

**ADAPTIVE BEHAVIOR MISCONCEPTIONS ABOUT CRIMINAL
DEFENDANTS WITH A MENTAL RETARDATION CLAIM:
A RESPONSE TO WIDAMAN AND SIPERSTEIN**

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Upon conducting national surveys over two decades ago regarding mentally retarded offenders in the United States criminal justice system (1, 2), it became evident to us that no standardized instrument had been developed for quantifying accurately the adaptive behavior of members of that sociocultural subgroup. This void persists, and its adverse impact has been exacerbated by many misconceptions that have been injected into criminal proceedings involving a mental retardation claim. As a result, adaptive behavior evaluation has become a focal point of controversy among psychologists. We therefore expected that some opposition would be expressed to the adaptive behavior evaluation model that we introduced recently (3). But our methodology is theoretically sound and has been well-received by fact finders. Moreover, no other system has been proposed in the professional literature which systematically, transparently and quantitatively accounts for the shortcomings inherent in the use of contemporary standardized instruments to establish the adaptive behavior of criminal defendants. We respond here to the reservations Widaman and Siperstein expressed in this issue regarding our evaluation model (4). We begin by outlining its procedures, and then examine each of their concerns.

“The key challenge is to identify sociocultural circumstances that might differ from those of the norm group, to examine the individual’s performance in relations to others of the same age and culture, and to evaluate the expectations and opportunities of the individual’s culture that might influence an adaptive behavior score” (5, p. 87).

On June 20, 2002, the United States Supreme Court ruled in favor of Virginia death row inmate Daryl Atkins, decreeing that mentally retarded persons cannot be subjected to a death penalty since they lack sufficient culpability (6). The Court left to each state how to decide whether criminal defendants with a mental retardation claim—so-called *Atkins* claimants—were afflicted with that disability. Since then, this condition has come to be con-

ceptualized forensically as being characterized by significantly subaverage intellectual functioning with concomitant deficits in adaptive behavior that originated in the developmental period of life (7).

Though psychologists who conduct *Atkins* examinations disagree regarding some intellectual assessment and age of onset issues, how adaptive behavior deficits should be established has become mired in controversy. As viewed by J. Gregory Olley, a Widaman and Siperstein consultant for their article in the current issue of the *Journal*, this state of affairs evolved because of "limitations to precise and valid measurement" of the adaptive behavior of criminal defendants, and it has caused such evaluations to become "a lightning rod for controversy" (8, p. 5).

While adaptive behavior in conventional clinical practice is usually established on the basis of scores from standardized adaptive behavior scales, three major demands of the forensic setting preclude this customary approach. First, adaptive behavior scales were not developed for criminal offenders or normed on this subgroup. It is also highly improbable that such individuals were included in standardization samples (9, 10). Moreover, these instruments assess various skills that are considered to be important for functioning in the social mainstream, and the vast majority of *Atkins* claimants led a criminalized life with its own behavioral demands (11). Most also came from underprivileged homes where many skills assessed by contemporary adaptive behavior scales were not displayed by family members. Due to those antecedents, *Atkins* claimants typically fail to evidence, for non-ability reasons, numerous skills manifested by their mainstream peers, and display behaviors which facilitate their lifestyle but whose components go unmeasured by mainstream-g geared instruments (e.g., skills used to sell drugs, stalk victims, change license plates to avoid arrest, hide a murder weapon, or provide fabricated accounts of activities to police). Though research remains to be conducted on how much lower criminal offenders score on current adaptive behavior scales than the general population, informed reasoning indicates that their attained scores will understate their functional status.

Secondly, it is imperative in criminal proceedings to base findings on the totality of relevant evidence (12-14). Since standardized instruments merely sample adaptive behavior, none are capable of capturing all skills that a spe-

cific defendant displayed (5, p.15). As viewed by the lead developer of the *Adaptive Behavior Assessment System* (ABAS; 16, 17), adaptive behavior authority Patti Harrison, these instruments "fail to take into account a variety of factors necessary to obtain a complete picture of adaptive functioning" (18, p. 207). Accordingly, it must be expected that the restricted scope of contemporary adaptive behavior scales further suppresses the scores *Atkins* claimants attain on such measures.

Finally, the professional standard for adaptive behavior "deficits" is minus two standard deviations (-2 S.D.) below the mean (5, 19). All evidence regarding criminal defendants' functional status, including sociocultural impacts, must therefore be integrated and quantified in some manner to yield summative standard scores than can be subjected to that psychometric criterion.

While general advice on how to conduct adaptive behavior evaluations of *Atkins* claimants has been dispensed by many (14, 20-22), it has not addressed the thorny issue of how instruments that were not designed for use with criminal offenders, which lack norms for that sociocultural subgroup and which cannot capture all relevant evidence in a case, are to be used to quantify accurately the adaptive behavior of *Atkins* claimants. The only method for doing so that seemed logical to us is to use a standardized measure as the psychometric vehicle for structuring the adaptive behavior evaluation, and to account quantitatively for the impact of sociocultural factors and for adaptive behaviors that are not assessed directly by the scale. Since we consider the ABAS to be best-suited for use with *Atkins* claimants, we tailored such a quantitative approach to that instrument.¹

In this issue, Widaman and Siperstein called for rejection of our proposed use of the ABAS to structure adaptive behavior evaluations to deal quantitatively with that instrument's shortcomings for application to *Atkins* claimants. Here we address their concerns, mostly in the order in which these appear in the final draft of their article that we were provided. Initially, we overview our evaluation model.

