

Assessment of Adaptive Behavior in Adult Forensic Cases:  
The Use of the Adaptive Behavior Assessment System-II

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The assessment of adaptive behavior has several core components that must be considered in any setting. When assessing adaptive behavior in forensic (legal or court-related) settings, some special considerations must be addressed. The core strategies are as follows: the use of multiple types of information, the use of multiple informants, the examination of behavior over time, beginning with childhood, the examination of behavior in two or more environments, and the use of multiple methods to obtain information. This chapter considers each of these strategies in detail as they apply to the assessment of adaptive behavior in forensic settings. The focus is on the challenges in the assessment of adaptive behavior in the diagnosis of mental retardation (also referred to as intellectual disability) and its application in legal proceedings with emphasis on capital cases.

Throughout the history of the United States' legal system and its predecessors in the American Colonies and English Common Law, an individual's level of functioning has been considered in both civil and criminal proceedings. Early courts made crude

distinctions between individuals who displayed what we now refer to as mental illness and those with mental retardation or intellectual disability (Wickham, 2002, 2006).

Individuals with such disabilities and children and youth have been recognized as special classes who are less culpable for criminal acts and whose rights under the law can be limited.

In earlier periods, before the development of intelligence tests, the diagnosis of mental retardation was based on deficits in everyday performance (see Oakland and Harrison, chapter 1 for additional details on the history of mental retardation). In other words, adaptive behavior historically has been a key aspect of the diagnosis of mental retardation in all circumstances, including legal matters. In 1961 the American Association on Mental Deficiency (now American Association on Intellectual and Developmental Disabilities or AAIDD) changed its definition of mental retardation to add a formal requirement of deficit in adaptive behavior, defining mental retardation as, "... subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior" (Heber, 1961, p. 3).

Recent legislation and court decisions have spelled out many specific examples and clarifications of the legal status of individuals with developmental disabilities (Landau, 2007). A valid assessment of adaptive behavior is important in several legal matters, such as the need for a guardian, competency to retain custody of a child, eligibility for services or entitlement programs (e.g., Medicaid, Social Security benefits, special education services), competency to execute a will or a contract, and most recently, eligibility for the death penalty.

### Definitions of Mental Retardation/Intellectual Disability

The most widely recognized and authoritative sources on the definition and diagnosis of mental retardation make little reference to the application of these standards in forensic settings. However, best practices in forensic work are based on current standards. Knowledge of current standards is essential for experts working with the courts (Bonnie & Gustafson, 2007).

Several recent authoritative publications can be used to guide legal proceedings in the diagnosis of mental retardation. Virtually all recent definitions of mental retardation or intellectual disability contain the three elements in the 1961 American Association on Mental Deficiency (AAMD) definition (Heber, 1961): significant impairment in intelligence, significant impairment in adaptive behavior, and origin of the disability in the developmental period. The 2002 *Atkins v. Virginia* U. S. Supreme Court ruling that prohibited the execution of individuals with mental retardation noted these three components and left to the states the responsibility of determining their procedures to establish mental retardation in capital cases. Prominent attorneys and professional organizations have recommended procedures to implement *Atkins* at the state level (American Bar Association, 2006; Bonnie, 2004; Bonnie & Gustafson, 2007; Ellis, 2003). However, many details remain controversial (Duvall & Morris, 2006; Olley, Greenspan & Switzky, 2006).

Although the existing standards for the diagnosis of mental retardation have much in common, the application of these standards to forensic settings is challenging. The most widely accepted current standard in the United States is that of the American Association on Mental Retardation (1992, 2002). The 1992 definition was current at the

time of the *Atkins* decision. However, the 2002 AAMR/AAIDD definition now is widely accepted. One of the differences between the two standards concerns the definition of adaptive behavior and deficits in adaptive behavior. The 1992 AAMR definition required evidence of significant deficits in 2 or more of the following 10 adaptive skills: Communication, Community Use, Functional Academics, Home Living, Health and Safety, Leisure, Self-Care, Self-Direction, Social, and Work. The 2002 standard identified three broad adaptive domains (i.e., Conceptual, Social, and Practical) and specified that significant impairment in at least 1 of the 3 areas is required for a diagnosis of mental retardation. When using a standardized measure of these three skill areas, such as the ABAS-II, an overall (total) score also can be used (AAMR, 2002).

