

Individuals with Intellectual Disabilities and Considerations for the Criminal Justice System

Gordon B. Worcester II

Lynchburg College

## Individuals with Intellectual Disabilities and Considerations for the Criminal Justice System

Individuals with intellectual disabilities (ID) generally encounter many social challenges throughout their lives. A diagnosis of ID is contingent on the individual meeting criteria within its two prongs—deficits in intellectual ability and adaptive behavior. The American Association on Intellectual and Developmental Disabilities (2013) and the Diagnostic and Statistical Manual of Mental Disorders (2013) are two national authority reference sources that provide explicit definitions and criteria for the identification of ID. A major focus in this review will be on the adaptive behavior component and how it can affect the lives of individuals with ID who face, or could potentially face, obstacles within the criminal justice system.

This paper will explore the adaptive components of ID as expressed by Greenspan (2003; 2006)—vulnerability/suggestibility, gullibility, naiveté, one's desire to please and a cloak of competence. These and other adaptive characteristics provide strong evidence that individuals with ID are more vulnerable than typically developing persons; and these characteristics can be problematic for individuals with ID who may encounter entities from the criminal justice system. Furthermore, existing research indicates that there are a disproportionate number of individuals with ID represented within the criminal justice system. Between 4% and 10% of the prison population are individuals with ID (Petersilia, 2000).

In addition, this paper will review the circumstances and implications of the *Atkins v. Virginia* case and the effect of the verdict on identifying individuals with ID in the criminal justice system. The paper will provide a short evaluation of the existing evidence on the assessment process and how *Atkins v. Virginia* effected the identification of individuals with ID in the criminal justice system. This paper also will examine the research on interrogative strategies used by law enforcement officials and the problems these tactics can have on

individuals with ID. Additionally, a synthesis of the current research that suggests training and instructional planning strategies for professionals working with individuals with ID will be provided. This research review will contribute to and integrate the existing body of literature about the effects of various adaptive behaviors on individuals with ID and how these deficits can be problematic when these individuals face the criminal justice system. This paper will conclude with a discussion that summarizes major themes and provides considerations for equal treatment of individuals with ID in the criminal justice system.

### **Background: Intellectual Disability Definition**

#### **Intellectual Abilities**

The American Association on Intellectual and Developmental Disabilities (AAIDD, 2013) and the Diagnostic and Statistical Manual on Mental Disorders (APA, 2000) are the leading national diagnostic criteria and definitional reference sources for intellectual disability (ID). According to AAIDD (2013), for an individual to receive a diagnosis of ID, first he or she must have deficits in intellectual abilities. That is, the individual must receive an intelligence quotient (IQ) score of around 70 or as high as 75. The AAIDD (2013) considers one to have ID if he or she has “significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18” (para.1). Intellectual functioning refers to one’s cognitive ability to learn, reason, and solve problems (AAIDD, 2013, para. 2).

The Diagnostic and Statistical Manual of Mental Disorders (APA, 2000) indicates that for an individual to receive a diagnosis of ID they must have significantly subaverage intellectual functioning—an IQ score of 70 or below on an individually administered IQ assessment. This intellectual deficit must coexist with deficits in adaptive behaviors (APA, 2000). Both

definitions (APA, 2000; AAIDD, 2013) overlap in that they denote subaverage IQ scores as important criterion for diagnosing ID.

It is important to note that the DSM-IV-TR (APA, 2000) subdivides the category into four levels of severity—mild, moderate, severe, and profound. These subdivisions are contingent on the full-scale score of the individually administered IQ test; the lower the score the greater the intellectual deficit (APA, 2000). AAIDD (2013) includes five other criteria that complement its definition; for example the individual must exhibit a limitation in adaptive functioning within an age-appropriate community environment.

As indicated by Perske (2000), it is a legal obligation for officers to recite the Miranda rights to every suspect before the interrogation process; that is, the suspect must be told that he or she has the right to remain silent and that anything said can be used against them in a court of law, and that he or she has the right to a lawyer (appointed or hired by the individual). An individual must have seventh grade reading and listening skills to completely understand the warnings provided in the Miranda rights (Petersilia, 2000). Thus, intellectual functioning can affect one's ability to comprehend Miranda right warnings. "When considering the characteristics of the ID offender, it is important to be aware that the individuals are likely to be functioning at the mild level (IQ approximately 55-70)" (Salekin, Olley, & Hedge, 2010, p. 101). Because of a mild IQ, it is assumed that these persons with ID have had some general success with living independently, employability, and social acceptance (Salekin et al., 2010). Thus, many mental health professionals can assume that the intellectual functioning prong is more important for diagnosis of ID than the adaptive behavior criteria; it is however, functional behavior with adaptive skills that is affected most by deficits in intellectual functioning.

### **Adaptive Behavior**

Both leading national authority sources (AAIDD 2013; APA; 2012) indicate that the diagnosis of ID must coexist with deficits in adaptive functioning before the age of 18. The AAIDD (2013) definition states that an individual must have significant limitations in three areas—conceptual, practical, or social. Conceptual refers to the affects of intellectual functioning on communication, academics, and self-direction; social skills refers to deficits in interpersonal, social concern, ability to follow rules, and one’s self-confidence; practical skills refers to one’s daily living skills (e.g., health, hygiene) (AAIDD, 2013). Relatedly, the DSM-IV-TR outlines more specific adaptive behavior criteria than the AAIDD, which suggests that deficits must be applicable, but not limited, to such abilities as communication, personal independence, home living, and interpersonal skills (APA, 2000).