¹ When used in this article, the acronym ABAS refers to both the ABAS and ABAS-II.

ABAS-BASED FORENSIC ADAPTIVE BEHAVIOR EVALUATION

Table 1 summarizes the six basic steps of our forensic adaptive behavior evaluation model. That process begins with an analysis of the defendant's case record information to survey how he functioned in the various environments in which he lived. This material typically includes school, psychological, vocational, and legal documents, as well as affidavits of persons solicited to provide opinions about his behavior. To clarify and expand on information cited in that evidence, numerous questions (300-400) are then prepared for an adaptive behavior oriented interview of the defendant.

Table 1. Major Steps In the Forensic Adaptive Behavior Evaluation of Criminal Defendants Structured with a Self-rating using the Adaptive Behavior Assessment System (ABAS)

Step 1	Step 2	Step 3
Analyze case records to survey how defendant has functioned in those environments in which he has lived.	Interview the defendant with prepared questions to clarify and expand on information cited in the case records.	Administer and score the ABAS in a conventional self-rating format; report data as "attained scores."
Step 4	Step 5	Step 6
Account for deficient ABAS relevance to the criminal socioculture (credit self-ratings for undiscovered skills used by the low-level mildly mentally retarded).	Integrate all relevant case-specific adaptive behavior information with self-ratings (credit for manifested skills not captured directly by the ABAS).	Re-score the ABAS ratings to include all adjustments to derive "adjusted scores" that quantify the totality of relevant evidence in a case; decide if those summative scores are of -2 S.D. quality.

The third step consists of a conventional administration of the ABAS. It begins with an explanation of that instrument's 0-3 scoring system: "0" unable to perform, "1" can perform but never or almost never does, "2" performs sometimes, and "3" performs always or almost always (23). To assure that defendants understand the 239 skills that are assessed, we recommend

that the description of each be read to them, and that any needed clarification be provided. Defendants then rate themselves on each skill, by circling the number next to it on the test protocol which best gauges their competence level. The resultant ratings are transformed into scaled and standard scores, using tables in the ABAS administration manual. Those data are cited as defendants' attained ABAS scores.

The fourth step consists of adjusting for the ABAS' inadequate accounting for sociocultural factors, especially for its lack of criminal offender norms. As pointed out by the American Association on Mental Retardation (AAMR), while "a diagnosis of mental retardation must take into account the sociocultural context of the individual" (5, p. 87), "it would be impossible to obtain many standardization samples to represent all the cultural variations in the United States" (5, p. 87). Since there are no ABAS criminal offender norms and research has yet to establish how much lower they score on any adaptive behavior instrument than the general population, clinical judgment must be used for this accounting. We proposed questioning defendants during the self-rating process regarding each undisplayed skill that low-functioning mildly mentally retarded persons (i.e., those with a full scale IQ in the 55-65 range) can be taught and motivated to display. The aim is to determine whether these were absent due to inability, lack of training or insufficient motivation. Unless questioning established that a defendant was unable to perform such a skill, we consider that he should be credited for it. A notation is made on the ABAS protocol to identify each rating that is adjusted for that reason. We cautioned that "solid hands-on experience with mentally retarded persons" is a prerequisite for making such adjustments (3, p. 55).

Step five consists of integrating all other available relevant information regarding the defendant's functional status with the ABAS scores. As explained by the AAMR, "the addition of different sources of data provides a basis for more informed professional judgment" (5, p. 86). Among other things, this process accounts for adaptive behavior which is not measured directly by that instrument, including that which is mostly adaptive to a criminal lifestyle. For example:

“[I]f the defendant used verbal ploys to gain proximity to robbery victims, it is apparent that he plans ahead, recognizes what kind of conversation is appropriate for a particular context, pays attention when people talk, and reacts adequately to situational demands. If he used a car to drive to the victim’s location, he obviously knows how to operate an automobile, obeys traffic signs at least sometimes, and gets around adequately in his community. Efforts to avoid detection and/or arrest for crimes (e.g., disposal of murder weapons, killing a witness, wiping off fingerprints, leaving town to avoid police, affixing stolen license plates to a getaway car, formulating feasible lies to police and/or during court testimony) convey social awareness, self-direction, and an obvious concern for health and safety” (3, p. 55).

Again, a notation is made on the ABAS protocol next to each adjusted skill citing why its rating was changed.

In step six, the ABAS is re-scored to reflect the rating adjustments that were made, and the results are transformed into scaled and standard scores, using the administration manual tables. Those data are identified as defendants’ adjusted scores. It is on their basis that we recommend that a determination be made regarding whether adaptive behavior is of -2 S.D. standard score quality.

