psychiatric testimony without pleading not guilty by reason of insanity.)

The refusal to permit evidence of an impaired mental condition short of insanity has been criticized, and should be challenged as unconstitutional. See, e.g., Chestnut v. State, 538 So.2d 820, 828 (Fla. 1989) (Overton, J., dissenting) (the majority holding, namely that expert testimony regarding brain damage may be barred when offered to establish the defendant could not or did not harbor the requisite intent, where evidence of intoxication may be presented on this issue, may violate the equal protection and due process clauses of both the United States and Florida Constitutions because no reasonable classification or distinction to justify different treatment exists.); State v. Noel, 133 A. 274, 285 (1926) (“The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient rule to the case of a drunkard, whose mental faculties are disturbed by his own will and conduct, than to the case of a poor demented creature afflicted by the hand of God.”); State v. Bouwman, 328 N.W.2d 703, 706 (Minn.1982) (Wahl, J., dissenting) (“A defendant charged with murder in the first degree must be permitted to offer relevant and competent expert psychiatric opinion testimony on the issues of premeditation and specific intent. To hold otherwise would be to violate the defendant's constitutional right to present evidence.”); Joshua Dressler, “Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse,” 75 J. Crim. L. & Criminology 953, 953 n.6 (1984) (due process precludes the exclusion of probative information which directly impacts upon the requisite mens rea; presentation of evidence regarding diminished capacity may also be constitutionally protected pursuant to the Sixth Amendment right to introduce competent and relevant evidence). Compare Montana v. Egelhoff, 518 U.S. 37 (1996) (O'Connor, J., dissenting) (statute which precluded jury from considering defendant’s intoxicated state in determining whether defendant “purposely” or “knowingly” caused the death of another violated due process) with Montana v. Egelhoff, 518 U.S. 37 (1996) (Ginsburg, J., concurring in judgment) (Montana statute did not violate due process because it redefined mens rea element of crime rather than excluded relevant evidence).
Courts that have upheld exclusion of mental impairment evidence often rely on Fisher v. United States, 328 U.S. 463 (1946), where the Supreme Court ruled that the District of Columbia was not constitutionally required to recognize and instruct on a defense of diminished responsibility. Even assuming the ruling remains good law, it should not be seen to preclude evidence presented to negate the mens rea element of the charged crime. In Mott v. Stewart, 2002 WL 31017646 (D. Ariz. Aug. 30, 2002), for example, an Arizona federal court determined that a trial court violated a murder defendant's constitutional right to present a defense when it prevented her from presenting expert testimony about battered woman syndrome (BWS) to negate the element of mens rea and to rebut the state's evidence. The Mott case concerned a woman who was accused of child abuse and first-degree murder, after she left her children in the care of her boyfriend, despite knowing he was abusive. The charges involved specific intent crimes of omission based on Mott’s failure to protect her children from her boyfriend. In her defense, she sought to present evidence of BWS to negate the mens rea element of the charged offenses, and to rebut the state witnesses' testimony that she had always confronted her boyfriend. In affirming the exclusion of the expert testimony, the state supreme court had relied on United States v. Fisher, 328 U.S. 463 (1946). The federal court found Fisher distinguishable. There, the question was whether a jurisdiction was required to offer a diminished responsibility defense, which the federal court found to be distinct from presenting testimony to explain the defendant’s behavior, and to negate the prosecution’s evidence that she had knowingly or intentionally neglected her children.

Therefore, if counsel is prohibited from presenting expert testimony on mental retardation intended to negate the mens rea requirement, constitutional objections should be lodged.

Even in jurisdictions where expert testimony is prohibited, counsel may be able to introduce lay testimony demonstrating such things as the defendant’s limited ability to plan, or his tendency to follow others. See, e.g., State v. Cooey, 544 N.E.2d 895 (Ohio 1989) (reaffirming rule that psychiatric testimony unrelated to insanity may only be offered at sentencing phase of capital trial, but noting that lay witnesses could testify that defendant was too intoxicated to form specific intent).

For further information on the status of diminished capacity defenses, see 22 A.L.R.3d 1228.

6.3 AFFIRMATIVE DEFENCES (OTHER THAN INSANITY)

Mental retardation may also be relevant to affirmative defenses other than insanity or diminished capacity. For example, in State v. Davidson, 2003 WL 151202 (Tenn.Crim.App. Jan. 22, 2003) (unpublished), a homicide case, the Tennessee Court of Criminal Appeals recognized that mental retardation was relevant to the subjective component of self-defense (an honest belief that the danger was real), as well as to the lesser included offense of voluntary manslaughter (whether the killing was actually committed in a state of passion). The defendant had unsuccessfully sought to introduce expert testimony about his mild mental retardation and undifferentiated schizophrenia. As to the defendant’s mental retardation, the expert had explained outside the presence of the
jury that mentally retarded individuals "are somewhat slower in terms of their capacity to process information", and that "it is difficult for them to process information quickly." The expert further noted that this type of deficit would be worse in a situation where there is a lot of stress and emotion. The appellate court concluded that such testimony was erroneously excluded, although the error was harmless on the facts of the case.

6.4 **GUilty BUT MENTALLY ILL OR MENTALLY RETARDED**

A modern development is the verdict of guilty but mentally ill or mentally retarded. What this tends to mean, in jurisdictions that permit such a verdict, is that the defendant’s mental impairment will not preclude a conviction, or even lessen the sentence, but will instead require that the defendant receive appropriate treatment while in custody. These laws have been subject to much criticism. *See, e.g.*, Christopher Slobogin, “The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come,” 53 Geo. Wash. L. Rev. 494 (1985); Comment, “The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle,” 10 Notre Dame J.L. Ethics & Pub. Pol’y 341 (1996).
7 CHALLENGES TO PRIOR CONVICTIONS AND UNADJUDICATED CHARGES OFFERED IN AGGRAVATION

As discussed above, mentally retarded defendants are at special risk of giving involuntary or false confessions, and making unintelligent waivers of their rights. Additionally, many commentators and experts believe that the criminal justice system under-identifies mentally retarded defendants who are incompetent to stand trial, or who have viable defenses that go unexplored. If a defendant has prior convictions, counsel must carefully review the record to determine whether the convictions were constitutionally flawed, or otherwise unreliable. A death sentence based in part on an invalid prior conviction violates the Eighth Amendment. Johnson v. Mississippi, 486 U.S. 578 (1988).

Some states limit challenges to prior convictions. For example in Garcia v. Superior Court, 928 P.2d 572 (Cal. 1997), the state supreme court ruled that a criminal defendant may not challenge a prior conviction via a motion to strike on the ground of ineffective assistance of counsel in the course of a current prosecution for a noncapital offense. Challenges to prior convictions are generally limited to instances where there was a complete denial of counsel. See also Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001) (similar ruling in regard to federal habeas challenge to current sentence based on unconstitutional prior conviction that was the basis for the sentence enhancement.) Notably, however, the California Supreme Court treats capital cases differently. In People v. Horton, 906 P.2d 478, 520 (Cal. 1995), the court found that “the special need for reliability in the death penalty context is undermined whenever a prior conviction (upon which a death judgment is based) is tainted by a fatal fundamental constitutional defect.” It therefore held: “[I]n the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance may not properly be confined to a claim of Gideon error, but may be based upon at least some other types of fundamental constitutional flaws.” Id. Similarly, Coss, a non-capital case, should not be read to limit challenges to prior convictions used in capital cases.

Where evidence of unadjudicated crimes is offered against a defendant with sub-average intellectual functioning as aggravation, counsel must investigate the circumstances surrounding those crimes as extensively as the capital offense itself. The mens rea issues noted above may be applicable, or the inculpatory statements may be subject to suppression or challenge.
8 **Behavior/Appearance Post-Crime or in Courtroom**

In the *Atkins* decision, the Supreme Court expressly noted that mentally retarded defendants may be unfairly judged during sentencing proceedings because their demeanor “may create an unwarranted impression of lack of remorse for their crimes . . .” *Atkins v. Virginia*, 536 U.S. at 320-21. Counsel may need to present expert testimony that addresses the defendant’s behavior during the trial, as well as descriptions of his demeanor after the crime. This may be particularly important given the frequently misleading portrayal of mentally retarded individuals in films and on television as innocent and excessively loveable.

Another common problem in cases involving mentally retarded defendants is the defendant’s efforts to mask his or her disabilities. For example, the defendant may take copious notes in order to appear to be following and actively participating in the trial. This can lead the jury to wrongly conclude that the defendant is not significantly impaired. To the extent that counsel can control such behaviors, counsel should do so. If counsel cannot prevent the defendant from giving a false impression of intelligence, expert or lay testimony may be necessary to counter the defendant’s actions or appearance.
9  **CUSTODIAL ADJUSTMENT**

In *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989), the Supreme Court recognized that a mentally retarded defendant may not be as morally culpable as a “normal” adult because mentally retarded individuals are typically less able to control impulses, and to evaluate the consequences of their conduct. Unfortunately, these same characteristics can lead a jury to conclude that a defendant is likely to be dangerous in the future. *Id.* at 323. Thus, evidence of subnormal intelligence can be a “two-edged sword.” *Id.* at 324.

To ensure that subnormal intelligence is not transformed into a factor weighing in favor of a death sentence, counsel should develop and present evidence that will establish that the structured environment of a prison is precisely the type of place in which the defendant can peacefully thrive. *See, e.g.*, *People v. Robertson*, 767 P.2d 1109 (Cal. 1989) (evidence presented of mild mental retardation, along with lay witness testimony demonstrating that the defendant positively adjusted to incarceration).

If counsel is relying upon evidence that the defendant is a “follower” in an effort to reduce culpability for the capital offense or prior crimes, counsel must make special efforts to demonstrate to the sentencer that this characteristic is not likely to render the defendant dangerous in prison. For example, the sentencer may fear that the defendant could become a pawn of violent and manipulative inmates. One possible means of accomplishing this is through evidence of probable conditions of confinement for the defendant. In Texas, for example, there is the Mentally Retarded Offender Program. Under this program mentally retarded inmates are housed separately from other inmates in order to ensure, among other things, protection from prisoners who could manipulate or otherwise abuse the mentally retarded inmates. Counsel must thoroughly investigate the relevant prison system in order to determine whether similar protections would be available.
10 POST-CONVICTION COMPETENCE

A mentally retarded inmate may be unable to assist post-conviction counsel and/or may be incompetent to be executed.

10.1 POST-CONVICTION PROCEEDINGS

At least one Florida death row inmate had been found, pre-Atkins, to be incompetent to proceed in post-conviction proceedings due to active psychosis and mental retardation. *Florida Department of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001); cf. *In re Dunkle*, S014200 (Cal. Supreme Court July 24, 2002) (granting motion for appointment of guardian ad litem to incompetent death row inmate for the purpose of preparing and pursuing habeas corpus petition). If mental retardation or sub-average intellectual functioning interferes with the ability of an inmate to assist counsel in litigating challenges to his conviction and sentence, a request to stay proceedings should be considered. See, e.g., *Rohan ex rel. Oscar Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) (staying federal habeas proceedings pending restoration of competency where counsel for incompetent capital habeas petitioner raised claims that could potentially benefit from the defendant’s ability to communicate rationally with counsel).

10.2 COMPETENCE TO BE EXECUTED

“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.” *Ford v. Wainwright*, 477 U.S. 399, 410. *Ford* was a plurality opinion and it did not resolve what constitutes insanity to be executed. In his concurring opinion, Justice Powell defined the standard for competency to be executed as requiring that the “defendant perceive[] the connection between his crime and his punishment . . ..” Id. at 422 (conc. opn. Powell, J.). While the full court has yet to define what constitutes competency to be executed, at the very least, the Eighth Amendment bars execution of prisoners who are insane in the sense of being unaware of the punishment they are about to suffer, or why they are to suffer it. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989).

Some states have adopted standards that include a prong for ability to rationally assist counsel, and to identify information calling the conviction and death sentence into doubt. See, e.g., Miss. Code. Ann. § 99-19- 57(2)(b) (1994); *Singleton v. State*, 437 S.E.2d 53, 57-58 (S.C. 1993); *State v. Harris*, 789 P.2d 60, 66 (Wash. 1990). Counsel representing a defendant who is of sub-average intelligence should advocate for this more protective standard, utilizing the abundant materials demonstrating that mentally retarded defendants are at special risk of being wrongfully convicted and receiving an unwarranted death sentence.
11 Clemency

Residual doubt about guilt has been the basis for a number of clemency grants in the modern era. Where a defendant with sub-average intelligence is found eligible for the death penalty despite *Atkins*, counsel should invoke any doubts about whether the defendant is in fact mentally retarded and argue that the defendant is similarly situated for all practical purposes to defendants who were spared the death penalty under *Atkins*. In any event, significant mental limitations should be the basis for a finding of lesser moral culpability, and hence make the granting of clemency a possibility.

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109 According to the Death Penalty Information Center’s website, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), possible innocence was a reason for clemency in numerous cases since 1976.
PART III

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Adaptive Behavior: Background Questions to Ask Credible Informants (Combined Version)

'Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning'
1 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL
RETARDATION/INTELLECTUAL DISABILITY AND CAPITAL PUNISHMENT: AN
INTRODUCTION

1.1 WHY IS INTERNATIONAL LAW IMPORTANT IN A DOMESTIC CONTEXT?

The utilization of capital punishment is not prohibited under international law. However the
abolition of the use of the death penalty under all circumstances is the ultimate objective of
the majority of the international community. Until that time, there are restrictions on the
categories of persons who are subject to such a punishment; the execution of persons with
mental retardation constitutes one such restricted category.

It is important that counsel and mental disability advocates familiarize themselves with the
international legal system and the laws and norms that protect relevant rights.

Over the last 50 years, humankind has seen substantial developments in both the
recognition and importance of international law, particularly in the field of human rights.
Although the concept of an international judicial entity is often difficult to comprehend, it
became clear in the aftermath of the Second World War that nations could no longer
consider themselves as independent entities, isolated from the wider world.

Today, a number of cases being brought before U.S. courts utilize international law and
therefore a sound knowledge of such concepts is required.

In fact, this development was recently encapsulated by former U.S. Supreme Court Justice
Sandra Day O’Connor in a speech at Georgetown Law School. She held that:

“International law is no longer a specialty... Since September 11, 2001, we’re
reminded some nations don’t have the rule of law or (know) that it’s the key
to liberty.”

