

PROTECTING PEOPLE WITH INTELLECTUAL DISABILITY FROM WRONGFUL EXECUTION: GUIDELINES FOR COMPETENT REPRESENTATION

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I. INTRODUCTION

*Atkins v. Virginia*¹ holds that a person with intellectual disability (“ID”) cannot be sentenced to death or executed.² At the time *Atkins* was decided, many lawyers involved in capital defense were not steeped in the nuance of intellectual disability, because in many death penalty states, cognitive limitations were mitigating, but life and death was not determined by which side of the diagnostic line a client fell on. We count ourselves among that number, in part because we practiced

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1. 536 U.S. 304 (2002).

2. *Id.* at 321. The definition of intellectual disability will be discussed in more detail later in this Article. Briefly, however, the definition has three prongs: (1) significantly subaverage intellectual functioning (generally an IQ of approximately 70 or below with a standard error of measurement of 5 points); (2) significant deficits in adaptive functioning; and (3) during the developmental period (generally age eighteen). See AM. ASS’N ON INTELLEGENCE AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5, 12 (11th ed. 2010) [hereinafter AAIDD 2010 MANUAL]; see also *infra* Part II.

primarily in jurisdictions that did not have a pre-*Atkins* bar to the execution of persons with intellectual disability.³

As fate would have it, at the time the Supreme Court granted certiorari in *Atkins*, we were in pre-trial hearings in a South Carolina capital case with a client who had intelligence quotient (“IQ”) scores in the 60s and 70s and had been labeled by various mental health professionals as being “mentally retarded”⁴ or as having “borderline intellectual functioning.”⁵ The South Carolina Supreme Court stayed the proceedings while the United States Supreme Court resolved the issue, and after some additional ancillary litigation about procedures,⁶ we found ourselves preparing for our first *Atkins* hearing. With the assistance of our students, we dove into the clinical literature, talked with experts in the field, and interviewed our client, his teachers, friends, employers, and family members. It was not obvious from the outset that our client was intellectually disabled; some of our students were certain that he was not, based on conversations with him, which they thought showed “street smarts [sic]” inconsistent with their views of how a person with intellectual disability functioned.

The prosecution expert was both uninformed and biased; he testified that our client was not “retarded,” but rather, that his intellectual deficits were the result of him being “just” a poor, uneducated, rural African-American. Fortunately, the judge rejected his unscientific testimony in favor of IQ scores that were clearly inside the intellectual disability range and a wealth of evidence of adaptive functioning deficits.⁷ Looking back on it, we, and especially our client, were extremely fortunate. The judge provided adequate funding, enabling us to secure needed investigative and expert assistance. Perhaps because the judge’s wife had been a special education teacher, he also did not harbor many of the common stereotypes of persons with intellectual disability as we have seen in many cases. And, while our understanding of

3. Prior to the Supreme Court’s decision, some states had legislatively or as a matter of state constitutional law prohibited the execution of persons with intellectual disability. *See Atkins*, 536 U.S. at 313-16.

4. Intellectual disability was previously referred to as “mental retardation.” *See Hall v. Florida*, 134 S. Ct. 1987, 1990 (2014) (citing Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010)).

5. John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 694 (2009).

6. *Franklin v. Maynard*, 588 S.E.2d 604, 606 (2003).

7. *See id.*

intellectual disability was still developing, it was much better than that of our opposing counsel.

In the years since *Atkins*, we have continued to litigate cases where intellectual disability was (and is) at issue. Additionally, we have tracked and documented how the Court's categorical exemption from capital punishment has been implemented in the jurisdictions that retain capital punishment. We have tried to discern why cases (even strong cases) sometime lose.⁸ Our purpose in writing this Article is somewhat different. Here, we attempt to set forth what we have learned about the appropriate "standard of care" in cases where intellectual disability is at issue based on what professionals in the field say, our litigation experiences (and the experiences of many others in the capital defense community), and our empirical research.⁹ We hope this piece will be a useful guide for lawyers in determining whether to pursue a claim of intellectual disability, in seeking resources (including investigators and experts), and in the investigation, development and presentation of a case of intellectual disability.¹⁰

II. IDENTIFYING POTENTIAL *ATKINS* CLAIMS

Because the possibility exists that any capital client is a person with intellectual disability, all attorneys who represent persons on death row or facing the death penalty at trial must be familiar with its legal and diagnostic utility.¹¹ Though the Supreme Court left it to the states to develop procedures for determining whether a capital defendant is intellectually disabled,¹² it has since held that a determination of intellectual disability must be "informed by the medical community's

8. See e.g., John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 400-09 (2014); Blume et al., *supra* note 5, at 704-17; John H. Blume et al., *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625, 631-39 (2009).

9. See *infra* Part II.

10. See *infra* Parts III-IV.

11. See Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), 31 HOFSTRA L. REV. 913, 925 n.16 and accompanying text (2003), https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf [hereinafter *ABA Guidelines*] (the commentary to ABA Guideline 1.1 specifically identifies intellectual disability as a subject that must be included in counsel's pretrial investigation because intellectual disability is a legal bar to imposition of the death penalty); see also *id.* at 1005-11 (the commentary to ABA Guideline 10.5 instructs that counsel should have immediate contact with new capital clients because "they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding").

12. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

diagnostic framework.”¹³ *Atkins* and its progeny have cited two professional organizations for their definitions and established medical standards for diagnosis of intellectual disability: (1) the American Association on Intellectual and Developmental Disabilities (“AAIDD”),¹⁴ previously known as the American Association on Mental Retardation (“AAMR”); and (2) the American Psychiatric Association (“APA”), author of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).¹⁵

The main three criteria for an intellectual disability diagnosis are agreed upon across the medical community and legal jurisdictions.¹⁶ Often referred to as prongs, the three criteria of an intellectual disability diagnosis are:

- (1) Significantly subaverage intellectual functioning;
- (2) Significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and
- (3) Onset of these limitations during the developmental period (generally considered before the age of 18).¹⁷

Though a full discussion of the medical standards for diagnosing intellectual disability is beyond the scope of this Article, a few points are relevant to our discussion.¹⁸

A person meets the significantly subaverage intellectual functioning prong if his or her IQ is approximately 75 or less (approximately two standard deviations below the mean, considering the standard error of measurement).¹⁹ A reliable and accurate assessment of an individual’s

13. *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).

14. *See, e.g., Hall*, 134 S. Ct. at 2003 n.1.

15. *Atkins*, 536 U.S. at 308 n.3; *see also Hall*, 134 S. Ct. at 1998-99. At the time of *Atkins*, the relevant publication from the APA was the Fourth Edition, the DSM-IV-TR. In 2013, the APA released the next edition, the DSM-5. *See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013) [hereinafter DSM-5].

16. *See Atkins*, 536 U.S. at 308 n.3; *see also Hall*, 134 S. Ct. at 1994. For a more detailed overview of the definition of intellectual disability, *see James W. Ellis, Caroline Everington, & Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1305, 1325-29 & nn.97-99, also published in this issue.

17. *See Atkins*, 536 U.S. at 308 n.3; *see also Hall*, 134 S. Ct. at 1994; *infra* note 27 (discussing the age of onset in more detail).

18. For an in depth discussion of diagnosing intellectual disability in death penalty cases according to the medical and clinical standards, *see MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES* (2018); *see also AAIDD 2010 MANUAL, supra* note 2; DSM-5, *supra* note 15.

19. *Atkins*, 536 U.S. at 309 n.5. When evaluating a score obtained on an intelligence test, one must also consider certain factors that can affect test scores including the standard error of

IQ score for purposes of the intellectual functioning prong requires at least one individually administered, comprehensive test of full-scale, global intelligence.²⁰

Adaptive behavior, the focus of the second prong, is defined as “[a] collection of conceptual, social, and practical skills that have been learned [and are performed] by people in . . . their everyday lives.”²¹ Proof of deficits in adaptive behavior requires evidence of significant deficits in one of three types of adaptive behavior—conceptual, social, or practical skills²²—generally identified through interviewing witnesses who knew the individual during the developmental period.

Proof of onset during the developmental period requires evidence that the client’s limitations in intellectual functioning and adaptive deficits began before the age of 18 in most states,²³ as demonstrated by records from the developmental period and witnesses with knowledge of the client during the developmental period. “Evidence” of limitations during the developmental period does *not* mean the client needs to have been diagnosed with intellectual disability, had an IQ test, or received

measurement (“SEM”). As the Supreme Court explained in *Hall v. Florida*:

The SEM reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual’s score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual’s true IQ score lies. . . . Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor.

134 S. Ct. at 1995. Accounting for the SEM, when an individual’s IQ score is 75 or below, the Court must consider the intellectual functioning prong satisfied and review the remaining two prongs of the intellectual disability diagnosis. *Id.* at 1996.

20. DSM-5, *supra* note 15, at 37; AAIDD 2010 MANUAL, *supra* note 2, at 40-41. A variety of other tests—such as short-form IQ tests, Beta tests, screening tests, group-administered tests, and tests of academic achievement or academic aptitude—are sometimes mentioned, and even incorrectly relied upon, by courts and experts in *Atkins* cases. None of these tests measure full-scale, global intelligence. Although it may, in some instances, be relevant and informative to know that a defendant scored poorly on a short-form screening instrument, for example, such a score should never be treated as equivalent to an individually-administered, full-scale measure of intelligence because the test simply does not measure global intelligence. This issue is discussed in more detail in Part II.B.

21. AM. ASS’N ON INTELLEGEENCE ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 41 (10th ed. 2002) [hereinafter AAMR 2002 MANUAL].

22. *See id.* at 41-42.

23. *See* Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 99 (2003). However, Indiana’s statute extends the developmental period to the age of 22. Ind. Code § 35-36-9-2 (2005). Maryland also defined the developmental period as up to age 22, but its statute was repealed in 2013 when Maryland abolished the death penalty. MD. CODE ANN., CRIM. LAW § 2-202(b)(1).

special education services prior to the age of 18.²⁴ There are many reasons why a person who is intellectually disabled may not have been diagnosed as such prior to investigation in a capital case. For example, a client may have been attending schools or other institutions serving lower socioeconomic neighborhoods where the child's need for special education was overlooked or where attaching the "label" of intellectual disability was frowned upon (or in some cases legally prohibited).²⁵ Alternatively, a foreign national "may not have grown up in an environment where standardized intelligence testing was available."²⁶ The AAIDD has specifically identified "[a] number of reasons [that]

24. See Blume et al., *supra* note 5, at 729-30; Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 854-55 (2007). See also, e.g., AAIDD 2010 MANUAL, *supra* note 2, at 27-28 ("[D]isability does not necessarily have to have been *formally identified*, but it must have *originated* during the developmental period . . . the current criterion of 'originates before age 18' leaves open the possibility that when an accurate diagnosis of ID was not made during the developmental period, a retrospective diagnosis may be necessary in some situations . . .") (emphasis added); Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 APPLIED NEUROPSYCHOLOGY 124 (2009) ("Persons can, of course, be properly diagnosed as MR as adults even if no official diagnosis can be found over the ages of birth to 18."); Matthew H. Scullin, *Large State-Level Fluctuations in Mental Retardation Classifications Related to Introduction of Renormed Intelligence Test*, 111 AM. J. MENTAL RETARDATION 322, 331 (2006) ("There is no professionally recognized requirement for a developmental period classification of mental retardation or developmental period IQs in the mental retardation range from childhood to establish mental retardation for these [Supplemental Security Income] benefits."); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 115 (2009) ("It should be noted that 'originated during the developmental period' does not preclude making a first time diagnosis of mental retardation when an individual is an adult.").

25. Bonnie & Gustafson, *supra* note 24, at 855.

26. Blume et al., *supra* note 5, at 729-30. During the 1970s and 1980s, there was also growing concern that African-American and Latino students were over-identified and placed in classes for mentally retarded students and parents of these students filed a lawsuit resulting in a finding that there was bias in the placement of African-American students in mentally handicapped classrooms. See *Larry P. v. Riles*, 793 F.2d 969, 973-77 (9th Cir. 1984). After this period, school districts grew increasingly reluctant to identify African-American and Latino students in mentally retarded or intellectually disabled. See *Brumfield v. Cain*, 808 F.3d 1041, 1062 n.30 (5th Cir. 2015) (describing expert testimony that in the late 1970s, African-American males were disproportionately diagnosed with intellectual disability and schools, psychologists, and appraisal teams were later cautious not to over-represent black males as intellectually disabled, but were urged to consider other alternatives that would avoid labeling them as mentally retarded). For this reason, counsel investigating intellectual disability should fully explore the meaning of labels used by schools that could be euphemisms for, or mislabeling of, intellectual disability (i.e., "student displays a number of specific learning deficits" or "student needs additional individualized attention to assist with learning"). See *infra* notes 39-40.

might explain the lack of an earlier, official diagnosis of mental retardation,²⁷ including:

- the individual was excluded from a full school experience;
- the person's age precluded his/her involvement in specialized services such as special education programs;
- the person was given no diagnosis or a different diagnosis for "political purposes," such as protection from stigma or teasing, avoidance of assertions of discrimination, or related to conclusions about the potential benefits or dangers of a particular diagnosis;
- the school's concern about over-representation for data reporting purposes of specific diagnostic groups within their student population;
- parental concerns about labels;
- contextual school-based issues such as availability or nonavailability of services and potential funding streams at that time; and
- the lack of entry referral into the diagnostic-referral process due to cultural and linguistic differences or for other reasons.²⁸

Counsel, therefore, cannot simply rely on prior diagnoses (or absence thereof) to determine whether to pursue an *Atkins* claim. It is incumbent upon counsel to ascertain for themselves whether there is evidence in the client's history that indicates further investigation into intellectual disability is necessary.

A. *Red Flags for Intellectual Disability*

As counsel investigate any capital case, they must recognize information, or "red flags,"²⁹ indicating they should conduct further investigation into the possibility that their client is a person with intellectual disability. When such flags for intellectual disability are present, counsel is responsible for ensuring their client is evaluated for intellectual disability in the manner discussed in the following sections.³⁰

27. AM. ASS'N ON INTELLEGENCE AND DEVEL. DISABILITIES, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 18 (10th ed. 2007).

28. *Id.*

29. We use the term "red flag," borrowing from the Supreme Court's jurisprudence recognizing that further investigation is necessary when counsel identify "red flags" for mental illness or brain damage, which could be mitigating, in a death penalty case. *See Rompilla v. Beard*, 545 U.S. 374, 391 n.8, 392-93 (2005).

30. *See infra* text accompanying notes 31-90.

Though not an exhaustive list, the following are major indicators that further investigation is warranted.

Prior Diagnosis of, or Assessment for, Intellectual Disability or Mental Retardation: The most obvious red flags are prior diagnoses of intellectual disability (or mental retardation for older clients) noted in records collected in the mitigation investigation.³¹ Prior diagnosis of a client could be made by the school(s) in psychological evaluations or educational assessments, by the Social Security Administration when evaluating for disability benefits, or by any other mental health evaluation.³² Records that identify intellectual disability as a possible diagnosis are also a red flag, even if there is no definitive diagnosis or the diagnosis is instead “borderline intellectual functioning” (i.e., just above the intellectual disability range).