This overall methodology systematically integrates all information pertaining to defendants’ adaptive behavior in a manner which generates summative standard scores for the entire evidentiary database. That process also identifies which skill ratings were adjusted to account for sociocultural factors and for adaptive behavior that is not measured directly by the ABAS, and it shows the size of each adjustment. As a result, how clinical judgment was exercised is entirely transparent.

WIDAMAN’S AND SIPERSTEIN’S CONCERNS

Respondents or Informants

Widaman and Siperstein stated that family and friends should not be dismissed summarily as potential respondents for providing ratings on adaptive behavior scales. We never advocated that practice. Our advice was merely that they should be used “very cautiously” (3, p. 51), since we found

that such individuals tend to understate an *Atkins* claimant's adaptive behavior, and can do so markedly. For example, the prosecution's expert (who was subsequently retained by the defense in the *Ex Parte Jesus DeJesus* case [24] cited by Widaman and Siperstein) determined that Daryl Atkins' mother rated him so impaired on the ABAS that her input was unusable. Making such judgments about ABAS ratings can be difficult since respondents can over-report deficits on that instrument believably (25). Understandably, a recent survey of experienced *Atkins* examiners conducted by Olley found that only 44% assigned much weight to information provided by family members (26, p. 18).

Widaman and Siperstein also speculated that relatives of *Atkins* claimants are often inclined to overstate the functional competence of defendants since "they do not want the family to look bad." Based on the many case records that we reviewed, we have not found family members or friends to overstate these defendants' adaptive behavior.

Widaman and Siperstein disputed our experienced-based finding that there are typically no credible persons who knew an *Atkins* claimant well enough to provide information regarding their adaptive behavior. They contended that "a whole cadre" of third party informants is usually accessible. This view contradicts that of Olley who found that "locating suitable informants may be difficult" (14, p. 391). However, we never advised the rejection of input from credible persons with adequate knowledge of a defendant. When available, we recommend integration of such evidence with defendants' attained ABAS scores (i.e., step five of our model).

Sociocultural Factors

Widaman and Siperstein argued that the unique sociocultural background of *Atkins* claimants should be ignored during adaptive behavior evaluations. While acknowledging the AAMR position that sociocultural factors must be taken into account during adaptive behavior evaluations (5, p. 87), they strove to undercut it. They claimed research on the impact of socioeconomic status on adaptive behavior "found differences, but the effect sizes are quite small," and that these "appear to be driven more by influences other than identifiable specific sociocultural factors." To support those assertions they

cited a dissertation review of the ABAS standardization sample's children's data generated with the "Parent" and "Teacher" forms (27). Since those versions assess skills needed only for childhood functioning, any finding cannot be generalized to the ABAS "Adult" form used in *Atkins* examinations. Widaman and Siperstein also cited a study of 7-year-olds' *Adaptive Behavior Inventory for Children (ABIC)* (28) scores which probed the impact of gender and ethnicity (29). Those data also cannot be generalized to the ABAS "Adult" version. Moreover, since the *ABIC* was standardized on California youth, even children's data from other regions and from sociocultural groups on which it was not normed must be viewed very carefully (30).

Research remains to be conducted which establishes the amount of adaptive behavior score suppression that occurs on the ABAS "Adult" form in response to sociocultural factors that characterize criminal defendants. Nonetheless, forensic authorities have emphasized that "difficulties in adaptive functioning *must* necessarily be evaluated in light of each individual's education, personality, mental health, motivations, sociocultural background, and community setting" (italics added; 10, p. 61). In particular, the AAMR instructed that "a diagnosis of mental retardation *must* take into account the sociocultural context of the individual" (italics added; 5, p. 87), which is predicated on the widely held view that "the skills needed to function in the community depend on the community in which one lives" (31, p. 74). The ABAS developers share this perspective, stressing that adaptive behavior must be assessed within a sociocultural context because expectations may vary "within different settings and contexts" (32, p. 13). As explained by ABAS lead developer Patti Harrison:

"Different sociocultures within the United States place different expectations on dress, social skills, leisure activities, and other variables related to adaptive behavior" (33, p. 198).

Accounting for sociocultural impact is especially important with criminal defendants since "it is not uncommon for adolescents and young adults with antisocial personality disorder or conduct disorder to have adaptive skills problems in the areas of health and safety, occupational performance, daily living, self-direction, and interpersonal skills" (34, p. 317). Expectedly, a

California court of appeals ruled in an *Atkins* case that it is necessary to account for "cultural background and its effect on motivation to perform tested tasks [i.e., adaptive skills]" (bracketed material added; 35, p. 49). Thus, while research is unavailable currently on how to manage the suppression which sociocultural factors impart on *Atkins* claimants' ABAS scores, it is evident that examiners must do so. In terms of how this accounting should proceed, authorities have tended to cite the American Psychiatric Association's position (36). For example:

"Ultimate discretion in making such determinations is typically left to the clinical judgment of the assessing psychologist, who must assess each individual based on the individual's interactions within his or her particular life context" (10, p. 60).