110 On 18 December 2007 the UN General Assembly voted to back a resolution calling for a global
moratorium on executions with a view to the abolition of the death penalty. The resolution was passed by a
vote of 104 in favour to 54 against, with 29 abstentions. The resolution states “that there is no conclusive
evidence of the death penalty’s deterrent value and that any miscarriage or failure of justice in the death
penalty’s implementation is irreversible and irreparable.” It calls on nations that do impose the death
penalty to ensure they meet internationally agreed minimum standards on the safeguards for those facing
execution, and to provide the United Nations Secretary-General with information about their use of capital
punishment and observation of the safeguards. Furthermore, the resolution asks countries to progressively
restrict the use of the death penalty, such as by reducing the number of offences for which it may be
imposed, and calls on those States that have abolished the practice to not reintroduce it. See
adopted a further resolution calling for a global moratorium on capital punishment 106 to 46 (with 34
abstentions). In 1994 and 1998 similar proposals failed before the UN General Assembly.
110 See, e.g. Grutter v. Bollinger, 539 U.S. 306 (2003), Lawrence v Texas 539 U.S. 558 (2003); Roper v
In emphasizing the significance of international law within the U.S. judicial system, O'Connor also remarked that the judiciary would be “negligent” if it simply disregarded its importance. 111

Consequently, international law should no longer be seen as a foreign concept; it has relevance in domestic courtrooms across the world and as such, at the very least, a basic understanding is required. Whether such law has binding force or not, it can still be an influential authority when considering constitutional and human rights questions. Justice Ruth Bader Ginsburg recently recalled:

“We refer to decisions rendered abroad, it bears repetition, not as controlling authorities, but for their indication, in Judge Wald’s words, of “common denominators of basic fairness governing relationships between the governors and the governed”…

National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.” 112

The U.S. Supreme Court, having recently reflected upon international law and context in a number of cases, is becoming increasingly inclined to rely upon it as a supplemental source of consideration. Specifically in the context of capital litigation, the U.S. Supreme Court has looked to foreign and international law to inform its understanding of what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment as part of its determination of “evolving standards of decency”.113 Notwithstanding this development, it is still critical for attorneys to continue to include arguments on the basis of international law and norms. Such practice is essential to keep open all possible avenues of appeal (including, perhaps, to international courts), as well as to preserve both specific arguments and a general approach which could benefit future cases. As with other restricted categories of death penalty litigation, the accumulation of a body of cases evidencing a coherent and consistent line of argument can be useful in setting the stage for future decisions. 114

It is important to note that the application of international law and human rights standards extends beyond capital punishment and can be articulated in both civil and criminal legal arguments.

Mindful of the dynamic context within which international law finds itself, we are hopeful this section, which is rather general in nature, will introduce those who are unfamiliar with international law and human rights standards to this burgeoning area of law.

112 “A decent respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Justice Ruth Bader Ginsburg, delivered at the ASIL Annual Meeting, 1 April 2005, accessible at http://www.asil.org/events/AM05/ginsburg050401.html
114 See, e.g., The Inter-American Commission on Human Rights (www.cidh.org) infra.
**Proviso**

Please take note that throughout this section of the resource we suggest potential avenues of legal argument. These are advisory only. Despite this stipulation, we are hopeful that the information which follows will at the very least allow you to begin to consider international law as a supplementary line of reasoning that may bolster legal argument.
2 INTERNATIONAL INSTITUTIONS, LAW AND INSTRUMENTS

2.1 WHAT IS INTERNATIONAL LAW?

Law might be simply described as a body of rules which restrains certain behavior within a society and to some extent reflects the ideas and concerns of the society it protects. The same is true of international law, with the important difference being that its subjects are predominantly states rather than individual citizens.

The apparently “soft” nature of international law can obscure its value, especially if considered within the context of the principal characteristics of domestic law: an established body to legislate or create laws, a hierarchical court system with compulsory jurisdiction to resolve disputes, and an accepted system of enforcement. International law has no legislature, there is no system of courts or executive branch as traditionally understood, and there is no cohesive system of punishment. Further, it is important to recognize that the international legal structure is more “horizontal” in nature than the vertical hierarchy with which we are familiar in domestic law. Nonetheless, the international community is not without institutions, the most notable being the International Court of Justice (ICJ), the judicial body, and the United Nations (UN), the administrative body, although a wide variety of other bodies make significant contributions within certain fields. There are also a number of regional institutions including the Inter-American Commission on Human Rights, the European Court of Human Rights, the African Court on Human and Peoples’ Rights and the Council of Europe.

International law is primarily created by international agreement, which establish rules that are binding on all signatories, and custom, which is determined by State practice; practice recognized by the international community as forming a framework of conduct that must be observed.

Contrary to popular belief, international law is observed more often than not: violations are infrequent. However, if a violation does occur it usually generates a great deal of media and political attention. It is important for us to remember that just as rape and murder continue to take place within a domestic society and such occurrences do not invalidate the system, correspondingly, attacks on international legal rules do not negate their authority or necessity. Accordingly, although international law arguments may seem of limited use in domestic legal settings, they can at the very least lend weight to a legal argument.


Before attempting to understand the finer details of international law, it will be beneficial first to gain some insight into how the International Court of Justice and the United Nations operate, and to detail other institutions within the UN system.

2.2 INTERNATIONAL INSTITUTIONS

The United Nations

The United Nations (UN) was established on 24 October, 1945 by 51 countries committed to preserving peace through international cooperation and collective security. Today, nearly every nation in the world belongs to the UN: membership totals 192 countries, most recently including Montenegro.

When States become members of the UN they agree to accept the obligations of the United Nations Charter, an international treaty that sets out basic principles of international relations.

United Nations Charter

The United Nations Charter (UN Charter)\textsuperscript{117} is the founding instrument of the UN\textsuperscript{118}. It serves a constitutional function, creating the organs and bodies of the UN, as well as establishing procedure and confirming the rights and obligations of Member States. The UN Charter, alongside the Universal Declaration of Human Rights,\textsuperscript{119} adopted by the General Assembly in 1948, forms the basis of modern international human rights law. Since then, the UN has gradually expanded human rights law to encompass specific standards for women, children, disabled persons, minorities, migrant workers and other vulnerable groups.\textsuperscript{120}

The UN Charter sets forth the four principal purposes of the UN:

- "To practice tolerance and live together in peace with one another as good neighbors, and
- To unite our strength to maintain international peace and security, and
- To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- To employ international machinery for the promotion of economic and social advancement of all peoples."


\textsuperscript{118} Shaw, M.N, INTERNATIONAL LAW, Cambridge University Press p.6, and generally pp.1–13, (5 ed. 2003).


\textsuperscript{120} "[W]hat the UN has done in the fields of... human rights... development of international law, and furthering a set of new community values... constitutes a great legacy. If the international community is so starkly different from that existing before the Second World War, this is primarily due to the UN": Cassese, A, INTERNATIONAL LAW, 1 Ed., Oxford University Press, p. 295.
The six principal organs of the UN are the General Assembly (GA), Security Council (SC), Economic and Social Council (ECOSOC), Trusteeship Council, International Court of Justice (ICJ) and Secretariat. The newly-established Human Rights Council may come to be considered the seventh. The UN family, however, is much larger, encompassing a number of agencies, programs, offices and funds.

In relation to human rights, the most important bodies are the General Assembly, the Economic and Social Council and the International Court of Justice, although other agencies may also take a leading role in specific fields.

The General Assembly

The General Assembly is composed of representatives from all Member States. It is the principal decision-making organ within the UN. The significance of the General Assembly’s role should not be underestimated: "while the decisions of the Assembly have no legally binding force for Governments, they carry the weight of world opinion on major international issues, as well as the moral authority of the world community." The General Assembly is a fundamental component in determining the activities undertaken by the UN. However, the Economic and Social Council and the International Court of Justice are the two organs of particular relevance to the issue of capital punishment among its Member States.

The Economic and Social Council

The Economic and Social Council concerns itself with an extensive range of issues, including those of employment, health, education, human rights, culture, society and economics. Of particular note is that ECOSOC encourages “universal respect for human rights and fundamental freedoms" and that it "issues policy recommendations to the UN system and to Member States". ECOSOC remains concerned with the issue of capital punishment.
ECOSOC presides over 14 specialized UN agencies, ten functional commissions, and five regional commissions. It reports to the UN General Assembly and is comprised of 54 member governments. The General Assembly elects these member governments to the ECOSOC, based on requirements pertaining to geographical representation of Member States. The terms of membership last for three years and are set on a staggered basis.129

The International Court of Justice

The ICJ satisfies the judicial function of the UN and is located in The Hague in the Netherlands. The ICJ is composed of 15 judges from different member nations who serve terms of a predetermined duration. The Court resolves existing disputes between States, and can only decide cases with the consent of both parties, namely where both states have submitted to the jurisdiction of the ICJ. It does not concern itself with the question of enforcing its decision.130 The ICJ may also provide the Security Council and the General Assembly with advisory opinions131, answering legal queries posed to the Court by certain international agencies. The Statute of the Court guides the jurisdiction and procedure of the court.132

The Commission on Human Rights and the Human Rights Council

The principal committee pertaining to human rights, and thus affecting the use of capital punishment, was the Commission on Human Rights, a subsidiary of ECOSOC.133 The Commission was entrusted with a number of responsibilities; addressing human rights violations on a global basis, and "[the] promotion and protection of human rights, including the work of the Sub-Commission, treaty bodies and national institutions". Additionally, the Commission contributed to the development of global human rights standards.

The Commission’s work touched upon a number of international treaties and was one of the UN organizational bodies that issued resolutions. The treaties that refer to capital punishment prompted much international debate, particularly with regard to the execution of juveniles and those with mental retardation. The Commission on Human Rights hosted a number of sub-committees, referred to as working groups.

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129 Current member governments and dates of expiry of membership terms can be found at “ECOSOC Members”, http://www.un.org/en/ecosoc/about/members.shtml
130 Art. 94 of the UN Charter requires Member States to comply with the decision of the ICJ in any case to which it is a party (see http://www.un.org/aboutun/charter/index.html); the ICJ has made clear its own position, saying “[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it”: Nuclear Tests Case (Australia v. France), Judgment (Merits) [1974], para. 60, at http://www.icj-cij.org/docket/files/58/6093.pdf?PHPSESSID=9c22b47692d9b2f1cc589dc2f0e18b59
131 The only bodies at present authorized to request advisory opinions of the Court are five organs of the United Nations and 16 specialized agencies of the United Nations family.
132 The Statute of the Court can be found at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=9c22b47692d9b2f1cc589dc2f0e18b59
133 Set up in accordance with Article 68 of the UN Charter, see http://www2.ohchr.org/english/about/publications/docs/factsheet27.pdf
Significantly, on 15 March, 2006, the General Assembly voted to establish a new Human Rights Council, replacing the Commission. In addition to assuming the duties of the Commission, the Council will “assume, review, and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure”. The Assembly recommended that ECOSOC request the Commission to conclude its work, and to abolish it on 16 June 2006. The Commission duly concluded its activities on 27 March 2006.

The Council is directly responsible to the General Assembly. It is composed of 47 Member States, directly elected by the General Assembly, taking into account equitable geographic distribution. Members of the Council serve for a period of three years. As with membership of ECOSOC, membership is staggered. A State’s contribution to the promotion and protection of human rights is recommended as a factor to be considered in voting.

The Council is now fully established and has held numerous sessions since its inception. During this time it has instituted a new Universal Periodic Review process (“UPR”), which constitutes a human rights review of all 192 countries once every four years, and a revised procedure for complaints about human rights infringements. The U.N.’s first Universal Periodic Review of the United States is scheduled to take place in November, 2010.

2.3 SOURCES OF INTERNATIONAL LAW

Within a domestic legal system, there is a specific method for determining the nature of a law and its content. However, as we have previously noted, the lack of a traditional legislature, executive or judiciary within the international legal system distinguishes it from the domestic. Accordingly, an attorney seeking to rely on international law arguments is faced with the challenge of first searching for relevant norms, and then discovering whether such propositions amount to legal rules. As a result, the first step of an international law argument typically has to be “foundational”, asserting what the law actually is, before continuing to apply it to the facts and circumstance at hand. Once the practitioner has identified a norm that might be relevant to their case, the best way to lay the foundations is by examining it in the context of the established sources of international law. If the norm was created through one of these sources, or has been impliedly affirmed by them, then the foundations look solid. Wherever possible, it is advantageous for the argument to be based on several sources, if not all of them. An understanding of the sources of international

134 GA Res. 60/251 “Human Rights Council” supra, at para. 6.
135 For current members, see “UN Human Rights Council: Membership of the Human Rights Council” at http://www2.ohchr.org/english/bodies/hrccouncil/membership.htm (N.B. Elections are due to take place on 13 May, 2010).
136 For the UPR process see http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx and for complaints, http://www2.ohchr.org/english/bodies/chr/complaints.htm
138 N.B. Before citing any document, international instrument or principle, always research and confirm applicability to ensure accuracy.
law and the law of treaties is thus essential. Article 38 (1) of the Statute of the International Court of Justice is the starting point with regard to sources.

*The Statute of the International Court of Justice*

Article 38(1) of the Statute of the ICJ is expressed in terms of the function of the ICJ. However, in providing a list of the sources of international law, Article 38 (1) is generally accepted as the authoritative guide, and provides a basic framework for organizing international legal arguments or research. Most international law falls under the first two categories listed below and sometimes under the third. The fourth category may indicate that a law exists, and may add weight to an argument, but is rarely conclusive as a single source.

Article 38 (1) lists:

- *International Conventions*, whether general or particular, establishing rules expressly recognized by the contesting States. (Treaties are the most common examples of this.)
- *International Custom* - evidence of general practice accepted as law.
- *General principles of law* recognized by civilized nations
- *Judicial decisions* and the *teaching* of the most highly qualified publicists of the various nations, as subsidiary means of determination of law. (This means that in formulating your argument, it is possible to rely on secondary authorities such as judicial precedent or recognized academic opinion. An argument solely advanced on this basis is unlikely to succeed, however.)

There is no formal hierarchy to these sources, however arguably in practice the strongest arguments are in descending order.

It should be noted that while Article 38 (1) has not been fully accepted by the United States, it is generally regarded as a definitive guide. Given their consequence, we believe it may be helpful to explore a few of the sources in more detail and examine how they could perhaps be used in practice.

2.4 TREATIES

Treaties are also commonly referred to as Conventions (e.g. the Convention on the Rights of the Child) or Covenants (e.g. the International Covenant on Civil and Political Rights). In fact, there are a variety of names for legally binding international instruments, but suffice it to say that, provided the intention to create a legally binding agreement is there,

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140 Other, less obvious, terms have included “Compact, Solemn Declaration, Administrative Agreement, Protocol of Decisions, Platform, Concordat, Agreed Minute… Terms of Reference… Joint Declaration”: Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 22.
differing names do not change the substance of an instrument. In many ways, the treaty lawyer’s approach recalls the objective analysis of a lawyer considering a contract.

The primary definition of a treaty is:

“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

In practical terms, treaties are concluded by States for any number of purposes. However, in the field of human rights, the primary purpose is generally to provide some form of legal protection from a perceived wrong, and so the provisions clearly reflect the characteristics of a legally binding international agreement. As a result, identifying human rights treaties as treaties is usually relatively straightforward.

As a source of international law, treaties are of growing importance: the last 50 years have seen a significant upsurge in the number of treaties made, and a change in the nature of the obligations introduced. Treaties play a major role in promoting the modernization and development of law. The most basic treaty is an express agreement between parties, which binds only those parties (a classic bilateral treaty). Treaties are often used to codify, and even reform or update, rules of customary law in accordance with the legal perceptions and inclinations of their drafters. However, where States wish not only to change the law that regulates their own behavior but also to indicate a general rule of law (a frequent occurrence for human rights law), other States may be invited to become parties (a multilateral treaty). In order to give full effect to the purpose of the treaty, such treaties require the participation of a large number of States. If sufficient States accept the principles contained in a treaty as general principles of international law, and act in a manner consistent with this belief, those provisions can become customary law, which will bind all. In this fashion, treaties act as agents of change, both “crystallizing” existing law and “generating” the new.