IQ Scores In or Near the Intellectual Disability Range: Even when there is no diagnosis of intellectual disability, a client’s social history records might include historical IQ test scores. IQ scores are often found in school records (from psychological testing for special education, or in an Individualized Education Plan (“IEP”)), other mental health records, employment or military records, or records from prior incarcerations.³³ When a client has an IQ score in or near the intellectual disability range (near or below 75), counsel must investigate intellectual disability further because the scores are evidence the client likely satisfies at least the first prong of an intellectual disability diagnosis.

School Records Demonstrating a Client’s Difficulty in School: School records should be reviewed for additional red flags, even if there is no diagnosis of intellectual disability or IQ score recorded. Any school records indicating the client was in special education (or any non-standard academic classes),³⁴ had an IEP, was diagnosed as disabled by

31. These evaluations can be particularly powerful evidence of intellectual disability given that the diagnosis was made prior to the client’s involvement in a capital crime.

32. TASSÉ & BLUME, *supra* note 18, at 115-16.

33. *Id.*

34. Many school districts, especially in cases with older clients, have referred to alternative education programs like special education as something other than “special education,” including terms like “educable mental handicapped,” “basic level classes,” or “adjunct” classes. *See, e.g.*, State v. Pearson, No. 96-GA-32-3338 (S.C. Ct. Gen. Sess. Dec. 14, 2005) (on file with authors); Bell v. State, No. 2003-CP-04-1857 (S.C. Ct. Common Pleas Nov. 18, 2016) (on file with authors). The defense team’s investigation, therefore, must determine what alternative designations for classes mean in the client’s school records through interviews and review of curriculum where

the school (i.e., had a learning disability or an emotional disability),³⁵ was held back one or more grades in school, was “socially promoted,” did not graduate from high school, or generally had poor grades in school warrant counsel’s further investigation into intellectual disability. Difficulty in school can be an indicator of subaverage intellectual functioning, deficits in conceptual adaptive behavior skills, and onset during the developmental period.³⁶

In reviewing school performance, counsel should avoid any temptation to attribute evidence of poor school performance to something other than intellectual disability before conducting an evaluation for intellectual disability. For example, in reviewing school records, an attorney or investigator might be tempted to blame difficulty in school on the client’s problem behavior and/or truancy. Problem behavior and truancy do not rule out intellectual disability and might in fact be evidence of a person suffering from undiagnosed intellectual disability.³⁷ School can be very frustrating and humiliating for persons with intellectual disability; acting out or not wanting to attend in response is quite understandable. Thus, poor school performance should be taken at its face value when making the initial determination of whether to conduct further investigation.³⁸

Evidence from Other Mitigation Investigation: Mitigation investigation, outside of gathering and reviewing school and psychological evaluation records,³⁹ can also provide red flags for intellectual disability. Mitigation investigation in all capital cases covers a broad spectrum of information regarding the client, including the client’s childhood development.⁴⁰ This investigation may reveal that the

available. See *infra* Part III.B.1-2.a.

35. A child with intellectual disability can also have a learning disability, or may have been misdiagnosed as having a learning disability or an emotional disability to avoid the stigma of a “mental retardation” diagnosis. See DSM-5, *supra* note 15, at 40. Additionally, factors such as the Flynn Effect, which artificially increase IQ scores can cause misdiagnosis of an individual as learning disabled when he or she is actually intellectually disabled. Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 155, 158 (Edward A. Polloway ed., 2015).

36. TASSÉ & BLUME, *supra* note 18, at 115-16.

37. *Bell*, No. 2003-CP-04-1857, at *19.

38. See *infra* notes 116-23 and accompanying text (discussing interpreting school records).

39. In some cases, records will no longer exist or will not include information relevant to intellectual disability. In such cases, interviews of witnesses with information about the client’s life during the developmental period become even more important. See *infra* Part III.B.2.

40. See *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 689 (2008), <https://www.americanbar.org/groups/>

client missed developmental milestones,⁴¹ fell behind other children his or her age,⁴² and/or required supports from family and friends in order to function in everyday life.⁴³ These are all red flags warranting further investigation of intellectual disability. The “multi-generational family history” investigation that is important in every case may also reveal that family members of the client are intellectually disabled,⁴⁴ warranting additional investigation to determine whether the client is also intellectually disabled.⁴⁵

Defense Team Observations: Counsel and investigator observations of their client can also reveal red flags for intellectual disability.⁴⁶ When a client has difficulty understanding things such as the potential consequences of their case, court procedures,⁴⁷ or new rules at the

committees/death_penalty_representation/resources/aba_guidelines.html (Guideline 10.11(B) “The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.”); *see also* ARLENE BOWERS ANDREWS, SOCIAL HISTORY ASSESSMENT 132-36 (2007) (listing relevant childhood developmental history areas to investigate when conducting a social history assessment).

41. DSM-5, *supra* note 15, at 38 (noting that “[d]elayed motor, language, and social milestones may be identifiable within the first [two] years of life among those with more severe intellectual disability”).

42. *See* JAMES C. HARRIS, INTELLECTUAL DISABILITY: UNDERSTANDING ITS DEVELOPMENT, CAUSES, CLASSIFICATION, EVALUATION, AND TREATMENT 53-56 (2006) (noting that children with intellectual disability, especially mild intellectual disability, can keep up with their peers to a certain point, but then start falling behind in their comprehension, problem solving, etc.).

43. Children with mild intellectual disability develop social and communication skills like children without intellectual disability during the pre-school years (ages 0-5) and can acquire academic skills up to approximately the sixth grade level. *See id.* at 53-54. Evidence that a child stopped being able to keep up with his peers on a social, communication, or academic level after the age of five indicates counsel should conduct additional investigation into intellectual disability. *Id.*

44. *ABA Guidelines*, *supra* note 11, at 1025 (“A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of particular impairments.”).

45. AAIDD 2010 MANUAL, *supra* note 2, at 62 (“In particular, relatives who were affected by conditions that may be associated with ID (such as autism) or who were diagnosed with ID should be noted.”).

46. The contrary is not true: counsel’s observations cannot rule out intellectual disability. As discussed below, one cannot identify a person who is intellectually disabled or not simply by observation. *See infra* Part II.B; *see also* Gary N. Siperstein & Melissa A. Collins, *Intellectual Disability*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 21, 28 (Edward A. Polloway ed., 2015) (“The conundrum, both for the courts and for society at large, is that the public may not *perceive* these individuals have disabilities. Indeed, even considering their impaired cognitive and social functioning, the greatest challenge that individuals with mild levels of ID face is their own invisibility.”).

47. A client’s difficulty understanding the consequences of his or her case or the court procedures need not be so profound as to warrant a finding that the client is incompetent to stand

detention center or has difficulty communicating with counsel, the judge, or law enforcement, counsel must take steps to determine the source of these difficulties, which could be intellectual disability, a mental health disorder, both, or some other explanation relevant to the case.

*B. Evidence that Should Not Deter
Further Investigation of Intellectual Disability*

When counsel identify red flags for intellectual disability, they must not be deterred from conducting a full investigation based on misconceptions or other evidence they think rules out intellectual disability. This is especially so because most *Atkins* cases involve individuals “who have . . . mild deficits in intellectual functioning and/or adaptive behavior rather than individuals with more severe forms of the disability.”⁴⁸ Mild intellectual disability is challenging to identify and diagnose because persons falling in this category almost always have significant relative strengths and abilities and greater masking skills that could lead inexperienced counsel to erroneously believe their client is not a person with intellectual disability.⁴⁹ Thus, counsel must conduct a full investigation of intellectual disability, including a qualified expert evaluation,⁵⁰ regardless of seemingly contrary evidence. Counsel must recognize the following types of evidence cannot end the intellectual disability investigation.

Higher IQ Scores: When a client has IQ scores in, or near, the intellectual disability range, counsel should proceed with an intellectual disability investigation even when the client has additional scores above the intellectual disability range. Many courts have found an individual intellectually disabled despite having IQ scores over 75 or even 80.⁵¹

trial in order to alert counsel to the need for an intellectual disability investigation. I. Bruce Frumkin, *Challenging Expert Testimony on Intelligence and Mental Retardation*, 34 J. PSYCHIATRY & L. 51, 55-56 (2006).

[Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Atkins v. Virginia, 536 U.S. 304, 318 (2002).

48. TASSÉ & BLUME, *supra* note 18, at 144-45.

49. *Id.*

50. *See infra* Part III.

51. *See, e.g., Pruitt v. Neal*, 788 F.3d 248, 253-54, 270 (7th Cir. 2015) (finding Pruitt

There often is reason to question the reliability of higher IQ scores.⁵² For example, higher IQ scores may have resulted from scoring error(s) during administration of the test (which a retained intellectual disability expert can identify), testing examiner bias, recent administration of another IQ test (i.e., practice effect), or simply be an outlier score that does not accurately reflect the individual's intellectual functioning.⁵³ It is simply not true, as some prosecution experts have testified, that the highest IQ score is more reliable than the low(er) IQ scores or is the individual's true IQ.

Higher IQ scores are also common, but unreliable, when the individual was not tested with an individualized "gold standard" IQ test. In particular, unreliable higher scores can result from school-age testing that was group administered or used "short form" or brief screening tests, which are not clinically reliable and/or do not test general intellectual functioning.⁵⁴ The clinical literature is clear that only global measures of intelligence are acceptable for making a diagnosis of intellectual disability.⁵⁵ Group administered tests, by contrast, do not

intellectually disabled with reported IQ scores of 52, 76, and 93); *United States v. Wilson*, 170 F. Supp. 3d 347, 363, 392 (E.D.N.Y. 2016) (finding Wilson intellectually disabled with reported IQ scores of 84, 78, 78, 70, 80, 84, 76, and 80); *Branch v. Epps*, 844 F. Supp. 2d 762, 772-73 (N.D. Miss. 2011) (finding Branch intellectually disabled with reported IQ scores of 68, 84, 68, and 60); *People v. Superior Court*, 155 P.3d 259, 261, 267-68 (Cal. 2007) (finding Jorge Vidal intellectually disabled with reported IQ scores of 81, 92, 78, and 77); *Hall v. State*, 201 So. 3d 628, 632-34, 638 (Fla. 2016) (finding Hall was intellectually disabled with reported IQ scores of 73, 71, 76, 79, 80, 60, 74, 69, 52, 71, and 72); *Pennsylvania v. Gibson*, 925 A.2d 167, 170-71 (Pa. 2007) (finding Gibson intellectually disabled with reported IQ scores of 67, 81, and 74); *see also Nixon v. State*, No. SC15-2309, 2017 WL 462148, at *1 (Fla. Feb. 3, 2017) (finding an IQ score of 80 is not dispositive of a finding of significantly subaverage intellectual functioning).

52. Additionally, the fact that a client has a higher IQ score early in the developmental period does not rule out the possibility that he or she may have lower IQ scores (in the intellectual disability range) later in the developmental period. The diagnostic criteria only require that evidence of significantly subaverage intellectual functioning to occur *sometime* within the developmental period. *See AAIDD 2010 MANUAL*, *supra* note 2, at 6-7. While IQ is generally stable over time, it is not that unusual for scores to drop in the developmental period as test items become more complex. *See Bonnie & Gustafson*, *supra* note 24, at 854-85 (noting that courts should regard tests administered late in, or after, the developmental period with high regard).

53. *See, e.g., Wiley v. Epps*, 625 F.3d 199, 214-16, 222 (5th Cir. 2010) (finding Wiley intellectually disabled despite IQ scores of 80 and 78, noting those scores were "outliers" in that they did not fit with the overall pattern of scores obtained across Wiley's range of testing); *Hughes v. Epps*, 694 F. Supp. 2d 533, 544 (N.D. Miss. 2010) (finding Hughes intellectually disabled, discounting an outlier score of 81 because it could not be substantiated with raw data and other reported scores of 72, 67, 64, and 63).

54. *See Dale G. Watson, Intelligence Testing, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 113, 130 (Edward A. Polloway ed., 2015).

55. Gilbert S. MacVaugh, III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 144 (2009) [hereinafter *Implications*] (citing other sources); *see also AAIDD 2010 MANUAL*, *supra* note 2, at 41 ("For

produce valid measures of full-scale, global intelligence.⁵⁶ Rather, they are (generally) pencil-and-paper, multiple-choice tests that are typically “self-administered,” meaning the test-taker works through a test booklet without any interaction with the test administrator, who is not required to have any professional training.⁵⁷ This makes group tests fast, easy, and cost-efficient to administer, but presents a number of disadvantages. For example, the group test setting makes it impossible to collect any qualitative data because the tests “simply provide[] data on the number of questions answered correctly. . . . Generally, it is impossible to determine with any precision why a person chose a particular (correct or incorrect) response to any given question on a multiple-choice group test.”⁵⁸ Moreover, multiple-choice questions use “different psychological processes than the open-ended questions typically used in individual testing, and many critics suggest that the functions measured by multiple-choice questions have little to do with intelligence.”⁵⁹ In a group-test setting, there is also “the additional risk that the individual received additional help or copied the responses of others.”⁶⁰

Similarly, high scores often erroneously result from prison screening tests, such as Beta tests,⁶¹ which do not provide an accurate measure of general intellectual functioning.⁶² In addition to these

evaluating whether or not a person meets the significant limitations intellectual functioning criterion for a diagnosis of intellectual disability, one should employ an individually administered, standardized instrument that yields a measure of general intellectual functioning.”); DSM-5, *supra* note 15, at 37 (“Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.”).

56. DSM-5, *supra* note 15, at 37 (“Invalid scores may result from the use of brief intelligence screening tests or group tests.”); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM & MARY BILL RTS. J. 467, 474 (2014) (“A commonly observed error is the reliance on screening or group-administered intelligence tests that do not provide accurate measure of IQ.”); *see also* Denis Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998) (“[G]roup-administered IQ tests . . . are inadequate tests to diagnose mental retardation.”).

57. *See* Alan S. Kaufman, *Tests of Intelligence*, in HANDBOOK OF INTELLIGENCE 449-50 (Robert J. Sternberg ed., 2000); John Fremer, *Group Tests*, in 1 *Encyclopedia of Human Intelligence* 508, 508-11 (Robert J. Sternberg ed., 1994).

58. PSYCHOLOGICAL TESTING: PRINCIPLES AND APPLICATIONS 289 (Kevin R. Murphy & Charles O. Davidshofer eds., 2005).

59. *Id.*

60. Everington, *supra* note 56, at 474.

61. *See, e.g.*, *Porterfield v. State*, No. W2012-00753-CCA-R3-PD, 2013 WL 3193420, at *23-24, *27 (Tenn. Crim. App. June 20, 2013) (declining to rely on a Beta test because it was group administered).

62. Watson, *supra* note 54, at 130; *Implications*, *supra* note 55, at 131-87. For further discussion of testing that is not appropriate for determining intellectual functioning for the purposes

examples, there are many other tests that masquerade as—or have incorrectly been interpreted by courts as—IQ tests when the tests were not designed to provide an IQ score.⁶³ We cannot over-emphasize the point that *only* individually administered, full-scale IQ tests like the Wechsler Scales and the Stanford-Binet Intelligence Scales have been identified as “gold standard” measures for accurately and reliably determining global intelligence.⁶⁴

Test scores may also be artificially inflated due to scoring and/or arithmetic errors, the use of outdated versions of IQ tests or when in the life cycle of a particular IQ test it is given to a client (the norms used to determine IQ age over time, which is often referred to as the “Flynn

of an intellectual disability diagnosis, see Watson, *supra* note 54, at 130-31; see also TASSÉ & BLUME, *supra* note 18, at 88-89.