There thus exists no realistic support for Widaman's and Siperstein's proposition that sociocultural factors should be ignored in the adaptive behavior evaluation of *Atkins* claimants. Instead, general professional opinion holds these evaluations must factor in, on a case by case basis, the various influences unrelated to mental retardation that are considered to have suppressed the attained standard scores, especially sociocultural factors.

"Cloak of Competence"

Widaman and Siperstein contended that "persons with mental retardation want to appear not to be mentally retarded and thereby avoid the pejorative label of mental retardation." In support of that theory, they referenced a study by Edgerton of the community adjustment of patients released from the Pacific State Hospital between 1949-1958 (37). Most were admitted during the 1930s when the mentally retarded were considered dangerous, and were institutionalized to protect the public, not for treatment purposes. Those facilities were essentially warehouses in which patients were forced to work, were mistreated, and were not provided with educational services. Focused on by some is Edgerton's opinion that the patients he studied claimed to be able to do things that they actually could not. He generalized that behavior to all mentally retarded persons, and referred to it the "cloak of competence."

What goes unstated by proponents of this notion is that only 48 of the 110 releasees selected for that research were actually studied, which gives little assurance that whatever was found can be generalized beyond this truncated sample of convenience. In addition, mental retardation at the time was diagnosed solely on the basis of IQ, and an IQ up to 85 was considered to convey deficient mental ability. Since 14 of those 48 patients had IQs above 70, it also cannot be held that this study's findings apply only to the mentally retarded. But most problematic for the "cloak of competence" thesis is the outcome of a 1972-1973 follow-up of 30 of those 48 patients.

When revisited, they "made it abundantly clear that what mattered most to them was not stigma or passing [for normal], and not the ability to work, but the quality of their lives" (bracketed material added; 38, p. 201). Why did they shed their "cloak of competence" a decade after being freed from confinement? The parsimonious explanation is that they no longer worried about being institutionalized. The studied Pacific State patients thus appeared to exaggerate their competence in the past in efforts to get out of an inhumane environment. Accordingly, their profession of fictitious competence seemed geared to gaining discharge, not to "passing." Thus, especially in view of its sample, the Edgerton study provides no objective support for the "cloak of competence" theory. Moreover, even studies of *bone fide* mentally retarded persons indicate that this group does not exaggerate their adaptive behavior upon self-report (39-42).

Records Review

We agree with Widaman and Siperstein that defendants' school records frequently require concerted interpretation, and this first author's graduate training in school psychology has been very helpful in that regard. Relatedly, we understand that academic limitations can lead to behavior problems, but do not consider that this occurs exclusively with the mentally retarded. Merely because a youth acted out in school due to academic difficulties does not mean that the cause was mental retardation. We have also found that an analysis of the course of academic, behavior, drug-use, and legal problems usually clarifies the extent to which non-ability factors contributed to the typically poor educational attainment of *Atkins* claimants.

Cell Possessions

Widaman and Siperstein argued that defendants' cell possessions should not be considered as evidence regarding adaptive behavior since "one cannot know how any materials in a defendant's cell are used by the defendant." Yet this first author's interview of many *Atkins* claimants has indicated that they use items such as vitamins, skin lotions, deodorants, medications, watches, calendars, writing and drawing supplies in conventional ways. Particularly helpful have been defendants' writings since these frequently provide information about functional academics, health and hygiene, communication, self-direction, leisure interests, and social skills.

Widaman and Siperstein also professed that "many persons with mental retardation often had an array of relatively sophisticated materials in their possessions, such as books and newspapers." As a source for this claim, they cited the 1960s Edgerton study (38). But its findings do not support their assertion. Upon examining the apartments of five Pacific State patients who may have been mentally retarded, Edgerton noted that one man possessed a "few magazines," while his wife had "a few cookbooks" (38, p. 28). Though she apparently never read those books, she did cook (38; p. 36). Another man had magazines that "contained nude pictures" (38, p. 46), while the other two persons owned no reading matter (38, pages 61, 81). Accordingly, the Widaman and Siperstein belief that the mentally retarded possess an "array" of material that they are unable to use is unsubstantiated.

Semi-structured Interviewing

Widaman and Siperstein voiced opposition to interviewing *Atkins* claimants with questions that were specifically tailored to clarifying and expanding upon the information contained in their case record. They professed initially that this procedure is "not standard" or a "recommended part of a typical assessment of adaptive behavior" per the ABAS administration manuals. But those manuals do not address how a forensic adaptive behavior evaluation should be conducted. Moreover, all *Atkins* evaluation reports that we have reviewed showed that examining psychologists interviewed defendants, and it seems reasonable to expect that they prepared themselves for those interviews in some manner. For example, Olley interviewed Mr. DeJesus as

part of the adaptive behavior evaluation he conducted, and the lead defense psychologist did so in *Plata* (43).