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) (2000) is the other most widely cited authority on the definition of mental retardation. The DSM definition of mental retardation retained the AAMR's 1992 standard of impairment in 2 of 10 areas, and, unlike the AAMR, it maintained an older classification system that identified degrees of impairment, using the terms *mild*, *moderate*, *severe*, and *profound* mental retardation. Although the AAMR/AAIDD has dropped these terms in favor of a system that classifies the level of supports that the individual needs, the older labels often are used in court to note that there are degrees of severity of this condition. Most people with mental retardation fall into the mild category with IQs between 55 and 70. Most individuals with mental retardation who commit criminal acts display mild mental retardation (Greenspan & Switzky, 2006). The DSM states that, "Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation" (DSM, 2000, p.42).

Following the AAMR and DSM standards, several valuable books have been published to clarify the concepts, definitions, research basis, and clinical applications of these definitions (Jacobson & Mulick, 1996; Jacobson, Mulick & Rojahn, 2007; Switzky & Greenspan, 2006). The National Research Council (2002) has established standards for the diagnosis of mental retardation for eligibility for Social Security benefits. These well-respected sources address the assessment of adaptive behavior yet offer little for applications in forensic settings. Thus, our challenge is to apply these established assessment procedures and ethical standards (American Academy of Psychiatry and the Law, 2005; American Psychological Association, 2002; Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2006) to the specific questions posed by the court.

The challenges of the *Atkins* decision and related legislative and judicial decisions seem to have raised more questions than answers (Olley et al., 2006). However, several recent publications by attorneys, psychologists, and educators have pointed toward a growing consensus in some areas, including the assessment of adaptive behavior and skills. The remainder of this chapter reviews the issues in the assessment of adaptive behavior with emphasis on *Atkins* cases and the use of the Adaptive Behavior Assessment System.

#### Challenges in Adaptive Behavior Assessment in *Atkins* Cases

Although deficits in adaptive behavior have been the basis for diagnosis of mental retardation for as long as this disorder has been recognized, the development of scientifically sound intelligence tests about 100 years ago shifted attention from adaptive behavior to intelligence as the key requirement in diagnosis. As noted earlier, it was not

until 1961 that the organization then known as American Association of Mental Deficiency (AAMD) introduced adaptive behavior deficits as a formal criterion for the diagnosis of mental retardation (Heber, 1961). Bonnie and Gustafson (2007) argued that the science of measurement of intelligence is more precise than the science of measurement of adaptive behavior. Therefore, the examiner must be very thorough and draw relevant information from many sources in order to arrive at a valid conclusion. Even with this effort, Bonnie and Gustafson (2007) asserted that clinical judgment plays a greater role in assessing adaptive behavior than intelligence.

Schalock and Luckasson (2005) have provided a thorough guide to clinical judgment in the diagnosis of mental retardation. They emphasized that clinical judgment is more than an impression. Clinical judgment in the diagnosis of mental retardation requires a clinician to have experience with the diagnostic process and the population of people with mental retardation and to consider scientific evidence applicable to this population. The following considerations should be included in the assessment of adaptive behavior for the diagnosis of mental retardation in criminal cases.

#### The Nature of Adaptive Behavior

Many disagreements in court derive from different views of the nature of adaptive behavior. The 2002 AAMR definition stated: “Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives” (p. 73). As this definition has been applied to *Atkins* hearings, writers have found it necessary to emphasize some aspects of adaptive behavior for clarity. For example, adaptive behavior assessment describes an individual’s actual functional performance and is not used to speculate as to a person’s potential. In other

words, a person's adaptive behavior is what a person has done rather than what he or she may have done or could have done if raised in more ideal conditions (Bonnie & Gustafson, 2007; Schalock, 1999; Schalock, Buntinx, Borthwick-Duffy, Luckasson, Snell, Tassé & Wehmeyer, 2007; Stevens & Price, 2006).

As an example of this issue, some have argued in court that the observed deficits in adaptive behavior are simply a result of poor motivation. Thus, if the person had tried harder (e.g., in school), he or she would not have shown these deficits. The recently published *AAIDD User's Guide* (Schalock et al., 2007) described "several reasons for limitations in adaptive behavior [which] may include not knowing how to perform the skills (acquisition deficit), not knowing when to use learned skills (performance deficit), or other motivational factors that affect the expression of skills (performance deficit). When an individual has limited intellectual capacity, both acquisition and performance deficits may be attributed to the disability" (p. 13). Thus, poor motivation is better used as an argument **for** the diagnosis of mental retardation than as an argument against it.

