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## Division 33 Ad Hoc Committee on Mental Retardation and the Death Penalty

J. Gregory Olley, Stephen Greenspan, and Harvey Switzky

At the August 2005 meeting of APA, Division 33 President, Sara Sparrow, appointed an ad hoc committee of Division 33 to identify issues related to mental retardation and the death penalty and to report to the Division's Executive Committee at the 2006 meeting. This ad hoc committee is made up of Greg Olley (Chair), Steve Greenspan, and Harvey Switzky. The committee identified several tasks for the upcoming year, and the committee welcomes the participation of Division 33 members in accomplishing these tasks.

The need for this committee came from the Supreme Court's June 2002 decision in the case of *Daryl Renard Atkins v. Virginia*. The Court's ruling prohibited the execution of persons with mental retardation. Justice Stevens in his majority opinion wrote that execution of persons with mental retardation is excessive punishment under "the Eighth Amendment in light of our evolving standards of decency." The Supreme Court left it to the states to enact

legislation or otherwise establish procedures to implement the *Atkins* decision. At this time, 38 states allow the death penalty, but many of those states do not have a statute dealing with mental retardation and the death penalty. In those states that do have a statute, there is wide variation in their definitions of mental retardation and their procedures for determining mental retardation in capital cases.

### The Committee's Charge

The members of the ad hoc committee have participated as expert witnesses in "*Atkins* hearings" in several states and have found great variability in the ways that states address *Atkins* claims. Since these procedures nearly always involve psychologists as experts in the diagnosis of mental retardation, Division 33 has an opportunity to address some of the difficult controversies that have come up in these hearing. The committee's responsibility is to clarify the role of psychologists, not to address the



many broader issues related to *Atkins*. The tasks of psychologists in *Atkins* hearings would be made clearer, and we presume that justice would be served more effectively, if this committee could identify those areas in which there is consensus on standards for psychologists.

Toward that end, the committee has identified a tentative list of controversial concerns related to *Atkins* claims. The committee is also compiling a list of publications on this topic with an emphasis on publications that are based on relevant research. The committee will receive comments and suggestions from members of Division 33, the American Psychology-Law Society (Division 41), other psychologists, attorneys, and others experienced in mental retardation as it relates to the death penalty. In order to solicit such information, members of the committee will attend and present at conferences in the coming year and will solicit comments and suggestions from individuals.

In order to encourage participation from anyone knowledgeable about this topic, the committee members also will write a regular column on mental retardation and the death penalty in this newsletter and will invite articles from others. These articles may be drawn from the tentative list of controversial issues, or contributors may want to address other related concerns. Also, future issues of this newsletter will contain position papers addressing one or more of the topics identified by the ad hoc committee. In this issue, Steve Greenspan offers a position paper on the Flynn effect and its use in capital cases involving people with mental retardation.

### **Controversial Issues for Psychologists in *Atkins* Hearings**

The list of topics identified by the ad hoc committee is as follows:

#### Qualifications of experts

- Qualifications of psychologists (Licensure? Experience in mental retardation? Forensic training?)
- Qualifications of other experts (In the *Atkins* trial in Virginia, only a psychologist could testify regarding diagnosis, although other experts testified about other issues.)
- Use of lay experts (How do psychologists obtain and use information from lay persons who know the defendant?)

#### Ethical/Professional Issues

- Independence of the evaluation vs. advocacy role (This is not unique to *Atkins* cases, but it may be a confusing issue for psychologists

with a background in mental retardation and little forensic experience.)