Suggestibility

Widaman and Siperstein claimed that mentally retarded persons are highly suggestible which causes them to characterize their own behavior "in a positively biased fashion." They contended that Finlay and Lyons (44) determined that mentally retarded persons "acquiesce to a powerful other in describing their behavior" since they have "have a clear tendency to want to appear not to have mental retardation." But those researchers never stated that efforts to avoid being recognized as mentally retarded was a cause of acquiescence. Regarding "unequal distribution of power" arguments, it was concluded that "they are usually offered as explanations without substantiating evidence being provided" (44, p.18). Moreover, based on a literature review of the impact of submissiveness and suggestibility on interviews, Finlay and Lyons found that even "many people with mental retardation have no such problems with answering questions" (44, p. 26). No substantive basis thus exists for the belief that *Atkins* claimants self-report less accurately than do criminal defendants in general.

Acquiescence

In the mental retardation literature, the concept of acquiescence derived from the early 1980s studies by Sigleman of mostly institutionalized adults and children (45-47). She noted that when members of those groups were in doubt about how to answer a "yes/no" question, they tended to say "yes," the so-called acquiescence response set or ARS. But she also found that mentally retarded persons with higher IQs were likely to provide information which was consistent with that given by their parents. In addition, more recent research has determined that ARS is much less common in this group than reported by Sigleman (44). For instance, King et al. noted that acquiescence was not present even among mentally retarded children (48), which was confirmed by Ramirez's large study (49). It is therefore highly doubtful that the kind of aggressive adults who are involved in *Atkins* proceedings provide more false "yes" answers during interview than typical criminal defendants. For example, this first author asked Mr. DeJesus 344 prepared questions, of

which 120 could be answered "yes/no," and he responded with "yes" to only 33 of the latter. This outcome has been typical. In addition, "yes/no" questions are often answered in an explanatory way (e.g., in response to "Did anybody ever teach you to brush your teeth?" defendants often respond with an answer such as "my mom.") Understandably, Finlay and Lyons found that even many mentally retarded persons can participate in interviews and answer self-report questionnaires adequately (42). Similar results were reported by Voelker et al. (39) and Villeportaux et al. (41).

Gullibility

Widaman and Siperstein considered that *Atkins* claimants cannot reply correctly to interview since they are gullible. This belief rests on Greenspan's proposition that mentally retarded persons are more gullible due to their modest intelligence (50). While this notion may be appealing, it is entirely untested. To our knowledge, no one, including Greenspan, has conducted research to probe the validity of that theory, which should be related to the lack of a published measure of gullibility. The only support Greenspan has offered is a 1980 study by Rotter (51), which he interpreted as showing that persons with less intelligence are more gullible (52). But this representation is incorrect. Rotter wanted to know if the scholastic aptitude scores of college students in his studies who were very trusting were lower than those of the untrusting group. (His hypothesis was that the very trusting are easier to dupe.) He reported that "in several of our studies, we have correlated scholastic aptitude scores with trust scores and have in each case found a nonsignificant relationship" (51, p. 5). Relatedly, a 2001 study estimated that Americans succumb to scams at an annual rate "exceeding \$100 billion" (53), which presumably referred mostly to the non-retarded segment of our society. Greenspan himself reported to having been duped by an investment scam (54). That mildly mentally retarded persons are more gullible than those with borderline normal IQs (70-85) from whom they must be discriminated is thus speculative.

Memory Difficulties

Widaman and Siperstein professed that "persons with mental retardation have various kinds of memory difficulty" which makes "any information"

supplied by them "highly variable and suspect." They credited Sattler and Hoge (55) for that opinion but failed to report that those authors were talking about "children with special needs" (55, p. 2). Widaman and Siperstein thus offered no relevant evidence for their assertion that *Atkins* claimants' memories are too porous for effective self-reporting. Perhaps its lack explains why Olley found that 56% of experienced *Atkins* examiners considered interview of *Atkins* claimants to be "essential" to "very valuable" (26, p. 23). In that regard, both prosecution and defense experts relied on information provided during interview by Daryl Atkins, as did Olley when he evaluated Mr. DeJesus.

Self-report Information

Widaman and Siperstein contended that information gained from interviewing *Atkins* claimants should not be relied upon since "factors including suggestibility, acquiescence, gullibility, and so forth" make "self-reports by persons with mental retardation highly inaccurate or unreliable." We explained that they did not show that such factors are applicable to these defendants. Moreover, since even mildly mentally retarded persons have been found to be reasonably accurate self-reporters (39-42), and much information typically exists to which defendants' self-reports can be compared, we see no difficulty with integrating *Atkins* claimants' interview information with all other relevant evidence when evaluating their adaptive behavior.

Widaman and Siperstein also contended that information provided by *Atkins* claimants during interview "should not be an important or central piece of information used in the diagnosis of mental retardation." But it is not unusual for psychologists to regard a defendant's self-reports as the "centerpiece" for their opinion regarding his adaptive behavior. For instance in *Plata*, the primary evidence relied upon by defense psychologists to opine that the defendant's adaptive behavior was deficient were the attained ABAS scores from the self-rating conducted by this first author.

However, we consider that practice to be inappropriate. Instead, we advocate that all pertinent information regarding defendants' functioning should be integrated with their self-rating so that the totality of relevant evidence serves as the basis for determining adaptive behavior status.

