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Mental Retardation
A Primer to Cope with Expert Testimony

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With increasing frequency, attorneys in civil and criminal cases litigate issues involving intellectual functioning. As with all forensic assessments in the civil context, no IQ or diagnosis automatically renders an individual incompetent to execute a will, to consent to treatment, to manage one's affairs, or to be caretaker for a minor. Often, a comprehensive assessment of a client's intellectual functioning is needed to litigate a variety of these issues. While it is less important for there to be a formal diagnosis of mental retardation, the clinician integrates any intellectual deficits with relevant psycholegal criteria. The same model holds true for criminal forensic assessments. Mental retardation per se does not automatically equate with incompetency to stand trial or insanity. It is important for attorneys to understand what "intelligence" is, how it is measured, and how the concept of mental retardation can be misused or misapplied.

This is particularly important in light of a recent United States Supreme Court ruling. A year ago, in *Atkins v. Virginia,* 122 S. Ct. 2242 (June 20, 2002), the U.S. Supreme Court reversed its 1989 decision in *Penry v. Lynaugh,* 492 U.S. 302, and held that it is now unconstitutional to execute the mentally retarded. The court noted that few mentally retarded individuals had been executed since 1989, and that many states had outlawed the execution of the mentally retarded since the *Penry* decision. The court found that mentally retarded people are less likely to be deterred by the prospect of capital punishment, may be less culpable than those not mentally retarded and are more at risk of giving false confessions and being unable to adequately assist defense counsel.

An individual's intellectual functioning has always been a potential issue in both criminal and civil litigation. Yet because of *Atkins*, the accurate determination of a diagnosis of mental retardation becomes – in death penalty cases – a life or death matter. Unfortunately, no bright-line rule was adopted for other forms of mental impairment (such as brain damage or psychosis) which may make a person even more at risk of incompetency to stand trial or to waive *Miranda* rights, of being less responsible for their actions, or of being more likely to produce false confessions. This article will focus on the clinical aspects of mental retardation, how it is assessed, and the impact of mental retardation on an individual's functioning.

Definitions

There are several different definitions of mental retardation. Psychiatrists and psychologists are likely to use the definition contained in the DSM-IV-TR, the manual used to make diagnostic judgments. Here mental retardation is defined as 1) an IQ of approximately 70 or below, 2) concurrent deficits or impairments in present adaptive functioning in two areas (communication, self-care, home-living, social/interpersonal skills, the use of community resources, self-direction, functional academic skills, work, leisure, health, and safety), 3) onset before age 18.

It is important to note that IQ is a statistical concept, derived by psychological testing. Mental retardation has been defined by convention as two standard deviations below the mean, (the lower two to three percentile ranges of the population). With an average or mean IQ score being 100 and with a standard deviation being 15, an IQ score of 70 falls within the mentally retarded range, as long as the other criteria are met. But there is no such thing as an absolute IQ score. The IQ number should always be interpreted within a range of scores. There is built-in error in any type of measurement. For example, there can be slight differences in scoring between clinicians or there can be varying levels of motivation and/or fatigue within subjects, or other factors. Thus, there is a 95 percent chance that any particular "true" Full Scale IQ score falls within five points in either direction of the obtained score.

The DSM-IV-TR lists types of mental retardation. *Mild* is defined as an IQ level of 50-55 to approximately 70. *Moderate* is an IQ level of 35-40 to 50-55. *Severe* is an IQ level of 20-25 to 35-40. *Profound* is an IQ level below 20 to 25. Remember, approximately 98 percent of the population functions intellectually at a higher level than someone who is at the Mild range of retardation.

Atkins relied on the American Association of Mental Retardation (AAMR) 1992 definition of mental retardation, which entails "…significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more … adaptive skill areas ... manifests before age 18." The definition does not give approximate IQ cutoffs. In 2002, the AAMR revised its definition to include the above but also to emphasize "practical adaptive skills" and a "multidimensional and ecological approach that reflects the interaction of the individual with the environment, and the outcomes of that interaction with regards to independence, relationships, societal contributions, participation in school and community, and personal well-being." This definition appears to incorporate social and cultural influences in the individual's functioning.