A great many international legal disputes are concerned with the validity and interpretation of an international agreement. In essence, all treaties are governed by one set of rules: the law of treaties. The Vienna Convention on the Law of Treaties (VCLT) is not as a whole declaratory of general international law, but a significant number of its articles might be

141 “[T]he name does not, in itself, determine the status of the instrument; what is decisive is whether the negotiating states intended the instrument to be (or not to be) legally binding”: Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 20. Note, however, that there are some other international instruments (although fortunately relatively rare in the field of human rights) which are NOT legally binding: see further pp. 20–22, 25.


143 “[A] treaty only creates law as between the States which are parties to it.”: Certain German Interests in Polish Upper Silesia (Merits), Judgment of 25 May 1926, PCIJ, Series A, no. 7, at 29.

144 …or almost all. See Section 4, infra.

considered so. The provisions of the Convention are normally regarded as an authoritative source.

Although there may be no direct enforcement mechanism for a treaty (unless one is specified or created through the treaty itself), a treaty is invaluable when preparing an international law argument. The political consequences, both internally and externally, of a State party breaching its obligations can often be enough to ensure compliance.

As a general research point, it is prudent to reference the full text of a treaty, just as you would reference a piece of domestic legislation. For independent research purposes, the following three current sites are incredibly useful:


- For the status of treaties and membership, dates of ratification, signature etc, the UN Treaty Collection is particularly useful: http://treaties.un.org/Pages/Home.aspx?lang=en

- The University of Minnesota Law School Human Rights website: http://www1.umn.edu/humanrts/

These sites enable you to search for a full range of treaties using keywords. They are also organized by subject matter. A little surfing of the Web will also yield many other useful sites.146

2.4.1 What are the Legal Effects of a Treaty?

Externally

A treaty is only binding upon a State in international law when it has both consented to be bound by it, and when the treaty has come into force.147 The time of a treaty’s entry into force is often as much a practical question as a legal one: certain human rights treaties may, for example, only be of utility when a requisite number of States become parties.148

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146 E.g., for general research, the utility of an ordinary search engine like Google (http://www.google.com) is not to be overlooked. On the UN, see also http://www.un.org, (United Nations website), http://www.icj-cij.org/docket/index.php?p1=3&PHPSESSID=1d1a74597d4c73fadad9a0b0b6e5de6b6 (ICJ website case information section) and http://ap.ohchr.org/documents/mainec.aspx (Human rights documents search portal provided by the Office of the High Commissioner for Human Rights).

147 Vienna Convention on the Law of Treaties, Art. 2(1)(g). Note that, although these are separate processes (often evidently), they can in some circumstances appear to occur simultaneously, where a treaty “enters into force on signature”, for example. To avoid doubt, reference to the treaty itself will often clarify the procedure which its parties should follow. See Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 75–76, 81–87.

148 See, e.g. the Rome Statute of the International Criminal Court which was concluded in 1998 but only entered into force in 2002, when 60 States had become parties.
When relying upon a treaty in legal argument, it is important to confirm that the treaty has entered into force.\footnote{On entry into force, see further Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 131–142.}

States can express their consent to be bound by treaty in any way they choose.\footnote{Vienna Convention on the Law of Treaties, Art. 11.} The two principal forms, “signing” and “ratifying” treaties, are, however, often confused: it is possible both to sign a treaty in a way that is itself sufficient to express consent to be bound, or to sign “subject to ratification”.\footnote{Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 75–76.} For human rights treaties, the latter is far more common. Ratification might best be understood as an “extra step” before the State has given its full consent, often used to provide time for practical difficulties to be resolved (sometimes to comply with domestic law, such as a requirement for parliamentary approval, or perhaps to introduce enabling legislation). It is important to note, however, that ratification itself is a process “on the international plane”, distinct from national law:\footnote{Vienna Convention on the Law of Treaties, Art. 2(1)(b).}

“[a]lthough parliamentary approval of a treaty may well be required—and be referred to, misleadingly, as ‘ratification’—that is a quite different process.”\footnote{Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 81.} This distinction is particularly important in the case of the United States, as will become apparent below.

It is clear that when a State signs subject to ratification, the treaty can have no legally binding effect until that ratification has occurred.\footnote{North Sea Continental Shelf Case, ICJ Reports, 1969, pp.3, 25; 41 ILR, pp.29, 54. See http://www.icj-cij.org/docket/files/51/5535.pdf?PHPSESSID=326aecf71db95e2e6db494097c2ce8a1} Accordingly, the period after a treaty has been signed but before it has been ratified is more or less analogous, in principle if not in substance, to the period when a State has fully consented to be bound by a treaty, but it has not yet come into force. The law treats the obligations of the State in these periods in the same way.

“\textit{Article 18 [of the Vienna Convention on the Law of Treaties] requires a state ‘to refrain from acts which would defeat the object and purpose of a treaty’ before its entry into force for that state. When the treaty is subject to ratification... this obligation lasts until the state has made clear its intention not to become a party. When a state has expressed its consent to be bound, the obligation continues pending entry into force of the treaty, provided this event is ‘not unduly delayed’}.”\footnote{Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 93–94.}

Thus, in these circumstances, a State is bound \textit{in good faith}, if not in law, to ensure that nothing is done which would defeat the object and purpose of the treaty, pending a decision on ratification. A signature does not create an obligation to ratify. In fact, the precise extent of the good faith obligation remains a matter of academic debate, although it might
reasonably be argued to mean that a State may not act in a way which would invalidate the basic purpose of the treaty.  

**Example**

A State has signed but not yet ratified a treaty banning the use of the death penalty for the mentally ill. It is probably not bound in good faith to refrain from allowing a case to proceed where an individual, despite evidence to the contrary, is held not to be mentally ill, and sentenced to death. It probably would be bound, however, not to enact a law making execution mandatory for capital crimes, regardless of mental health.

Once ratified, of course, the State is considered to have consented to be bound. When making treaty arguments, it is important to check whether the treaty specifies a particular manner for States to become parties, and whether the State relevant to your case has complied.

**Internally**

Even if a State has complied with the full requirements of international law, and has become a party to a treaty, it still does not mean that the treaty necessarily has effect in domestic law. As States, not biological individuals, are the actors of international law, the classic view has it that only States can enforce international legal obligations. A State can, as a rule, only give its citizens the right to enforce that law by incorporating it into its own, domestic legal system. This is an issue of particular relevance to human rights treaties. States vary in the way in which they approach this issue. In the United States, the Constitution provides that treaties “shall be the supreme law of the land”, a clause which the U.S. Supreme Court has also held applicable to executive agreements (see below). However, U.S. law draws a distinction between “self-executing” and “non-self-executing”

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157 It is important to note that where a treaty reflects customary international law, non-parties are still bound. Their obligation does not flow from the treaty itself, but because the treaty provisions mirror and/or reaffirm a rule or rules of customary international law.

158 Information on the ratification status of the major human rights treaties may be found at http://www2.ohchr.org/english/law/index.htm#core.

159 Note, however, that although States have, by default, autonomy to choose to assume international obligations to which they do not give full effect in domestic law, this position may slowly be changing. A number of treaties include provisions requiring that States introduce enabling legislation (e.g. Convention on Genocide 1948, Art. 5; ICCPR 1966, Art. 2(2); Convention on Torture 1984, Arts. 4, 5), and recent judicial decisions suggest that *jus cogens* norms (see below) also impliedly require implementation in national law: *Prosecutor v. Furundžija*, Trial Judgment, 1998, paras 148–150, see http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf

160 Constitution of the United States of America, Act. VI, s.2.

treaties, only the former are automatically incorporated in domestic law and so provide enforceable rights to individuals, while the latter require enabling legislation.\textsuperscript{162}

Finally, while discussing the position in U.S. law, it is also worth noting the distinction between “treaties” and “executive agreements”. The U.S. Constitution uses only the term “treaty” for all international instruments, and provides that the President may only ratify a treaty with the “advice and consent” of the U.S. Senate. However, a parallel international instrument, not mentioned in the Constitution at all, known as an “executive agreement” has developed in U.S. law. It is identical to a treaty in every way, recognized by both the U.S. government and the governments of other States, but does not require Senate approval. This distinction is not, perhaps, of significance for most multilateral human rights treaties but is sometimes relevant for certain bilateral instruments. Although the majority of treaties upon which a practitioner may rely in domestic litigation will be the former, bilateral instruments on consular relations may, for example, be “executive agreements”. It is as well, then, to understand both. Certainly, it illustrates why American treaty law is fairly described as “remarkably complex”.\textsuperscript{163}

Mindful of the above information, the manner in which a treaty argument is phrased must be adjusted to suit the treaty’s legal status. For those treaties which require ratification, but for which ratification is still pending, it remains possible to argue that the state must not act contrary to the object and purpose of the treaty. The fact of a State’s signature to the instrument may, in some cases, also be good evidence in support of a customary law argument.\textsuperscript{164} A strong international legal argument can be made if a treaty is ratified and in force. For those treaties which are (at least arguably) self-executing, domestic legal arguments may also be raised.

Examples of Treaties

- Charter of the United Nations.\textsuperscript{165}
- The Geneva Conventions on the Treatment of Prisoners and the Protection of Civilians.\textsuperscript{166}
- The Vienna Convention on Diplomatic Relations.\textsuperscript{167}


\textsuperscript{164} “[S]igned but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of the signature”: \textit{Qatar v. Bahrain}, 2001, para. 89, see http://www.icj-cij.org/docket/files/87/7027.pdf?PHPSESSID=679e1421f320c183f3f2bf1c50c6451. On customary law, see further below.

\textsuperscript{165} \textit{Infra}.

\textsuperscript{166} Can be accessed at http://www.icrc.org/ihl.nsf/CONVPRES?OpenView
• The International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{168} Ratified by the United States on 8 June 1992 with 5 reservations. The ICCPR is perhaps the most consequential human rights treaty in existence. In fact, the U.S. State Department applauded it as "the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II." \textsuperscript{169}

• The Convention on the Rights of the Child (CRC) Convention on the Rights of the Child,\textsuperscript{170} signed by the U.S. in 1995, but not yet ratified. One hundred and ninety three parties have ratified the CRC. \textsuperscript{171}

• The Convention on the Elimination of all forms of Racial Discrimination (CERD).\textsuperscript{172}

• The Convention Against Torture (CAT).\textsuperscript{173}

The UN keeps a record of the principal human rights treaties, and their ratification status.\textsuperscript{174}

Summary

• Treaties only bind parties which have consented to be bound, and for whom they are in force.\textsuperscript{175}

• A State which has signed but not ratified a treaty is not legally bound by it.

• However, by signing an international instrument, a State incurs an obligation to refrain from acts which would defeat the instrument’s object and purpose, at least to a certain extent. The matter remains controversial but would be a viable legal argument if required.

• A signature does not create an obligation to ratify.

• Even when seeking to rely on a treaty to which a state is a party and which is in force, it is important to check whether domestic enabling legislation is required to provide individually enforceable rights.

2.4.2 Interpretation and Applications of Treaties

Like the common law of contract, the majority of disputes concerning treaties relate to their validity and/or interpretation. The law of treaties is based in customary law, but a\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{167} Can be accessed at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1__1961.pdf
\item \textsuperscript{168} Can be accessed at http://www2.ohchr.org/english/law/ccpr.htm
\item \textsuperscript{169} Can be accessed at http://dosfan.lib.uic.edu/ERC/law/Covenant94/02.html
\item \textsuperscript{170} Text can be accessed at http://www2.ohchr.org/english/law/crc.htm
\item \textsuperscript{171} Note: the SFRY ratified the CRC in 1990/1991 before the break-up. Serbia and Montenegro was considered to have succeeded to the obligations in 2001 and Montenegro itself in 2006, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en The US and Somalia have signed the convention but not ratified it (see again http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en
\item \textsuperscript{172} Can be accessed at http://www2.ohchr.org/english/law/cerd.htm
\item \textsuperscript{173} Can be accessed at http://treaties.un.org/doc/source/RecentTexts/iv_9bE.pdf
\item \textsuperscript{174} See http://www2.ohchr.org/english/bodies/docs/status.pdf and http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en
\item \textsuperscript{175} Although a state might be bound by the substance of the treaty even if not a signatory (unless a persistent objector) in circumstances where the substance has achieved the status of custom.
\end{enumerate}
\end{footnotesize}
significant proportion has been encapsulated within the Vienna Convention on the Law of Treaties (VCLT). Although some sections of the VCLT remain controversial, it does provide a good outline of the principles, and is typically regarded as a primary source. It governs, for example, the validity of reservations and the obligation of a State, upon signing a treaty, to bind itself in good faith to ensure that nothing is done that would defeat the treaty's "object and purpose," pending ratification.

The VCLT is widely accepted as codifying the customary rules relating to treaty interpretation and application. Although not without controversial aspects, it is the governing international treaty on such matters. One of the most notable areas of contention upon which the VCLT sheds light is the validity of reservations, and the obligation of a State upon signing a treaty to bind itself in good faith pending ratification.

It should be noted that the U.S. has signed but not ratified the VCLT. In accordance with the principles of international law, as stated above, it may be obliged, however, to bind itself in good faith. The U.S. Department of State has taken the position that the treaty is the authoritative guide to existing treaty law and procedure.

2.5 RESOLUTIONS

It is important to understand that resolutions of international organizations are not treaties and are not usually binding upon a nation. However, a resolution does serve to encapsulate the general acceptance by the international community of an international norm and as discussed below, can constitute positive evidence of State practice for the purpose of demonstrating customary international law.

Examples of resolutions include the Universal Declaration of Human Rights and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

2.6 RESERVATIONS

In the process of becoming party to a treaty, either upon signature or ratification, States can attach “reservations”; pronouncements which purport to exclude or modify the legal effect of certain provisions. For example, when ratifying the ICCPR, the United States made a reservation to Article 6(5), which explicitly provides:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

177 Id.
178 See also, Restatement (Third) of Foreign Relations Law of the United States, Sec. 313(1)(c)(1987).
179 See FN 12 above for the UDHR and FN 126 below for information on the Safeguards.
The United States put forward this reservation in order to permit various U.S. States to continue to execute juvenile offenders.\textsuperscript{181} The validity of this particular reservation was extremely controversial.\textsuperscript{182}

This example neatly illustrates the fundamental problem posed by reservations, and the reason why they continue to be contentious, particularly in the area of human rights.\textsuperscript{183} Why should a State be allowed to “contract out” of an instrument which it has accepted as legally binding upon it? The short answer is that without reservations very few multilateral treaties would ever be successful because all the parties involved would be required to agree on all points, however, through the mechanism of the reservation, each State can accept the treaty as a whole, but can “opt out” of provisions with which it disagrees.\textsuperscript{184} This of course, does risk making the law significantly less effective as well as particularly complex. The VCLT has attempted to introduce a consistent regime for this area of law,\textsuperscript{185} yet the practice of States since it has come into force reveals anything but consistency. The International Law Commission, the body of experts which advises on international legal reform, remains actively involved in this area.\textsuperscript{186}

\subsection{2.6.1 When is a Reservation Invalid?}

As a rule of thumb, a reservation is invalid when it runs contrary to the \textit{object and purpose} of the treaty, or when the treaty itself expressly excludes the possibility of all reservations, or some types of reservations.\textsuperscript{187} The Statute of the International Criminal Court is an example of a treaty to which reservations may not be attached under any circumstances,\textsuperscript{188} the Second Optional Protocol to the ICCPR is an example of a treaty which has a “partial” exclusion of reservations.\textsuperscript{189} An example of a reservation that has failed for being contrary to the object and purpose of a treaty has deliberately not been offered in this section as practice in this area is confused, and the precise application of the rule uncertain. The U.S.

\begin{footnotes}
\footnotetext{181}{Note that the United States may no longer execute juveniles following the landmark ruling by the Supreme Court in \textit{Roper v Simmons} 543 U.S. 551, 125 S.Ct. 1183 (2005) which decided that executing juveniles violated the Eighth Amendment ban on cruel and unusual punishment.}
\footnotetext{184}{See Aust, A, \textit{MODERN TREATY LAW AND PRACTICE}, Cambridge University Press, 2000, p. 107, and more generally, pp. 100–101, 104–130.}
\footnotetext{185}{Vienna Convention on the Law of Treaties, Arts. 19–23.}
\footnotetext{187}{Vienna Convention on the Law of Treaties, Art. 19; this rule, however, almost certainly subsists in customary law too.}
\footnotetext{188}{Statute of the International Criminal Court 1998, Art. 120, see http://www2.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.}
\footnotetext{189}{Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Art. 2, see http://www2.ohchr.org/english/law/ccpr-death.htm.}
\end{footnotes}
reservation to the ICCPR discussed above was the subject of objections from no fewer than 11 European States on the grounds that it was incompatible with the treaty’s object and purpose, yet it still appeared to remain valid.\(^{190}\)

Despite these confusions, it can be argued that a reservation worded so vaguely that its precise application cannot be reasonably understood, or that its application could be read so widely as to defeat the object and purpose of the treaty, is also likely to be invalid on the grounds of ambiguity.