63. For example, The Lorge-Thorndike Intelligence Test, subsequently renamed as the Cognitive Abilities Test (“CogAT”), was not designed to be used as an IQ test; instead it was intended to be used as a measure of academic aptitude, provide vocational guidance, assist with curriculum selection, and the like. Gilbert Sax, *The Lorge-Thorndike Intelligence Tests/Cognitive Abilities Test*, in 1 TEST CRITIQUES 421, 428-29, 431 (Daniel J. Keyser and Richard C. Sweetland eds., 1985). Similarly, the Otis Intelligence Scales were “designed primarily to assess the pupil’s current readiness for school-oriented learning or to predict his likelihood of future success in dealing with the types of tasks encountered in his academic work.” ARTHUR S. OTIS & ROGER T. LENNON, OTIS LENNON MENTAL ABILITY TEST 4 (1967). Examples of other tests that are likewise *not* reliable measures of full-scale IQ are the Kaufman Brief Intelligence Test, Slosson Intelligence Test, Beta tests, Culture Fair Intelligence Test, Test on Nonverbal Intelligence (“TONI”), Comprehensive Test of Nonverbal Intelligence (“C-TONI”), General Ability Measure for Adults, Raven’s Progressive Matrices, and Peabody Picture Vocabulary Test. See Watson, *supra* note 54, at 130-31; *Implications*, *supra* note 55, at 144-45. This list is not exhaustive.

64. See, e.g., Rivera v. Quarterman, 505 F.3d 349, 361 (5th Cir. 2007) (“Rivera scored a 68 on the Wechsler Adult Intelligence Scales (WAIS-III) IQ test, a test which both parties agree is the best full-scale IQ test available in English.”); United States v. Roland, No. 12-0298 (ES), 2017 U.S. Dist. LEXIS 207018, at *75 (D.N.J. Dec. 18, 2017) (“Expert witnesses for both Roland and the Government described the Wechsler Adult Intelligence Scale, Fourth Edition as the ‘gold standard’ in intelligence testing.”); United States v. Williams, 1 F. Supp. 3d 1124, 1148 n.23 (D. Haw. Mar. 6, 2014) (accepting the Stanford-Binet as “an appropriate instrument for assessing intellectual functioning, which the court accepts as similar to a WAIS instrument”); United States v. Montgomery, No. 2:11-cr-20044-JPM-1, 2014 U.S. Dist. LEXIS 57689, at *79 (W.D. Tenn. Jan. 28, 2014) (“Expert witnesses for both Defendant and the Government described the Wechsler family of IQ tests . . . as the ‘gold standard’ in intelligence testing. Federal courts typically rely on Wechsler IQ test scores in making prong-one determinations.” (citation omitted)); United States v. Wilson, 922 F. Supp. 2d 334, 365 (E.D.N.Y. Feb. 7, 2013) (citing AAIDD 2010 MANUAL, *supra* note 2) (“Dr. James . . . had the opportunity to administer the WAIS-IV—the ‘gold standard’ of IQ tests.” (citations omitted)); United States v. Smith, 790 F. Supp. 2d 482, 491 (E.D. La. 2011) (“Psychologists use IQ testing to measure intelligence and the WAIS-III is a gold standard for this testing.” (citations omitted)); Wiley v. Epps, 668 F. Supp. 2d 848, 895 (N.D. Miss. 2009) (“Both the WAIS and SB meet the ‘gold standard’ measure for use in *Atkins*-related hearings.” (citations omitted)); Pruitt v. State, 903 N.E.2d 899, 914 n.11 (Ind. 2009) (“Dr. Olvera testified that the Stanford-Binet IQ test, along with the WAIS, are considered the ‘gold standard’ among IQ tests. Dr. Hudson also testified that the Stanford-Binet test is ‘reliable, well accepted.’” (citations omitted)).

Effect”),⁶⁵ or the individual having taken the same, or a similar, test within a short period of time (the “Practice Effect”).⁶⁶ Given the multitude of factors that could result in an inaccurate IQ score, counsel should not abandon an intellectual disability investigation based on a score or scores that appear to be outside the range. In short, the defense team must rigorously examine all test scores in the client’s records, determine what the test actually measures, whether the result is relevant to an intellectual disability assessment, whether the test was properly administered and scored, and whether there are any issues regarding interpretation of the score.

Prior Evaluations with No Diagnosis of Intellectual Disability:

Counsel should not be deterred from investigating intellectual disability based on prior evaluations of a client that did not result in an intellectual disability diagnosis or affirmatively rule out intellectual disability.⁶⁷ Rather, where there is a current indication a client may be intellectually disabled, counsel should investigate whether there is reason to doubt prior evaluations, such as the prior evaluation being based on outdated medical/clinical standards,⁶⁸ the prior evaluator not conducting a full, clinically appropriate intellectual disability evaluation,⁶⁹ the prior evaluator relying on improper or mis-scored IQ tests,⁷⁰ examiner bias or

65. *Implications*, *supra* note 55, at 144-51. The Flynn Effect, named for the researcher who discovered it (James Flynn) recognizes that IQ scores among the general population increase over time, resulting in “overly high scores due to out-of-date test norms.” DSM-5, *supra* note 15, at 37; *see also* AAIDD 2010 MANUAL, *supra* note 2, at 37 (“[B]est practices require recognition of a potential Flynn Effect when older editions . . . of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score.”).

66. “The *practice effect* refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument.” AAIDD 2010 MANUAL, *supra* note 2, at 38; *see also* DSM-5, *supra* note 15 (recognizing the practice effect may affect test scores).

67. *See, e.g.*, *Brumfield v. Cain*, 808 F.3d 1041, 1066 (5th Cir. 2015) (finding *Brumfield*’s expert provided “a compelling reason not to draw a negative inference due to the lack of childhood diagnosis by explaining the political incentives in place at the time *Brumfield* was in school” (internal quotation marks omitted)).

68. *See Moore v. Texas*, 137 S. Ct. 1039, 1048-49 (2017) (requiring courts’ *Atkins* determinations be informed by current medical standards).

69. This can often be determined by reviewing the referral question provided to the prior expert and reviewing the evidence considered by a prior expert to determine if the expert evaluated intellectual functioning and adaptive behavior or was merely commenting on an IQ score and by interviewing the prior expert. *See Simmons v. State*, No. 05-CP-18-1368 (S.C. Ct. Common Pleas Jan. 22, 2014) (on file with authors) (recognizing prior experts did not conduct a reliable assessment of mental retardation because they did not complete a standardize measure of adaptive behavior and failed to interview lay witnesses about *Simmons*’ adaptive functioning or learn about the level of classes available at *Simmons*’ school).

70. *See Implications*, *supra* note 55, at 131-87 (2009).

inexperience with evaluating persons with intellectual disability. A typical example of this phenomenon often appears in cases where the prosecution argues there was no indication of intellectual disability during a competency evaluation.⁷¹ In addition to evaluations for competency and intellectual disability considering two entirely different questions, as discussed below, most forensic psychologists (including those who typically conduct competency evaluations) do not have adequate training to make an intellectual disability diagnosis.⁷²

Adaptive Strengths: “Individuals with [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior.”⁷³ As the Supreme Court recognized in *Moore v. Texas*: “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.”⁷⁴ The Court went on to criticize the lower court for relying on Moore’s perceived strengths, including that he lived on the streets, mowed lawns, and played pool for money,⁷⁵ to the exclusion of evidence of Moore’s adaptive deficits.⁷⁶ As the AAIDD explicitly states, “in the process of diagnosing ID, significant limitations in conceptual, social, or practical skills is not outweighed by the potential strengths in some adaptive skills.”⁷⁷ Therefore, counsel must investigate for deficits in adaptive behavior even when investigation identifies evidence of adaptive strengths as well.

Stereotypes & Misconceptions: Counsel must be vigilant to avoid letting their own stereotypes or misconceptions about what it means to be a person with intellectual disability deter an evaluation of the client when red flags are present. Contrary to what some believe, there are no distinguishing facial or physical features of intellectual disability;⁷⁸ most persons with intellectual disability do not look any different than a client

71. See, e.g., *In re Henry*, 757 F.3d 1151, 1155-56 (11th Cir. 2014) (noting the psychiatrists who examined Henry for competency found no intellectual disability).

72. See *infra* note 102-04 and accompanying text.

73. AAIDD 2010 MANUAL, *supra* note 2, at 47; see also DSM-5, *supra* note 15, at 33, 37-38 (focusing on adaptive *deficits* in describing the assessment of the adaptive functioning prong of an intellectual disability diagnosis).

74. *Moore*, 137 S. Ct. at 1050.

75. *Id.* Many of the “strengths” relied on by the Court also demonstrate a misunderstanding of what a person with intellectual disability can do. Such misconceptions are discussed in the next section. See *infra* notes 78-92 and accompanying text.

76. *Moore*, 137 S. Ct. at 1050.

77. AAIDD 2010 MANUAL, *supra* note 2, at 47.

78. See TASSÉ & BLUME, *supra* note 18, at 7.

without intellectual disability. Similarly, there are no particular personality characteristics or behaviors counsel could expect to recognize in an intellectually disabled client.⁷⁹ Contrary to some misconceptions, many people with intellectual disability do not talk differently than people with “normal” IQ scores. Nor is their language necessarily limited to simple words, and they do not drool, or for the most part, have poor hygiene.⁸⁰ This is especially true with individuals with mild intellectual disability who often excel at masking their deficits.⁸¹

Other misconceptions about what a person with intellectual disability can accomplish must also be confronted. Contrary to many lay persons’ misconceptions, a person with intellectual disability can learn to read,⁸² learn to drive and acquire a driver’s license,⁸³ graduate from high school,⁸⁴ attend post-secondary school,⁸⁵ have and use a bank account or credit card,⁸⁶ hold a basic job,⁸⁷ live independently,⁸⁸ serve in

79. *Id.* at 7-8.

80. *See id.* at 8.

81. *See infra* notes 145-51 and accompanying text.

82. HARRIS, *supra* note 42, at 54.

83. A study of post-high school outcomes for young adults reported 39.2% of young adults with intellectual disability interviewed had a driver’s license or learner’s permit. LYNN NEWMAN ET AL., POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 8 YEARS AFTER HIGH SCHOOL: A REPORT FROM THE NATIONAL LONGITUDINAL TRANSITION STUDY-2 (NLTS2) 136-27 (2011) [hereinafter Newman, *Post-High School Outcomes*]. The study is also available online at <https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf>.

84. Off. of Special Educ. & Rehabilitative Servs., Off. of Special Educ. Programs, *30th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act – 2008*, U.S. DEP’T. OF EDUC., 65-66 (2011), <https://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/index.html#download>.

85. According to a U.S. Department of Education study, thirty-seven percent (37%) of students with intellectual disability graduated from high school with a regular high school diploma. *Id.* A study of post-high school outcomes for young adults 28.7% of young adults with intellectual disability had attended some post-secondary schooling and 16.4% attended a vocational, business, or technical school within eight years of leaving high school. Newman, *Post-High School Outcomes*, *supra* note 83, at 19.

86. Most young adults with intellectual disability reported some level of financial independence when interviewed eight years after high school. 42% had savings accounts, 29% had checking accounts, and 19.4% had credit cards. *Id.* at 123.

87. Eight years out of high school, 38.8% of intellectually disabled adults interviewed reported being employed at the time and 76.2% reported being employed at some point after high school. *Id.* at 55. Employment reported included food service, sales and related occupations, office and administrative support, construction and extraction, transportation and material moving, building, grounds cleaning and maintenance, and production. *Id.* at 64.

88. Thirty-six percent of intellectually disabled individuals interviewed reported living independently eight years after high school. *Id.* at 114.

the military,⁸⁹ and be attracted to, and in a relationship with or married to, another person and have children.⁹⁰

In short, counsel must avoid the misconception that a person can “look” intellectually disabled or that counsel would be able to recognize intellectual disability when they see it. Because intellectual disability exempts an individual from the death penalty,⁹¹ a capital defendant’s attorney has a responsibility to fully investigate intellectual disability whenever there are indications the defendant may be intellectually disabled, even when some apparent (or real) contradicting evidence exists.⁹²

III. INVESTIGATING & EVALUATING AN *ATKINS* CASE

Once a potential *Atkins* claim has been identified, the capital defense team must thoroughly investigate and evaluate the defendant for intellectual disability. The following Subpart provides steps for assembling a team to conduct the investigation and evaluation, investigating for evidence of intellectual disability, and obtaining an expert evaluation of the client’s intellectual disability.

A. Step 1: Assemble the Team

As with any capital case, a team is necessary to investigate and litigate a case involving an *Atkins* claim. Any capital defense team “should consist of no fewer than two attorneys . . . an investigator, and a mitigation specialist.”⁹³ At least one of these team members should have enough familiarity with intellectual disability to spot red flags as discussed above.⁹⁴ An intellectual disability evaluation will also require the assistance of qualified experts to conduct an evaluation according to the current clinical standards.⁹⁵

89. *Id.* at 62-64.

90. Eight years out of high school, 25.3% of intellectually disabled individuals interviewed reported having had or fathered a child and 10.5% reported being married. *Id.* at 118. Over 58% of intellectually disabled individuals interviewed reported seeing friends outside of school or work at least weekly. *Id.* at 131.

91. See TASSÉ & BLUME, *supra* note 18, at 42.

92. See *infra* Part III.

93. *ABA Guidelines*, *supra* note 11, at 952 (explaining Guideline 4.1(A)(1)).

94. See *supra* Part II; see also *ABA Guidelines*, *supra* note 11, at 952 (explaining Guideline 4.1(A)(2): “The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.”).

95. See TASSÉ & BLUME, *supra* note 18, at 143-44.

In addition to jurisdiction-specific capital defense qualifications, attorneys handling a capital case involving an *Atkins* claim must become familiar with the Supreme Court cases interpreting *Atkins*, their jurisdiction's legal definition of intellectual disability (either by statute or caselaw) and caselaw interpreting that definition, and the current medical standards for evaluation of intellectual disability.⁹⁶ Defense counsel cannot rely solely on their experts and investigators to conduct a clinically compliant evaluation for intellectual disability. Because defense counsel, especially lead counsel, “bear[] overall responsibility for the performance of the defense team”⁹⁷ and are the ones to present the *Atkins* claim to courts,⁹⁸ counsel must become educated in relevant legal and medical/clinical standards surrounding intellectual disability.

Counsel should ensure the investigator or mitigation specialist hired to investigate intellectual disability is also familiar with the current medical standards and has experience investigating evidence of intellectual disability. As discussed in “Step 2” below, investigating intellectual disability requires collection of records specifically related to the client's intellectual and adaptive abilities and witness interviews designed to elicit individuals' recollection of the same.⁹⁹ Even an experienced mitigation specialist may not uncover the most compelling evidence of intellectual disability if they do not have training and experience in interviewing for such information.