There are relatively few psychological tests that would easily meet *Frye* or *Daubert* standards to adequately assess intellectual functioning. IQ tests must be individually administered, measure intellectual functioning across different abilities, must be standardized – i.e., administered, scored, and interpreted in the same manner – and must be compared to a normative group, which should be a cross-section of the United States population.

Types of Intelligence Tests

The most accepted test for adults (ages 16 and higher) is the Wechsler Adult Intelligence Scale-III (WAIS-III). The version for children (ages six through 16) is the Wechsler Intelligence Scale for Children-III (WISC-III). A revision of the WISC-III is due out this summer. These tests comprise a number of different Verbal subtests which measure such areas as vocabulary knowledge, a general fund of information about the world, verbal abstract reasoning, social judgment and common sense, arithmetic skills, short-term memory and attention. The Performance subtests measure nonverbal areas including visual-motor coordination, perceptual organization, visual abstract reasoning, and attention to detail. The Full Scale IQ score is derived from the raw scores of both the Verbal and Performance IQ scores.

The Stanford-Binet Intelligence Scale is much less used but is still considered a good test, particularly for those whose IQ scores are anticipated to be below the mid-50s.

Apart from testing for IQ, concurrent deficits in adaptive functioning must be objectively assessed. The Vineland Adaptive Behavior Scales is a commonly used test to measure abilities in Communication, Daily Living, and Motor Skills. These domains are divided into subdomains. Standard scores result from comparing a subject's ability to other people of similar age. This test is administered by interviewing a family member or other person familiar with the subject's functioning. The results are

not valid if based upon interviewing the subject. Another test, the AAMR Behavior Scales: Second Edition (ABS-2), is useful because it tracks the language used in the AAMR definition of mental retardation and can assess adaptive functioning in those individuals in residential settings. A legitimate concern is how to assess adaptive functioning with someone who has been incarcerated for a number of years.

Any forensic assessment of intelligence needs to be combined with testing for feigning or exaggeration of intellectual impairments. A number of psychological tests exist to specifically measure if someone is trying to malinger low intelligence. Some psychologists may improperly rely on specific scales on the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) to look at faking. These scales are designed to look at exaggeration of psychopathology, not of cognitive deficits.

Psychologists who assess for mental retardation must rely on third party data, such as school records and/or previous evaluations and should make every attempt to interview those who are familiar with the subject's functioning. Personality testing is also warranted to better interpret intelligence test scores. An individual may score low on an intelligence test, not because of intellectual deficiencies, but because of a mental disorder. For example, a depressed individual may obtain a lowered Performance IQ score. Most of the nonverbal subtests are timed and many depressed individuals have difficulty responding quickly. Anxiety may interfere with those subtests susceptible to the influences of poor attention, concentration, and short-term memory.

Stability of IQ Scores

Intelligence is fairly stable. There should not be major changes in IQ scores throughout the years. But if there are, what are the possible causes? Some attorneys may want to rely on a low IQ score obtained a number of years earlier. They may not want to take the chance that a new evaluation might produce a higher score. A psychologist would have difficulty in court justifying why a more updated intellectual assessment was not conducted. A new evaluation should result in similar results unless the earlier assessment was plagued by factors such as: poor motivation or malingering, errors in administration and/or scoring, more recent brain trauma or organicity, or psychopathology. The clinician needs to look at the pattern of scores to help interpret why there may be a change in IQ. For example, some subtests like Vocabulary and Similarities (verbal abstract reasoning) are less susceptible to the influences of mental disorders. Additionally, if a defendant had low education or was from an impoverished environment, long-term incarceration may produce an elevation in the Information subtest. This subtest measures general fund of knowledge about the world. Thus, access to a library, television, or education opportunities may increase scores on this particular subtest.