Greenspan (2006) argued that a focus on the adaptive prong of either definition is a more natural approach than emphasizing deficits in intellectual function. “The natural approach to defining and diagnosing disability is preferable to the artificial approach in obtaining acceptance of a category” such as ID (p. 206). Greenspan (2006) focused heavily on cognitive, practical, and social adaptive skills and he suggested that gullibility makes one socially vulnerable.

Due to the research of Greenspan (2006), a greater emphasis on adaptive characteristics—social, conceptual, and practical—has been applied when states identify individuals with ID. The adaptive term, as indicated by Greenspan (2006), was initially used to study the cognitive ability of animals to determine how animals function in their natural environment. In human terms, Greenspan (2006) stated that studying adaptive behavior was limited in the ID field; however, the term is applicable to human functioning in the real world. “The purpose of creating what has been termed the *dual criteria definition* of MR was to reduce

substantially the exclusive reliance on IQ in diagnosing MR” (Greenspan, 2006, p. 213). The adaptive behavior criteria is essential to diagnosing ID, because it suggests how intellectual ability can effect the application of functional adaptive skills in one’s naturally occurring environment. Greenspan (2006) further suggested that adaptive behavior is a more powerful indicator of intellectual deficits than an IQ score. While an IQ score suggests deficits in intellectual abilities, it is the application of intelligence in an adaptive cognitive skill area that implies how the intellectual discrepancy affects ones ability to function with a conceptual task (Greenspan, 2006). Likewise, it is how one applies his or her intellectual ability to practical adaptive skills that also should be given precedence over IQ scores when considering a diagnosis of ID.

When one has deficits with social adaptive skills, intelligence can affect one’s ability to interact with others in a community (Greenspan, 2006). One’s ability to solve social problems, his or her self-concept, and his or her ability to follow the rules of a social system, are also important elements in the social adaptive behavior criteria (Greenspan, 2006). Practical skills are one’s ability to function in everyday life tasks such as health, hygiene, toileting, cooking, cleaning, and paying bills (Greenspan, 2006). Intellectual ability can impact these areas, and thus practical skills are critical for diagnosis ID and measuring how intelligence affects one’s ability to function with daily living skills (Greenspan, 2006).

Salekin et al. (2010) argued that offenders with ID have limitations in cognitive functioning, which makes the individual more vulnerable to negative influences than a typically developing offender. Salekin et al. (2010) also stated that, while an offender with ID may seem to live an independent and normal lifestyle, ones who were brought up in a household where

criminal behavior was common place are “more likely to follow this course rather than carving out a separate existence” (p. 101).

It is crucial to consider the adaptive behavior criteria when considering a diagnosis of ID. By looking at the adaptive behavior prong, one can gain a better understanding of how one’s intellectual functioning impacts his or her functionality in a naturally occurring environment. Greenspan (2006) stated:

In pursuing a better definition of MR, I suggest that (a) emphasis should be on specification of behaviors or deficits that are found in all person believed to have mild MR; (b) these characteristics should relate logically to the construct—particularly to the notion of incomplete mental development—as it is generally understood; (c) the definition should be framed in terms of overall vulnerability and not just academic vulnerability; (d) concepts contained within the definition should use everyday language that do not need further definition; and (e) description especially by people in an individuals own ecology, should be emphasized more than statistical measurement and arbitrary numeric cut-offs. (p. 222)

In relation to the criminal justice system, adaptive behavior has an affect on social skills for individuals with ID (Greenspan, 2006). Deficits with adaptive behavior skills suggest why there are a disproportionate number of individuals with ID in the prison population. Petersilia (2000) conducted research on this disproportionate number and concluded that, at the time, individuals with ID denoted between 4% and 10% of the prison population. Greenspan (1979) further indicated that the social skill element of adaptive behavior is crucial for obtaining a natural taxon for individuals with ID (as cited in Greenspan, 2006). While the level of intellectual ability greatly suggests one’s cognitive capacity for comprehending the warning in

the Miranda rights, it is adaptive functioning in practical, conceptual, and social skills that can make an individual with ID socially vulnerable when faced with aspects of the criminal justice system.

Intellectual ability is crucial for comprehending Miranda warnings, but adaptive behavior can be detrimental for individuals with ID when navigating the criminal justice system. Suffice it to say, Greenspan (2006) argued that the ID category is exceptional because it can be approached from an artificial or natural standpoint. An assessor using an artificial approach draws conclusions from both an etiological/biological perspective and from the IQ test score (Greenspan, 2000). Therefore, it is important for professionals to concentrate on using a natural approach for identifying ID by considering adaptive skill deficits and how social, conceptual, and practical skills are affected by intellectual ability. Since intellectual functioning can significantly restrict one or more adaptive skill areas, there is a need to educate professionals on how to effectively evaluate adaptive behaviors. Psychologists, psychiatrists, educators, and other professionals who work with individuals with special needs increasingly being invaluable figures within the criminal justice system (Patton & Keyes, 2006). The following section will concentrate on characteristics that are potentially problematic for an individual with ID in the criminal justice system. Smith, Polloway, Patton, and Beyer (2007) explored these vulnerably problematic areas with regard to the interrogation and prosecution processes of the criminal justice system.