To prevail in an *Atkins* case, counsel must also obtain an expert evaluation and diagnosis of intellectual disability. Despite the need for an expert evaluation, counsel should not retain a mental health expert to conduct an *Atkins* evaluation at the first sign their client may be intellectually disabled. Instead, counsel should conduct an investigation with an experienced investigator, develop evidence of intellectual disability, and consult with someone with expertise in *Atkins* cases prior to hiring an evaluating mental health professional. Conducting this preliminary investigation will allow the defense team to provide their evaluating expert with the most complete picture of intellectual

96. See *Moore v. Texas*, 137 S. Ct. 1039, 1049-50 (2017) (requiring an *Atkins* evaluation be informed by “current medical standards”); *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014) (same). For a more detailed discussion of these cases, see TASSÉ & BLUME, *supra* note 18, at 37-54.

97. *ABA Guidelines*, *supra* note 11, at 999 (explaining guideline rule 10.4(B)).

98. See *infra* Part IV.

99. See *infra* Part III.B.1; see also *infra* Part III.B.2.a.

disability¹⁰⁰ and will allow counsel to identify any particular expertise needed in their specific case.¹⁰¹

Forensic psychologists, neuropsychologists, and psychiatrists—even those who have substantial capital experience—often “lack necessary training, professional experience, and clinical judgement required to make a . . . reliable intellectual disability determination.”¹⁰² Counsel must, therefore, select an expert with care, ensuring the expert has “extensive professional experience working with individuals with intellectual disability . . . specifically with individuals in the ‘mild range’ of intellectual disability.”¹⁰³ No specific board certification exists for intellectual disability, but an expert in intellectual disability “may demonstrate a professional commitment to staying abreast of the field of intellectual disability by attending and/or participating at professional meetings in intellectual disability,”¹⁰⁴ or by being a member of “professional organizations such as the American Psychological Association (specifically Division 33: Intellectual and Developmental Disabilities/Autism Spectrum Disorder) and/or the American Association on Intellectual and Developmental Disabilities.”¹⁰⁵

Experts retained must also be experienced in administering standardized intelligence and adaptive behavior testing. Additionally, given that *Atkins* evaluations must be conducted retrospectively—because the client charged with a capital crime is necessarily over the age of 18 at the time of the evaluation¹⁰⁶ but intellectual and adaptive

100. *C.f.* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 974-75 (2008) (“As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete.”).

101. For example, a case involving significant special education records could benefit from an expert with knowledge and experience in the evaluation and support of children with intellectual disability. On the contrary, a case with no special education records and no childhood evaluations for intellectual disability could benefit from an expert in evaluating adults for intellectual disability.

102. TASSÉ & BLUME, *supra* note 18, at 144.

103. *Id.* (citing J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 APPLIED NEUROPSYCHOLOGY 135-39 (2009)). Expertise in mild intellectual disability is necessary because individuals in the mild range of intellectual disability “will have any number of strengths and areas of ability . . . and these strengths may confound a layperson or a mental health professional with limited clinical experience with this clinical population.” *Id.* at 145.

104. *Id.* at 150.

105. *Id.*

106. *See Roper v. Simmons*, 543 U.S. 551, 578, 623 (2005) (barring the death penalty for individuals under the age of eighteen at the time of the capital offense); *see also United States v. Hardy*, 762 F. Supp. 2d 849, 881 (E.D. La. 2010) (“As those under the age of 18 are already constitutionally ineligible for the death penalty, no clinician evaluating a person for purposes of an *Atkins* hearing will ever be evaluating the person prior to age 18. Mental retardation in the *Atkins*

deficits must generally be identified prior to the age of 18¹⁰⁷—counsel should identify an expert with experience in conducting retrospective assessments. An expert with experience and training in conducting all the required testing and a retroactive assessment may be difficult to find and counsel will often, if not always, need to “secure the services of more than one mental health professional in order to obtain complementary skills and competence”¹⁰⁸ to complete an evaluation and prove an *Atkins* claim.¹⁰⁹

Finally, in cases involving a client (or client’s family) from a country outside of the United States, counsel must assemble a culturally competent team.¹¹⁰ Cultural competence is also critical when the client is a member of a minority racial, ethnic, or religious group. Though it is well settled that “[i]ntellectual disability occurs in all races and cultures,”¹¹¹ courts often deny intellectual disability claims based on a misunderstanding of cultural differences.¹¹² Thus, in an *Atkins* evaluation, “[c]ultural sensitivity and knowledge are needed during an assessment, and the individual’s ethnic, cultural, and linguistic background, available experience, and adaptive functioning within [the client’s] community and cultural setting must be taken into account.”¹¹³ Counsel must, therefore, assemble a team of attorneys, investigators, and

context must therefore be diagnosed, if it is to be diagnosed at all, retrospectively in every sense of the word.” (citing *Roper*, 543 U.S.)).

107. See *supra* note 23-24 and accompanying text.

108. TASSÉ & BLUME, *supra* note 18, at 144. As discussed *infra* Part IV, counsel should also consider retaining a teaching expert to educate the decision-maker on the medical standards for evaluating intellectual disability who has not rendered a diagnosis of the client.

109. See *infra* Part IV (discussing use of experts in presenting an *Atkins* claim in court). We are not unmindful of the fact that in some jurisdictions counsel may have difficulty securing funding for multiple experts. But, we strongly believe that more than one expert is essential to competent representation and thus requests should be made and strongly advocated for.

110. Christopher Seeds & Scharlette Holdmann, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008).

111. DSM-5, *supra* note 15, at 39.

112. See, e.g., *Maldonado v. Thaler*, 625 F.3d 229, 234, 238 (5th Cir. 2010) (The State’s expert used an unqualified translator to administer the English version of the WAIS and then made upward adjustments to both IQ and DAF based on “cultural and educational factors.”); *State v. Escalante-Orozco*, 386 P.3d 798, 835-36 (Ariz. 2017) (finding no adaptive deficits because the defendant was raised in an extremely poor family in Mexico, but was able to keep himself clean, care for chickens, ducks, pigs, and other farm animals, move to another city at the age of fifteen, and work at an assembly plant); *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *10 (Tex. Crim. App. May 5, 2010) (The State’s expert adjusted IQ scores upward because “Hispanic test subjects historically score 7.5 points lower on IQ tests than Caucasian subjects . . . [due to] culture and influence”); *State v. Were*, 890 N.E.2d 263, 275-76 (Ohio 2008) (rejecting defendant’s IQ score of 69 as unreliable based on expert testimony that cultural bias tends to depress the IQ scores of minorities).

113. DSM-5, *supra* note 15, at 39.

experts able to effectively communicate with the client and his or her family and develop an understanding of the client's culture.¹¹⁴

B. Step 2: Investigating an Atkins Claim

1. Record Collection

As with any capital case investigation, investigating intellectual disability requires collection and interpretation of records.¹¹⁵ Pre-offense records relating to the defendant are necessary (and particularly powerful) in the *Atkins* context because they were created prior to the capital offense. In every case with the possibility of an *Atkins* claim, the defense team should seek to obtain all records relating to the client, including birth records, medical records, school records, juvenile justice records, driving records, employment records (including a Social Security insurance earnings report), military records, social service records, photographs from birth through adulthood, and records related to the community and school environment.

Educational records are of utmost importance¹¹⁶ as they provide a roadmap for how the client performed in school and can contain prior psychological evaluations.¹¹⁷ Though school records may seem straightforward, understanding their meaning requires sophistication and familiarity with educational records. Often, investigation is necessary to accurately assess the client's academic performance.¹¹⁸ To understand and interpret school records, it is often necessary to find a person who is familiar with the school district at the time a client attended the school, even if the witness did not have direct interaction with the client—this can be a teacher, counselor, psychologist, principal, superintendent, or

114. For more on assessment of non-native English speaking, racial minority, and foreign national clients, see *infra* Part III.C.1.b.2.

115. John H. Blume & Karen L. Salekin, *Analysis of Atkins Cases*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 37, 42 (Edward A. Polloway ed., 2015).

116. Given their importance, the defense team must make (and document) every effort to obtain school records, even when the school initially indicates the records have been destroyed. Experience teaches that assertions (even strong ones) that records have been destroyed are incorrect. Thus, counsel should be persistent in demanding the school conduct a thorough search for the records. This often requires that someone on the team go to the location where the records are kept. Additionally, some schools keep their special education records separately from their general educational records and the defense team must ensure they request all educational records, including special education records, from the appropriate entities.

117. See James R. Patton, *Educational Records*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 293, 293-304 (Edward A. Polloway ed., 2015).

118. *Id.* at 293.

another type of person familiar with the school. Such persons are often able to provide critical insight into school demographics, how to read that school's records, the division of students into class levels, how class assignments were made, what the school attitude was toward special education and assessing children for intellectual disability, and other information relevant to a client's experience at school.

Experience has taught us that the true meaning of grades and test scores can only be understood once it is determined what the grades represent and how they were obtained.¹¹⁹ For example:

[A] grade for a class might be equally divided across attendance, homework completion, and performance on various classroom tests. As a result, a student might obtain an acceptable, passing grade based on the fact that the student attends class regularly and turns in homework on time—and sometimes the homework might be a copy of the work of someone else (e.g., friend or relative) or completed in part by a parent or sibling.¹²⁰

Similarly, it is essential to determine what types of topics and skills were taught in a class. Classes attended by clients with intellectual disability may have been lower level classes, teaching vocational or life skills or remedial versions of subjects typically taught to other students the client's age.¹²¹ Furthermore, they are often graded based on attendance and effort, rather than performance.¹²² This information necessarily affects the interpretation of, and weight given to, grades obtained in such classes.

Standardized testing also requires additional information in order to interpret the scores' meaning. The defense team should determine the environment in which the test was given, if the student was given any accommodations in order to complete the testing, or if the student was exempted from any or all of the testing due to his or her disabilities.¹²³

Employment records similarly require additional information to interpret their true meaning. On their face, employment records may appear to demonstrate that a client was able to obtain and maintain a job, indicating a lack of adaptive deficits in that area. However, the defense team must conduct additional investigation to understand what the client actually did and what his or her responsibilities were. This investigation

119. *Id.* at 296.

120. *Id.*

121. *Id.* at 296-98.

122. *Id.* at 296.

123. *Id.* at 298-99.

can provide information about whether the client was able to accomplish the assigned tasks, whether the tasks were simple or complex, and what kind of supervision and supports the client had.¹²⁴ The team should also investigate how the client obtained the job (often through the help or direction of others), how the client was able to get to and from the job, what skills were required of the client to complete a job (often simple tasks with direction given from supervisors), and what performance evaluations were based on. Only then can the true meaning of the employment records be gleaned.

For all records relating to the client, the defense team must identify and present the true context in which they can be understood. This requires interviewing witnesses who created, or have familiarity with, the records.¹²⁵

2. Witness Interviews

a. Types of Witnesses to Interview

All competent social history investigations require a large number of witness interviews,¹²⁶ but capital cases where intellectual disability is at issue may win the prize for requiring the most. Because of the nature of the intellectual disability inquiry, it is essential that counsel locate and interview as many witnesses as possible who knew and interacted closely with the client over his lifetime, during different periods of time, across various communities and functional domains (social settings, work settings, academic settings, and so on), and in such a way that the witness has credible, reliable and detailed memories to offer about the client's life history, development and/or adaptive functioning.¹²⁷ No single witness can provide the necessary evidence for an adequate *Atkins* investigation. Each piece of evidence collected from one witness should be corroborated by information collected from others and, whenever

124. For example, in *Bell v. State*, trial testimony suggested Bell was learning the heating and air conditioning business. However, further investigation revealed he worked directly for the owner of the company completing "very basic tasks, including cleaning up, using a screwdriver to tighten bolts, and assist [his boss] by bringing tools or parts to him." The employer stated Bell could not have done more complex tasks and would not have been able to do the same work as students the employer taught at a local technical college. Investigation also revealed Bell never got a job for himself, but was given jobs through his school, a friend, or a neighbor. *Bell v. State*, No. 2003-CP-04-1857, slip op. at 20-21 (S.C. Ct. Common Pleas Nov. 18, 2016) (on file with authors).

125. See *infra* Part III.B.2.

126. ANDREWS, *supra* note 40, at 74.

127. See *id.*; see also Bonnie & Gustafson, *supra* note 24, at 847-48.

possible, written records. The key to a good investigation (and ultimately, a strong presentation) is the thorough collection of evidence resulting in *consistency* across time, in different domains of a client's life, displayed in the available records, and across information collected from multiple, credible witnesses.¹²⁸ It is not uncommon for an intellectual disability investigation in a capital case to involve multiple, face-to-face interviews with scores of witnesses. This requires extensive manpower, ample time and funding, not to mention old-fashioned grit and determination.

Many of the witnesses the team will interview will be “the usual suspects”—family, friends, teachers, neighbors, classmates, romantic partners, co-workers, doctors and other health care providers—and these are all very important categories of witnesses. However, some of the most valuable and useful evidence can also come from two specific categories often referred to as “lay experts” and “family adjacent” witnesses.¹²⁹ A “lay expert” is someone who may or may not actually know the client (and often does not) but who has some relevant knowledge of an institution, community, family, social environment or other domain in which the client lives, works, resides or otherwise interacts with the world. A classic example is a school guidance counselor, principal, or administrator who perhaps never met or cannot remember the client, but who nevertheless can provide information about the school's structure, funding, available special education programs, how students were identified and referred to these programs, description of courses, interpretations of school records, and myriad other bits of information needed for context and accurate understanding

128. See, e.g., *Brumfield v. Cain*, 854 F. Supp. 2d 366, 387-88 & n.22 (M.D. La. 2012) (The State's expert “did not interview anyone other than Brumfield, stating that he felt any information gleaned from outside sources would be unreliable. . . . [H]is failure to even make an attempt at corroborating his observations by cross-checking with collateral sources is of fundamental import. The AAIDD guidelines make clear that, especially in forensic diagnosis situations, a holistic review of petitioner's mental status must include these assessments. . . . Ratings by peers, teachers, family members, and others in the subject's community environment are considered crucial. . . . Dr. Blanche's failure to do so entitles his testimony to comparably less weight than Dr. Weinstein's and Dr. Swanson's, both of whom gave due consideration to the clinical guidelines in this regard.”); *United States v. Smith*, 790 F. Supp. 2d 482, 534 (E.D. La. 2011) (“[T]he Court does not find Dr. Hayes' assessment to be reliably-based nor persuasive. Her method of only interviewing the defendant and correctional officers presented a very narrow perspective on how Smith behaves now, in a structured environment, but offers little insight as to how he functioned during the developmental period in the larger community.”).

129. These types of witnesses can also be very important in non-*Atkins* capital cases, but the purpose of this Article is to discuss their specific application in intellectual disability investigations and presentations.

of the client's life history, records and information provided by other witnesses. Other examples might be the director of a soup kitchen where the client received meals, the supervisor at the department of motor vehicles where the client obtained a driver's license, or the president of a job training program where the client was enrolled. In every potential *Atkins* case, counsel must be on the hunt for various "lay experts" who can provide valuable context and help frame the client's story through their specific historical and institutional knowledge.

The second category of particularly useful witnesses includes people who are "family adjacent." By that we mean people who were close to the client in some way—maybe a neighbor who saw the client often, a family friend who helped the client get a job, or a football coach who spent a long time teaching the client to run plays—but who are not actual immediate family members. A person who is "family adjacent" is often described by the client and others as "like family" but they are not actually *in the family*.