Questioning Self-ratings

Widaman and Siperstein alleged that it is improper to question defendants who self-rate their adaptive behavior to determine if they were unable to perform an assessed skill, or if they merely chose not to. They claimed that doing so "nullifies the procedural guidelines for administering the test." We could find no such caution in the ABAS manuals. We did note that the *Scales of Independent Behavior-Revised* (SIB-R), which can be used in a self-rating format, provide specifically for questioning respondents to clarify skill ratings (40, p. 37). We also recalled that a California court of appeals which Widaman addressed responded by stating that it is necessary to determine whether a defendant's failure to display an assessed skill was due to "choice or inability" (35).

If adaptive behavior evaluations are to discern whether defendants suffer from a disability, it must be known which undisplayed behaviors were not manifested by choice. Understandably, the foregoing California court ruled that an adaptive behavior evaluation must take into account a defendant's "cultural background and its effect on his motivation to perform the tested tasks" (35, p. 49). We agree, and a viable means for gathering the information needed to make such decisions is questioning the defendant.

Post-Incarceration Behavior

Widaman and Siperstein argued that considering skills that an *Atkins* claimant exhibited only since incarceration precludes a determination of whether he was mentally retarded at the time of the capital offense. But we, along with Brodsky and Galloway, believe that "the immediate best professional choice appears to base adaptive functioning evaluations of capital case and death row inmates on a clinical synthesis of both preincarceration functioning and current functioning" (15, p. 7). This is a logical position since it must be determined whether failure to display a skill was due to choice or inability. In our view, if defendants display a skill after incarceration, it means that they possessed the ability to do so previously but did not actualize it for some reason. Moreover, adaptive behavior, regardless of when it was manifested, constitutes relevant evidence that must be factored into an evaluation.

Rescoring Self-ratings

Widaman and Siperstein accused us of rescoring defendants' ABAS self-ratings, which constitutes a mischaracterization of our methodology. In our system, the ABAS is administered in a manner that is consistent with procedures described in its manuals, scored as prescribed, and the resultant data are cited as attained scores. Those who wish can purvey those scores as indices of defendants' adaptive behavior. This was done by defense psychologists in *Plata*. But we consider that clinical judgment must be applied to those scores to deal with the ABAS' forensic shortcomings, and that this should be done in a manner that can be tracked by reviewing psychologists and fact finders. Adjusting selected defendants' self-ratings to account for sociocultural factors and for all relevant evidence achieves that goal, and yields summative scores that can be gauged objectively with the - 2 S.D. deficits criterion. This is an approach that was suggested to this first author by ABAS lead developer Harrison. Regarding self-ratings that are contradicted by case record information, she wrote:

"Another idea that you may want to consider, in addition to your plan, is to score the ABAS two ways (getting scores from the adaptive skill ratings and GAC): one set of scores with the client's ratings, and another set of scores using the 'corrected ratings' adjusted to the case record" (56).

Unexercised Potential

Widaman and Siperstein claimed that defendants should not be credited for undisplayed adaptive skills that could have been exercised if these had been taught and/or that could have been displayed if motivation to do so existed. This opinion contradicts the view articulated by the eleven mental retardation experts who formulated the AAMR's diagnostic manual. To make their point, they explained: "a person who has not been taught the use of money will not have this skill regardless of his or her potential to understand the concept and use the skills when needed" (5, p. 86). In general, it is understood that "an individual might have a skill, but for various reasons, chose not to perform the adaptive behavior" (57, p. 242), and that "many factors may explain why an individual failed or does not engage in that specific adaptive behavior (57, p. 250). In apparent recognition of this reality, the

ABAS was developed to credit an examinee for skills for which "he has the ability to perform but never or almost never does it when needed (23, p. 3)." Since defendants are assessed in this manner as part of the ABAS' standard administration, all psychologists who have used that instrument must have agreed, at least tacitly, that unexercised adaptive potential is relevant. This includes Olley, who administered the ABAS to Mr. DeJesus.

Facts of Crime Evidence

Widaman and Siperstein professed that "leading experts" advise that skills evidenced by *Atkins* claimants to facilitate the commission of crimes should be ignored during the adaptive behavior evaluation. But the rationale advanced by such writers is puzzling. Some claimed that criminal behavior should not be considered since there exist no norms which establish how crimes should be rated on adaptive behavior instruments (58). Missed by this conception is that it is not the crime *per se* that is of interest, but the behaviors that were displayed in its planning and execution, and in detection avoidance. Others contended that only behaviors demonstrated during the commission of a crime that typify how a defendant usually functioned should be considered (14, p. 23). But this view is at odds with the rating system of adaptive behavior instruments. For example, on the *SIB-R* credit is given for skills displayed "about 1/4 of the time," even if it was necessary for others to prompt that low performance level (59, p. 3). The ABAS credits for non-displayed skills that an examinee is judged to be able to perform even if they have never been exhibited (23). But most problematic for such exclusion advocacy is that compliance with it causes psychologists to violate their obligation to base opinions regarding defendants on the totality of relevant evidence. Only 40% of experienced *Atkins* examiners surveyed by Olley considered that the "events of the crime" should never be "used to argue that the defendant does or does not have mental retardation" (26, p. 27).