### **Problematic Characteristics of Adaptive Behavior**

#### **Socially Vulnerable Characteristics**

There are several areas of vulnerability within the adaptive functioning criteria that make an individual with ID susceptible in the legal system. Gullibility, as defined by the Random



House Webster's College Dictionary (2001), is the likelihood for one to be "easily deceived or cheated; naïve; credulous" (p. 585). Greenspan (1979, as cited in Greenspan, 2006) indicated that gullibility affects one's social ability because he or she has difficulty with processing circumstances in a social environment; furthermore, the individual has deficits with comprehending the hidden motives of others. Patton and Keyes (2006) suggested that gullibility could be described as a phenomenon marked by one being duped, which implies that another victimizes the individual. That is, one can be convinced into performing activities or saying something without understanding the consequences of that action (Patton & Keyes, 2006).

Since an individual with ID often tries to please an officer because he or she has learned to respect and obey them, gullibility should be one major concern in the social skills criterion of adaptive behavior with regard to individuals facing criminal interrogation (Perske, 2000; Smith et al., 2007). Greenspan (2006) concluded that individuals with ID can "have trouble understanding the nature of ambiguous and pressure-filled social situations, such as police interrogation," and that he or she "will attempt to cover up their lack of understanding by going along with whatever is asked of them" (p. 218). Kebbell and Davies (2003) implied that ID is a major factor for criminal justice entities to consider because this disability can increase the probability that one with ID will admit to a crime that he or she did not commit. This naiveté may be one of the characteristics that contribute to the disproportionate number of individuals with ID in who are incarcerated.

Gullibility is another characteristic that can increase the likelihood that a suspect with ID could be coerced into committing a crime; other criminals may often use individuals with ID to help them commit criminal activities, and the individual with ID may not understand the consequences of his or her involvement (Davis, 2009). With a desire to be accepted within their

community, Davis (2009) suggested that individuals with ID might agree to assist another with committing a crime. Since individuals with ID are particularly susceptible, criminals may use that vulnerable aspect as leverage for seeking their assistance with committing a crime. If detained by the police, one can assume that the actual perpetrator could shift blame on his or her “partner” with ID, since he or she is more likely to self-confess than a typically developing individual. Praiss (1989) implied that individuals with ID are susceptible to coercion and are likely to involuntarily confess to crimes. Like Davis (2009) suggested, a victim with ID is easily victimized, less likely to report that he or she has been victimized, eager to please others, believe that his or her treatment is standard procedure for law enforcement officials, believe that the perpetrator is his or her companion, and be unaware of dangerous situations. Naiveté, as indicated by Patton and Keyes (2006), can be intertwined with gullibility in that an individual with ID may believe what someone says without raising any objections.

### **Cloak of Competence**

As suspects, individuals with ID may present themselves as persons who are competent. Among several adaptive behavior deficits—pretending to understand rights and instruction, overwhelmed by the presence of authority figures, emotional responses to detainment, difficulty with recalling circumstances and facts of a criminal infraction, and confusion about who is accountable for a crime—suspects with ID can mask, or cloak, their competence (Davis, 2009). That is, the individual may not want their disability to be recognized, as it is often stigmatizing to the individual (Davis, 2009). Patton and Keyes (2006) described cloak of competence as the individual’s effort to pass as a ‘normal’, or as a competent individual. Edgerton (1967, as cited in Patton & Keyes, 2006) used this term as the title for his book, which describes this characteristic as a way an individual with ID manages and perceives his or her life and

interpersonal skills while living a life in a big city. Patton and Keyes (2006) stated that individuals with ID “may go to great lengths to deny or hide limitations” and that they “may cover for co-defendants in effort to appear strong” (p. 241). The implications for cloaking their competence, or masking their disability, can be detrimental during interviews or throughout an individually administered adaptive behavior assessment process (Patton & Keyes, 2006).

### **Atkins v. Virginia**

#### **The Case**

The U.S. Supreme Court forbade the execution of individuals with ID in a 6 to 3 decision that occurred in June of 2002 (*Atkins v. Virginia*, 2002). This ruling has had a national impact on the role and assessment process of an individual with ID in criminal cases. At about 12:00 pm on August 16, 1996, Daryl Atkins and William Jones, equipped with a semiautomatic handgun, kidnaped Eric Nesbitt, a naval airman (*Atkins v. Virginia*, 2002). According to the *Atkins v. Virginia* (2002) case, the two assailants robbed Mr. Nesbitt of his personal money; Atkins and Jones then drove Nesbitt to an ATM, where the ATM cameras recorded them withdrawing an additional sum of cash from Nesbitt’s account. Then they drove Mr. Nesbitt to a remote location and shot him eight times (*Atkins v. Virginia*, 2002). The exact details of what happened on that August night in 1996 are largely speculated, and the circumstances are unknown.