2.7 **WHAT IS THE DIFFERENCE BETWEEN A RESERVATION AND A DECLARATION?**

A reservation is a statement restricting the legal effect of a certain part of a treaty; if valid, it alters the treaty so far as that party is concerned. A declaration, on the other hand, is a statement (often political) of how a State actually understands the treaty. A declaration gives some indication as to how the treaty will be interpreted by that nation, but, of itself, generally has no binding effect.\(^{191}\)

2.8 **CUSTOMARY INTERNATIONAL LAW**

Customary international law has been referred to as the “oldest and original source of international law.”\(^{192}\) Custom is a dynamic source of law, particularly important for its broad scope. Being an inevitable consequence of the sum of their actions, States may not always realize that they are creating a new rule of law: custom has been described as “unconscious and unintentional lawmaking”.\(^{193}\) Whereas treaties bind only those States which are party to them, a rule of customary law binds all (with the exception of “persistent objectors”). For these reasons, customary law can be of particular value to the international litigator, where it can be brought to bear.

The existence of customary law can be deduced from the practice of States. As confirmed by the ICJ in *Nicaragua v. USA (Merits)*,\(^{194}\) custom comprises two main elements:

(i) The general practice of nations (objective)

(ii) …which is ‘accepted as law’ (also known as *opinio juris*) (subjective)

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\(^{190}\) The Human Rights Committee (the ICCPR’s “treaty body”) has offered a useful starting point for the analysis of the validity of a purported reservation to a human rights treaty: General Comment No. 24, at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument.


\(^{194}\) ICJ Reports 14, at 97, available at http://www.icj-cij.org/docket/files/70/6503.pdf?PHPSESSID=e8c201f9a13182c9338355f98b7f847b
The requirement of the first element is logical, and its nature easily understood. Since customary law is founded on the practice of States, what States actually do is significant. The test is high, however, and practice must have a certain consistency.195

The second element, however, is less easy to define in simple terms. *Opinio juris* in essence means that a State must act under what it perceives to be a legal obligation for its practice to be evidence of a rule of customary international law. However, a State does not always limit its practice to what is required by law: it may act in goodwill, or in hope of some perceived advantage. In other words, one cannot identify *opinio juris* behind every instance of state practice. Secondly, even leaving that difficulty aside, at what level should the test be set? The ICJ has held that:

_Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris...”_196

This would seem to suggest that the State has to believe that the law as constituted at that moment requires a certain action or inaction. However, it is equally clear that customary law can evolve. This can cause difficulties when assessing whether the requisite level has been attained. Instead, perhaps the preferable approach is to say that the level at which *opinio juris* is measured varies to a certain extent upon the amount of supporting State practice.197 In other words, the two elements of customary law, practice and *opinio juris*, are related in some manner. This is a tricky concept, but it illustrates the essential flexibility and complexity of customary law. It reflects the vagaries of the real world.

Evidence of custom is numerous, particularly for State practice, and can come in almost any form.198 It can, and often does, include diplomatic correspondence; opinions of official legal advisors; press releases from the nation; international and national judicial decisions; treaties; and resolutions. Obviously, the value of these sources varies and much depends upon the circumstances. A good rule of thumb, however, is to assess that “state practice covers any act or statements by a state from which views about customary law may be inferred.”199
Evidence of *opinio juris* is likely to be found in the same type of materials, but analyzed instead for insights into why the State acted in the way that it did. For obvious reasons, this is often a more difficult task. It is possible, however, that if one of the elements is proved with great consistency, the other element may not need to be satisfied to the same extent.\(^{200}\) State practice which is universal, or almost so, may itself be grounds for inferring that States feel themselves obliged to act in a uniform way, for example.\(^{201}\)

**Summary**

- A purported norm must satisfy prongs (i) and (ii) in order to be recognised as customary international law: the norm must be adhered to in practice by most relevant\(^{202}\) countries and those countries that follow the norm must do so because they feel obligated by a sense of legal duty ("*opinio juris*.").
- Customary international law is binding on a nation.

2.9 **PERSISTENT OBJECTOR**

A State may avoid being bound by customary international law if it has been a “persistent objector” to a particular rule or norm. This objection must be “consistent” and irrespective of disagreement. This is a common argument raised by an opposing party in litigation if you have established a relevant rule of customary law. However, if one looks back at the practice of a State, it is sometimes the case that the argument can be countered due to a lack of consistency. Even a short break in practice may be sufficient.\(^{203}\)

2.10 **GENERAL PRINCIPLES OF INTERNATIONAL LAW**

In any system of law a situation may arise where the court realizes that there is no authority covering a specific point. International law recognizes this in part by the inclusion of the provision “the general principles of law recognized by civilized nations” as seen in Article 38 (1) of the ICJ Statute. General principles allow international lawyers to connect on themes drawn from national law, the relative influence of such a principle being a product to a large extent of the number of domestic legal systems which recognize it. Accordingly,

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\(^{200}\) See Kirgis, F.L., ‘Custom on a Sliding Scale’ [1987] 81(1) AJIL 146.

\(^{201}\) See, e.g., the Dissenting Opinion of Judge Tanaka in the North Sea Continental Shelf Cases [1969] ICJ Reps. 3, at 176, finding in that case that there was “no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice.”

\(^{202}\) Custom does not require uniform practice: it recognizes, for example, that the practice of landlocked states may not be particularly telling with regard to maritime law, and also the possibility of local custom, on which see Shaw, M, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, pp. 87–88.

the Anglo-American traditions of the common law are an important general principle of international law.

2.11 JUS COGENS

While each source of international law is valuable, they generally take priority on the basis of time: a recent treaty will “trump” a purely historic custom, a change in state practice will lead to a new customary norm replacing an old discarded treaty, and so on. However, some international laws are protected, such that they cannot be supplanted in this fashion. They are known as norms of *jus cogens*, or “peremptory” norms of international law.

Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty will be void “if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. A similar rule exists with regard to customary law.

The article also offers a useful definition of a *jus cogens* norm as:

"a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The Restatement (Third) of the Foreign Relations Law agrees with this standard, asserting that a *jus cogens* norm is established where there is acceptance and recognition by a “large majority” of States, even if over dissent by "a very small number of States." 204

In *Domingues v United States*, the Inter-American Commission of Human Rights described a *jus cogens* norm as deriving its status:

“from fundamental values held by the international community" and "violations of such pre-emptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition, or acquiescence.” 205

The *jus cogen* norm describes such a bare minimum of acceptable behavior that no State may derogate from it. It is argued, therefore, that a nation cannot contract out of this peremptory norm or assert its “persistent objector” status as a defense. 206

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206 Of note, there are alternative arguments on this particular issue, for the relationship between *jus cogens* and the persistent objector-rule, see Charney, 'The Persistent Objector Rule and the Development of Customary International Law’, 56 *BYbIL* (1985) 1, at 14 note 81; .M. Danilenko, *Law-Making in the...*
It has been asserted that the prohibitions of slavery, the unlawful use of force, genocide, piracy and perhaps torture are *jus cogens* norms. The list is small, but not closed, although the test is high.\(^{207}\) Accordingly, a *jus cogens* argument is possibly the most difficult to articulate with success, especially as there is a school of academic thought which denies the existence of *jus cogens* for human rights norms entirely. Notwithstanding this, courts have expressly recognized both the existence of *jus cogens* and its application domestically within the United States.\(^{208}\) Thus, at the very least, as with all international legal arguments, it may well be worth articulating as a supplemental line of reasoning. Indeed, a *jus cogens* argument was asserted in *Roper v Simmons*. Indeed, norms of *jus cogens* are increasingly being asserted in capital cases\(^ {209}\) and indeed within the criminal justice sphere more generally.\(^ {210}\)

2.12 ‘SOFT’ AND ‘HARD’ LAW DISTINCTIONS

Finally, it is useful to note two key pieces of terminology, frequently used in discussion of the international legal regime. International law, norms and standards are generally said to fall into one of two categories: ‘hard’ or ‘soft’ law. ‘Soft’ law is technically non-binding or binding yet particularly controversial, while ‘hard’ law is considered to be unmistakably binding. In light of the above pages, you will see for yourself the usefulness of these concepts. Resolutions generally fall into the ‘soft’ law category; conversely treaties are considered to be ‘hard’ law. ‘Soft’ law instruments are also often referred to as international human rights “standards”. ‘Soft’ law is seen by some as germane to the process of the formation of customary law. Correspondingly, notions of “hard” and “soft” law lend a sort of hierarchical structure to international law. In constructing an argument, “hard” law appears to be most useful at first glance (perhaps particularly to a national lawyer, for whom it may seem more familiar); however, in the areas of contention—where litigation almost always arises—it is difficult to put together a comprehensive submission.

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\(^{208}\) See, e.g. Siderman de Blake v. República Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing torture as *jus cogens* violation); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244-45 (2d Cir. 1996); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004); Committee of U.S. Citizens in *Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (*jus cogens* norms may inform U.S. jurisprudence).

\(^{209}\) See, e.g. amicus curiae briefs filed on behalf of the EU and Members of the International Community and recipients of the Nobel Peace Prize in *Roper v Simmons* (543 U.S. 551 (2005)) asserting that international law and norms of *jus cogens* prohibit juvenile death penalty. For additional information and list of briefs filed, see http://www.internationaljusticeproject.org/juscSimmons.cfm#briefs

\(^{210}\) See, e.g. the joined cases of *Graham v Florida* 08-7412 and *Sullivan v Florida* 08-7621 (awaiting decision by the US Supreme Court) regarding the constitutionality of sentences of life without the possibility of parole as applied to juvenile offenders and the amicus curiae brief filed by Amnesty International et al, accessible at http://ccrjustice.org/files/Graham%20v.%20Florida,%20Sullivan%20v.%20Florida,%20Amicus%20Brief.pdf.
without using “soft” law sources as evidence of the way the law might be developing. A blend of the two can be a powerful combination.
3 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION/INTELLECTUAL DISABILITY

The UN, on behalf of the international community, has articulated a body of authority restricting the use of the death penalty,211 and ultimately prohibiting the execution of those with mental retardation. The various norms and standards established seem to show a progression from the general, e.g. the Declaration on the Rights of the Mentally Retarded in 1971, which inter alia, protects the defendant from degrading treatment and requires recognition of the degree of mental ability during trial, to the more specific, e.g. recent resolutions by the Economic and Social Council and General Assembly.212 Of the latter, the most significant resolution is ECOSOC Resolution 1984/50, UN Doc E/1984/92), which sets out the important “Safeguard 3”. See further information on this point in Section 3.4. The remainder of this section provides a brief survey of the extent and content of international norms relevant to mental retardation, providing a basis for research on specific legal arguments.

3.1 LIMITATIONS

- A number of countries, namely, the United States and Japan continue to ignore international standards protecting those with mental retardation from the death penalty.213
- In the United States the recognition of arguments based on international law or international standards is sporadic within criminal proceedings. However, as discussed above, support for such arguments does seem to be growing, as evidenced by the reference to international consensus in the US Supreme Court’s decision in Atkins. Indeed, usefully Atkins arguably lays out the framework for the articulation of international law in cases involving clients with mental retardation. See, e.g. European Union Amicus Brief filed in support of petitioner in Atkins.214

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211 Infra.
214 2001 WL 648609 (U.S.). See http://www.internationaljusticeproject.org/pdfs/emccarver.pdf. The amicus was originally filed in McCarver v. North Carolina 532 U.S. 941; however this case was mooted by subsequent legislation in North Carolina. The U.S. Supreme Court then took up the case of Atkins. The amicus was subsequently re-filed.
3.2 MAIN NORMS AND INSTRUMENTS

Treaties


- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608, 7 June 1999.216

International Instruments, Standards, Resolutions and Reports


- United Nations General Assembly, Declaration on Rights of Mentally Retarded Persons, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971)220

- United Nations General Assembly, Declaration on Rights of Disabled Persons, UN Doc A/RES/33447 (XXX) (1975)221


215 Can be accessed at http://www2.ohchr.org/english/law/ccpr.htm
217 Can be accessed at http://www2.ohchr.org/english/law/protection.htm
220 Can be accessed at http://www2.ohchr.org/english/law/res2856.htm
221 Can be accessed at http://www.un-documents.net/a30r3447.htm


• Organization of American States, Inter-American Commission on Human Rights, Recommendation of the IACHR for Promotion and Protection of the Rights of the Mentally Ill225

3.3 INTERNATIONAL PRACTICE: EXECUTION OF PERSONS WITH MENTAL RETARDATION/INTELLECTUAL DISABILITY IS CONTRARY TO THE PRACTICE OF VIRTUALLY ALL STATES.

There is a growing international consensus against the execution of persons with mental retardation. Certainly, recent years show very few states to have acted inconsistently with this position. As detailed above, Japan and the United States have reportedly carried out such executions.226 The vast majority of the world community, largely of its own volition, but also at the urging of various international bodies, including the UN, has enacted legislation, or taken other steps to prohibit the practice. Importantly, this position has not just been adopted by states which prohibit the death penalty in general, but of those nations which do still allow for the use of capital punishment, an overwhelming majority nonetheless proscribes its imposition upon those defendants with mental retardation. Such a clear trend may well indicate that, rather than a political fad subject to change, the international community’s stance flows from a near-universal conviction that the execution of persons with mental retardation is an “inhuman, medieval form of punishment unworthy or modern societies”.227

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### 3.4 International Instruments, Norms and Standards Prohibit the Application of the Death Penalty on Persons with Mental Retardation/Intellectual Disability

Experts appointed by the UN have found that the United States’ practice of executing those with mental retardation contravenes international standards and norms. The international standards and norms on mental retardation, the disabled and the handicapped focus on the ways such individuals are treated in general, as well as the ways in which those with mental retardation are regarded within the criminal justice system. All such standards call for humane treatment of persons with mental retardation, and within the criminal justice system, these standards call for adherence to the due process of law and protection from degrading treatment.