"Homogenizing" Adaptive Behavior

Widaman and Siperstein presumed that our procedure for accounting for the ABAS' deficient sociocultural relevance to *Atkins* claimants will result in their similar psychometric portrayal. But this is not the case. To account for

that instrument's inadequate applicability to criminal defendants, we do recommend that credit be given for non-displayed skills that are typically manifested by lower functioning mildly retarded persons. But that process will not equate defendants' adaptive behavior ratings. As pointed in our initial article, our experience has been that:

"[B]ecause no two defendants had exactly the same background and lifestyle, the skills that they possess vary considerably. This reality means that the number of adjustments that need to be made to defendants' self-ratings will vary" (4, p. 58).

Contrary to Widaman and Siperstein's concerns, our methodology facilitates very individualized adaptive behavior evaluations.

Widaman and Siperstein noted that how we account for the ABAS' forensic application shortcomings has a "positive bias." They complained that the adjustments we recommend to account for score suppression due to the ABAS' inadequate accounting for the unique sociocultural factors which shaped the adaptive behavior of *Atkins* claimants and for its inability to capture all relevant evidence will produce scores that are higher than defendants' attained scores. But by its very nature, any procedure which seeks to alleviate artificial score suppression will increase the affected scores.

Widaman and Siperstein hypothesized that the manner in which our model deals with the ABAS' forensic application shortcomings "would tend to ensure that few, if any, individuals who commit capital offenses would be diagnosed as having mental retardation." Our data-based finding refutes that conjecture. In four of the 33 litigated *Atkins* cases in which this first author applied the previously described ABAS-based methodology, defense psychologists using their own procedures concurred that defendants were not mentally retarded, as did defense attorneys in two other cases by withdrawing the mental retardation claim. Of the remaining 27 defendants who may have been mentally retarded, this first author found that eight or 29% met diagnostic criteria. This rate of mental retardation is dramatically higher than the top 2.8% incidence that was found recently by a large meta-study of prison inmates (60). Accordingly, the Widaman and Siperstein belief that our adaptive behavior evaluation model makes "a diagnosis of mental retardation

for any criminal defendant less likely, and, probably virtually impossible" lacks a basis in fact.

Transparency

Widaman and Siperstein contended that the manner in which we account for the ABAS' forensic application limitations adds subjectivity, rather than fostering transparency. This view reflects misconceptions about adaptive behavior evaluation protocols and of our model.

Two major adaptive behavior instruments can be used to capture all relevant evidence regarding defendants' functioning, the *Vineland Adaptive Behavior Scales Second Edition* (VABS-II; 61) and the SIB-R. With both, the examiner questions the respondent about each assessed skill and then makes a rating that is based not only on the resultant information, but on all relevant evidence. In that regard, the VABS-II manual instructs that each rating must reflect "complete information" pertaining to the assessed skill (61, p. 27). The SIB-R manual states that "the examiner makes the final judgment regarding the quality of information obtained about the individual, using the respondent's input to guide the rating of each task" (40, p. 36). However, with both applications it cannot be determined if a skill rating was predicated on the respondent's answers to questions, other information, or both, which makes it impossible to discern how much and where weight was given to account for sociocultural factors and for other relevant evidence. Due to these unknowns, reviewing psychologists cannot track the examiner's clinical judgment. For example, in *Ohio v. Clifton White III*, the defense psychologist assessed Mr. White's adaptive behavior with the SIB-R, using that defendant as the respondent (62). The Ohio Supreme Court noted that "he did not use White's information as the sole basis for scoring any question, and he estimated that 'probably less than 10 percent' of his information came from White" (62, p. 6). It is thus unknown whether a skill's rating was based on presumed potential, Mr. White's self-report, or other unspecified evidence. As a result, it is impossible to determine if that examiner's rating of many of the assessed skills was reasonable.

Our evaluation model calls for reporting of defendants' attained scores so that reviewing psychologists and fact finders know how adaptive behavior

was self-rated. Notations made on the ABAS form identify the skills whose rating were increased to account for sociocultural factors and those made for adaptive behaviors that are not captured directly by the ABAS. Reviewers thus know how clinical judgment was exercised to account for the ABAS' forensic application limitations, especially how the resultant summative standard scores for the entire relevant informational database were derived. Only because of this transparency did the *DeJesus* court know that 45 of that defendant's skill ratings were adjusted by this first author to account for the ABAS' shortcomings, and by how much the resultant summative scores exceeded the attained scores. We are thus confident that informed observers will find that our adaptive behavior evaluation methodology is both systematic and transparent.