This clarification of the nature of adaptive behavior is very important in *Atkins* hearings, because when all of the evidence for deficits in adaptive behavior is presented, the defense may argue that the evidence supports a diagnosis of mental retardation while the prosecution may argue that the same evidence supports a different diagnosis. That is, evidence of impaired adaptive behavior may reflect a comorbid condition or be interpreted as evidence for another diagnosis (e.g., conduct disorder, antisocial personality disorder) or simply as laziness or lack of motivation, not as evidence for mental retardation. In fact, mental retardation can co-exist with these and other diagnoses; they are not mutually exclusive (Fletcher, Loschen, Stavrakaki & First, 2007).

The AAMR (2002) and other definitions make no mention of the cause of the adaptive deficit. If the deficit exists with impairment in intelligence that originated in childhood and adolescence, the diagnosis of mental retardation is made regardless of the presumed cause of the impairments.

This 2002 definition also makes an important distinction between problem behavior and deficits in adaptive behavior. Diagnoses such as conduct disorder are indicated by problem behavior rather than deficits in adaptive behavior. “Adaptive behavior is considered to be conceptually different from maladaptive or problem behavior... Therefore, behaviors that interfere with a person’s daily activities, or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior” (AAMR, 2002, p. 79). This distinction also is emphasized in the AAIDD’s *User’s Guide* (Schalock et al., 2007).

Several writers have clarified that adaptive behavior refers to behaviors typically expected in one’s community (Bonnie & Gustafson, 2007; Brodsky & Galloway, 2003; National Research Council, 2002; Schalock et al., 2007; Stevens & Price, 2006). Thus, examples of isolated behavior are not useful in determining what is typical. The prosecution in many *Atkins* hearings has introduced the facts of the crime to demonstrate that the sophistication and planning of the crime rule out mental retardation. To the extent that the defendant’s behavior related to the crime is representative of his or her community performance since childhood and adolescence, it is relevant. If the crime required sophisticated thinking and behavior, the remainder of the defendant’s life also should illustrate high levels of adaptive behavior in order to rule out mental retardation. Several recent articles have argued against the relevance of the facts of the crime for



assessment of adaptive behavior (Everington & Olley, in press; Greenspan & Switzky, 2006; Stevens & Price, 2006).

The evidence for adaptive behavior strengths or deficits must illustrate typical community functioning. The emphasis on community functioning also addresses the controversial issue of assessing the defendant's current functioning in jail or prison. Experts in this area have pointed out that the restrictive and structured environment of incarceration makes it impossible to assess typical adaptive behavior (Bonnie & Gustafson, 2007; Everington & Olley, in press; Greenspan & Switzky, 2006; Patton & Keyes, 2006; Stevens & Price, 2006). Thus, reports from corrections officers or other observations of current functioning in prison are not valid indicators of level of adaptive behavior.

#### The Issue of Retrospective Assessment

Mental health experts often are called upon to testify regarding the retrospective assessment of the mental state of the defendant at the time of a crime or other significant event (Simon & Shuman, 2002). Although such testimony is more commonly about mental illness, the challenge is similar in the diagnosis of mental retardation. That is, the expert is asked to review all available evidence and to render an expert opinion about the defendant's mental state at an earlier time. As an example of the retrospective assessment of adaptive behavior, experts commonly are asked to assess earlier functioning and render an opinion in cases of disputed wills. That is, the expert is asked to determine retrospectively whether the person who made the will was competent to do so at the time. The issues raised in cases of disputed wills are similar to those described in this chapter to assess adaptive behavior in *Atkins* cases.