With the Declaration on the Rights of the Mentally Retarded, adopted in 1971, the UN began a long process of advocacy on behalf of those with mental retardation, a group that has long been misunderstood and misrepresented across the world. The associated resolution called on nations to recognize the right of the person with mental retardation to be protected against degrading treatment, and to assure that, “if prosecuted for any offense, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.”

Although subsequent UN resolutions have drawn increasingly fine distinctions between retarded, disabled and handicapped persons, the common intention to protect the fundamental human dignity of persons with mental retardation can be easily discerned. A number of regional instruments reflect a similar concern.

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In recent years, the UN has taken increasingly assertive measures to protect those with mental retardation from execution, most notably in ECOSOC’s 1984 adoption of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, (protecting, in Safeguard 3, “the insane” from execution).233 The Safeguards were endorsed by the General Assembly in the same year.234 Five years later, ECOSOC clarified its use of the term “insane” in Safeguard 3 to include “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”235 In 1996, ECOSOC reiterated its call for full implementation of the Safeguards, at least in part due to continued concern over the lack of protection from the death penalty afforded to those who are mentally retarded.236 From 1997 until its replacement by the UN Human Rights Council in 2006, the UN Human Rights Commission repeatedly called on countries that maintained the death penalty to observe the UN Safeguards in the Question of the Death Penalty resolution.237 From 1999, this resolution was adopted with additional language urging retentionist countries “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.”238

As a member of the UN Commission on Human Rights in each of the years in which it took action, the United States consistently voted against resolutions on the death penalty. The express concerns of the United States, however, did not go directly to the issue of the clause concerning the execution of persons with mental disorders.\textsuperscript{239} Nevertheless, over the negative vote of the United States, the resolutions that called on countries that maintain the death penalty to observe UN Safeguards that specifically condemn the death penalty for “persons suffering from mental retardation” passed.

The United States has been criticized by the UN Human Rights Committee, the body which oversaw compliance with the International Covenant on Civil and Political Rights (ICCPR), for its failure to protect those with mental retardation from the death penalty. At the time of writing, there are 166 States that are party to the ICCPR.\textsuperscript{240} The ICCPR itself prohibits the use of the death penalty on those with mental retardation; given the large number of parties which have ratified the treaty, this is a significant additional example of State practice. It has been noted, however, that certain countries may not have taken appropriate action in compliance with these obligations under the treaty, including the United States: “in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded.”\textsuperscript{241}

Additionally, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution (appointed by the UN Commission on Human Rights since 1982; the Rapporteur’s mandate has included review of those countries which still apply the death penalty) has articulated his concern with regard to the execution of persons with mental retardation, with express reference to the United States.\textsuperscript{242}

Regional organizations have demonstrated similar concern with the issue. It was considered most recently by the Organization for Security and Cooperation in Europe (OSCE), a regional security organization of 55 nations, including the United States. At the OSCE meeting in November 2000, the EU noted its concern that the execution of those with mental retardation continues to be carried out within the OSCE region. The EU itself has been actively involved with this issue for some time. Over the years it has presented a


\textsuperscript{240} See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en


number of demarches opposing the execution of several individuals with mental retardation or those who have been diagnosed with serious mental disorders.\footnote{See e.g., EU Demarche to the Honorable Bob Holden, Governor of Missouri, Concerning Mr. Antonio Richardson (21 Feb. 2001), at http://www.eurunion.org/legislat/DeathPenalty/Richardson.htm; EU Demarche to the Honorable Kenny Guinn, Governor of Nevada, Concerning Mr. Thomas Nevius (26 March 2001), at http://www.eurunion.org/legislat/DeathPenalty/NeviusGovLett.htm; EU Letter to Governor George W. Bush, Governor of Texas, Concerning Mr. John Paul Penry (7 Nov. 2000), at http://www.eurunion.org/legislat/DeathPenalty/Penry.htm.}
4 RECENT DEVELOPMENTS

On 13 December, 2006 the Convention on the Rights of Persons with Disabilities (CRPD) was adopted during the 61st session of the General Assembly. The Convention is monitored by the Committee on the Rights of Persons with Disabilities. It entered into force on 3 May, 2008 with the 20th member state ratification. As of 30 September, 2010, it has 147 signatories and 94 state parties. The United States became a signatory to the convention on 30 July, 2009. It is important to note that the United States has not ratified the convention.

The CRPD had its genesis in the UN General Assembly Resolution 56/168 passed on December 19, 2001. The resolution recognized “the need to advance in the elaboration of an international instrument” and created an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities”. The resolution was enacted out of concern for the “disadvantaged and vulnerable situation faced by six hundred million persons with disabilities around the world…” after being encouraged by “the increasing interest of the international community in the promotion and protection of the rights and dignity of persons with difficulties”.

The CRPD represents a shift in modern international approaches towards persons with disabilities in codifying accepted norms.

Article One states that “the purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. Importantly, persons with disabilities are defined as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

“Discrimination on the basis of disability” is defined as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination…”

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247 Earlier draft conventions failed to achieve consensus.
The CRPD in general terms calls for "respect for inherent dignity" (Article 3(a)) and "non-discrimination" (Article 3(b)). More specifically it confirms the prohibition on “torture or cruel, inhuman or degrading treatment or punishment" (Article 15) and provides for "equal recognition before the law" (Article 12); equal "access to justice" (Article 13); "freedom from exploitation, violence and abuse" (Article 16); and protection of the "integrity of the person" (Article 17).

The CRPD may offer a plethora of avenues for litigation. One area which may prove fruitful is that relating to the standards of expert witnesses participating in death penalty evaluations and trials. As discussed in earlier chapters, it is "imperative" that evaluations of defendant are conducted in a culturally competent manner and this extends to the conduct of mitigation investigation.249 This is even more important when considering a defendant with mental retardation or mental illness. If such expert assistance is substandard an argument arises as to whether such proceedings are in compliance with the provisions of CRPD in that a defendant in these circumstances is deprived of effective representation and hence unable to realize their right to equal access to justice. It may be that such arguments can also be deployed more generally in relation to the concept of ineffective assistance so as to broaden its scope as a consequence of treaty obligations and indeed to arguments relating to the conduct of police and agents of the state.250 Other applications include questions as to funding of representation. “Although international human rights and cultural sensitivity have been considered with regard to race, gender, and religion, applications to criminal matters are still in their infancy”251 and hence previously unexplored avenues may bear fruit.

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5 REGIONAL BODIES AND INTERNATIONAL TRIBUNALS

It is important for U.S. litigators to use both the Inter-American Commission on Human Rights of the OAS (which has jurisdiction to hear complaints against the United States) and, if feasible, the International Court of Justice (where the United States has become the object of complaints). Although international measures to promote the protection of human rights are important, many initiatives have been introduced at regional level. Many domestic lawyers are unacquainted with the availability of international mechanisms or are unfamiliar with the rules and procedures of the tribunals; therefore, this section gives a brief overview of the principal organizations involved, beginning with the organization of most relevance to cases in the jurisdiction of the United States, the OAS.

5.1 ORGANIZATION OF AMERICAN STATES

The United States is one of the 35 members of the Organization of American States (OAS), a regional agency created within the meaning of Article 52 of the United Nations Charter. The OAS is an international organization created to achieve an order of peace and justice, promote solidarity and defend the sovereignty, territorial integrity and independence of the American States that established the OAS through the Charter (Article 1 of the OAS Charter). The Charter of the OAS, which entered into force in 1951, reaffirms that international law is the standard of conduct of States in their reciprocal relations.

The Inter-American human rights system is one of two regional systems to have adopted a convention abolishing the death penalty (Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty).253 The Council of Europe is the other, having adopted a similar convention.254

The 35 American States have adopted numerous international instruments that have become the foundation for the regional structure for the promotion and protection of human rights. The Inter-American human rights system recognizes and defines those rights and establishes binding rules of conduct, while creating organs to monitor their observance. A number of Latin American nations have abolished the death penalty and the long-term worldwide trend is towards total abolition. Conversely, the membership of the OAS also includes avid supporters of the death penalty, including Jamaica and the United States.

252 See http://www.oas.org
253 See http://www.cidh.oas.org/Basicos/English/Basic7.Death%20Penalty.htm
5.2 **INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

Established in 1959, the Inter-American Commission on Human Rights (IACHR) is the principal organ of the Organization of American States (OAS) charged with promoting the observance and protection of human rights and to act as a consultative organ of the OAS in human rights matters. The Commission is a seven member body based in Washington DC. Each member is elected by the OAS General Assembly. The United States upon ratifying the Charter of the OAS in 1951 became a Member State of the Organization and subsequently became subject to the Commission’s authority upon the creation of the IACHR’s creation in 1959.

One of the Commission’s functions is to receive and take action on petitions and other communications lodged by any person, or group of persons, or any non-governmental entity legally recognized in one or more of the Member States of the Organization, alleging violations of human rights. It exercises this jurisdiction in two principal respects. With respect to State Parties to the American Convention on Human Rights, the Commission is mandated to act on petitions containing denunciations or complaints of violations of the Convention by a State Party. In relation to those Member States of the OAS that are not parties to the American Convention, the Commission has jurisdiction to receive and examine communications that contain complaints of alleged violations of human rights set forth in the American Declaration of the Rights and Duties of Man (the “American Declaration”) based upon the ratification by those States of the OAS Charter. Consistent with this jurisdictional framework, as the United States has not ratified the American Convention on Human Rights, it is subject to the Commission’s competence to receive complaints of violations of the American Declaration.

As discussed below, within the Commission’s competence is the authority under Article 25 of its Rules of Procedure in “serious and urgent cases” to request that States adopt precautionary measures “to prevent irreparable harm to persons.” Such measures have been requested, for example, in complaints involving the death penalty where the Commission has asked States to stay an execution until the Commission has an opportunity to study the case and make a recommendation.

The Commission’s powers and functions, including its authority to receive and consider individual human rights complaints, are derived from the OAS Charter, the American Declaration the American Convention, the Commission’s Statute, and the Commission’s Rules of Procedure.

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255 Charter of the OAS, Article 106. See http://www.oas.org/juridico/english/charter.html
257 See IACHR Statute, Art. 20, ibid.
Precautionary Measures

As provided for under Article 25 of the Commission’s Rules of Procedure, in serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative, or at the request of a party, require that the State concerned adopt precautionary measures to prevent irreparable harm.

In qualifying cases of extreme gravity and urgency, the Commission issues precautionary measures when it becomes necessary to avoid irreparable damage to persons in the matter before them. Upon the issue of these precautionary measures, the Commission may, for example, request that the United States preserve the life of the individual in question, pending their investigation of the allegations forwarded in the relevant petition.

How is the United States bound by the precautionary measures in death penalty cases?

The Commission has found that in death penalty complaints, Member States are subject to an international legal obligation not to proceed with an execution until the Commission has had an opportunity to investigate and decide upon the complaint.258 Accordingly, to ignore the granting of precautionary measures in a death penalty case causes irreparable damage on the party and thus the case under consideration. For the United States to disregard precautionary measures would defeat the purpose of the OAS Charter. When signing international documents, the signing party is obligated not to “defeat the purpose” of the document.

The Exhaustion of Domestic Remedies

The American Convention and the Commission’s Rules of Procedure provide that in order for a petition to be considered by the Commission, remedies of the domestic legal system of the State concerned must have been pursued and exhausted in accordance with the generally recognized principles of international law. Therefore, petitioners may not lodge a petition, until all available domestic remedies have been exhausted. The petition must note

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that all available domestic remedies have been exhausted. The petition should also note the process by which the claimant exhausted all available domestic remedies.

Art. 31 of the Rules of Procedure - Exhaustion of Domestic Remedies

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.

2. The provisions of the preceding paragraph shall not apply when:
   a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
   b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
   c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

When must the petition be filed?

As outlined in Article 32 of the Rules of Procedure, the petition must be filed within six months of exhausting available domestic remedies.259

Who can present a petition?

Article 23 of the Commission’s Rules of Procedure provides that “[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the Member States

259 Article 32 of the Rules of Procedure

1. The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.

2. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.
Regional Bodies and International Tribunals

of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons”. Therefore, a petitioner does not have to be a member of any specific Bar and does not even have to be an attorney.

What violations can be claimed?

Article 1 of the Statute of the Inter-American Commission of Human Rights

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.

2. For the purposes of the present Statute, human rights are understood to be:


   b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Claims can be filed under Art I of the American Declaration (right to life), Article II (Right to equal protection under the law), Article XVIII (right to a fair trial), and Article XXVI (right to due process).

The Commission’s competence is limited to interpreting and applying the human rights instruments of the Inter-American system, although in deciding upon complaints of violations of relevant Inter-American instruments the Commission has held that it may give due regard to other relevant rules of international law applicable to Member States against which complaints of violations of Inter-American instruments are properly lodged – these rules of international law may include the provisions of other prevailing international and regional human rights instruments. In the event that the Commission finds a Member State responsible for violations of its human rights obligations, the Commission is empowered to make proposal and recommendations with respect to those violations that it deems appropriate.

Precautionary measures are granted in order to give the Commission time to make a recommendation when a person’s life is in imminent danger. It is imperative to note in a petition that the defendant’s life is in imminent danger when filing for precautionary measures. An attorney will file a brief requesting precautionary measures be installed in his client’s case. The Commission will then decide whether to issue the precautionary measure or not. The request for precautionary measures must contain at least a brief

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261 See IACHR Statute, Art. 4. ADD art 43.
description of the facts and issues. The required information is stipulated in Article 28 of the Commission’s Rules of Procedure.262

Why file with the Commission and not the Inter-American Court on Human Rights?

In accordance with Article 62 of the American Convention on Human Rights, the contentious jurisdiction of the Inter-American Court of Human Rights is limited to those States that have explicitly recognized the Court’s competence to entertain cases concerning the interpretation and application of the provisions of the American Convention in respect of that State. The United States has not recognized the Inter-American Court’s jurisdiction under Article 62 of the American Convention and therefore cannot be the subject of a contentious case before the Court.

Filing a Petition

For ease of application, a standard form to present a petition can be found in pdf format at https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E

Article 28. Requirements for the consideration of petitions

Petitions addressed to the Commission shall contain the following information:

a. the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s);

b. whether the petitioner wishes that his or her identity be withheld from the State;

c. the address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and email address;

d. an account of the act or situation that is denounced, specifying the place and date of the alleged violations;

e. if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;

f. the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated;

262 A sample form that details the type of information required can be found at https://www.cidh.oas.org/cidh_apps/instructions.asp?gc_language=E. Further information on how to present a petition can be found in an OAS/IACHR resource, Human Rights: How to Present a Petition in the Inter-American System (Organization of American States, Inter-American Commission on Human Rights).
g. compliance with the time period provided for in Article 32 of these Rules of Procedure;

h. any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and

i. an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure.

The request can be sent by any means of communication.

*Address:* Inter-American Commission on Human Rights  
1889 F Street, N. W.  
Washington, D.C. 20006, USA

*Fax:* (202) 458-3992

*Internet:* https://www.cidh.oas.org/cidh_apps/instructions.asp?ge_language=E

If precautionary measures are granted, it is essential to notify the Board/Governor of the granting of precautionary measures by the IACHR.