There are several reasons why both lay experts and family adjacent witnesses present specific advantages in *Atkins* cases. First, as any member of a capital defense team knows, close family and friends are routinely accused of bias. This creates an especially burdensome problem for a client with an *Atkins* claim because the clinical practice specifically requires that information related to adaptive behavior be collected from sources who knew the client well and interacted with him regularly in his typical environment during the developmental period.¹³⁰ Naturally, the people most likely to have this information (e.g., family members and close friends) are also the most likely to be accused of bias. The primary solution to this problem is consistency and corroboration to the greatest extent possible. Perhaps the client's favorite grandmother can be accused of bias, but if three additional witnesses provided similar information and one or more written records corroborate at least some of what she says, this accusation is less persuasive. Obviously, it is even better if some of that corroboration comes from a lay expert or someone close to but outside the family. Is a high school football coach likely to make up an elaborate, detailed account of the client's limitations on the football team just to help him avoid a death sentence fifteen years later? Unlikely. Does a guidance counselor who never met the client have much incentive to lie about the lack of available special education programs at the client's school? Probably not. And what is the likelihood that they *both* decided to lie

130. TASSÉ & BLUME, *supra* note 18, at 116-17.

just to help the client? Extremely remote. Did all of the witnesses call a meeting before their interviews to get their stories straight? No. This is why the thorough, rigorous collection of information is both consistent with the clinical practice *and* the key to *Atkins* success.

A second reason why lay experts and family adjacent witnesses can add value is that intellectual disability sometimes, but not always, has a genetic component.¹³¹ As a result, a client may have family members who are themselves persons with intellectual disability or otherwise working with cognitive limitations.¹³² This can make it difficult for the family to serve as reliable witnesses, remember important details, or even recognize the client's deficits. Such relatives may offer unhelpful claims like "he seemed normal to us" or "he was the smartest one in our family," which may, in fact, be true but does not, given the family's limitations, undermine an intellectual disability claim. Thus, it is important to investigate social histories of the client's family members as well as the client's.¹³³ In cases where a client's family members are themselves impaired, a person who had "family-like" relationships or caregiving responsibilities but is not similarly limited can be especially helpful.¹³⁴

Another reason that family adjacent witnesses can be particularly helpful is that they sometimes feel less concerned about providing objective, but perhaps unflattering, evidence about the client. Any witness—especially close family and friends—may feel uncomfortable or concerned that the client will be hurt by their truthful descriptions of him as "slow," "not smart," or "different" from others.¹³⁵ This is certainly not the case with every witness (whether inside or outside the family circle), but it is an additional reason to seek out a wide variety of

131. Heredity plays a role in at least some intellectual disability cases. AAIDD 2010 MANUAL, *supra* note 2, at 62 ("A detailed family history is necessary to identify potential genetic etiologies." citing Cynthia J. Curry et al., *Evaluation of Mental Retardation: Recommendations of a Consensus Conference*, 72 AM. C. MED. GENETICS 468 (1997)). Other risk factors, such as prenatal toxins, problems during pregnancy or delivery, and environmental factors are likely to affect more than one family member. But, in a large number of intellectual disability cases, no known causal factor can be identified. TASSÉ & BLUME, *supra* note 18, at 3 ("A formal diagnosis of intellectual disability can be made, as is made in approximately 40-50% of all cases, in the absence of a clearly established etiology.").

132. See AAIDD 2010 MANUAL, *supra* note 2, at 62.

133. Clinical judgment also plays an important role in assessing the reliability and accuracy of information provided by witnesses, which is one of the reasons why it is a good practice for an expert witness to meet face-to-face with witnesses. TASSÉ & BLUME, *supra* note 18, at 119-20.

134. *Id.* at 116-17.

135. This issue is discussed in more detail below under "Obstacles and Challenges." See *infra* Part III.B.3.

different types of witnesses and consider the value of lay experts and family adjacent witnesses.¹³⁶

A final group of witnesses to consider includes prison guards, inmates, chaplains, and other people involved in institutions where the client is or has been housed. We mention this group with (extreme) caution because we do *not at all* intend to suggest that prison behavior, or criminal behavior, is an appropriate consideration for assessing adaptive behavior. The clinical literature is clear that prison is not a real community, but is instead a highly structured environment in which people with intellectual disabilities can often perform well.¹³⁷ Correctional officers do not have the type of continuous contact with prisoners that is typically needed for assessments of adaptive behavior (and usually not during the developmental period), nor are they properly trained to recognize adaptive deficits.¹³⁸ Moreover, how the client performs relative to other prisoners (many of whom may also suffer from intellectual disability or other mental impairments) is not relevant or informative for an accurate assessment of adaptive behavior. Likewise, criminal behavior is, by its very nature, maladaptive behavior and the clinical literature clearly cautions against reliance on criminal behavior and the facts of the crime as an indication of adaptive behavior.¹³⁹

But, the (sad) reality is that prosecutors, judges, and juries frequently rely on prison behavior and criminal behavior as a reason to reject claims of intellectual disability.¹⁴⁰ In fact, out of thirty-six reported decisions denying *Atkins* claims solely on the basis of prong 2 (deficits in adaptive functioning), more than 61% relied on some aspect of the

136. We reiterate that we are not suggesting that close family and friends are less important witnesses in an *Atkins* case. Indeed, they are essential. We are simply including this discussion because we have observed that certain categories of likewise important witnesses are less frequently discussed and considered by defense counsel handling intellectual disability claims.

137. TASSÉ & BLUME, *supra* note 18, at 117.

138. *Id.*; see also *United States v. Wilson*, 170 F. Supp. 3d 347, 369-70 (E.D.N.Y. 2016); *United States v. Smith*, 790 F. Supp. 2d 482, 517-19 (E.D. La. 2011); *United States v. Hardy*, 762 F. Supp. 2d 849, 900 (E.D. La. 2010).

139. See AAMR 2002 MANUAL, *supra* note 21, at 79; see also TASSÉ & BLUME, *supra* note 18, at 124-25.

140. Reported decisions often cite the fact that the defendant followed the rules in prison, made phone calls, ordered items from the canteen, had books or magazines in his cell, survived on a violent prison unit, or carried on normal conversations with prison guards. See, e.g., *Dufour v. State*, 69 So. 3d 235, 244-45 (Fla. 2011); *Ex parte Smith*, 213 So. 3d 313, 316 (Ala. 2010); *Commonwealth v. Hackett*, 99 A.3d 11, 17, 24-25 (Pa. 2014); *Porterfield v. State*, No. W2012-00753-CCA-R3-PD, 2013 WL 3193420, at *8, *21, *26 (Tenn. Crim. App. June 20, 2013); *Ex parte Cathey*, 451 S.W.3d 1, 23-25 (Tex. Crim. App. 2014).

defendant's criminal behavior, prison behavior, or both.¹⁴¹ Thus, counsel must be prepared to address arguments about prison behavior and criminal behavior. One way to do that is to educate the factfinder and explain why this type of evidence is not particularly relevant or informative for an assessment of intellectual disability.¹⁴² But, another important part of addressing these issues is a thorough social history to provide context and to determine whether the prosecution's assertions are even factually accurate. For example, if the prosecution argues that the client regularly checks out books from the prison library and has been seen with a Bible and a fiction novel in his cell, there may be several potential responses. First, the fact that a person can read or write is in no way inconsistent with intellectual disability. The clinical literature clearly establishes that people with mild intellectual disability can achieve academically up to at least a sixth grade education level.¹⁴³ Second, it is possible that the client does not actually read the books seen in his cell, but instead requests them at the urging of other inmates. Perhaps the prison has a limit on the number of books an inmate can keep at one time, and the client is easily led by others to keep books he doesn't intend to read so that they can circumvent this rule.¹⁴⁴ A third possibility is that the client requests the books for himself as a masking behavior.¹⁴⁵ He sees that all of the other inmates request books from the library, so he does the same and possibly even pretends to read them so that he will appear to be "normal" like everyone else. Even if the client does, indeed, request the books and read them for himself, there are a number of important details that could be collected through investigation.

Interviews with guards or other inmates may shed light on the request process itself—does the inmate have to file a written request asking for specific books by title, or does a book cart come around twice

141. See *Atkins* Decision Spreadsheet, merits decisions (updated Sept. 30, 2017) (on file with authors).

142. Counsel may also want to consider a motion to exclude or limit this type of evidence. This is discussed in more detail below. See *infra* Part III.B.3.a.

143. See Jeffery Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 901-02 (2012). But see Ellis et al., *supra* note 16, at 1396 n.346 (stating this may underestimate the potential for many people with intellectual disability).

144. See Taylor G. Stout, *The Costs of Religious Accommodations*, 96 VA. L. REV. 1201, 1212 (2010).

145. ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED* 158-59 (1st ed. 1967); see also Martha E. Snell et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 222 (2009).

a week for anyone to grab from if they wish? How sophisticated are the books that the client reads? Are they written on elementary school grade level? Does he understand and discuss what he has read, or does another inmate help him with difficult words and explain basic elements of the plot line? All of these details can be critically important to providing an accurate understanding of the client's true level of functioning if the court does decide—despite clinical consensus to the contrary—to consider the client's behavior in the artificial environment of a prison setting. A careful investigation into the client's current life in an institutional setting is therefore essential to rebutting misguided (and often misleading or false) arguments by the prosecution.¹⁴⁶

b. Interviewing Topics and Techniques

The purpose of this Article is not to provide a comprehensive guide to conducting social history interviews. However, after considering some general categories of witnesses, it seems appropriate to offer a brief discussion about what to ask those witnesses, along with some general thoughts on how to do that in the *Atkins* context. In addition to the typical social history information that should be collected in all capital cases, an intellectual disability investigation must focus on the specific areas of adaptive behavior relevant to the clinical guidelines with a heavy emphasis on the client's developmental history. Each witness should be asked detailed questions relevant to the different categories of adaptive behavior (conceptual, social, and practical skills).¹⁴⁷ In planning the investigation, it also may be helpful to keep in mind the sub-categories from older definitions of intellectual disability. These are: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.¹⁴⁸ These categories often overlap and are now treated as collapsed within the three broader categories of the updated definitions.

Once a witness interview is under way, the goal is to elicit as much detailed information as possible, focusing on specific stories rather than general descriptions. A witness statement that the client was "slow" is not nearly as informative as, for example, a witness's specific recollection that, at age 16, the client was still in the ninth grade, sick

146. See *infra* Part III.B.3.a.

147. See AAIDD 2010 MANUAL, *supra* note 2, at 44; see also DSM-5, *supra* note 15, at 33.

148. See AAIDD 2010 MANUAL, *supra* note 2, at 44; see also AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 39-42 (4th ed., text rev. 2000).

with a cold at a football game, and ended up drunk because he thought that if he drank a whole bottle of cough syrup, he would get better faster than if he just took a small amount.

All interviews must (because intellectual disability is a developmental disorder) cover whether or not a witness has information about the client's developmental history. Proof that the client's intellectual functioning and deficits in adaptive functioning manifested during the developmental period is essential to success. Social history records are an important piece of an investigation of evidence for prong 3, but witness interviews are also essential for examining age of onset.¹⁴⁹ Asking specific questions of witnesses, such as when a child mastered walking, talking, toilet training, independent play and so on can be a useful way to collect some of the necessary information.¹⁵⁰ However, collecting developmental specifics from lay witnesses can be challenging—particularly in cases where the client's family members are also impaired, or the client suffered neglect or parental abandonment. For witnesses who knew the client during the developmental period, it is often useful to find out whether there were children of a similar age and developmental stage in the family, school, neighborhood or other area where the witness observed the client; asking a witness to assess the client's development in comparison to others of approximately the same age often sparks more detailed memories and informative stories than simply discussing a client's developmental history in the abstract.

Another useful technique for conducting witness interviews where intellectual disability is at issue is to try what we refer to as “interviewing for supports.” Many people with mild intellectual disabilities can function well and even appear “normal” to the general society if they have sufficient support. The supports are often subtle, even hidden, and frequently provided by family and friends. For example, the client's wife may pay the bills and balance the checkbook, while his responsibilities include taking out the trash when asked and tossing a ball in the yard with his son. The couple may present this

149. Counsel should not overlook family records or other documentary items each witness may have in his or her personal possession. Baby books, family Bibles, photos, videos, and similar items can be extremely useful for establishing proof of prong 3.

150. We caution counsel that although there are many “developmental history checklists” available online and in various medical texts, which may be useful for thinking about and planning an investigation, it is never wise to conduct a witness interview by asking the witness to march through such a checklist or complete it on their own. Moreover, some standardized measures of adaptive behavior address developmental milestones, but these testing instruments may only be administered by an expert, using their training, experience, and clinical judgment. These are not appropriate tools for defense attorneys or investigators to use with witnesses.

arrangement as simply one of preference—she likes doing the bills and he’s good at playing with the children. But, the reality may be that they reached this division of labor because the client is not able to handle the more complex task of managing the family’s finances. Perhaps the client’s oldest son always goes with him when he needs to run down the street to the grocery store. The family lore may be that the son is simply a “daddy’s boy” and likes to “stick to his father’s hip,” but the deeper truth could be that the older son helps make sure his father gets correct change from the cashier and doesn’t get lost on the way home. It is important to be aware that people with intellectual disability and their loved ones often engage in these types of masking behaviors (sometimes referred to as the “cloak of competence”).¹⁵¹ But, identifying and discussing these coordinated activities can also sometimes be a more comfortable and appealing way for family and friends to talk about the client’s impairments. Witnesses may have fond memories of the way they worked together or complemented each other’s strengths and weaknesses. In short, interviewing for supports can sometimes be a slightly more positive way to begin a discussion about adaptive deficits with witnesses who feel reluctant to disclose their loved one’s limitations.

3. Obstacles and Challenges

Just as defense counsel should be mindful of the possibility of stereotype and misconceptions within the defense team itself, counsel must also consider that *everyone*—including witnesses, judges, jurors, and teachers—can hold such stereotypes. As some of us have written about elsewhere, numerous cases have turned on a court’s unscientific use of misconceptions and stereotypes.¹⁵² By noting that most witnesses defense teams encounter are likely to hold at least some common misconceptions, we are not necessarily suggesting that counsel should attempt to identify and dispel each stereotype a witness holds during the interviews. Rather, we are simply asserting that counsel should be mindful that every witness likely comes to the table with misconceptions that are likely to color the responses received during the interview.

As we have already noted, another major difficulty in *Atkins* investigations can be that some witnesses (including the client) are

151. ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE: REVISED & UPDATED* 175-76 (Univ. of Cal. Press 1993).