In such cases, all available types and sources of adaptive functioning should be examined. When using informant information, the validity of the expert's conclusion relies heavily upon the memories of the individuals who provide the information. In *Atkins* cases, informants may be asked to remember the defendant's adaptive functioning from one to more than 20 years ago. Several writers have pointed to this problem of reliance on memory as an indication that available clinical procedures (e.g., interviews and adaptive behavior scales, such as the ABAS-II) are of questionable validity for this purpose (Bonnie & Gustafson, 2007; Greenspan & Switzky, 2006; Stevens & Price, 2006). Although this criticism is an important caution, it should not rule out the use of such procedures. It is important to bear in mind that psychologists and psychiatrists include, as part of their assessment, methods that are not validated for the specific question being asked. For example, psychologists use standardized personality tests and projective tests to assist in decision-making on a wide range of topics (e.g., child custody decisions in divorces, competence to regain custody of a child from a social service agency). Yet these tests may lack empirical evidence for these specific purposes. The question is not whether the test or interview procedure is valid for this purpose. The question is whether the totality of the available information is sufficient for the expert to make a well-founded and ethical clinical judgment about the question at hand. Thus, the focus should be on the proper use of all available assessment methods and sources of information. With the best available information in hand, the expert can exercise clinical judgment to reach a conclusion.

Reliance on Multiple Sources

Many writers on this topic have emphasized that no single source of information or test score should be the sole source of information to determine whether a significant impairment in adaptive behavior exists (Bonnie & Gustafson, 2007; Everington & Keyes, 1999; Everington & Olley, in press; Greenspan & Switzky, 2006; National Research Council, 2002; Olley, 2007; Patton & Keyes, 2006; Schalock et al., 2007; Stevens & Price, 2006). Olley (2007) noted that possible sources of adaptive behavior information in *Atkins* cases could include interviews with the defendant; interviews with family, friends, former neighbors, teachers, and employers; and archival information, such as school and other juvenile records. As indicated earlier, corrections officers do not have the necessary information about community functioning to be a valid source (Bonnie & Gustafson, 2007; Everington & Olley, in press; Olley, 2007; Patton & Keyes, 2006; Stevens & Price, 2006).

By using multiple sources of information and thoroughly understanding the nature of mental retardation, the expert can reach a conclusion that has consensual validity. Ideally, many sources of information are congruent and lead to a single conclusion. In *Atkins* hearings and other forensic cases, a perfect congruence of all sources of information is unlikely, yet the expert who relies on multiple sources is better equipped to use his or her judgment to draw a valid conclusion.

#### Use of the *Adaptive Behavior Assessment System* in *Atkins* Cases

The administration of standardized scales, such as the *Adaptive Behavior Assessment System* (ABAS-II) (Harrison & Oakland, 2003), is one of the most widely used and accepted methods for the assessment of adaptive behavior. Since Heber introduced adaptive behavior as a component of the AAMD definition in 1961, more than

200 formal and informal instruments have been developed to assess adaptive behavior. There are marked differences among them in content and in psychometric properties (Spreat, 1999). Given this great variability among instruments, it is essential to choose an adaptive behavior scale with strong psychometric properties.

#### Attributes of the ABAS-II

Although the ABAS-II should not be the only source of adaptive behavior information, it has several advantages that address the challenges to adaptive behavior assessment. First, the ABAS-II is a standardized measure with strong psychometric properties. Several recent writers have pointed to the psychometric strengths of the ABAS and ABAS-II (Borthwick-Duffy, 2007; National Research Council, 2002; Stevens & Price, 2006).

Second, clinical validity studies that compared the mean scores for people with mental retardation with match controls demonstrated that the ABAS-II can provide a valid assessment of adaptive skills for individuals with mental retardation. The results are provided in the ABAS-II manual for the Parent Form, Teacher Form, and Adult, Rated by Others Form (Harrison & Oakland, 2003). The validity of the ABAS-II, using the Adult Form, Self Report, was established with adults (ages 18-85) with neuropsychological disorders, not mental retardation. Thus, the validity of using the ABAS-II Adult Form, Self Report, with individuals with mental retardation has not been established. The authors (Harrison & Oakland, 2003) concluded that these data “indicate that all samples of individuals with mental retardation scored significantly lower on the ABAS-II than the matched control groups and demonstrated deficits in skill areas, adaptive domains, and overall adaptive functioning...” (p. 147).

Finally, the standardized administration and scoring based on a well-standardized norm group has obvious advantages over the use of unstructured or semi-structured interviews. The ABAS-II provides scaled scores for the 10 skill areas that define adaptive functioning in the 1992 AAMR definition as well as composite scores for the three adaptive domains (i.e., conceptual, social, and practical) in the 2002 definition. The General Adaptive Composite provides an overall standardized score. These scores provide information that is needed to measure adaptive behavior in most states that have statutes or court precedents that guide procedures in *Atkins* hearings.