While intelligence is generally stabile, there may be *practice effects* if the test is re-administered less than six months to a year. Most of the time, the second administration will overestimate IQ scores, particularly with the Performance (nonverbal) IQ. It is well documented that Verbal IQ score should increase approximately three points (which is not clinically significant), while the Performance IQ score should increase some nine to 10 points. The Full Scale IQ score should increase approximately six points. Also, most individuals' intelligence increase approximately one-third of an IQ point every year. This is the result of better dissemination of information obtained from television, the Web, better schooling, as well as improved health and nutrition. That is one reason why psychological tests in general need to be updated every number of years. Thus, a person's IQ score from a test developed 15 years ago is likely to produce scores some five points higher than if the person were to take an updated version of the test today.

Cultural Factors

Cultural and language factors are also important to consider in evaluating mental retardation. Unfortunately, there is only one Spanish-language standardized adult intelligence test that measures intelligence across a number of different domains. This is the Spanish version of the Wechsler scales. It is called Escala de Inteligencia Wechsler Para Adultos or EIWA for short. This test was normed and developed on a rural population in Puerto Rico in the early 1960s. Individuals who take this test today obtain IQ scores some 20 points higher than their actual intelligence. Is this test appropriate to give? Well, little else exists. It is inappropriate for the psychologist to translate the English version of the test or to use its normative data. As long as one considers the 20 point increase in interpreting the meaning of the IQ score and perhaps administer a nonverbal intelligence test, such as the Test of Nonverbal Intelligence (TONI), one can still obtain an approximate estimate of the individual's intellectual functioning. The EIWA may also provide behavioral samples as to how an individual responds to a variety of different cognitive tasks.

Implications for Litigation

Intellectually impaired individuals may try to mask their cognitive limitations. While it may be particularly important in capital cases to prove a defendant is mentally retarded, it may also be important to show an individual has low intelligence, even if he does not formally meet clinical criteria for mental retardation. For example, low intelligence correlates with competency to stand trial, may be a factor in mental state issues at the time of the offense, and as we know from research, lowered intelligence is negatively correlated with *Miranda* comprehension. Also, low intelligence is related to interrogative suggestibility and an increase in the likelihood a defendant may succumb to police coercion or provide a false confession. While the *Atkins* court specified that a mentally retarded person cannot be executed, it is less mental retardation and more verbal intelligence that is related to the legal issues listed above.

It is important to consider that in any context, IQ should not be viewed as a fixed, invariable number. Mental retardation should also not be defined rigidly as having to include an IQ score below 70. Because of measurement errors, one can have a Full Scale IQ score as high as 75 as still can be classified as mentally retarded. Yet that Full Scale IQ score is not completely relevant to factors related to why mentally retarded individuals should not be executed. For example, if a defendant obtained a Verbal IQ score of 69 and a Performance IQ score of 95, he or she would then have a Full Scale IQ score of 85, which is in the Low Average range of intellectual functioning. If one can prove concurrent deficits in adaptive functioning, an argument can be made that the individual functions *verbally* in the "mentally retarded" range. Such an analysis successfully litigated may eventually broaden the scope of the *Atkins* decision in that we are dealing with the same class of individuals who need special protection from being executed. Likewise, though IQ scores in the "mentally retarded" range can occur because of a traumatic head injury or medical condition occurring after age 17, these individuals cannot be formally diagnosed as mentally retarded. It may be that they equally merit *Atkins* protection because of their problematic ability to understand the legal process, competency to waive *Miranda* rights, and increased likelihood of giving a false confession.

There are all types of intelligence. Intelligence tests do not measure such constructs as creativity, ability to work in groups, or "street smarts." The concept of intelligence, which is basically what intelligence tests measure, is much more imprecise than is generally expected. This article will hopefully provide the civil and criminal attorney with needed information to better judge the adequacy of

your mental health expert's assessment and allow for a more thorough cross-examination of the opposing expert.

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