- Protection of raw test data and test protocols (Ethical principles 9.04 and 9.11)

#### Issues related to definition of mental retardation

- The Supreme Court used the 1992 American Association on Mental Retardation definition. Should a psychologist offer best interpretation and application of that definition or make suggestions to states for new definitions that are congruent with *Atkins*?
- Since the 1992 definition is widely used in *Atkins* hearings, is there consensus on the meaning of the 10 areas of adaptive behavior as they apply to forensic circumstances? (They are only briefly described in the 1992 AAMR manual.) Is a new manual needed that addresses forensic procedures?
- Use of terms: mild, moderate, severe, borderline
- Use of the mental age concept
- Times at which mental retardation must be determined: childhood, time of the crime, present (This question will be determined differently by different courts.)
- Issue of taking an isolated example of high skill to show no mental retardation (e.g., language use, driving a car)

#### Issues Related to Retrospective Diagnosis

- Role of archival information
- School records; missing or incomplete records; problems in interpretation of old school records
- Lack of Special Education documentation in some records (It is policy for some school systems to delete this information.)
- Interpretation of past testing reports
- Standards for interpretation of old tests (Are they interpreted by the norms of their time, or can they be re-interpreted based on more contemporary psychometric methods?)
- Proper methods to obtain information from informants
- Possible biases in the memories of informants

#### Measurement of Intelligence

- Choosing a proper test
- Qualifications of tester
- Firm IQ cutoffs vs. ranges (Law may make no mention of range or variability of scores.)

- Global IQ vs. subtest scores (Are subtest scores or Verbal or Performance IQs relevant?)
- Interpretation of group tests and short forms. Should they be considered at all?
- Attempts to alter or reinterpret IQ scores after the fact (e.g., He had higher potential. He could have done better. His "true" IQ is 5 points higher.). Invalid score vs. altered or reinterpreted score.
- Interpretation of variability of scores with repeated testing.
- Flynn effect (Does it apply to individual scores?)
- Practice effect

#### Adaptive Behavior

- Is adaptive behavior measured solely by functioning, or can potential be considered?
- Interpretation of cultural factors
- Value of multiple respondents
- Value of multiple sources and types of information (e.g., archival, anecdotal, standardized instruments, direct observation)
- Is it valid to use the events of the crime to show adaptive behavior?
- Problems assessing adaptive behavior in prison.
- Role of clinical interview and observation in prison
- Is it valid to use maladaptive behavior as evidence of adequate adaptive behavior?
- Is it valid to argue against a diagnosis of mental retardation by interpreting low adaptive behavior as a behavior disorder, not retardation? ("It's not mental retardation; it's a conduct disorder.")
- Is reliance on others or need for support a key characteristic of mental retardation in adults? (This factor is only indirectly assessed in tests of adaptive behavior.)
- Is naïveté or gullibility or susceptibility to undue influence of others a critical characteristic of mental retardation? This factor is emphasized in the literature on mental retardation (e.g., Greenspan, 1999) but not in tests of adaptive behavior.
- Role of standardized tests of adaptive behavior
- Can standardized tests of adaptive behavior (e.g., SIB-R, ABAS-II) be given retrospectively? What adaptations are acceptable?
- Is client self-report of adaptive behavior valid (either anecdotally or in response to the ABAS)?
- Is the Street Survival Skills Questionnaire a valid instrument for diagnosing mental retardation?



- Role of anecdotal information from informants
- Bias in information from informants (possible bias in either direction)

Responsibility of psychologist in educating the court about characteristics of mild mental retardation

- Variability in skills
- "Cloak of Competence" - influence of trying to look good
- Mental retardation vs. mental illness
- Mental retardation not defined by etiology but by functioning

- Lack of visible stigmata
- Association with conditions of poverty
- Heritable component

Assessing malingering

- Appropriate methods and instruments

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## APA Convention, August, 2005, Washington, D.C.



*President-Elect Bruce Baker with Naomi Davis, Recipient of Student Research Excellence Award.*



*President-Elect Bruce Baker with Sigan Hartley, Recipient of Student Research Excellence Award.*



*Michael Cataldo (R) Congratulates Robert Sprague, Doll Award Recipient.*



*Executive Council Meeting*



*Laraine Glidden, Robert Sprague, Bonnie Sprague, Stan Lunde*



*Incoming President Bruce Baker Expresses Appreciation to Outgoing President Sara Sparrow.*



*Div. 33 Past Presidents Michael Cataldo and Wayne Silerman*



*Naomi Davis Celebrates with Proud Family Members*



*Robert Hodapp and President Sara Sparrow*