The standardized wording and instructions for administration provide protection against bias in the administration and interpretation of the instrument. In forensic settings concerning people with mental retardation or low intelligence, several cautions should be emphasized in ABAS-II administration.

#### Informant Selection

The scale should be completed only by informants who have known the defendant well, preferably during childhood and adolescence. The person administering the scale should spend some time getting acquainted with the informant before deciding whether this person can provide suitable information. For example, the examiner should establish the nature of the relationship between the defendant and the informant. Are they related? How long they have known each other? In what capacity have they known each other (e.g., relative, friend, neighbor, former teacher, employer, coach, scout leader)? Some informants may have known the defendant's functioning well in one setting and be able to provide useful anecdotes, yet not know enough to complete all sections of the ABAS-II. If the focus of adaptive behavior is work, the informant may be a former employer or

co-worker. He or she may provide useful information by completing only the Work scale. If the focus of adaptive behavior is school, the informant may be one or more educators with whom the ABAS-II's Teacher Form would be used. If the focus of adaptive behavior is home, the informant may be a parent, siblings, other relative, or close neighbor. Use the Parent Form when assessing persons younger than 22 and the Adult Form when assessing persons 22 and older.

Before administering the ABAS-II, discuss with the informant the importance of providing complete, honest, unbiased information. The expert must testify under oath that he or she believes that the obtained information will contribute to a valid conclusion. The ABAS-II will not provide a useful contribution to the legal process if the examiner believes that the information is biased.

#### Time Frame for Scoring

As noted earlier, the administration of the ABAS-II used in forensic settings usually focuses the assessment of adaptive functioning at some time in the past. This procedure has been criticized (Bonnie & Gustafson, 2007; Greenspan & Switzky, 2006; Stevens & Price, 2006), because the ABAS-II and other adaptive behavior scales were standardized by asking informants about current functioning or functioning in the recent past. Although all adaptive behavior testing relies on accurate memory, reliance on memory from the distant past is a departure from the standardized procedure. Nevertheless, information obtained in this way can contribute to a valid conclusion.

State laws and policies help define the age at which mental retardation should be determined and the qualities that constitute mental retardation. Although uniform national laws and policy on these two issues would be helpful, they do not exist. Thus, an

examiner's first task is to determine the standards that apply to the definition of mental retardation in the state in which he or she is practicing.

The examiner must make every effort to establish with the informant the time frame in which the items apply. The informant must express confidence that he or she remembers the defendant's activities at that time. To accomplish this, the examiner must ask careful questions to establish the most recent time at which the informant knew the defendant well. For example, if the informant is the defendant's mother, inquire whether she knew the defendant's activities well at the time of the crime. If this is the case, the items on the ABAS-II may be answered with reference to the defendant's community functioning at the time immediately before the crime.

If the informant has a clear memory of the defendant's functioning at this time, the examiner should emphasize that all items on the ABAS-II are in reference to functioning on that date. Accuracy of information is increased to the extent that the informant has a clear memory of events during this time period and answers consistently with regard to functioning at this period. Data from the ABAS-II would be considered less accurate if the informant cannot remember events clearly and consistently during a specified period in the defendant's life. Although such an informant may be able to offer important anecdotes or examples of effective or impaired functioning at different ages, this information would not produce useful ABAS-II standard scores.

If the examiner determines that the informant has the required information and can report consistently with regard to functioning at a certain date, that date should be considered the date of the defendant's functioning and may be recorded as "Today's Date" on the ABAS-II rating form or other suitable location. Scoring should be carried

out using that date in order to compare the defendant with the standardization sample of the same age. For example, if the defendant who is incarcerated is age 28, and informants report adaptive functioning at age 22, then age of 22 should be considered his or her chronological age, and norms based on this age group should be used to derive ABAS-II scores.

Before administering the ABAS-II, review with the informant the general purpose of the assessment and the scoring criteria. The informant must know whether the defendant was not able to perform the behavior (i.e., exhibited a skill deficit), able yet never or almost never performed it when needed (i.e., exhibited a performance deficit), sometimes performed it when needed, or always or almost always performed it when needed. These four response options are used with all ABAS-II items.