Atkins' account of the events that occurred in August of 1996 contained a number of inconsistencies; the concerns with his initial testimony were supported when a cellmate indicated that Atkins confessed guilt to him (Walker, 2009). Jones then legally struck a deal of life in jail for his full testimony that against Atkins; based on the testimony provided by Jones, Atkins was found guilty and sentenced to death (Walker, 2009). According to Atkins’ testimony and cross-examination, he and Jones, after spending a day smoking marijuana and drinking, went to a 7-11

with the intent to rob someone. At the store, Atkins indicated that it was Jones who flagged down Nesbitt in his truck and took control of it forcibly with a .38 semiautomatic handgun. After taking \$60 cash, Jones saw an ATM and forced Nesbitt to withdraw \$200 (Walker, 2009). According to Atkins, the initial plan to tie up Nesbit and leave him in an isolated area was both of the men's intent, but upon arriving at the destination, which Jones had chosen and driven to, Jones opened fire on Nesbitt once he exited the truck and was directed by Jones to stand up (Walker, 2009). Atkins ascertained that a sharp pain in his leg was due to a gunshot wound imposed by Jones, who drove Atkins to the emergency room and dropped him off. Walker (2009) stated that Atkins' testimony implicates Jones as the murder suspect and that Atkins only admitted to robbery and abduction. Jones' testimony, while there were fewer inconsistencies than Atkins', suggested that Atkins was the assailant and Judge Smiley sentenced Atkins execution date for August 20, 1998.

During the penalty phase, Atkins's defense attorney called a clinical psychologist, Dr. Evan Stuart Nelson, to the stand; Atkins's school records and an IQ test were presented; the records and the IQ test indicated that Atkins was an individual with mild ID (Walker, 2009). The results of the intelligence test, the WAIS-III "provided the most compelling evidence for the defense. Nelson's evaluation classified Daryl Atkins as mildly mentally retarded. His full-scale IQ score of 59 placed him in the bottom first percentile" (Walker, 2009, p. 134). In spite of this information, the Court sentenced him to death.

The *Atkins v. Virginia* ruling was appealed on the grounds that it violated the Eighth Amendment to the Constitution; this Amendment forbids cruel and unusual punishment (Patton & Keyes, 2006). On February 20, 2002, a Professor from the School of Law at the University of

New Mexico, James Ellis, argued to the Supreme Court in defense of *Atkins* and presented evidence that a death sentence violated the Eighth Amendment (Patton & Keyes, 2006).

Ellis had to convince one of seven justices that this sentence was cruel and unusual and violated the Eighth Amendment (Walker, 2009). He had to convince the justices that executing an individual with ID served no legitimate penal objective. In *Atkins v. Virginia* (2002) Ellis, in defense of the petitioner, suggested that states have come to the same conclusion with regard to how the AAIDD and the DSM-IV-TR define ID at that time. That is, the definitions seek to protect these individuals from cruel and unusual punishment. “Capital punishment is often justified because it promotes the interest of deterrence and retribution”, but the death penalty is not objective to these ends in the case of an individual with ID (Walker, 2009, p. 194). Ultimately, it is considered that there was shift in the state legislature’s judgments about a diagnosis of ID and whether execution is an appropriate punishment for individuals with ID (Walker, 2009).

In *Atkins v. Virginia* (2002), Ellis also supported the Virginia Supreme Court’s decision that executing an individual with ID, such as Atkins, was cruel and unusual, regardless of the psychologist’s, [Stanton Samenow] testimony, which rejected that Atkins was an individual with ID. Samenow never administered an IQ test to Atkins but declared that Atkins poor academic performance while in school was due to his frequent inattention and his overall tendency toward noncompliance in school (Gresham, 2009). Samenow expressed that Atkins did not have ID and was functioning in the average range (Gresham, 2009). In fact, it seems as though Samenow does not even accept ID as a legitimate diagnosis, particularly as a defense for criminal behaviors. In an interview with Harris (1984), Samenow defended a criminal personality by focusing on a study of criminal thinking. He found that criminals are different from other

typically developing individuals in that they “have a quantitatively and qualitatively different view of themselves and the world. Their patterns of thinking develop at an early age” (Harris, 1984, p. 227).

Samenow also stated “we first thought that some crimes were a result of mental illness (our work was, after all, based at a psychiatric hospital) only to find that the insanity defense was a charade participate in equally by the courts, the psychiatrist, and the criminal” (Harris, 1984, p. 227). He continued by stating that his study identified 52 errors in thinking that humans make irresponsibly, but that a criminal makes them more frequently than non-criminal individuals (Harris, 1984). One example of this is that people with a criminal personality do not believe that the rules of society directly apply to them. Given that information, these 52 errors could occur more frequently when an individual is identified with ID. However, Samenow argued that bizarre crimes were committed by “rational, purposeful, and deliberate” persons that were in contact with reality (Harris, 1984, p. 227).

Atkins life was spared, but this case set the pendulum swinging for states when considering whether an individual with ID is an appropriate candidate for execution. That is, “some state attorneys general supported legislation to alter the definition of mental retardation in their laws” (Patton & Keyes, 2006, p. 242). On January 16, 2008, Atkins sentence was commuted to life imprisonment (Walker, 2009).