152. Blume et al., *supra* note 5, at 707-10.

resistant to the label of intellectual disability.¹⁵³ This is a well documented phenomenon.¹⁵⁴ The irony is that although virtually every *Atkins* claimant is accused of malingering (or faking) symptoms of intellectual disability by the prosecution, people with intellectual disability and their families are often counterintuitively inclined to deny their diagnosis (rather than fake it) even when it would clearly benefit them to embrace it.¹⁵⁵ There is no perfect solution to the problem of a witness's or client's reluctance to accept a finding of intellectual disability. The first step is building trust with clients and their families, conducting multiple, face-to-face interviews and listening carefully, actively, and compassionately. It is also true that lay witnesses are not qualified to determine whether a person is or is not intellectually disabled and lay opinions on whether that is an appropriate diagnosis for the client are not relevant in *Atkins* litigation.¹⁵⁶

Even in cases in which witnesses have no inherent resistance to intellectual disability, they may mistakenly believe that they are “helping” their loved one by only disclosing positive information or even exaggerating the client's abilities. It is natural for some people to believe that portraying the client in the best possible light is in his best interest—a tendency that is further reinforced by the typical “good guy” testimony often elicited and encouraged in other types of proceedings in the criminal justice system. Further complicating matters, these same witnesses may have previously given statements (in prior litigation or elsewhere) along these lines, often stated in general platitudes like “he was a good worker,” “he was the best brother to me,” or “he was a great dad.” The prosecution may seize on these statements to argue that they indicate adaptive strengths such as an ability to perform complex tasks at work, the development of good social skills, or performance of caretaking activities, as the case may be. This underscores the importance of a thorough investigation into as much detail as possible. A

153. See *supra* Part III.B.2.

154. TASSÉ & BLUME, *supra* note 18, at 101.

155. See, e.g., J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in THE HANDBOOK OF HIGH-RISK CHALLENGING BEHAVIORS IN PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 229, 232 (James K. Luiselli ed., 2012); Ellis et al., *supra* note 16, at 1410; Newman, *Post-High School Outcomes*, *supra* note 83, at 40 (finding 37.1% of students diagnosed by the school system as having a disability nonetheless did not consider themselves to have a disability as an adult).

156. See Blume et al., *supra* note 8, at 635-36; see also *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (holding the consensus of state citizens regarding who should be exempted from the death penalty, based on lay perceptions of intellectual disability, is not a proper consideration when determining *Atkins* eligibility).

“good worker” may mean the client showed up and worked hard, but he was not able to handle sophisticated job duties. His family’s claim that he was a “good brother” or a “great dad” could merely reflect that people enjoyed his silly sense of humor or constant smile, rather than an assertion that he assumed the role of an adult mentor and role model. It is also important to keep in mind that all people with intellectual disability have both adaptive strengths and weaknesses.¹⁵⁷ Thus, even if such claims accurately reflect one or more adaptive strengths, that does not undermine the existence of the client’s adaptive deficits.

Finally, most *Atkins* investigations will require the defense team to interview various experts who have encountered the client in one way or another prior to the *Atkins* litigation.¹⁵⁸ These may be people who evaluated the client for competency to stand trial at an earlier proceeding, mental health professionals who conducted an assessment for a number of different purposes, or school psychologists and other mental health professionals. The first objective should always be to determine what was the scope of the task this expert was given. Prosecutors and courts often superficially rely on the fact that the client was previously “evaluated” by an expert who made no diagnosis of intellectual disability. This is especially true when a client was previously tried prior to the Supreme Court’s decision in *Atkins*.¹⁵⁹ Prior to *Atkins*, even experts conducting an evaluation for broader purposes (i.e., the evaluation was not limited to competency or criminal responsibility, but was also supposed to encompass a review of general mitigation) had much less incentive to distinguish between borderline intellectual functioning, intellectual disability, and numerous other disorders because intellectual disability was not a categorical bar to execution, and therefore, in many cases nothing of significance turned on that diagnosis. Counsel involved in investigating those cases and sharing information with their experts were also unlikely to have conducted the kind of careful, exhaustive, intellectual disability focused investigation required for an accurate and reliable assessment of intellectual disability. It is not uncommon for pre-*Atkins* trials to include testimony from even defense experts who testified that the defendant had “borderline intellectual functioning,” or that their diagnosis was only “provisional” intellectual disability or “rule out” intellectual disability,¹⁶⁰

157. See *supra* Part II.B.

158. See *supra* Part III.B.

159. See *supra* Part I.

160. A “rule out” diagnosis is just another way of saying “provisional” and does not mean that an evaluator has conclusively “ruled out” (or in) a diagnosis.

but then once a true *Atkins* investigation has been completed, for the defendant to be determined intellectually disabled.¹⁶¹ This same lack of incentive is also present, even post-*Atkins*, where the scope of the evaluation is limited only to competency, criminal responsibility, or some other narrow inquiry, or in the trial of non-capital crimes where nothing significant turns on a diagnosis of intellectual disability.

As we have already explained, it is not possible to reliably evaluate the possibility of intellectual disability without conducting a thorough assessment according to the clinical guidelines.¹⁶² The fact that a psychiatrist previously found the client competent to stand trial in no way suggests that he cannot meet criteria for an intellectual disability. It is also important to find out how much experience, if any, a previous expert has with mild intellectual disability. It bears repeating that even highly educated experts—especially those without much exposure to working directly with people who have mild intellectual disabilities—may have misconceptions, stereotypes, or simply not enough experience to reliably assess intellectual disability in an *Atkins* case.¹⁶³

161. For example, in one successful *Atkins* case, *Simmons v. South Carolina*, No. 05-CP-18-1368 (S.C. Ct. Common Pleas Jan. 22, 2014), a defense expert testified at the pre-*Atkins* trial in 1999 that Simmons had very low cognitive functioning and was unable to understand his *Miranda* rights, but the expert specifically stated he did not think Simmons was intellectually disabled. Instead, he assumed Simmons must have previously functioned at a higher cognitive level and declined during adulthood due to drug use or possible head injuries, since Simmons graduated from high school, played on the football team, and had a job. The expert had some social history records and spoke to Simmons, but did not conduct any collateral interviews or receive additional information from trial counsel. At the *Atkins* hearing in 2009, the same expert provided a written affidavit explaining:

I was not asked to determine whether or not Mr. Simmons met diagnostic criteria for mental retardation. Furthermore, I did not have all of the materials available to me that I would require for an evaluation of mental retardation per standards of current practice. For example, I did not have access to a complete social history or have family members or teachers available for interview. I did not formally assess Mr. Simmons' adaptive behavior functioning.

I conducted my evaluation of Mr. Simmons prior to the Supreme Court's decision in *Atkins v. Virginia*. Thus, distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today. Given what I was asked to do – assess whether Mr. Simmons could comprehend and thus make a knowing and intelligent waiver of the *Miranda* rights – the important issue was Mr. Simmons' cognitive deficits, not determining whether he had mental retardation.

Affidavit of Psychologist (on file with authors).

162. See *supra* Part III.B.2.b.

163. See *supra* Part III.B.3.

a. Other Investigation Considerations

Risk Factors for Intellectual Disability: It is not necessary to prove the cause or etiology of intellectual disability in order to establish a diagnosis,¹⁶⁴ but evidence of etiology can, in some cases, be persuasive to a court in support of an intellectual disability diagnosis. The defense team should, therefore, be cognizant of risk factors for intellectual disability while conducting their investigation and should investigate further when there is some evidence a risk factor is present. Risk factors for intellectual disability can originate prenatally, perinatally, and/or postnatally.¹⁶⁵ Examples of risk factors include:

- *Prenatally:* genetic or chromosomal factors, maternal alcohol or drug consumption during pregnancy, maternal illnesses or malnutrition, parental age, trauma or insult during fetal development, poverty, domestic violence, lack of prenatal care, parental cognitive disorder without supports;
- *Perinatally:* prematurity, birth injury, neonatal disorders, lack of medical care, infection transmission, trauma, parental rejection of caretaking;
- *Postnatally:* deprivation, malnutrition, traumatic brain injury, seizure disorder, impaired child-caregiver interaction, poverty, chronic illness, institutionalization, child abuse or neglect, inadequate family support.¹⁶⁶

Identification of risk factors present in the client's life can provide further support for an expert's diagnosis of intellectual disability (and many can be used as other mitigation as well).¹⁶⁷ The defense team should, therefore, look for these factors when reviewing records and interviewing witnesses.

Prosecution Arguments: While collecting records and conducting witness interviews, the defense team should do so with an eye toward combatting counterarguments expected from the prosecution. The prosecution often relies on predictable arguments to attempt to discredit the defense team's evidence of intellectual disability—most commonly,

164. TASSÉ & BLUME, *supra* note 18, at 1-2.

165. AAIDD 2010 MANUAL, *supra* note 2, at 58-62; DSM-5, *supra* note 15, at 39; TASSÉ & BLUME, *supra* note 18, at 1-2.

166. AAIDD 2010 MANUAL, *supra* note 2, at 60; DSM-5, *supra* note 15, at 39; TASSÉ & BLUME, *supra* note 18, at 1-2.

167. TASSÉ & BLUME, *supra* note 18, at 1-2.

accusations of malingering.¹⁶⁸ The prosecution (and its experts) also repeatedly present clinically inappropriate evidence to show a defendant is not intellectually disabled, including evidence of “planning” in the crime committed, adaptive functioning in jail or prison, or another diagnosis they argue rules out intellectual disability.¹⁶⁹ Despite not being supported by the clinical diagnostic standards, prosecutors’ arguments are often appealing to judges based on their own misconceptions of intellectual disability and are used in denying *Atkins* claims. The defense team should, therefore, explain that the judge is bound by the clinical standards and should disregard clinically inappropriate evidence proffered by the prosecution. However, the defense team should also investigate the types of evidence expected to be offered by the prosecution in an effort to minimize its impact.

Every *Atkins* team must be prepared for the prosecution to argue the defendant is malingering the deficits of intellectual disability.¹⁷⁰ The prosecution’s experts may rely on tests administered, which they say can detect malingering,¹⁷¹ or the prosecution and its experts may simply raise the specter of malingering by arguing that there might be an incentive to fake intellectual disability to avoid the death penalty.¹⁷² The best way to combat an accusation of malingering is to investigate and present evidence of consistent deficits in intellectual functioning and adaptive behavior over time and domains.¹⁷³ Additionally, counsel should work with the defense experts to educate the decision-maker that there are no “formalized, reliable assessments designed to determine whether a person is attempting to fake symptoms of intellectual disability.”¹⁷⁴

168. See *supra* note 78 and accompanying text.

169. See Blume et al., *supra* note 5, at 724.

170. Malingering is “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives.” DSM-5, *supra* note 15, at 726-27. In Mississippi, a test for malingering is required by law, so defense counsel must consider how to best prove the defendant is not malingering to satisfy the state’s legal definition. See *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004).

171. See TASSÉ & BLUME, *supra* note 18, at 98-99.

172. See, e.g., *Petetan v. State*, No. Ap-77,0378, 2017 WL 2839870, at *24 (Tex. Ct. Crim. App. Mar. 8, 2017).

173. See *Tarver v. Thomas*, No. 07-00294-CG-B, 2012 WL 4461710, at *5-7 (S.D. Ala. Sept. 24, 2012); *Allen v. Wilson*, No. 1:01-cv-1658-JDT-TAB, 2012 WL 2577492, at *7-8 (S.D. Ind. July 3, 2012); *United States v. Smith*, 790 F. Supp. 2d 482, 535 (E.D. La. 2011).

174. TASSÉ & BLUME, *supra* note 18, at 71, 98-101. Most standardized tests for “malingering have not been standardized or normed on persons with an intellectual disability.” *Id.* at 98 (citing *Implications*, *supra* note 55, at 172-75). Some tests regularly relied upon by the prosecution—the Test of Memory Malingering (“TOMM”) and the Rey 15-Item Memory Test—were designed to test faking memory problems, not deficits associated with intellectual disability. *Id.* at 99. Additionally, a personality test like the Minnesota Multi-Phasic Inventory (“MMPI”) “has been shown to be a

Finally, the defense team should investigate and evaluate the client to determine if there is evidence that the opposite of malingering is true—that the client has masked his or her deficits or has faked “good”¹⁷⁵ to counter accusations of malingering.

Though it is not clinically appropriate to rely on one instance of behavior demonstrated during the commission of a crime to rule out intellectual disability,¹⁷⁶ the defense team should investigate the crime charged in order to determine the client’s true level of participation. The prosecution will often (misleadingly) argue that the crime involved significant planning,¹⁷⁷ the defendant directed others in the crime,¹⁷⁸ or the defendant covered up his crime afterward disproves intellectual disability.¹⁷⁹ To counter this evidence, the defense team should investigate to determine whether it can undermine the prosecutor’s often false depiction of their client as a criminal mastermind. Investigation almost always shows that the client was in fact operating at the direction of other crime participants or that the crime did not really involve much planning at all.¹⁸⁰

Finally, the prosecution will often argue a defendant is not intellectually disabled because he or she has some other mental illness, disability, or a personality disorder (typically antisocial personality

poor proxy for malingering or effort testing in individuals with intellectual disability and should be avoided.” *Id.* at 98 (citing Frumkin, *supra* note 47, at 60-62).

175. *Id.* at 101; *see also supra* notes 144-46, 151 and accompanying text (describing the “cloak of competence”). Studies show that even when an individual may have everything to gain by being diagnosed as intellectually disabled, capital defendants often continue to exaggerate their accomplishments to avoid being labeled intellectually disabled. Olley, *supra* note 155, at 232.

176. John Gregory Olley, *Adaptive Behavior Instruments*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 187, 196-97 (Edward A. Polloway ed., 2015) (“[I]solated examples of relative strengths are expected. It is difficult to prove that specific examples of criminal behavior are typical or representative of one’s overall adaptive functioning.”); *see also* AAIDD 2010 MANUAL, *supra* note 2, at 45 (noting that “assessment of adaptive behavior is based on the person’s typical (not maximum) performance”).

177. *See, e.g., Petetan*, 2017 WL 2839870, at *28 (finding Petetan’s crime involved forethought and planning).

178. *See, e.g., Jackson v. Norris*, No. 5:03-CV-00405, 2016 WL 1740419, at *23 (E.D. Ark. Mar. 31, 2016) (finding Jackson instructed his nephew to help in committing the crime); *Wright v. State*, 213 So. 3d 881, 901 (Fla. 2017) (finding Wright gave instructions to others involved in the crimes with which he was charged).

179. *See, e.g., Butler v. Stephens*, 625 Fed. App’x 641, 652 (5th Cir. 2015) (finding Butler avoided capture for some time after committing the crime).

180. As discussed previously, the defense team should investigate their client’s jail and prison behavior. Although it is not clinically appropriate to rely on prison behavior as evidence of adaptive behavior, the defense team must be prepared to address non-clinical arguments from the prosecution on this topic. *See supra* notes 142-51 and accompanying text.

disorder or a learning disability).¹⁸¹ Mental illness, learning disabilities, and personality disorders do not exclude an intellectual disability diagnosis,¹⁸² rather they can (and often do) co-occur with intellectual disability.¹⁸³ However, the defense team should investigate other diagnoses to determine if they can be undermined as courts often (erroneously) rely on other diagnoses to deny an *Atkins* claim (and also because they may be useful as other mitigation).

C. Step 3: Expert Evaluation

Although experts are indispensable, and *consulting* with an expert early in the development of an intellectual claim is crucial, absent exigency of some kind, an expert should not test a client or interview informants until most of the record gathering and interviewing of witnesses has been completed.¹⁸⁴ Counsel should share the results of the investigation with the expert(s) who will test the client and then discuss with the expert(s) any other information that the testing expert(s) believes he or she needs prior to administering tests or interviewing witnesses himself or herself. As discussed earlier, reliance on only one expert to make the intellectual disability determination is generally a mistake,¹⁸⁵ so it is important to establish the role of each expert before any expert administers any test or interviews any witness.