5.3 **THE INTERNATIONAL COURT OF JUSTICE**

As stated above, the ICJ satisfies the judicial function of the UN. Owing to the fact that only nation states are entitled to apply to and appear before the Court, opportunities to utilize the ICJ are somewhat limited. Therefore, the ICJ is unlikely to be a viable avenue of appeal in all but the rarest of cases.263

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263 For further information, see http://www.icj-cij.
6 CLEMENCY AND INTERNATIONAL INTERVENTION

International arguments should also be presented at the clemency stage. Certain international institutions and Governments may provide support in the form of letters, or in the case of the European Union, demarches requesting clemency. Such letters and demarches increase pressure on the decision maker(s), as well as enhancing the legitimacy of such claims. In effect, they can be utilized as a tool of persuasion.

6.1 INTERNATIONAL INSTITUTIONS OVERVIEW

Each of the following institutions has previously provided letters or demarches requesting clemency. Individual nations may also consider intervention in certain cases.

European Union

The EU is a unique regional international institution. It is composed of 27 Member States. Although the EU is not a unified State, it has created certain institutional bodies that will speak on behalf of the member nations on areas of economic and human rights interests. These interests were agreed upon by all members upon signing the EU formation treaties. The principal objectives of the EU are: to establish European citizenship, to ensure freedom, security and justice, to promote economic and social progress, and to assert Europe's role in the world.

The EU prohibits its members from the use of the death penalty as a punishment; in fact, it is now a precursor to entry to the Union. Furthermore the extradition of defendants to countries that apply the death penalty has been held by the European Court of Human Rights to be contrary to Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading punishment and hence prohibited under the ECHR.

The EU is opposed to the death penalty in all cases and accordingly aims at its universal abolition. The EU believes the abolition of the death penalty to contribute to the enhancement of human dignity and the progressive development of human rights. The EU pursues this policy consistently in different international fora such as the UN and the

[264] Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. There are four official candidate countries: Croatia, Iceland, The Former Yugoslav Republic of Macedonia and Turkey. Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo, under UNSCR 1244, are officially recognised as potential candidates.


Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty.  

The EU has taken a strong stance against the use of the death penalty in non-member nations and provides demarches requesting clemency in certain categories of capital cases including those involving persons with mental retardation, the mentally ill, juveniles and foreign nationals. 

Council of Europe

The Council of Europe, headquartered in Strasbourg, France, is Europe’s oldest political organization. Established in 1949 by the Treaty of London, it groups together 47 countries. In addition it has granted observer status to five international entities (the Holy See, the United States, Canada, Japan, and Mexico). The Council of Europe was created in order to defend human rights, parliamentary democracy, and the rule of law. It seeks to develop continent-wide agreements (to date, it has developed 200 legally binding European treaties or conventions) to standardize member countries’ social and legal practices, and also seeks to promote awareness of a European identity based on shared values.

The Council of Europe has taken the firm position that everyone’s right to life is a basic value and that the abolition of the death penalty is essential to the protection of this right and for the full recognition of the inherent dignity of all human beings. Correspondingly, the Council of Europe provides letters requesting clemency in certain categories of capital cases.

Other European Institutions

There are also other European based organizations that have views on the death penalty in general, and include the Organization for Security and Co-operation in Europe (the “OSCE”). In particular, at a conference organized by the OSCE it was noted with concern that “executions of mentally retarded persons continue in the OSCE region”.  

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267 For examples of demarches and policy statements, see EU Policy and the Death Penalty at http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm
268 For examples of demarches and policy statements, see EU Policy and the Death Penalty at http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm
269 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. Additionally, an application for membership from Bélarus is currently pending.
270 For further information on the Council of Europe, see http://www.coe.int/T/e/Com/about_coe/
6.2 CRITERIA FOR INTERVENTION

If you believe you have a client who fulfills the criteria for mental retardation, please contact the International Justice Project (“IJP”). The IJP advises Governments and international institutions and provides assistance in obtaining intervention letters and demarches. Owing to the complexity of intervention by these institutions and individual nations, documentary evidence such as affidavits and school and medical records are of particular probative value.\(^{271}\)

*Please note that strict criteria are followed in all cases and consideration of intervention is not guaranteed.*

6.3 EXAMPLE CASE: DARYL RENARD ATKINS

Daryl Atkins was sentenced to death for the murder of Eric Nesbitt Atkins on August 16, 1996.\(^{272}\) Atkins presented evidence that his overall IQ test score was 59, his verbal IQ being 64 and his performance IQ 60. Based on these scores, the forensic psychologist for the defense, Dr. Evan Nelson, stated that Atkins fell into the range of being “mildly mentally retarded.” Nelson testified that Atkins did understand the criminal nature of his conduct and that he meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition, Atkins had a strong social history indicating mental retardation. Dr. Nelson testified that Atkins had a limited capacity for adaptive behavior. He pointed to his school records, which showed that he scored below the 20th percentile in almost every standardized test he took. He failed the 2nd and 10th grades. In high school, Atkins was placed in lower-level classes for slow learners and classes with intensive instruction for remedial deficits. His grade point average in high school was 1.26 out of a possible 4.0. Atkins did not graduate from high school. Dr. Nelson testified that Atkins' academic records “are crystal clear that he has been an academic failure since the very beginning.”

The EU subsequently filed an amicus brief on behalf of Atkins with the U.S. Supreme Court articulating the international law and norms prohibiting the application of the death penalty to those with mental retardation.

It should be noted that this was a particularly strong case and the institutions and Governments are aware that such documentary evidence may simply not exist. This should not dissuade you from contacting the IJP. The IJP can advise you and put your case forward to the various parties for consideration.

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\(^{271}\) American Association on Mental Retardation (AAMR) 2002 Definition
\(^{272}\) For full discussion of the case and its ramifications, see infra.
APPENDIX

ADAPTIVE BEHAVIOR: BACKGROUND QUESTIONS TO ASK CREDIBLE INFORMANTS (COMBINED VERSION)

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NB:

(1) This list of questions is designed to assist in obtaining confirming information to support claims that limitations in adaptive behavior exist -- either currently or in the past.

(2) The questions included in this list were generated by the author. Other lists have been developed -- for example, a list of questions was published in Equal Justice for People with Mental Retardation (Institute on Disabilities at Temple University, 2002) -- appearing in the "Training Guide for Attorneys" written by Edwards, Bryen, and Murphy.

(3) The questions are organized according to the 3 adaptive skills areas of the American Association on Intellectual and Developmental Disabilities (AAIDD) and the 11 adaptive areas of the Diagnostic and Statistical Manual of Mental Disorders -- Fourth Edition -- Text Revision (DSM-IV-TR) of the American Psychiatric Association. The 11 adaptive skill areas can be accessed in such a way to be used by any definition of mental retardation/intellectual disabilities that one is using.

The adaptive skill areas for two major professional sources are provided below.

AAIDD (2010): conceptual, social, practical

DSM-IV-TR (2002): communication, functional academic skills, self-direction, social & interpersonal skills, leisure, self-care, home living, health, safety, use of community resources, work

(4) Questions are phrased usually in the present tense -- it may be necessary to use the past tense, depending on the type of assessment that is being conducted.
(5) It is **ESSENTIAL** that the informant **explains his/her responses** on many of the questions, as most statements may need further explanation. Frequently a prompt for requesting more detailed information is provided. However, asking for explanations of specific occurrences of problems is strongly recommended. **Contextual information** (i.e., stories or specific examples) is extremely useful and should be obtained whenever possible.

(6) When obtaining information related to adaptive functioning, it is always important to be responsive to an individual's cultural and family background.

(7) Substitute the person's name for the symbol "X."
Adaptive Skills

Specific Questions

Conceptual Adaptive Skills:

Communication

Language

(receptive)

- How well does X understand what is said to him/her? [explain]
- How well does X pay attention when someone is speaking to him/her?
- Does X interrupt other people who are speaking to him/her? [explain]
- Can X follow simple directions given to him/her orally?
- Can X follow multi-step directions given to him/her orally?
- Does X understand humor (e.g., jokes, funny stories) that others say?
- Can X answer simple questions?
- Can X retell a story that someone else has told
- Can X understand phrases like "dressed to the teeth" or "at rope's end"?

(expressive)

- Does X speak to others on a regular basis?
- Does X have any speech problems? [explain]
- How well does X use words when he/she talks?
- Does X have trouble finding the right word for things?
- Does X have a large vocabulary when he/she speaks?
- How well does X talk using full sentences?
- When X talks, do others have problems understanding him/her?[explain]
- When X talks, does what he/she says make sense? [explain]
- Can X tell others what he/she did that day?
- Can X ask questions about how things work?
- Can X tell jokes effectively?
- Does X tell others what he/she likes and dislikes?
- Can X explain his/her legal rights?
- Can X engage in conversation with a stranger?
- Can X explain his/her expectations of others?
- How well does X …
  - give directions to someone?
  - talk about current events going on in the community?
  - talk with someone he/she has just met?
  - convey his/her needs?
  - talk on the phone?
Functional Academic Skills

Reading

- What types of reading material (books, newspapers, magazines) did/does X like to read? [details, specific examples]
- How often did X read as a child? As an adolescent? As an adult?
- When X was in school, how well did X read textbooks and other materials?
- In general, how well does X read?
- How well does X say the correct sound of letters he/she sees?
- How well does X read specific words?
- How well does X understand what he/she reads?
- How well does X read …
  - the newspaper?
  - mail or other notes written for him/her?
  - labels on cans of food or other materials?
  - directions on medication labels?
  - manuals that explain how to do something
  - notices or flyers that are put in public places?
  - menus in unfamiliar restaurants?
  - applications and other formal documents?
  - signs in the community?
  - books written for adults (novels)?

Writing

- In which situations does X write?
- In general, how well does X write?
- How well does X spell words?
- When X was in school, how well did X do when he/she had to write a paper that included many paragraphs?
- How well does X write sentences? Paragraphs?
- How well does X use writing to write …
  - a personal letter to someone else?
  - down a phone message on a piece of paper?
  - notes to himself/herself?
  - information on an application?
  - message on a birthday card?
  - short paper on a topic?
  - email or text message?

Math

- In general, how well does X do math?
- Can X count to ten? To one hundred?
• Can X add and subtract numbers?
• Can X multiply and divide numbers?
• Does X understand fractions and decimals?
• When X was in school, how well did X do in the area of math?
• When in school, was X able to solve math word problems?
• Can X …
  use an ATM machine
  use online or telephone banking features
  tell time? [traditional clock, digital]
  use a calendar?
  understand a bus schedule?
  recognize and count money?
  make change?
  understand how much change he/she should get back?
  buy items in stores without assistance? with assistance?
  pay bills? [explain]
  manage a checking and/or savings account?
  understand the information on a pay stub?
  use a tape measure or ruler?
  use measuring cups for cooking?
  weigh himself/herself accurately?
  use a thermostat in a house or apartment?
  keep score in a game?
  understand distances?
  tip appropriately
  estimate how long some event may take?
  complete a form requesting items (e.g., commissary request)?

Self-Direction

• How well does X manage his/her day-to-day life?
• Does X make key decisions in his/her life? [explain]
• How well does X make changes in his life to correct things that did not go right?
• How well does X know what his/her strengths and weaknesses are?
• How well does X follow his/her own schedule?
• Does X initiate activities on his/her own? [explain]
• Can X make his/her concern known to others?
• Does X know when to ask for assistance?
• How well does X work independently?
• Does X take responsibility for his/her own actions?
• Is X reliable?
• Can X set goals … and make plans to accomplish them?
• Can X solve various problems that arise in life?
• Can X make good decisions?
Social Adaptive Skills

Social & Interpersonal Skills:

Interpersonal

- How many close friends does X have?
- How much time does X spend with his/her friends?
- How well does X get along with his friends?
- Does X make new friends very often? [explain]
- Does X make new friends easily? [explain]
- Is X able to keep friends over time?
- Does X have a girlfriend/boyfriend?
- Does X go out on dates?
- Does X initiate social events or activities?
- What types of things do X and his/her friends like to do?
- Does X like to spend time with others who are younger than he/she is?
- Does X initiate group activities?
- How well does X handle competition?
- How well does X handle criticism from others?
- When in school, how did X get along with his/her …
  - classmates?
  - teachers and administrators?
  - other school staff?
- How well does X get along with his/her …
  - parents or caregivers?
  - siblings
  - wife/husband?
  - children?
  - girlfriend/boyfriend?
  - persons in the neighborhood?
  - co-workers?
  - supervisor/boss at work?
- How does X handle problems with his/her …
  - parents or caregivers?
  - siblings
  - friends?
  - co-workers?
  - boss?
- How would you explain X's anger?
- Does X get angry often?
- Does X get angry easily?
- Does X's anger usually lead quickly to verbal or physical aggression? [explain]
- Does X calm down quickly or does the anger last a long time?
- Does X know how to manage his/her anger?
- Is X able to move on or does he/she hold grudges?
Responsibility

- Do you remember any situations where X was given responsibility to take care of something?
- If yes, can you tell me how X did?
- Was X ever in a position where he/she was the leader of a group or organization?
- How would you explain X's opportunities to be in charge of something or be responsible for something?
- Is X able to follow through with a task until it is completed?

Self-esteem

- In your opinion, how did X feel about himself/herself as a child? As an adolescent? As an adult?
- How confident is X in his/her abilities?
- Has X had experiences where he/she did well and was recognized for doing well? [explain]
- What accomplishment(s) do you think X is most proud of?
- Has X had experiences where he/she did not do well and was criticized for not doing well? [explain]
- How did X feel about his/her performance in school?

Gullibility

- Was X ever taken advantage of when X was … [explain, examples]
  child?
  adolescent?
  adult?
- Can X easily be talked into doing things that others want? [explain]
- Can X recognize the intentions of others?
- How much has X been influenced by others when he/she was in school? In the neighborhood? At work? At home? Elsewhere?
- If X is in a gang or other group, what is his/her role?
- Does X associate with persons who are much older that he/she is? Or who are much younger than he/she is?
- Does X say what others want him/her to say?
- Would you describe X more as a "leader" or a "follower"?

Naïveté

- How easily is X tricked or fooled by others? [explain]
- How well can X identify when he/she is being put down or made fun of?
- How well does X understand what others are asking him/her to do - especially when he/she could get into trouble?
- Has X ever been accused of doing something when he/she really did not do it?
• Have others often played jokes on X?  [explain]
• Did people make fun of X and he/she did not know it?

Follows rules

• When in school, how well did X behave in his/her classes?
• How well did X follow school rules?
• Did X get into trouble at school for not following the rules?  [explain]
• Was X ever suspended or expelled from school?  [explain]
• How well did X follow rules at home?
• Was X ever severely punished for not following rules at home?
• Did X ever have problems following rules in settings outside of the home such as on a sports team or participating at a community center?

Obeys laws

• Has X been in trouble with the law in the past?
• In your opinion, what are X's attitudes about obeying the law?

Avoids victimization

• Was X picked on by other students in school or on the school bus? By other children in the neighborhood? By co-workers? By others?
• When X is in situations where he/she might be picked on or taken advantage of, does he/she know how to prevent this from happening? [explain]
• Does X avoid situations where he/she may be picked on or taken advantage of?
• Does X select friends using good judgement?