Thus, the results of the ABAS-II should accurately indicate the extent of the defendant's independence to perform the behavior without help, the frequency of the adaptive behavior (i.e., how often it is displayed), whether the behavior is used in appropriate circumstances--when it is needed, and the extent to which the performance is typical and not an isolated instance.

#### Conducting the Interview in Person

Although the scale may be administered over the telephone or by having the informant read and complete the items, it is preferable to administer the scale in person in a setting in which the informant is comfortable, such as his or her own home. First, discuss the purposes of the interview, the scoring criteria, and the need for accurate information. Continue by asking the respondent to describe the defendant's behavior at home, school, or work at a particular age. This discussion may provide a general



understanding of the defendant's adaptive skills and behaviors at that time. The examiner should continue by reading the items aloud while the informant answers the questions assisted by knowing the four response options stated above. Providing these options on a separate card or providing another ABAS-II rating form also may clarify the items and the scoring criteria.

This approach provides some assurance that the informant understands each item and does not fall into a response bias (e.g., giving the same answer to nearly every item). Items should be read as they appear, and they may be repeated to assure understanding. If the informant does not understand the wording, it is permissible to paraphrase the item. However, it is essential not to change the meaning of the item or to include wording that suggests an answer. Clarification is helpful, but coaching in any form is not permissible.

Clarification may be needed if the informant provides information that is incongruent with other information pertaining to the defendant's history. In such a case, the clarification should be a reminder of the four-option scoring criteria, not a suggestion of how to reply. Clarification also may be needed if the informant answers *yes* or *no* to a question. In response to a *yes* response, the examiner may ask, "Did you mean always (3) or sometimes (2)?" In response to a *no* response, the examiner may ask, "Do you mean that he was not able to do it (0) or that he could do it and never or rarely did when needed? (1)." This distinction may be difficult for some informants. Nevertheless, an examiner can assure more accurate answers by clarifying without guiding responses.

These steps are necessary precautions when using the ABAS-II retrospectively, because they help to protect against bias and assure accurate reporting to the extent that it is possible when relying on memory of earlier events. An examiner is likely to obtain

valid information by selecting and interviewing several informants using the safeguards described above. However, locating suitable informants may be difficult.

#### Administering the ABAS-II to the Defendant

The ABAS-II is the only contemporary scale of adaptive behavior that offers the option of administering the items directly to the defendant and scoring with the use of separate self-response adult norms. Thus, although its use may be considered when the defendant displays suitable intellectual ability, including memory, this and other scales of adaptive behavior should not be used when either is diminished.

Defendants on death row or those awaiting trial for capital crimes have an incentive either to exaggerate their deficits to avoid execution or to exaggerate their accomplishments to save face or achieve a “cloak of competence” to avoid the stigma of mental retardation (Edgerton, 1967; 2001; Greenspan & Switzky, 2006; Schalock, et al., 2007). Instead of using the ABAS-II in a standard fashion, examiners may elect to use its questions to guide their interview of the defendant with regard to his or her functioning when not incarcerated. Such an interview may provide information about the defendant’s ability to understand the questions and his or her tendency either to exaggerate accomplishments or to malingering in order to appear to have mental retardation. However, one may be able to gather only limited valid information from a defendant regarding his own community functioning. Cautions regarding interviewing the defendant are discussed in the next section.

#### Other Sources of Information

A score on the ABAS-II or other measure of adaptive behavior serves as one piece of information that can be added to information from other sources to contribute to

a valid conclusion regarding typical adaptive functioning. Other sources may include the defendant, family members, neighbors, friends, former employers, and teachers as well as archival information. Each source will be examined in terms of its suitability for providing useful information about the defendant's adaptive behavior.

#### Interview the Defendant

An examiner may elect to conduct an interview of the defendant with or without following questions from the ABAS. Under the best of circumstances, interviews of people with mental retardation can easily lead to incorrect conclusions due to the way that questions are presented (Finlay & Lyons, 2001). An interview may reveal information pertinent to the defendant's current mental health. Many defendants may be able to provide some history regarding their education, work, or friends that can be externally validated. However, the interview of the defendant should not be the centerpiece of evidence about adaptive behavior.