### **Was Daryl Atkins Socially Vulnerable?**

While test results from initial administration of the WAIS-III in the *Atkins v. Virginia* (2002) case indicated that Daryl Atkins had an IQ of 59, and subsequent tests reveal scores as high as 79, evidence provided by his academic career, peers, and family members imply that many of Daryl’s behaviors meshed well with characteristics of an individual with limited

adaptive functioning (Walker, 2009). The clinical psychologist who evaluated Atkins suggested that Atkins behavior throughout his life was consistent with an individual with low intellectual ability. That is, his academic records showed repeated failures as early as the second grade; he repeated the second and tenth grades, and when he was placed in highly structured classroom environments, Atkin's academic abilities did not improve. Walker (2009) suggested that Atkins, due to his academic failures, sought acceptance from his peers by engaging in substance abuse and criminal activities.

Although interviews with Daryl Atkins and background information about his life suggested that he was an individual who exhibited adaptive behavior deficits that made him socially vulnerable, most of the information was disregarded during his initial trial. Greenspan and Switzky (2003) indicated:

Given this pervasive social naiveté, which we believe is a common characteristic of people who are considered to have MR, there is, thus, a much greater possibility that the proceedings were tainted or that there were extenuating circumstances that were not fully taken into account in a trial. (pp. 23-24)

Nevertheless, when Attorney Benjamin Hahn's cross-examined Nelson, he concluded that Atkins was aware of the long-term consequences that could result from his criminal behavior and substance abuse (Walker, 2009). While Daryl's self-awareness of his behaviors was apparent, and Nelson acknowledged that the test results suggested an antisocial personality behavior that was aggravated by substance abuse (causing aggressive criminal conduct), Nelson also maintained that Atkins was less accountable for his actions (Walker, 2009). Daryl's intellectual deficits limited his understanding of how the world worked, and Atkins was socially vulnerable

to environmental influences. Walker (2009) also ascertained that Atkins was a follower when committing crimes because most of the crimes that Atkins engaged in alone were failures.

As Walker (2009) indicated, Atkins watched TV, smoked cigarettes, and read adult magazine while he was incarcerated during the hearings. Robert S. Brown Jr., a forensic psychiatrist, noted that during an evaluation Atkins exhibited a sixth-grade reading level, could count and make simple change, but omitted the months of March and September when reciting the months of the year (Walker, 2009). Walker (2009) also stated that Atkins believed his sentence was unjust, and that he deserved merely a five-year sentence. Thus, Atkins clearly had an irrational understanding of the consequences his criminal behavior. The testimony provided by Phillip Atkins, Daryl's father, explained how his divorce from his wife affected Daryl, and how the intellectual deficiencies impacted Daryl in school; even his father suggested that Daryl's intellectual capacity affected how he chose peers, which led him to be a follower (Walker, 2009). Walker (2009) stated that Daryl Atkins claimed to have been duped into a murderous crime with William Jones in the *Atkins V. Virginia* (2002) case. Social acceptance could have been a motivating factor for the criminal behavior that marked most of Daryl Atkins's life.

Daryl's grandmother, Virginia Banks Atkins, also implied that Daryl's actions were a result of his intellectual and adaptive functioning, which led her to pray for her grandson because she had always been aware of his criminal tendencies (Walker, 2009). Other accounts indicated Daryl's failure in sports and in acquiring a positive set of peers. As Greenspan (2006) suggested, a description that is provided by persons in one's own ecology should be given precedence over statistical and numerical measurements. According to Walker (2009) however, attorney Hahn continually implied that Daryl's academic functioning was due to a lack of motivation and that Daryl did not have ID. Stanton Samenow, a psychologist involved in the *Atkins v. Virginia*



(2002) case, supported Hahn's conclusion by stating that his interactions with Atkins "revealed a young man who used vocabulary and syntax inconsistent with mental retardation" (Walker, 2009, p. 152).

It seems that Daryl Atkins's academic and social history suggests an individual who had limited academic functioning which limited practical, social, and conceptual skills. While prosecutors insisted that Daryl's intellectual functioning (e.g., his awareness of current events and used of vocabulary/syntax) were inconsistent with ID deficits, his behaviors seemed consistent with an individual who has limited adaptive skills.

### **Effects from *Atkins v. Virginia* (2002) Ruling**

There were significant trickledown effects from the ruling in the *Atkins v. Virginia* (2002) case, namely that states had a desire to redefine ID (Patton & Keyes, 2006). Patton and Keyes (2006) found that inmates began to malingering ID as a reason for their behavior. Salekin et al. (2010) indicated that before the *Atkins v. Virginia* (2002) ruling, feigning ID was nonexistent. To malingering is to pretend or exaggerate an illness or, in this case, a disability. Malingering, prior to the *Atkins v. Virginia* (2002) ruling, usually occurred when one sought Social Security benefits (Salekin et al., 2010). The incentive to feign ID for inmates on death row is, of course, to spare one's life. Consequently, malingering for a stay or for prevention of execution has led to an increase in the prevalence of evaluations and assessment of ID in penitentiaries (Salekin et al., 2010).