1. Testing

An attorney must know what tests an expert is planning to administer before making arrangements for the expert to see the client.¹⁸⁶ Although a competent expert should know which tests are appropriate, the attorney has an independent obligation to be familiar with which tests are reliable and valid.¹⁸⁷ When meeting with the expert to

181. See, e.g., *Murphy v. Ohio*, 551 F.3d 485, 502-03 (6th Cir. 2009); *Gutierrez v. Davis*, No. SA-09-CA-543-FB, 2016 WL 4079546, at *4 (W.D. Tex. July 29, 2016).

182. *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (“The existence of a personality disorder or mental-health issue, in short, is ‘not evidence that a person does not also have intellectual disability.’” (citation omitted)); *Brumfield v. Cain*, 135 S. Ct. 2269, 2280 (2015) (“[A]ntisocial personality is not inconsistent with any of the . . . areas of adaptive impairment or with intellectual disability more generally.”); DSM-5, *supra* note 15, at 39-40.

183. *Moore*, 137 S. Ct. at 1051 (“[M]any intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism.”); see also AAIDD 2010 MANUAL, *supra* note 2, at 58-63.

184. See *supra* Part III.A-B.

185. See *supra* Part III.A-B.

186. See *supra* Part III.A.

187. See *supra* note 101 and accompanying text (discussing defense counsel bearing

determine which tests are appropriate, lawyers need to have a basic familiarity with the “gold standard” tests and their alternatives, as well as the pitfalls of various tests (as previously discussed in detail),¹⁸⁸ along with a good grasp of the client’s social history. The time for such a discussion is prior to the administration of any instrument, because once a test has been administered, its results may be discoverable, and even if they are not, the expert who administered them has knowledge of those results that may be revealed on cross examination.

a. IQ Testing

Test Selection

In circumstances where the client has already had one or more valid, individually administered test of global intelligence, additional testing may not always be needed. Defense counsel should carefully discuss testing issues with the experts before deciding whether additional testing is appropriate for the case. If additional IQ testing is going to be completed, the AAIDD and the DSM-5 agree that to be appropriate for the measurement of IQ, a scale must be a comprehensive measure of intellectual functioning; it should include measures of verbal comprehension, perceptual reasoning, quantitative reasoning, working memory, abstract thinking, and cognitive efficiency.¹⁸⁹ The test must have strong psychometric properties—established reliability and validity—and its norms must be both recent and representative of the United States census.¹⁹⁰ Finally, the test must be designed for individual administration.¹⁹¹

The two most commonly available intelligence scales that meet these criteria are the Wechsler and Stanford-Binet.¹⁹² The fourth edition of the Wechsler Adult Intelligence Scale (“WAIS”) and the fifth edition of the Stanford-Binet “are considered by many experts as the gold standard for the assessment of intellectual functioning for the purpose of making an intellectual disability determination, especially in death

responsibility for the overall performance of the defense team).

188. See *supra* Part III.A.

189. TASSÉ & BLUME, *supra* note 18, at 88-89.

190. *Id.*

191. *Id.*

192. AAMR 2002 MANUAL, *supra* note 21, at 59-60; TASSÉ & BLUME, *supra* note 18, at 88-89. However, we would note that the Stanford-Binet 5 is now fifteen years old and thus its norms are a bit older. Thus, there is some concern that a Stanford-Binet 5 score could overstate an individual’s intelligence.

penalty cases.”¹⁹³ Other standardized, comprehensive, multi-ability tests that may be considered include the Cognitive Assessment System, Second Edition, and the Woodcock-Johnson, Fourth Edition Tests of Cognitive Ability (“WJ-IV COG”).¹⁹⁴

“Practice effects” refers to gains in IQ scores that occur as the result of retesting on the same instrument within a relatively short period of time. In one study, the average increase in IQ between administrations was 6 points,¹⁹⁵ with another study finding possible increases as high as 15 points.¹⁹⁶ Thus, if a client recently has been administered a particular instrument, whether by the state or by another defense expert, some other test must be selected.

Test Administration

The attorney needs to do more than set up an appointment; he or she will need to prepare the prison, the expert, and the client for the testing. The defense team must work with the prison in advance to assure an appropriate and sufficient time and a quiet space. It is best if the expert has an opportunity to meet the client prior to the testing day, and view the setting in which he or she will administer instruments so that problems can be identified in advance. It is important that all of the protocols for testing, such as length of time permitted for a response and the appropriate prompts, as set forth in the publisher’s manual, are both observed and documented.¹⁹⁷ Moreover, the expert should also document his or her efforts to detect possible malingering, or lack of effort. Concomitantly, the attorney should talk with the client not only about the purpose of the testing, but also about the importance of a good

193. TASSÉ & BLUME, *supra* note 18, at 88-89. With respect to any test, counsel should be certain that the expert is using the most recent version of the test; unfortunately, some experts have been known to “economize” by using outdated tests, a completely unacceptable practice that renders the results subject to attack. As discussed previously, when evaluating tests results, an expert must be certain to account for aging norms and adjust scores for the Flynn Effect. *See supra* Part II.B.

194. TASSÉ & BLUME, *supra* note 18, at 88-89. This may not be an exhaustive list of appropriate scales for administration to adult clients. *Id.* at 88-89. Moreover, the Kaufman Assessment Battery for Children and the Wechsler Intelligence Scale for Children (“the WISC”) are also valid, reliable tests for the measurement of IQ, and if administered to the client as a child, may be reliable indicators of intellectual ability that contribute to the case, though obviously not suitable for administration to the adult client. *Id.*

195. DAVID WECHSLER ET AL., WECHSLER INTELLIGENCE SCALE FOR CHILDREN: ADMINISTRATION AND SCORING MANUAL 58 (2014); *see* Alan S. Kaufman, *Practice Effects*, in ENCYCLOPEDIA OF HUMAN INTELLIGENCE 828, 830 (Robert J. Stenberg ed., 2d vol., 1994).

196. Kaufman, *supra* note 195, at 832.

197. *ABA Guidelines*, *supra* note 11; *see* Frumkin, *supra* note 47, at 59.

effort, explaining that attempts to perform poorly usually can be detected and will invalidate the test results—as well as create doubt about the results of other expert evaluations.

Other Kinds of Cognitive Functioning Testing of the Client?

After the expert has analyzed the IQ test results, the lawyer should discuss what, if any, additional testing (or investigation of the social history) of the client is needed. In addition to yielding an overall IQ score, the test results—in particular, low scores on some of the subtests—may suggest other testing to further probe or document particular impairments. “Additional testing,” however, refers to *testing relevant to cognitive functioning, not personality testing*.¹⁹⁸

Under *no* circumstances is it (ever) appropriate for an expert to administer any version of the Hare Psychopathy Checklist (“PCL” or “PCL-R”), the Minnesota Multi Phasic Personality Inventory (“MMPI”), or for that matter, any personality test. Administration of any sort of psychopathy testing is inappropriate in any capital case.¹⁹⁹ Such tests lack validity when administered to a client with the traumatic social histories of most death row inmates and persons facing capital charges. Even if that were not the case, the reading level for such tests is beyond the capacity of most persons at or near the intellectual disability range. Furthermore, it hardly needs to be said that a diagnosis of psychopathy is not mitigating and is, in fact, extremely damaging to the case for life. The importance of avoiding such testing cannot be overstated. If the expert cannot be convinced, and insists that such testing is necessary, a new expert must be retained.

b. Adaptive Behavior Testing

Test Selection

Many capital defense lawyers who are generally familiar with IQ testing have less knowledge of the standardized instruments that measure the second prong, adaptive functioning. In part, this is because the use of adaptive behavior instruments was not standard practice when *Atkins* was decided²⁰⁰ and in part because there are often such substantial

198. Olley, *supra* note 103, at 135-36.

199. TASSÉ & BLUME, *supra* note 18, at 98-99.

200. *Id.* at 144-45.

obstacles to use of adaptive behavior instruments in the *Atkins* context that it is not possible.²⁰¹ Now, however, there is a general clinical consensus that such testing is crucial where feasible (with the understanding that sometimes it is not):

For the purpose of making a diagnosis or ruling out ID, a comprehensive standardized measure of adaptive behavior should be used in making the determination of the individual's current adaptive behavior functioning in relation to the general population. The selected measure should provide robust standard scores across the three domains of adaptive behavior: conceptual, social, and practical adaptive behavior.²⁰²

Some adaptive functioning instruments are designed to assess the individual's adaptive functioning for the purpose of planning goals and determining appropriate services, while others—more relevant here—are designed to determine the existence of significant deficits for the purpose of diagnosis of intellectual disability. Among the most suitable for the diagnostic purpose are: the *Adaptive Behavior Assessment, 3d Edition* (“ABAS-III”); the *Vineland Adaptive Behavior Scale, 2nd Edition* (“Vineland II”); the *Scales of Independent Behavior, Revised* (“SIB-R”); the *Adaptive Behavior Diagnostic Scale* (“ABDS”); and the forthcoming AAID instrument, the *Diagnostic Adaptive Behavior Scale* (“DABS”).²⁰³

Informant Selection

Adaptive behavior scales may be partially completed through direct observation of the individual's functioning, but generally rely in part or in whole on interviews with an adult who knows the assessed person well and has observed him in his everyday functioning.²⁰⁴ Most often the best respondents are members of the individual's family, neighbors, teachers, co-workers, and others who have had multiple opportunities to observe the individual; the DSM-5 lists parents, other family members, teachers, counselors, care providers, and sometimes the individual himself as other appropriate sources.²⁰⁵

201. *Id.*

202. AAIDD 2010 MANUAL, *supra* note 2, at 49.

203. TASSÉ & BLUME, *supra* note 18, at 115.

204. Brad Hill, *Adaptive and Maladaptive Behavior Scales*, ASSESSMENT PSYCHOL. (Jan. 11, 2001), <http://www.assessmentpsychology.com/adaptivebehavior.htm>.

205. DSM-5, *supra* note 15, at 37.

Correctional officers are inappropriate respondents for adaptive behavior scales. As discussed previously, both the APA and the AAIDD are clear that adaptive behavior in an institutional setting is of very limited probative value because the environment is so highly controlled that it does not predict behavior in the community—which is the basis for adaptive functioning.²⁰⁶ Moreover, standardized adaptive functioning instruments preclude reliance on informants who must “guess” about a large number of items, and correctional officers would have no basis for answering many of the questions on adaptive functioning scales.

In some cases, there may be no available respondent with comprehensive knowledge of the client sufficient to complete a standardized adaptive functioning scale. In such cases, multiple respondents may be used, and a broad array of other sources of information must be utilized. These may include school, medical, or employment records, previous psychological evaluations and data from those evaluations, therapy or intervention records, DMV records, or information gathered by state or federal offices related to eligibility for benefits.²⁰⁷ Of course, as discussed previously, these sources should have been mined in the course of the social history investigation, even when an appropriate respondent for a standardized adaptive functioning scale exists.²⁰⁸

Administration of Adaptive Functioning Tests

Prior to the administration of an adaptive functioning test, the lawyer needs to let the respondent know that the expert will be contacting him or her, and sometimes counsel may need to remind the witness about the purpose of the interview, particularly if such explanations were not provided earlier in the social history investigation. While it may be the case that it is better for the expert to be able to say that the witnesses were not told ahead of time about the subject of the interview, that is not always true. The need for accuracy should be reinforced, as well as the importance of reporting *typical* adaptive behavior.

Interviews with a respondent should be scheduled with plenty of time and in a location where the respondent is both comfortable and alone. The expert should administer the instrument (rather than

206. See TASSÉ & BLUME, *supra* note 18, at 117-19.

207. TASSÉ & BLUME, *supra* note 18, at 115-17.

208. See *supra* Part II.B.2.

delegating it to someone who is not as well trained). It is also important for the expert to speak—himself or herself—with other witnesses to corroborate the respondent’s account; the expert is responsible for verifying the accuracy and reliability of the respondent’s information,²⁰⁹ so it is the lawyer’s job to provide access to other witnesses who will make that possible.

2. Special Concerns: Language, Culture, and Nationality

As noted in the discussion of assembling a team and expert selection, it is crucial to retain an expert who is culturally competent to assess the client.²¹⁰ However, it is also important to discuss with the expert both options and pitfalls in the evaluation of non-native English speakers, other racial minorities, and foreign nationals. As AAIDD (then AAMR) noted more than a decade ago, it is all too easy to “overlook genuine disability by permitting language and culture to overshadow it.”²¹¹

Perhaps the clearest, most important rule is that it is *never* appropriate for an expert to adjust an IQ score upward based upon the client’s race, ethnicity, or deprived childhood. Although some experts claim to have devised a correction formula for purported racial and ethnic bias in testing instruments, there is no scientific or psychometric justification for doing so.²¹² Prosecutors in at least eight states have presented expert testimony or reports that argue for adding points to the IQ scores of minority clients,²¹³ and counsel must object to such testimony as contrary to clinical consensus and as violative of the Equal Protection Clause of the Fourteenth Amendment.

Almost as clear is the selection of the language of assessment. The language in which the client is proficient must be determined, and assessments administered in that language. Interpreters should be used as a last resort—only when an appropriately standardized and normed version of an intelligence test does not exist.²¹⁴

209. TASSÉ & BLUME, *supra* note 18, at 116.

210. *See supra* Part III.C.1.a.

211. Robert L. Schalock & Ruth Luckasson, CLINICAL JUDGEMENT 80 (Am. Ass’n Mental Retardation 2005).

212. *Id.* at 96-97 (noting the discipline of a psychologist who made such an adjustment).

213. Robert M. Sanger, *IQ Intelligence Tests, ‘Ethical Adjustments’ and Atkins*, 65 AM. U. L. REV. 87, 89-91 (2015).

214. *Id.* at 94-95.

a. IQ Testing

Which particular instrument should be selected and which norms should be used to determine IQ? These choices, unlike the choice of language, are complicated. For example, there are four Spanish language tests of intelligence similar to the gold standard WAIS-III and Stanford-Binet: (1) Bateria-III Woodcock-Munoz (with Mexican, Spanish, and Central-American norms); (2) WAIS-III (Mexican norms); (3) WAIS-III (American norms); and (4) WAIS-III (Puerto Rican norms).²¹⁵ One commentator recommends the Bateria-III Woodcock-Munoz—despite the small size of some of its normative sample cells²¹⁶—because the others have much more serious problems. Probably the worst is the WAIS-III with Mexican norms, which has a very large standard error of measurement, a large number of psychometric and technical errors in the user's manual as well as problems with the normative sample;²¹⁷ critically, *the result is an instrument that has been shown to overestimate IQ by an average of 12 points.*²¹⁸ The Spanish WAIS-III also tends to overestimate full-scale IQ scores for certain age groups.²¹⁹

Obviously, the lawyer must urge avoidance of the WAIS-III with Mexican norms, and the Spanish WAIS-III (if his or her client is in the age range for which the Spanish WAIS-III is inaccurate). The larger point is that before IQ tests are administered to a client whose first language is not English, the lawyer and expert need to consult the current literature to ascertain what test, on balance, is most appropriate for the client.

b. Adaptive Functioning Testing

Assessment of adaptive functioning is complex when the client is a non-native English speaker, a foreign national, or an American-born racial minority. Because adaptive behavior differs across linguistic and cultural groups, an adaptive behavior instrument normed on one group

215. TASSÉ & BLUME, *supra* note 18, at 96.

216. *See id.*

217. Hoi K. Suen & Stephen Greenspan, *Serious Problems with the Mexican Norms for the WAIS-III when Assessing Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 214, 214-22 (2009); *see also* Pedro Sánchez Escobedo & Liz Hollingworth, *Annotations on the Use of the Mexican Norms for the WAIS-III*, 16 APPLIED NEUROPSYCHOLOGY 223, 226 (2009).

218. Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used with the Mexican WAIS-III in Capital Cases*, 34 PSYCHOL. INTELL. & DEV. DISABILITIES 2, 2-3 (2008); Suen & Greenspan, *supra* note 217, at 214.

219. TASSÉ & BLUME, *supra* note 18, at 96-97.

cannot simply be administered to a member of another group; it may require adaptation.²²⁰ However, the APA standard requires that any substantial modification of a test's format, mode of administration, instructions, language, or content requires either revalidation of the test or demonstration that revalidation is not necessary; revalidation entails an onerous ten-step procedure and often has not been performed.²²¹ Thus, there may be no available, appropriate, valid measure of adaptive functioning for some clients.

As is the case with respect to ad hoc or idiosyncratic systems of IQ score adjustment, it is impermissible to alter an adaptive functioning instrument by skipping items or modifying scores in a good (or bad) faith attempt to correct for cultural or socioeconomic factors.²²²

When assessing a foreign national's adaptive functioning, both the possibility of using an American instrument and the possibility of using one normed on the client's country of origin should be considered. However, in many instances it may be impossible to find an instrument appropriately translated, standardized, and normed.²²³ In such cases, the expert may have to rely upon qualitative interviews (and must be prepared to defend his or her decision to do so).²²⁴ Whether the expert has an appropriate adaptive functioning instrument or not, he or she is likely to have to travel to the client's country to find appropriate respondents/interviewees and to inform himself or herself as to the cultural standards and expectations with which the client was raised.²²⁵

IV. PRESENTING AN *ATKINS* CASE

Before counsel begins to think about presenting evidence of intellectual disability to a judge or jury, they should first consider whether the *Atkins* claim can be used as part of successful plea negotiations. Although it is impossible to collect comprehensive data on this issue, given the unpublished and often unstated nature of a prosecutor's decision to drop his or her pursuit of a death sentence, the authors are aware anecdotally of at least sixty cases that were resolved, at least in part, because of credible claims of intellectual disability

220. AM. ASS'N MENTAL RETARDATION, *ADAPTIVE BEHAVIOR AND ITS MEASUREMENT: IMPLICATION FOR THE FIELD OF MENTAL RETARDATION* 217-18 (Robert L. Schalock ed., 1999).

221. *Id.*

222. TASSÉ & BLUME, *supra* note 18, at 119-21.

223. *Id.* at 120.

224. TASSÉ & BLUME, *supra* note 18, at 120; *see also supra* note 26 and accompanying text.

225. *Id.* at 120-21.

during plea negotiations.²²⁶ In conducting the risk-benefit analyses involved in any decision-making process surrounding plea negotiations, counsel should be mindful of the particular jurisdiction's procedures for determining intellectual disability claims. In states where the intellectual disability determination is made by juries, instead of judges, counsel should know that juries appear to be more hesitant to find a capital defendant to be a person with intellectual disability than are judges. The authors are aware of only one successful jury determination out of (at least) twenty-nine jury determinations in *Atkins* cases.²²⁷

In most, if not all, cases counsel should also prepare and file pre-trial motions and briefs that streamline the litigation, educate the court, and preserve legal issues for appeal. It is generally sound practice to submit a pre-trial brief setting forth the clinical guidelines for a proper judicial assessment of intellectual disability. Such a pleading should also educate the court about stereotypes and misconceptions of intellectual disability. In states where the intellectual disability decision is made by a jury, counsel may want to think about legal challenges to that process based on the factors we discussed above.²²⁸ Counsel should also move *in limine* to exclude certain categories of evidence, such as prison behavior, criminal behavior or other factors that are irrelevant to an *Atkins* assessment.²²⁹

226. See Spreadsheet (on file with authors); see also TASSÉ & BLUME, *supra* note 18, at 63.

227. See *supra* note 161. There are several reasons why juries may be more inclined to reject a capital defendant's claim of intellectual disability than judges. In most jurisdictions juries are asked to decide whether a capital defendant is intellectually disabled at the same time that they decide the issue of punishment—meaning, after they have determined the defendant is guilty. See Blume et al., *supra* note 8, at 411-12. Research suggests that jurors are not truly capable of deciding the issues in the order in which they are instructed (i.e., if you find the defendant intellectually disabled, then stop; if you find he is not intellectually disabled, then decide if he should be sentenced to life or death). Instead, they are much more likely to “retrofit” their decision-making along the lines of: first, do we want to sentence this person to death? If so, then we will find he is not intellectually disabled. See John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1035-43 (2008). Moreover, jurors may be less able to recognize their own biases, or accept that they are—in fact—biases once they have been pointed out, than judges who are ostensibly in the business of making objective decisions on a regular basis. See Blume et al., *supra* note 8, at 411-12. Finally, jurors may be less able to set aside their own biases, even if they acknowledge them, than judges who are arguably more practiced at putting aside personal thoughts and opinions than laypeople. *Id.*; see also Emily V. Shaw, Nicholas Scurich, & David L. Faigman, *Intellectual Disability, the Death Penalty, and Jurors*, 58 JURIMETRICS J. (forthcoming 2018) (manuscript at 20) (on file with authors) (finding, in a study of 286 mock jurors, that “the provision of crime information influenced whether participants believed the defendant was intellectually disabled over and above the expert’s diagnosis.”).

228. See *supra* Part II.

229. See *supra* notes 137-42 and accompanying text.

All *Atkins* presentations should involve a heavy focus on educating the factfinder. As we have emphasized throughout this Article, inadequate investigation, failure to place all evidence into context, and general misunderstandings about intellectual disability and the clinical guidelines are sometimes the biggest impediments to success in an otherwise meritorious case.²³⁰ Providing a thorough and detailed education on these issues is the key to success. We recommend that all *Atkins* presentations include one or more “teaching experts” whose primary job is to educate the court about what intellectual disability is, explain how it is properly assessed, and address and dispel common misconceptions and stereotypes.²³¹ Whenever possible, it is usually better if the teaching witness serves *only* this role and does not evaluate the client or otherwise comment on the specific evidence in the case.

In addition to one or more teaching witnesses, the presentation will, of course, also require testimony from one or more experts who have evaluated the client and come to a diagnosis.²³² For such witnesses, we note that it is never appropriate for an expert witness to offer a diagnosis of a client that he or she has not met. Witnesses for the prosecution often seek to do exactly that, but it is wholly inconsistent with the clinical guidelines and practice.²³³ As we have previously discussed at length, the expert’s ultimate opinion should be corroborated with as much information from lay witnesses and records as possible.²³⁴ But, it is important to note that it is not enough for the expert witnesses to testify that they believe their own opinions to be well-corroborated. The presentation should include testimony from as many lay witnesses as possible, including those lay experts and family adjacent witnesses we discussed previously.²³⁵ The testimony should include as many detailed

230. See *supra* Part III.

231. See *supra* notes 108, 228 and accompanying text.

232. See *supra* Part III.A.

233. See *Allen v. Wilson*, No. 1:01-cv-1658-JDT-TAB, 2012 WL 2577492, at *8 (S.D. Ind. July 3, 2012) (“Dr. Hazelrigg [the State’s expert] did not diagnose whether Allen is mentally retarded under the DSM or *Green Book* [i.e., the AAIDD]. Dr. Hazelrigg admits that he never met Allen, never administered tests to him and never met with [his special education teacher]. He did not listen to the first day’s testimony, meet with Allen’s family members or diagnose Allen. If Dr. Hazelrigg gave a diagnosis on the day of his testimony, he admitted that would be unethical. He neither agreed nor disagreed with Dr. Swanson’s assessment because he did not make his own assessment.”).

234. See *supra* notes 126-28 and accompanying text.

235. Counsel may want to consider saving any evidence about prison behavior or criminal behavior for rebuttal. As we have explained, prison behavior and criminal behavior are not indicative of adaptive behavior. However, if the prosecution is allowed to offer testimony, for example, that the client filed a lot of prison grievance forms, counsel would then want to offer

stories and vignettes as possible, and counsel should avoid offering testimony stated in general terms such as “he was slow” or “he was different.” Instead, the witnesses should be asked to describe specific examples, giving rich, detailed accounts of the client’s story to corroborate the experts’ opinions. This will require extensive and careful witness preparation. Counsel must spend enough time with each witness to first collect all of the detailed information available and then to ensure the witness is comfortable and confident enough about his or her testimony to recount it in court effectively.²³⁶

The actual supporting documents underlying the case should also generally be entered into the record and discussed by both the lay witnesses and the expert witnesses. Again, the point is to demonstrate that the case is consistent, coherent, and corroborated over different time periods in the client’s life, across multiple domains (school, work, social, home life, etc.), and across a plethora of information collected from different people and documented in the records throughout the client’s social history.²³⁷ The use of demonstrative aids can be very helpful to both clearly convey the vast amount of information required in an *Atkins* case and to demonstrate how well documented and corroborated the case actually is. Counsel should consider using charts summarizing the client’s school history or work history, timelines of various aspects of his life, summary charts of the information offered regarding adaptive behavior sorted by specific domain, or a chart depicting the many times the client relied upon supports from friends or family to function throughout his life. In sum, it is incumbent upon counsel to think creatively about how to best present a clear, cohesive and persuasive story about how all aspects of the client’s life support the case for intellectual disability. The value of a coherent, corroborated, credible, and comprehensive case cannot be overstated.

We caution counsel handling *Atkins* cases not to avoid addressing what may appear to be “bad” facts. Perhaps the client had a commercial driver’s license (“CDL”), an unbroken fourteen-year work history delivering goods for a paper supply company, or filed a federal civil rights suit under Section 1983.²³⁸ These and similar factors may seem, at

testimony from other inmates who have stated that they wrote out the grievance forms for the client and asked him to submit them because the guards liked him best since he was well behaved. In many cases, it is better to save such testimony for rebuttal, if necessary, rather than offer it up front as if counsel believes prison or criminal behavior is useful and informative.

236. See *supra* Part III.B.2.b.

237. See *supra* note 130-31 and accompanying text.

238. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2012).

first blush, to be “inconvenient” facts that counsel hoping to win an *Atkins* claim would rather ignore. But failing to embrace and fully engage all aspects of the client’s life is a recipe for disaster as doing so can quickly sink even the strongest of intellectual disability claims, and investigating and discussing such facts can often strengthen and add persuasive depth to the client’s story.²³⁹ For example, once the defense team digs deep into the details, it may be the case that the client only obtained a CDL after multiple attempts and extensive practice with a friend. The friend’s descriptions of his many efforts to teach the client to simply pull forward, pull backward, and park, and the client’s many struggles to achieve these basic tasks, could become some of the most powerful evidence in support of the *Atkins* claim. Upon further investigation, counsel may discover that the client’s long, unbroken work history was largely because he worked for a family friend who wanted to help and appreciated the client’s efforts to be on time, do what was asked of him, and not complain. Or it may be the case that during the client’s fourteen-year history with the same company, he had only one responsibility—to drive the same basic route twice a day, wait for the paper to be unloaded, and then return via the same path. His co-worker’s descriptions of how he once got confused when the normal return path was blocked or how he was unable to adjust to a change in the schedule without help from his supervisor to remind him of the time change will actually support the case rather than hinder it. As for the federal suit, it could be (and likely will be) the case that the well-organized pleading was written by another inmate who can describe the client’s childish attempts to draft such a suit themselves after being harassed by correctional officers. There is *always* a story to be told about the client’s life, his strengths and limitations, and the supports he received from others. Refusal to fully engage with all aspects of the story because of fear that certain facts may harm the case will only backfire.²⁴⁰

We assume counsel handling capital cases know that they should investigate the backgrounds and review prior testimony of the prosecution’s experts and their own experts. It is nonetheless worth noting that counsel should always investigate the prosecution’s experts, including checking with any state in which they are licensed to find out whether they have ever been disciplined by various licensing or ethics boards. Almost every *Atkins* case will involve a basic “battle of the

239. See *supra* note 177-80 and accompanying text.

240. See *supra* Part III.B.3.a.

experts”²⁴¹ and information about professional disciplinary matters can be an important piece of undermining the credibility of a prosecution’s expert. And, if the prosecution’s experts have testified in other *Atkins* hearings, transcripts of the testimony should be obtained and analyzed. The methodology used by many such experts deviates significantly from clinical consensus, and it is essential that counsel be prepared to confront such testimony.

Counsel should also carefully prepare their own expert witnesses to testify. As we have emphasized, often the best experts for an *Atkins* case tend to be people who have clinical or other direct experience evaluating, researching, and working with people who have mild intellectual disabilities.²⁴² These are not usually people with much forensic experience. Moreover, even those experts who do have experience testifying in court about their diagnoses are not accustomed to the type of highly adversarial proceeding they will face in a capital case. Experts with the most experience working directly with people with mild intellectual disabilities are often those who work in schools, or provide services, or conduct evaluations for various benefit programs. In all of these settings there is rarely, if ever, another “expert” on the other side who will come in and question their findings and diagnoses. There is certainly not often an aggressive lawyer who will cross-examine and question them on every tiny detail of the case. Thus, in many cases, counsel may need to do much more preparation of the expert witness’s testimony than they may be accustomed to doing with other forensic experts. Another aspect of expert witness preparation unique to *Atkins* cases is that often the experts are not fully prepared to address, and even surprised by, the unscientific testimony they encounter from the opposition’s witnesses. Witnesses for the prosecution will offer testimony and arguments that are sometimes so wildly incorrect and inconsistent with the clinical consensus that good, reliable experts are unprepared to respond because it has not occurred to them that anyone worth their salt would claim, for example, that a person’s highest IQ score is their “true IQ,”²⁴³ or that he or she can tell whether a person is malingering because you can just “feel” it,²⁴⁴ or that a person’s IQ score should be adjusted upward because Hispanic test takers typically score

241. See *supra* Part III.A, C.

242. See *supra* Part III.A.

243. *Wright v. State*, 213 So. 3d 881, 896-98 (Fla. 2017), *judgement vacated*, *Wright v. Florida*, 138 S. Ct. 360 (2017).

244. *Long v. Davis*, 663 Fed. Appx. 361 (5th Cir. 2016), *judgement vacated*, 138 S. Ct. 72 (2017).

lower than Caucasians due to “cultural influence.”²⁴⁵ Counsel working with experts in an *Atkins* case must therefore be ready to help them anticipate the unscientific and otherwise unfounded claims they may face from the prosecution’s expert witnesses.

V. CONCLUSION

As we noted in the Introduction, the Supreme Court’s categorical ban excluding persons with intellectual disability from capital punishment has been enforced unevenly.²⁴⁶ Some persons with strong, sometimes even very strong, cases of intellectual disability lose. Post-decision developments also reveal that in a number of instances, the case for intellectual disability presented to the finder of fact was not as robust compared to what could (and should) have been discovered and presented. We have attempted in this Article to provide counsel with the steps we believe are essential to competent representation in cases where intellectual disability is at issue.²⁴⁷ We believe, or at least hope, that if counsel follow these steps, then when we next report on post-*Atkins* developments, there will be fewer losing cases to discuss.

245. *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *11-12 (Tex. Crim. App. 2010).

246. *See supra* Part I.

247. *See supra* Part III.