#### Test the Defendant's Knowledge

Several tests of knowledge include topics that are relevant to adaptive behavior. However, the defendant's current knowledge may be a very imprecise indicator of his or her adaptive behavior when not incarcerated. Tests of academic achievement typically do not address practical applications. Tests of vocational knowledge, interest, or aptitude are only loosely related to community functioning. The format of many tests also makes them poor predictors of the application of knowledge. For example, tests that require an oral answer, or pointing to the right answer, or pointing to a picture of the right answer are likely to be inadequate indicators of actual community functioning.

#### Test the Defendant's Performance

Performance in the highly structured and limited environment of prison is a poor indicator of one's functioning. Many people with mental retardation perform better in the structured prison setting than in less structured settings (Bonnie & Gustafson, 2007).

Therefore, observing the defendant's completion of prison chores or any other activities does not give a valid sample of adaptive behavior. An examiner may ask a defendant to complete practical tasks, such as writing his name, looking up numbers in a telephone book, or demonstrating map skills. However, the observed behavior provides only anecdotal evidence. One may reasonably infer that a defendant who currently is unable to perform these tasks did not perform them at an earlier time.

#### Interview Family Members, Former Neighbors, Friends, and Employers

People who knew the defendant well in his or her community (and especially during childhood and adolescence) can be excellent sources of adaptive behavior information if they are available (Borthwick-Duffy, 2007; Greenspan & Switzky, 2006; Olley, 2007; Patton & Keyes, 2006). The best informant is one who has known the defendant well and has no reason to be biased in the information provided. Like the defendant, family members may be motivated to make members of their family look good to avoid stigma or to report deficits in adaptive behavior in hope that a diagnosis of mental retardation will help their family member to avoid execution. The interviewer must exercise careful judgment to obtain the most objective information possible.

Independent of whether an informant is able to complete the ABAS-II, supplementary interview questions may be helpful in providing practical examples of adaptive behaviors. The following are examples of some follow-up questions that one may consider.

Home Living. Did [the defendant] ever live independently (maintain his or her own home or apartment)? Whether living alone or with another person, how much assistance did [the defendant] need when performing routine household tasks (e.g., clothing care, housekeeping, property maintenance, cooking, budgeting, shopping)?

Social. Tell me more about the kind of friends that [the defendant] had. Were they a good influence on him/her? Did he/she bring them to his/her home? Did they treat him/her fairly, or did they take advantage of him/her? How did they take advantage of him/her? Did [the defendant] realize that these friends were taking advantage of him/her? Did [the defendant] have healthy, non-exploitive sexual relationships?

Community Use. Did [the defendant] vote? Was he/she registered to vote?

Self-Direction. Did [the defendant] make the major decisions in his life, or did others make these decisions for him/her? Did [the defendant] have a long-term plan for his/her life that involved work, relationships, saving money, and achieving greater independence? Would you regard [the defendant] as a responsible person who lived up to his/her obligations? Did he/she use good judgment? Explain.

Health and Safety. Did the defendant brush his/her teeth daily? Did he/she go to a dentist for preventive care or just in a dental emergency? Did he/she remove dangerous objects from his/her home or property (e.g., old prescription drugs, old refrigerators, junk cars)?

Functional Academics. Did [the defendant] have a driver's license? If not, why? If yes, how many times did he/she take the test? Did he/she receive assistance when taking the test? What type? From whom? Did [the defendant] have a bank account? What type? Did he/she deposit and withdraw money independently? Did he/she file an

income tax return? Did he/she require assistance when needing to read, use money, or do tasks that required math skills?

Leisure. Did [the defendant] make good use of his/her leisure time? Did he/she have varied interests? Did he/she have leisure interests that involved others, or were his/her activities solitary in nature? Were his/her interests active (e.g., fishing, engaging in sports) or passive (e.g., watching television)? Was he/she open to new experiences?

Work. How did [the defendant] obtain employment (e.g., assistance from family, read newspaper, use employment agency)? How did employment end (e.g., quit, fired)? What was the length of his jobs? How many hours weekly did he/she work? Did he/she take classes or receive other special training to prepare for his/her work? When leaving a job, did he/she give notice or just stop showing up? Describe the responsibilities of his/her job(s). Were they repetitive, or did they require change among tasks? How did he/she respond to such changes? Did his/her work require judgment, decision-making, or problem solving? Describe. Was he/she ever promoted to a position of higher responsibility? Did he/she ever supervise anyone on the job? Did he/she call his supervisor if he/she was going to be absent from work,? What type of supervision did he/she require? How did he/she get to and from work? Did he/she require transportation assistance?