One of the greatest arguments against malingering is that the diagnostic criterion requires deficits in intellectual and adaptive function to occur by the age of 18 (Salekin et al., 2010). Thus, this criterion set forth by the two nationally recognized authorities on ID—APA (2000) and AAIDD (2013)—makes feigning a disability harder for individuals to use as a defensive

reasoning for his or her criminal actions. In response, many states have reevaluated their approach for identifying adaptive behavior deficits by implementing adaptive behavior rating scales. Patton and Keyes (2006) indicated that some states required the use of problematic personality inventories; these inventories have manuals stating that individuals with brain damage shouldn't be administered these scales due to the nature of its questions. There is a need to further refine components of various adaptive behavior scales so that the contents of the scales can accurately identify deficits in adaptive behavior.

When assessing adaptive behavior for a diagnosis of ID, particularly when the individual faces criminal prosecution or is incarcerated, it is important that the assessor corroborate information from multiple sources such as interviews and through a thorough analysis of previous records, evaluations, and data (Tassé, 2009). Relying solely on one adaptive behavior assessment does not foster best professional practice, and it does not create a practical illustration of how intellectual functioning affects the individual's adaptive behavior in a natural environments. Furthermore, if the individual is incarcerated, the prison environment does not represent a natural or "free" environment and could skew the results from an adaptive behavior scale. For example, there is little need for transportation, which is generally prohibited; there is little need to cook or pay bills. According to Tassé (2013), assessing if an individual has acclimated to an institutional environment may be worthwhile for interventional planning or for determining if further structure is necessary, "but has not relevance in determining how an individual's adaptive functioning compares to the general population for the purpose of ruling in/out diagnosis of ID (p. 3-4). Daily prison activities vary from the activities performed by individuals who are free citizens, and thus an accurate adaptive behavior assessment can be

skewed due to these compounding variables. Therefore, a multidisciplinary evaluation is crucial for assessing adaptive behavior.

Tassé (2009) also suggested that malingering is an actual concern when using self-reported adaptive behavior assessments. The vulnerability of the questions in the adaptive behavior interview scales in conjunction with improper administration can produce invalid outcomes. Unfamiliarity with some of the characteristics of an individual with ID—social vulnerability, naiveté, gullibility, and the desire to please—can impede the interview process. “Someone unfamiliar with these characteristics of individuals with mental retardation may misinterpret the individual’s actual adaptive behavior” (Tassé, 2009, p. 120). Schalock (2007, as cited in Tassé et al., 2009) indicated that a retrospective assessment is a feasible approach for evaluating an incarcerated individual, because this assessment requires the respondent to recall a time prior to his or her incarceration (). This approach can give the interviewer a clear indicator of how adaptive skills affected the responder at a time when the individual was not incarcerated.

A need for reliable capital sentencing criteria was best stated by Bonnie (2004), who suggested that an important practice should be for criminal justice entities to promote a high quality of assessment and to “minimize unnecessary variation from accepted professional standards” (p. 307). He continued by stating that the Virginia statute for ID has set a high standard because the law: requires at least one standardized test for determining ID administered by a professional who is knowledgeable with the assessment tool; the use of at least one adaptive behavior assessment tool; interview process with people who have interacted with the offender; and permission to assess ID in conjunction with other mental health assessments (Bonnie, 2004).

The *Atkins v. Virginia* (2002) decision simultaneously impacted two fields. It has “resulted in the bridging of two fields: forensic psychology and the interdisciplinary field of

mental retardation” (Tassé, 2009, p. 122). There is a clear need for assessment professionals to refine how an individual in the criminal justice system is evaluated for adaptive behavior deficits. Since an adaptive behavior instrument is not error-free, it is essential for the assessor to draw information from using a combination of standardized adaptive behavior scales, interviewing various informants, and a review of all records (Tassé, 2009). In addition, he indicated that the adaptive behavior scale must be current, valid, and reliable.

### **Implications for Training and Best Practice**

#### **Problems with Interrogation Techniques and Prosecution**

Since law enforcement officials are trained to use the interrogation room as a place where they can assume total control, individuals entering this room, which is deep within a police station, can be immediately intimidated (Perske, 1991). Persons with ID are inclined to please persons with authority, and the interrogation room, an environment where total control is ushered freely at the dispense of the officer, places that individual at a disadvantage. Perske (1991) argued that individuals with ID, when immersed in an intense interrogation session, may inadvertently confess to crimes they did not commit.

Furthermore, Perske (2000) postulated that interrogators often make a suspect wait for a long time. This elapse in time can easily frustrate a typically developing individual, but it can be especially exasperating for an individual with ID. He also indicated that the long wait could be exhausting to an individual with ID because a common characteristic is a short attention span (Perske, 1991). Environmental distractions in the interrogation room can be vexing to an individual with ID. An individual with ID can become exhausted easily and therefore forfeit any defense mechanisms; that is, long waits add pressure to the individual and can foster vulnerability when one surrenders his or her defenses. Perske (1991) indicated that most

individuals with ID that he has confronted in his career would profess guilt after about five hours of extreme interrogation; long waits contribute to that feeling of pressure.