Leisure

• How well does X use his/her free time?
• Does X like to play any sports?
• Does X have any regular hobbies or interests?
• What does X do for entertainment?
• Does X understand the rules and procedures of various games?
• Can X keep score when playing certain games?
• Does X learn a new game, sport, or other activity easily?
• Can X identify local activities that are occurring?
Practical Adaptive Skills

Self-Care

Activities of daily

- In general, how does X deal with common activities that we have to do living on an everyday basis such as . . . [explore each in detail]
  - eating?
  - walking -- moving around?
  - toileting?
  - dressing?
  - bathing?
  - grooming?
- Can X select appropriate clothes to wear for weather?
- Can X select clothes that match or go together?
- Does X wear clean clothes?
- Does X present himself/herself in an acceptable manner?

Home Living

Everyday life skills

- How well does X do the following daily activities? [details]
  - Prepares meals?
    - planning a meal (identifying and obtaining materials, etc)
    - preparing the meal (reading recipe, etc.)
  - Cleaning up afterwards (knows where things go, etc.)
    - cleans his/her room, apartment, or house?
    - sweeps, vacuums, etc.
    - keeps room organized
  - Uses the telephone?
    - finds a number in a phone book
    - places a call
    - answers a call
    - knows how to find and use a public phone
  - Can use household appliances?
    - kitchen: stove, oven, microwave, toaster, etc.
    - house: washing machine, dryer, air conditioning, etc.
  - Can do laundry?
    - organizes/sorts clothes
    - uses appropriate detergent, etc.
  - Can use basic household tools (e.g., pliers, screwdriver, etc.)?
    - can perform basic home maintenance? (e.g., change filters change filters of furnace change light bulbs
change batteries in smoke detector
fix simple leaks
fix simple toilet problems
cut grass … rake leaves

o Knows how to get household problems repaired by someone else?

**Health**

- How well does X do the following?
  - keeps healthy -- both physically and mentally?
  - knows basic first aid?
  - knows how to treat day-to-day ailments such as a headache or stomach?
  - knows who to call in the event of a medical emergency?
  - knows how to fill a prescription?
  - takes prescribed medication as directed and in a timely fashion?
  - understands the warnings on prescribed medications?
  - knows how to schedule an annual physical or dental exam?
  - knows how to handle food in a sanitary way?
  - knows how to prevent getting catching an illness from someone else?

**Safety**

*Maintains safe environment*

- When X does things that involve risk, does he/she do things to make sure that he/she is safe?
- Did X know how to tell if another person was safe or not?
- In X's living situation, is his/her room, apartment, house safe (e.g., dangerous materials are not available to children)?
- Does X follow safety precautions at work (e.g., wears a hard hat)?
- How well does X do the following?
  - ride a bicycle?
  - cross a street?
  - buckle seat belt when in a car?
  - avoid dangerous materials (e.g., toxic material in the house)?
  - fix things that can be dangerous (e.g., remove a broken light bulb, bread that is stuck in a toaster)?
  - use extension cords appropriately?
  - use portable heaters?
  - respond to thunder storm with severe lightening?
  - avoids putting objects near hear sources?
Use of Community Resources

- How well does X do the following?
  - gets around in the neighborhood and community (including driving or using public transportation)?
  - recognizes street signs and local landmarks?
  - knows which agencies can provide help?
  - find and use stores in the neighborhood?
    - Uses a restaurant -- sit-down or fast-food?
      - order from a menu
      - order something new -- i.e., something other than what is typically ordered
    - Can use resources in the community such as … [details]
      - grocery store
      - department store (clothing, other items)
      - department of motor vehicles -- driver's license or registration
      - gas station/quick stop
      - bank
      - post office
      - recreational facilities
      - government offices (social security, etc.)
      - other public services (library, etc.)
  - Did X go to church on a regular basis?
  - Did X participate in any cultural events in the community?

Work

Occupational skills

- Has X had any full-time or part-time jobs? [explain]
  - if yes, how has X done in these jobs?
- Does X know what jobs really interest him/her?
- Did X have any specific job/vocational training?
- For any current job or any jobs in the past (full-time or part-time) …
  - what was the job title?
  - what were the job requirements?
  - what were the job duties?
  - how did X … [details needed]
  - find/get the job? Was assistance required?
  - apply for the job?
  - interview for the job?
  - perform on the job? Any work evaluations/ratings?
  - did X require extra support/supervision on the job?
  - did X get promoted?
  - why did the job end?
• Does X have a good work attitude?
• Does X have the following general job skills: [explain]
  arrived at work on time
  got along with co-workers
  followed the directives of his/her supervisor or boss
  could work without assistance, support, or special help
  understood employment policies
  displayed dependability
  was able to problem solve when facing new tasks
• Are you aware of any personnel issues that X might have had on a job?
• Has X ever been fired from a job? [explain]
**Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning**

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**Abstract:** The focus of this manuscript is on the challenges faced by individuals with developmental and intellectual disabilities within the criminal justice system. Prevalence data are cited and these data are interpreted in light of possible rationales for the disproportionate number of individuals with disabilities present within the system. Then the specific challenges faced by individuals with disabilities are discussed within the context of three key elements of the criminal justice system: interrogation and arrest, prosecution, and sentencing and disposition. The paper concludes with a discussion of the implications of this information for life skills instruction and transition planning. Specific recommendations are provided in terms of curriculum and instruction as well as community advocacy.

Transition planning is a central focus in the development of individualized educational programs as students enter the middle and high school years of school. As a part of that training, especially in cases of students with developmental and intellectual disabilities (D/ID), effective planning can help these students gain as much personal autonomy as possible and acquire critical self-determination skills. This process most commonly is accomplished by teaching skills such as how to maintain a home, manage finances, arrange leisure activities, be successful in the workplace, and make important life decisions. However one important area may be too often overlooked: teaching students basic information about potential interactions with the criminal justice system. By not addressing this key life domain, many students with disabilities will leave secondary education ill-prepared for the realities that may be associated with subsequent encounters with the criminal justice system.

While this area may seem like an incidental component to life skills education, recent research establishes a strong case for such an emphasis. A number of reports have recognized the difficulties that persons with mental retardation experience within the criminal justice system. Most notably, Perske’s (e.g., 2000, 2005) work in this area has highlighted the problem and discussed the consequences. The most dramatic attention has been given to a focus on mental retardation as related to death penalty cases. Given the decision in Atkins v. Virginia by the Supreme Court in 2002, the field of mild mental retardation has experienced renewed attention to concerns about definition and identification (Greenspan, 2006; Polloway, 2006) and particularly about the way in which death penalty cases unfold for defendants with intellectual disabilities.
(Patton & Keyes, 2006). While our purpose in this paper is not to suggest that more than a very few persons with intellectual disabilities will ever be charged with a capital crime, there clearly are issues that are highlighted in such cases that have importance for criminal justice processes in general.

This paper discusses the potential realities of interactions with the criminal justice system by persons with D/ID. The paper will explore the particular pitfalls that may be easier snare for persons with D/ID than for others without a disability, with a focus on key aspects of the criminal justice system. Using these problem areas as a foundation, the paper then focuses on selected implications for transition planning, including curricular emphases that result in the empowerment of the individual student as well as the possible roles that professional educators can play in ensuring that persons with disabilities experience justice within the criminal justice system, including collaboration with community partners.

**Criminal Involvement and Persons with Developmental and Intellectual Disabilities**

To understand the rates of crime for, and criminal justice system involvement by, persons with D/ID, Hassan and Gordon (2003) pointed out that definitions rooted in public policy determine who is identified and not identified as having a disability, which thus impacts rate of identification. While prevalence rates vary depending on the particular research study, the consistent finding is that there is a significant over-representation of persons with developmental disabilities in the criminal justice system worldwide (Hassan & Gordon, 2003). While approximately 2% of the population of the United States may be identified as having a developmental or intellectual disability, common estimates are that between 4-5% and 10% of the prison and jail populations in this country (and internationally) have been identified as having such a disability (Bowker, 1994; Davis, 2006; Petersilia, 2000a, 2000b), dependent on definitions used. As Davis (p.14) concluded: “This does not mean people with disabilities are more likely to commit crimes, but they are more likely to get caught if they become involved in a criminal act (they may or may not realize the act they are involved in is actually a criminal offense)”.

A comparable trend is also found within juvenile correctional facilities. Overall, of those incarcerated in the juvenile system, approximately 3.4% of the population has been identified as having mental retardation as a primary diagnosis (Rutherford, Bullis, Anderson, & Griller-Clark, 2002). It is important to note that IDEA is still relevant in terms of access to special education for these individuals.

To complicate an interpretation of criminal justice system prevalence data, there are a number of social and intrapersonal factors that make a risk of involvement in the criminal justice system higher for persons with D/ID. First, there is an over-representation of mild retardation in low-income minority groups, which collectively experience higher rates of police involvement and police presence in their neighborhoods than do those with fewer economic disadvantages. Approximately 34% of persons with developmental disabilities live in homes with incomes under $15,000 (almost triple that of persons without disabilities) (Petersilia, 2000b); although these data are not recent, a reasonable adjustment in income level would still underscore their viability for the current time.

A related issue is the social status of such individuals. As Petersilia (2000) points out, individuals with D/ID may be easy targets because, while they may not be “criminal”, they are persons who tend to skirt along the edge of society simply because they may not fully understand societal rules and laws. They can become easy targets to be included in a group offense for which the person who has the disability subsequently may become the one who is blamed for the crime.

A key concern is the interaction between certain common characteristics of persons with D/ID and the vulnerabilities that they may have within the criminal justice system. Table 1, adapted from Patton and Keyes (2006), provides an overview of key intrapersonal characteristics. Major areas of concern are then further discussed below.

Perske (2000, 2005, 2006a has focused on the fact that numerous individuals with mental retardation have beenocumented to have confessed to serious crimes that they did not commit. Perske (2006) provided data on 41

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### TABLE 1

**Potential Problematic Characteristics in Criminal Justice System**

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Description</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gullibility</td>
<td>Phenomenon of being duped or lied to and often involving some degree of victimization</td>
<td>Taken advantage of</td>
</tr>
<tr>
<td>Acquiescence</td>
<td>Tendency to give in when under pressure</td>
<td>Talked into doing things for which one does not understand consequences</td>
</tr>
<tr>
<td>Naïveté</td>
<td>Inexperienced, credulous</td>
<td>Accepts what someone says without question</td>
</tr>
<tr>
<td>Desire to please</td>
<td>Interest in pleasing another</td>
<td>Does not catch subtlety of situations</td>
</tr>
<tr>
<td>Concrete thinking</td>
<td>Inability to understand abstract concepts</td>
<td>Will do what someone else wants in order to be accepted</td>
</tr>
<tr>
<td>Memory issues</td>
<td>Difficulty with short-term memory</td>
<td>Does not understand Miranda rights</td>
</tr>
<tr>
<td>Language problems</td>
<td>Difficulty with receptive and expressive language</td>
<td>Not likely to recognize seriousness of what he or she is being accused of</td>
</tr>
<tr>
<td>Social behaviors</td>
<td>Displays certain emotions or feelings</td>
<td>Likely to get confused as to complexities of a crime</td>
</tr>
<tr>
<td>Cloak of competence</td>
<td>Attempt to pass as 'normal'</td>
<td>Does not remember details of a situation</td>
</tr>
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Persons with intellectual disabilities who have been legally exonerated in cases to which they had previously confessed guilt. Data on those accused of less serious crimes were not presented but the generalization to the latter appears to be a reasonable one to make.

Through the work of Greenspan (2006a, Greenspan & Switzky, 2003, 2006), increased attention has been given to the issue of social vulnerability in general and gullibility in particular. Greenspan posits that gullibility is a core characteristic in individuals with mild retardation and that these individuals are thus vulnerable to social manipulation, particularly within the criminal justice system. Further, this problem is exacerbated because contem-
porary adaptive behavior instruments (discounting those currently in production) have not included items that focused on gullibility and suggestibility as elements within the process of identifying adaptive functioning in individuals with intellectual disabilities.

Another aspect of the identification and prevalence question is that persons with developmental disabilities are much more likely to be involved in the criminal justice system if they also have limitations in intellectual functioning (e.g., mild retardation) (Hassan & Gordon, 2003) but not show physical signs of disability. This complicates matters for many persons in the criminal justice system because they may less frequently be recognized as having a disability (Petersilia, 2000). Patton and Keyes (2006) discussed some of the common misconceptions of the public, and attorneys, judges, and juries, of persons who have mild mental retardation that lead to failures in identification. Of course, persons with mild mental retardation typically do not have a particular appearance (e.g., Down syndrome) or exhibit childlike actions. As a partial result of such misconceptions, it is estimated that 75% of persons with disabilities who are arrested are not identified as having a disability. Further, an estimated 10% of this population goes unidentified during a subsequent prison term (Petersilia).

Hassan and Gordon (2003) noted that persons with D/ID often have more trouble gaining access to programs and treatment, and they may be stigmatized within the prison population. This issue may lead some attorneys to try to have the label removed in order to serve their client more efficiently. Another facet of labels is their view in varying contexts. For persons in the mental health field and teaching fields, the label serves as an informational tool from which to build strengths. However, in the legal system, the label serves to excuse behavior in some cases and to limit options in other cases, especially in capital cases (Patton & Keyes, 2006).

In summary, persons with disabilities are at risk for coming into contact with the criminal justice system for various reasons. Additionally, there are consequences for them whether they are identified as having an intellectual or developmental disability or not.

The Impact of Disability within the Criminal Justice System

The criminal justice system is built upon finding justice for persons who are the victims of crime and maintaining order in society. While there are protections built into the system to ensure fairness, it is not a system that was developed with a full appreciation of the needs and characteristics of all persons in mind. Persons with disabilities have particular issues that challenge a system that was built to ferret out truth and protect rights (Fowler, Wilensky, LoVoi, & Meng, 2005).

There are a number of processes underlying the criminal justice system. The discussion in this paper focuses on interrogation and arrest, prosecution, and sentencing and disposition. A full discussion of the corrections system is beyond the scope of this manuscript. Each of these three relevant categories is discussed below as related to defendants with D/ID.

Interrogation and Arrest

The role of the police officer at the occurrence of a crime is of course to locate and arrest the perpetrator as quickly as possible, and this objective increases especially in cases of serious offenses (Perske, 2003). Many political battles are waged when crime is seen as “out of control”. These types of campaigns put increasing pressure on officers to process cases as efficiently as possible, especially in high publicity cases (see Perske, 2005).

In order for police to be able to do their job, they have a variety of interrogation tools available to them that help them to find the criminals and gain the truth from them. These tactics, while falling to a degree into the realm of deception, are allowed by law. As Perske (1991) stated, “as a citizen, I am a firm believer in the use of police tricks that keep violent criminals in an interrogation room for reasonable periods until they truly confess” (p. 332) to a crime they did commit.

The problem with interrogation arises in that many tactics are particularly disadvantageous to persons with intellectual disabilities for a number of reasons. First, many persons with disabilities have been taught that police officers are to be respected and obeyed. They
often try to please the officer (Perske, 2000). Added into this mix, many police officers will not recognize the presence of a disability because persons with mild retardation may mask their limitations, because they are embarrassed or because they have been taught that it is not something that they should talk about. The classic finding of the "cloak of competence" (Edgerton, 1967), which many persons with intellectual disabilities may exhibit to mask their disability, is consistent with this pattern.