Seek Objective, Archival Information

All of the previously mentioned sources of adaptive behavior information come from individuals. All sources are subject to bias of some kind and may be further limited by the informants' memories. Therefore, when possible, information from these sources

should be supplemented with information collected objectively and at a time before the defendant was accused of the crime in question.

Archival information that describes functioning during childhood and adolescence may be helpful in addressing the third component of the mental retardation definition: origin in the developmental period (usually defined as before age 18). The most common example of such information is school records. If the defendant received special education services, records of classroom grades reflecting achievement as well as formal test results (e.g., of intelligence, academic achievement, adaptive behavior) that justified special education placement may have been retained. School policies differ with regard to how long such records are kept and whether the records may be purged of certain information. School systems may remove teacher comments or even remove all evidence of special education services or identification of a disability, given their desire to protect the student from stigma or because they interpret the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) to allow or require the destruction of certain records.

Although school records may be useful, they also may be misleading and inaccurate. Patton and Keyes (2006) provided a thorough discussion of this topic. For example, students with mental retardation may not be identified at all or may be served under another classification, most often learning disabled. This label is less stigmatizing for families, and schools may elect to limit the proportion of students from minority backgrounds who are identified as having mental retardation. Patton and Keyes (2006) also offered cautions regarding the interpretation of standardized achievement tests that often appear in school records. They noted that, “These tests are group-administered

achievement instruments, not intelligence tests, and the actual performance of an individual student cannot be validated” (p. 251). Interviews with educators who knew the defendant as a student may be very valuable. These interviews may provide new information and assist in interpreting school records or correcting school records that may be inaccurate.

In addition to school records, the defendant may have medical, mental health, or related records from other evaluations or social services. If the defendant received social security benefits because of a disability, these records often contain extensive information on adaptive behavior collected before the time of the crime (National Research Council, 2006).

#### Seek Subjective Archival Information

As noted in the previous section, school records may include teacher comments, or their comments may have been removed. Although information from day care providers, coaches, scout leaders, camp counselors, and others who knew the defendant during childhood and adolescence can be valuable, they seldom are preserved in writing. Records from therapeutic programs, such as camps or residential programs, may contain comments or notes that address adaptive behavior. However, if such comments are limited to functioning in a structured program, they may not be useful for assessing typical community functioning.

#### Clinical Judgment

The task of the expert witness is to review all relevant information and to use clinical judgment to reach a conclusion. Courts in the United States apply the Daubert standard (Daubert v. Merrill Dow Pharmaceuticals, 1993) that requires expert testimony



to be based on objective research or science. The opinions of experts generally are respected in court if they are based on science and objective information rather than uninformed or personal opinion. For example, interpretation of scores is part of clinical judgment. However, alteration of scores without a scientific basis is not acceptable practice. “Adjustments” that raise or lower scores to make them fit one’s clinical judgment or to account for possible influences, (e.g. poverty, lack of experience with test-taking, limited educational opportunities) are improper and should not be used. Consult Schalock et al. (2007) and Schalock and Luckasson (2005) for excellent discussions of the use of clinical judgment in the diagnosis of mental retardation.

### Conclusions

Information about adaptive behavior is critical to the determination of mental retardation in *Atkins* hearings and in determining competence or level of functioning in other legal proceedings. Current, widely accepted standards for the diagnosis of mental retardation, for psychological assessment, and for ethical practice form a foundation for practice. On this foundation, the Supreme Court has required in *Atkins* that states establish procedures for a fair and scientifically sound diagnosis of mental retardation. The challenges of carrying out such an assessment and reaching a valid conclusion have been described in this chapter. These challenges can be addressed through careful and thorough assessment that relies on the best available procedures and instruments. The ABAS-II offers some unique features that contribute essential information to the assessment of adaptive behavior. The careful use of the ABAS-II provides information that can be integrated with other sources of adaptive behavior information to yield valid

conclusions that are respected in the courts and are much preferred to less systematic and less scientific methods.

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