One tactic used by police interrogators is for them to say, “if you just tell us we can all go home” (Perske, 2000, p. 535). Combined with intense interrogative pressure, individuals with ID who desire to please authoritative figures, are looking for a way to get out of the room and away from his or her current predicament (Perske, 1991, 2000). Perske (2000) stated that when individuals with ID hear these words they believe they have discovered a way to escape. Going home however, is not an option once a confession is given and signed, as was the case with Johnny Lee Wilson who signed a confession after confessing guilt to the murder of a 79-year-old woman (Perske, 2000). Perske (1991) also indicated that officers may see persons with ID as lower human beings and therefore, combined with the pressure to solve a crime, may use interrogative tactics to get a guilty confession from a person with ID.

Clearly, the interrogation tactics used by officers are intimidating to anyone, but individuals with ID are more suggestible, naïve, and gullible during this intense process. But, the prosecution process also poses obstacles for individuals with ID.

An attorney and his or her knowledge about their clients is a vital aspect of the prosecution process, particularly when his or her client has ID; lack of knowledge about the adaptive behaviors (i.e., gullibility and suggestibility) of individuals with ID can be detrimental (Smith et al., 2007). The attorney should be an advocate for their client; thus, they should have complete knowledge about the affects of ID and how it can substantially limit one or more of the individual’s life activities (Smith et al., 2007). Likewise, attorneys should be knowledgeable about the public’s common misconceptions about individuals with ID. Patton and Keyes (2006) highlight some these misunderstandings that also are held by lawyers. A typical misconception

is to overgeneralize symptoms; that is, the idea that all individuals with ID have the features of an individual with Down syndrome (Patton & Keyes, 2006). The implication that individuals with ID display behavior that is typical of younger children is another common misconception (Patton & Keyes, 2006). These misconceptions can lead legal entities to draw prejudice conclusions about offenders with ID.

Bail proceedings are another issue that can be problematic for individuals with ID. Since they typically do not have strong ties within their community and are not likely to have a job (two provisions when determining bail), individuals with ID may be at a substantial disadvantage during the arraignment and bail processes (Smith et al., 2007).

### **Suggesting Improvements: A North Dakota (ND) Pilot Program**

The North Dakota Center for Persons with Disabilities (NDCPD) launched a Disabilities Justice Initiative (DJI) project in 2002 (Arrayan, 2009). The purpose was to improve the contacts between ND criminal justice officials and individuals with disabilities (Arrayan, 2009). Arrayan (2009) stated that the initiative intended to train authoritative personnel on how to recognize individuals who have ID, thus promoting interagency collaboration and bridging the gap between interactions of individuals with ID and criminal justice officials. Over the course of five years, the DJI consisted of two phases—training Police Department officials and then training Sheriff's Department officials (Arrayan, 2009). On-site PowerPoint instruction about common and misleading characteristics was provided, as well as viewing a 12-minute video and administering pre/post-tests. Arrayan (2009) stated that the officials were given questionnaires that established their knowledge and perceived ability to interact with individuals with ID; furthermore, the questionnaires addressed the officials' comfort level with these interactions. The analysis of the items on the tests indicated questions that were commonly answered

incorrectly—people first language, indicators of ID, communication strategies, and distinguishing the difference between ID and a mental illness (Arrayan, 2009). These results were consistent with those officers' lack of training. The DJI project also provided a setting for increasing communication between criminal justice entities and community services providers (Arrayan, 2009). These open door communication venues and training modules seem to be an effective approach for increasing awareness of ID with authorities in the criminal justice system. This pilot program indicates that there is an increasing desire for law enforcement officials to gain knowledge about the adaptive characteristics of ID, and the issues that individuals with ID confront within the criminal justice system.

### **Increasing Awareness through Education and Training**

Davis (2009) stated that equal justice for individuals with ID is attainable when individuals with ID receive proper education and training on interacting with law officials. All individuals with ID must acquire knowledge about the potentials of encountering law enforcement officials; they must gain awareness about how to protect their rights and how to be self-assertive in legal predicaments (Davis, 2009). Davis (2009) suggested that cross-training should occur with all school staff, police officers, and agencies that assist victims in the criminal justice system and should emphasize open communication between various organizations and services. The pilot program reported by Arrayan (2009) is an ideal move in the right direction for empowering communities with knowledge of appropriate interventions for and the characteristics of individuals with ID.

Within the school system, Smith et al. (2007) suggested that training about the aspects of the criminal justice system could occur in the transition process. They recommended that programs should be objective when empowering individuals and when these individuals work in

their communities. Additionally, Smith et al. (2007) suggested that direct instruction about civic responsibilities and in understanding one's rights proposed in the First Amendment could enable individuals with a clear understanding about their rights. This instruction can be infused in a curriculum. Teachers also can tailor instruction toward topics that relate to the criminal justice system. Visitations to police stations can provide individuals with ID direct contact with police officers and can give individuals with ID a genuine and motivating opportunity to discuss a variety of issues with police officers (Smith et al., 2007). Davis (2009) implied that building alliances could ready communities for potential instances when individuals with ID are confronted with the criminal justice system. Preparing entities within the criminal justice system for situations where they may come in contact with individuals with ID can promote efficient protection of these individuals' rights (Davis, 2009).