During an interrogation, the goal of the officer is to make the situation as likely to gain a truthful confession as possible. To accomplish this goal, they establish the interrogation room as "a place of total control" (Perske, 2000, p. 532). In order to establish this place, the room is typically located deep in the police station, with the individual being placed furthest away from doors, thermostats, and light switches, and with few distractions (Perske). Additionally, the police officer will try to place himself or herself in total control of the room, such that the person being questioned may have to ask for everything. Many people do not realize that they have not been arrested and may walk out, however, the police officer attempts to make them believe that he or she is in complete control, even when that may not be the case. The officer may also expose the person to long waits, a sequence of tiresome yes-no questions, and a series of routines where the officer minimizes and maximizes the offense, all in order to try to get the person to feel a need or desire to confess (Perske).

This pattern of control involved in interrogation is a particular concern for a person with a D/ID because of the increased likelihood of an individual being susceptible to suggestibility. Hassaan and Gordon (2003) note that, "the reliance on yes-no questions when interviewing developmentally disabled offenders at each point of the criminal justice process can have devastating impacts on the validity of the responses given and the subsequent fate of such offenders" (p. 13).

In a recent analysis of the work of Gudjonsson, Perske (2006, p. 15) identified three types of interrogational strategies that may impact on those who have high levels of suggestibility: "(1) responses to negative feedback, (2) responses to lead in questions, and (3) responses to repeated questions". Each tactic or strategy is consistent with the goals inherent in an effective interrogation but each nevertheless coincidentally can result in persons with D/ID inadvertently confessing to a crime, against their best interests.

Gullibility is a significant issue when discussing interrogation and arrest and it provides a foundation for social vulnerability that Greenspan (2006a, 2006b) argues is a universal trait in mental retardation. Consistent with this premise, Petersilia (2000b) noted the difficulty that some persons faced when critically responding to the greeting by an authority figure who says, "I am your friend, I am here to help you" (p. 24). She reported on a study by Reynolds (1998) in which persons with disabilities were asked about their perceptions in such situations. Sixty-eight percent of the sample felt that they would be protected. Additionally, 58% said that they would talk to the police before talking to an attorney. While over half would trust the police and talk to them, only 50% would reveal that they had a disability. Surprisingly, 38% were reported to maintain beliefs that they could be arrested because they had a disability. Everington and Fulero (1999) further reported that persons with developmental disabilities were more likely both to change and shift their answers to please their interrogators.

Suggestibility and confessions are a volatile combination because, as pointed out by Hassaan and Gordon (2003), "the act of confessing is further complicated, in the case of developmentally disabled defendants, as the confession process assumes an understanding of Miranda rights" (p. 14). It is at the point of interrogation that the discussion of the waiver of rights and the right to not self-incriminate is presented. Everington and Fulero (1999) noted that the Miranda rights given at the start of an interrogation are a major issue because there is reason to suspect the validity of the waivers that are agreed to by persons with mental retardation, thus calling in to question the understanding and concurrence assumed, for example, with a signature.

A key concern is the actual language of the Miranda warnings. Praiss (1989) noted that persons with retardation are challenged to understand the concepts inherent in Miranda
rights and to understand “a standard recitation of the Miranda warnings without further explanation” (p. 2). Petersilia (2000) studied the readability and listening difficulty of these warnings and determined that in order to fully comprehend these rights, a person needs to be functioning at seventh grade reading and listening levels, respectively. Similarly, Everington and Fulero (1999) assessed the comprehension of the Miranda rights on persons with mental retardation and reported that they had much more limited understanding of the rights than those who were not disabled. When they questioned their sample of individuals with disabilities about each of the four parts of the rights, they found that approximately 67% had little to no understanding of one or more of the parts of the warnings. As they concluded, “significantly more persons with mental retardation did not understand any of the substantive portions of this warning – right to remain silent, potential use of statements in a court proceeding, and the right to an attorney before and during questioning” (p. 217). The potential for misunderstanding of these rights underscores the importance of having an attorney or advocate present when they are read and before the individual confirms understanding Davis, 2006).

It is instructive to consider the three categories of false confessions that Guadjonsson (2003, in Peterske, 2006) identified. These include those that are: voluntarily false, due to vulnerability from the interrogator questioning him about the crime; coerced into compliance, in order to simply tell the interrogator that which he want to hear; and coerced interrogated, in which the suspect becomes convinced through the process that he actually did commit the crime. While concerns for justice relate to instances where persons with D/ID did, as well as did not, commit a crime, these categories illustrate the challenges inherent in the system.

Finally, it is important to note that while suggestibility indicates an individual’s “acceptance of the information provided or requests made”, compliance refers to the “tendency to go along with propositions, request, or instructions for some immediate instrumental gain” (Peterske 2006, p. 16) such as to “get out of that pressure cooker of an interrogation room. First, they try to do anything possible to please the police officer. Secondly, they do everything possible to avoid conflict or confrontation with him or her” (Guadjonsson, 2003, in Peterske, 2006, p. 16). Therein lies the challenge for a fair system of interrogation for persons with D/ID.

Prosecution

Once formal charges have been filed, persons with developmental and intellectual disabilities must navigate the prosecutorial system. Competence within the legal system is at issue when a person enters the trial stage of the criminal justice system. The attorney becomes a central feature at this point in the legal system, and it is imperative upon that attorney to recognize and understand the individual’s disability in order to help his or her client (Hassan & Gordon, 2003).

If the attorney does not recognize the disability or understand the impact of such a disability on a person’s decision-making ability, the consequences can be dire. The best protection for a person with a disability at this stage in the process is an attorney who is knowledgeable about the impact of a developmental disability on a person. Access to a professionally trained advocate to assist attorneys throughout this process also can be a critical asset (Bowker, 1994; Davis, 2006). Davis notes that the American Bar Association maintains a directory of attorneys with some experience in representing clients with D/ID. The preferred expertise of attorney vis-à-vis mental retardation is extensive and becomes even more so in capital punishment cases (see Burr, Cecil, James, Patton, & Peoples, 2002).

The task becomes more difficult when one considers that even simple identification of a person with a developmental or intellectual disability may still be difficult at this stage. In fact, when a probation program for persons with developmental disabilities evaluated how many of their participants had been given competency tests, they found that only approximately 27% had (Bowker, 1994).

At the prosecutorial stage, issues of bail and pre-trial incarceration become important. Petersilia (2000b) reported that persons with developmental disabilities had a more difficult time seeking bail prior to trial and therefore
were more likely to be incarcerated. The court seeks to determine a risk level when considering bail. Persons with developmental disabilities do not fare well in this area because they are less likely to be employed or have substantial community ties, which are two key considerations when determining whether or not to set bail. When a person is incarcerated at the time of trial, all other factors being equal, the person is more likely to be convicted of the crime (Petersilia).

McGillivray and Watterman (2005) examined the attitudes of attorneys within the justice system. They found that while the majority of attorneys understood that persons with D/ID may need services that were different than other offenders, there was less consensus on many other beliefs, including that such persons can be led into crimes more easily, that these individuals may fear authority, and that they may try to cloak or mask their disability when confronted by an authority figure. More significant, they reported that 35.4% of attorneys were unaware that a person with a developmental disability may not understand the part of the Miranda warning which allows a person to remain silent (Gillivray & Watterman, 2003). In fact, Petersilia (2000b), in her review of the literature, noted that persons with developmental disabilities concede guilt more quickly than their peers who are non-disabled, provide more self-incriminating material than other defendants, and are unable to participate in plea bargaining as easily as others.

**Sentencing and Disposition**

If a person with a disability is convicted, they may be at a greater risk of receiving longer sentences from the court. McGillivray and Watterman (2003) reported that persons with an intellectual disability run a greater risk at sentencing because many may have previously violated bail conditions or the communities in which they reside may lack the appropriate kinds of community options that can ensure subsequent success. In addition they may lack the social capital needed to secure their freedom. Further, with the degree of variability within attorney knowledge as noted above, competent representation can impact sentencing. This set of complicated and intertwined issues places persons with D/ID at a greater risk than those who do not have disabilities.

Once a sentence has been given, there remain additional significant concerns for persons with disabilities either within the prison system or if within a community-based program such as probation or parole. Glaser and Deane (1999) point to a subtle shift that has had a significant impact upon the lives of persons with disability. As society has normalized environments (and thus has re-defined the concept of disability; see Smith & Pollock, 2008), this transformation has resulted in an increased expectation that persons with disabilities be held accountable to the same expectations as their peers who are non-disabled. However, as Glaser and Deane (1999) pointed out, "offenders with an intellectual disability are more likely to be uneducated, unemployed, poor, members of an indigenous minority, have suffered from childhood neglect or abuse, have deficits in social communications skills, and suffer from a behavior or psychiatric disorder" (p. 339).

While the movement to "normalization" clearly reflects a positive trend in the societal inclusion and acceptance of persons with disabilities, it is nevertheless, and inadvertently, related to a corresponding shift in the goal within the correctional system that may lead to unfair consequences for persons with disabilities. Thus within the prison setting, the disadvantages that these persons face are likely to impact not only daily life activities within the setting but also their length of stay. While those under the age of 22 are eligible to still receive services under IDEA, these needs exist for older persons as well. Davis (2006) noted that a key focus should be on finding an alternative placement but she acknowledged the difficulty in doing so given the limited number of specialized programs available. Clearly the nature of the setting can have an impact on success after release from the system (Alexander, Crouch, Halstead, & Pichard, 2006).

**Implications for Transition Planning**

While a small minority of adolescents and adults with intellectual disabilities will have adversarial encounters with the criminal justice system, nevertheless the available data...
suggest that this minority is sufficient to warrant the professional attention of educators. Further, the challenges that persons with retardation face within the system underscore the importance of educational interventions to prevent subsequent problems. It is within this vein that the importance of including attention to the criminal justice system within the process of transition planning becomes most apparent.

The transition planning process is intended to be a comprehensive one that involves both skill development in students as well as coordination with the community in which the individual will live. With reference to the need for planning vis-à-vis the criminal justice system, two main areas are addressed below: programming to empower individuals and working within the community.

**Empowering the Individual**

Through the work of the Arc and other organizations, information has typically been available to adults with mental retardation to assist them in navigating the criminal justice system. While these are beneficial to those with access to this information, it is important that it also be provided to adolescents with D/ID through the same type of direct instruction that is used within other key domains within the school curriculum (e.g., reading, mathematics). The recommendations below follow from this basic assumption.

First, the topics related to the criminal justice system need to be addressed directly within the curriculum. These topics are appropriate components of broader curricular emphases on the development of self-determination skills and self-advocacy skills.

Second, given the fact that most individuals with disabilities are being taught in inclusive general education classrooms (US Department of Education, 2006), a key focus should be in reviewing the educational standards for a particular state that relate to coursework in government, civics, and/or political science. An example relates to teaching students the Virginia Standard of Learning CE. 3, which states that "The student will demonstrate knowledge of citizenship and the rights, duties and responsibilities of citizens by . . . describing the First Amendment freedoms of religion, speech, press, assembly, and petition, and the rights guaranteed by due process and equal protection of the laws; and] describing the duties of citizenship, including obeying the laws, paying taxes, defending the nation, and serving in court" (Board of Education, 2001). Instruction on a standard such as this one provides an excellent opportunity to incorporate individuals’ rights when being suspected of a crime by a police officer. A lesson in which the entire class goes to a local police station and discusses the topic with a police officer could be authentic, motivating, and have a powerful effect on the class.

Third, in situations where teachers may have significantly greater control over curriculum design (e.g., pull-out programs), opportunities to further develop topics relevant to the criminal justice system can be explored along with specific instructional instances in which career and life skills can be infused. Polloway, Patton, and Serna (2008) discuss this approach within the context of school curriculum while Cronin, Patton and Wood (2007) provide a detailed discussion of how to create courses, units, and/or infusions of topics for specific subjects. For example, when creating life skills lessons that include instruction on the criminal justice system, teachers must first be familiar with specific life skills (Cronin et al.). Then teachers can identify life skills areas, develop or identify a unit on the topic, plan for teaching the unit, and deliver the unit. Furthermore, a chart can be developed to outline the process and ensure that these steps are followed.

Cronin et al. (2007) identified a major series of life domains/skills (e.g., home and family, leisure pursuits, community involvement) and then, under each domain/skill, identified subdomains and life demands. Specifically under the domain of community involvement, these authors list understanding legal rights and judicial procedures and obeying laws. When a teacher is addressing this subdomain with his/her students, it would be a logical opportunity to incorporate topics within the criminal justice system.

Regardless of setting in which instruction occurs, one of the most significant foci should be direct instruction accompanied by role playing for persons with disabilities of their responses if they come into contact with the
criminal justice system. To this end, the Arc of New Mexico Justice Program developed a curriculum that included an alternate warning that can be used to discuss Miranda rights (see Davis, 2006). An analysis of the language and meanings of the words in this warning should be a critical component of life skills instruction. Another helpful resource, focused on the juvenile justice system, was developed by Dershowitz, Jouet-Nikinyang, Gill, and LoVoi (2004).

Involving School Personnel with the Community

To complement the above curricular emphases, education programs can also involve school resource officers in the classroom to create exposure and to teach relational skills with police officers. This education can include teaching and role playing, such as what “you have the right to remain silent” actually means, as well as other key features of the Miranda warnings.

The involvement of school resource personnel also provides a linkage to opportunities for community-based education related to the criminal justice system. While classroom field trips to local jails and courts of course can be unnecessarily negative if handled improperly, nevertheless students can learn to appreciate the nature of the system better when they experience it in a concrete form by meeting with and discussing the justice system with individuals who are responsible for its implementation. Further, as discussed below, such an opportunity provides these public servants with an occasion to learn more about developmental and intellectual disabilities and to have a greater sensitivity to individuals who they may subsequently encounter within the system.

Teachers have an opportunity to play a unique role in advocacy for their students and former students and for the community at large. In addition to strategies for building curriculum and providing instruction, teachers may be individuals’ best advocates if they have an interaction with the criminal justice system as adolescents or young adults. Special educators have the best understanding of the learning, behavioral, and personality characteristics of individuals with intellectual disabilities and can greatly assist police officers, prosecutors, defense attorneys, and judges in understanding, for example, the nature of mental retardation and intellectual disabilities in general and the characteristics of the individual person in particular.

For communities in which there is not a presence of mental retardation professionals, such as in small towns and rural areas, teachers are likely to be the best informed for educating professionals within the criminal justice system about intellectual disabilities. Opportunities for exchange of information can be critical in this regard because such information can serve in a preventive fashion by, for example, alerting law enforcement to the likelihood of suggestibility and gullibility as traits of persons with intellectual disabilities as well as to making them aware of the common preference of some individuals to mask their disability and adapt a cloak of competence even when it is not to their advantage. The result can be the prevention of unnecessary arrests and convictions (Davis, 2006) as well as the assurance of fair treatment within the system.

While model programs and the education of persons within the system may, over the long-term, create change, school program changes are imperative now. Instruction in basic skills may prevent the injustice of a child sitting in the classroom today, who may be an adult disadvantaged in the criminal justice system tomorrow. An adoption of a focus on the criminal justice system within life skills and transition planning and programs is a clear recognition of the realities of community living for all individuals and particularly for those with developmental and intellectual disabilities.

References


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Received: 27 February 2007
Initial Acceptance: 15 April 2007
Final Acceptance: 12 July 2007