School resource officers (SRO) also are valuable for helping to empower individuals with self-directive skills. School resource officers can educate students, particularly one's with ID, about how to interact appropriate with officers (i.e., understanding an officers role), and they can engage students with role playing activities that illustrate important topics like reviewing a citizen's individual rights in Miranda warnings (Smith et al. 2007). Classroom interaction can also promote police officers' knowledge and understanding about the characteristics and behaviors of individuals with ID and other disabilities; it also provides officers with direct contact with individuals with ID. Smith et al. (2007) also stated that special education teachers, who are trained and knowledgeable with the characteristics and symptoms of individuals with ID, can provide in-services with law enforcement officials to train and educate them about the learning and behavioral types of these individuals. Special educators can inform entities of the criminal justice about such adaptive characteristics as social vulnerability and gullibility.



### Discussion

This comprehensive analysis synthesized the current research available on individuals with ID and the potential challenges they face within the criminal justice systems. Firstly, the article explored the criteria and definitions of ID that are provided by two nationally recognized sources—AAIDD (2013) and the DSM-IV-TR (APA, 2000). Both sources have definitions and criteria that overlap. That is, for an individual to receive a diagnosis of ID, he or she must meet criteria within the two prongs—deficits in intellectual abilities and deficits in intellectual functioning. The two sources stipulate that these criteria must be met by the age of 18. Secondly, underpinning the adaptive criteria—social, practical, and conceptual skills—are characteristics that can be unidentifiable to many entities within the criminal justice system. Such characteristics include gullibility, social vulnerability, naiveté, cloak of competence, and one's desire to please. The adaptive prong of the dual criteria approach is more suggestive of the affects of intelligence on human functioning in a natural environment (Greenspan, 2006). Therefore, it is critical that entities of the criminal justice system give more precedence to how intellectual abilities, or lack thereof, affects one's ability to function in adaptive skill areas. Likewise, entities of the criminal justice system should know the characteristics of each adaptive skill area; this will give them a better measurement of how intelligence can limit one's adaptive functioning.

Thirdly, the aforementioned deficits underpinning the criterion in the adaptive prong—gullibility, naiveté, suggestibility, cloak of competence, and one's desire to please—can distort results of adaptive behavior scales. Social vulnerability may have been the leading deficit for Daryl Atkins in the *Atkins v. Virginia* (2002) case. While his intellectual functioning suggested ID, it is important to consider how his adaptive behavior deficits and his desire to be accepted

among his peers contributed to his involvement with negative behaviors and criminal activities. His adaptive behavior deficits are powerful indicators for ID. Because Atkins's sentence was commuted to life imprisonment, the ruling set a ball in motion for other criminals on Death Row. Specifically, some individuals on Death Row began to malingering ID; that is they feigned ID in order to escape execution. Blume and Salekin (2013) stated that in a forensic case of life or death malingering would always be an issue. They suggested that even if the malingering process does not arise, prosecutors and people familiar with an individual in question, who is being prosecuted for a capital offense such as murder, might try to paint an illustration of that individual with characteristics that are consistent with an ID diagnosis (Blume & Salekin, 2013). In the *U.S. v. Smith* (2011) case, the judge indicated that she had looked at all information—assessments, records, and interviews—before making her decision on the final opinion of malingering (as cited in Blume & Salekin, 2013). Consequently, adjustments in adaptive behaviors and in the identification of individuals with ID in the criminal justice system have had to build around the notion of malingering; and professional psychologists must look at the reliability of the assessment tool and draw conclusions from multiple sources.

Fourthly, the above-mentioned deficits that underpin adaptive behavior deficits are problematic for individuals with ID during the interrogation and prosecution processes of the criminal justice system. Interrogative tactics present problems for both law enforcement officers and individuals with ID. While the interrogator is hoping to seek confession by using intensive, total control tactics, the individual with ID, because of deficits in adaptive functioning, may inadvertently confess guilt for crimes he or she did not commit.

Finally, collaboration with community, educational, and criminal justice systems can establish an open line of communication that will empower the individual with ID and enable

these systems to be prepared for any future confrontations. Special educators, SROs, and other professional educators are invaluable resources for promoting self-determination skills and empowering an individual with skills that will help them interpret the challenging aspects of the criminal justice system (e.g., understanding Miranda right warnings). Furthermore, it is important for attorneys to understand the vulnerable characteristics of their clients with ID. With appropriate training, education, and programs that enhance awareness about the characteristics of ID, all systems that come in contact with an individual with ID will be better suited to appropriately uphold and protect these persons' rights.

It is optimistic to believe that entities in the criminal justice system will consider how one's intellectual ability affects the characteristics of his or her functional adaptive skills when considering ID as reason for one's choices. Furthermore, the adaptive behavior criteria is a clearer indicator of intellectual deficits, and thus should be given superiority to IQ scores when diagnosis ID. Entities in the criminal justice system should understand and gain knowledge about the implications of adaptive behavior deficits. With enhanced awareness about the impact of ID on one's ability to function in today's society, clinical, educational, and criminal justice professionals can work toward leveling the playing field for individuals with ID in the criminal justice system.

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