Litigation Results

Widaman and Siperstein cited two instances in which our adaptive behavior evaluation model was criticized by the judiciary. In *DeJesus*, the court did not accept the 45 adjustments that were made by this first author to Mr. DeJesus' attained ABAS scores. This was a highly unusual case in which records portrayed the defendant as a partner in narcotics trafficking who earned thousands of dollars per week, who was its enforcer, and whose life revolved around drug use and women. That lifestyle represented such a dramatic departure from the ABAS standardization sample that significant adjustments had to be made to his attained scores to account for sociocultural factors and for skills that are not measured directly by that instrument. Usually such accounting produces modest increases in the overall ABAS standard score or General Adaptive Composite (GAC). For example, in *Plata* this first author's adjustments increased the GAC from 61 to 70.

Widaman and Siperstein apparently cited the *DeJesus* and *Plata* courts' opinions regarding our adaptive behavior evaluation model in efforts to persuade that fact finders' view of its utility parallel theirs. But they seemed unaware that in 31 other litigated *Atkins* cases in which this first author applied the ABAS-based evaluation model, that approach was not found to be faulty. The resultant 94% acceptance rate indicates that, even after hearing rebuttal of our methodology such as that voiced by Widaman and Siperstein, fact finders have considered it to be appropriate.

Ethical Considerations

Widaman and Siperstein claimed that how we account for ABAS shortcomings for forensic use violates ethical standards. Our position is that it is professionally improper to purport that ABAS attained scores, whether produced by a self-rating or by other respondents, are accurate indices of *Atkins* claimants' adaptive behavior. The ABAS and all other adaptive behavior instruments were not normed on criminal offenders, and they cannot capture all relevant evidence regarding a specific *Atkins* claimant. Accordingly, we believe that it is ethically imperative for examiners to disclose that attained adaptive behavior scores cannot be considered accurate representations of these defendants' functional status. We also consider that clinical judgment must be applied to provide fact finders with a quantified estimate of its actual quality. As stated previously, we know of no way to quantify all relevant information available on defendants other than to use a contemporary adaptive behavior scale to structure that process. Widaman and Siperstein did not specify an alternative method for integrating and quantifying all evidence in a case related to adaptive behavior.

Our evaluation model does rely on an adaptation of the ABAS' conventional application. It is akin to the "off-label use" of prescription medications, which has been estimated to be 40-60% (63). As noted by Olley, "assessments of adaptive behavior in forensic evaluations for mental retardation often must rely on adaptations of customary methods" (64, p. 4), and the acceptability of such adaptations is articulated by the American Psychological Association's *Code of Conduct* Rule 9.02 (a):

"Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of research on or evidence of the usefulness and proper application of the techniques" (65, p. 13).

We thus consider that how our evaluation model accounts for the ABAS' deficient sociocultural relevance to *Atkins* claimants and its inability to capture all relevant evidence in a case is entirely ethical.

"Overriding" Self-ratings

Widaman and Siperstein stated that "no adaptive behavior administration manual states that any circumstances justify an examiner arbitrarily adding points to a person's score" and thus "overriding the response of the defendant." The procedures we propose to compensate for the ABAS' forensic application shortcomings are very systematic and theoretically sound, not arbitrary. In addition, manuals vary markedly regarding how much guidance they provide for the use of their instruments, and none instructs how to account for sociocultural factors and all relevant evidence.

With respect to ratings that do not comport with other evidence, the ABAS-II manual merely states that "it is necessary to resolve these differences to obtain an accurate description of an individual's adaptive behavior" (17, p. 37). Apparently it is up to examiners to devise their own procedures for doing so, of which the score-adjustment method suggested by ABAS developer Harrison is an example. The SIB-R manual provides more explicit instructions, stating that it is up to the examiner to determine how a skill should be rated, and that the respondent's input merely "guides" the rating of each skill (40, p. 36). "Overriding" a defendant's self-rating to enhance the accuracy of an evaluation is thus not a novel idea. However, casting our evaluation approach as being predicated on alteration of defendants' self-ratings is a gross mischaracterization.

In our system defendants' actual ABAS self-ratings are presented as attained scores, and some psychologists have elected to consider these as acceptable indices of adaptive behavior. But we believe that doing so constitutes misrepresentation since those scores have not accounted for sociocultural factors or all relevant evidence. Computing a second set of scores, derived by crediting defendants for undiscovered skills that are typically evidenced even by low functioning mildly mentally retarded persons (i.e., accounting for sociocultural factors) and by incorporating all other relevant evidence, helps compensate for the ABAS' forensic application shortcomings. Through those two procedures, clinical judgment is applied in a quantified manner to yield adaptive behavior scores that would have been generated by an ABAS self-rating if this instrument had been capable of accounting for sociocultural factors and for all relevant evidence in a case.

CONCLUSIONS

To date there exists no standardized instrument that was developed for establishing accurately the adaptive behavior of criminal defendants. As we endeavored to point out in our response to Widaman and Siperstein, the adverse impact of that void has been exacerbated by many misconceptions that have been thrust into *Atkins* proceedings regarding criminal offenders, the mentally retarded, adaptive behavior, the nature of adaptive behavior instruments, and the requirement of forensic adaptive behavior evaluations. We therefore expected some opposition to our ABAS-based evaluation model. But no other methodology has been proposed which systematically, transparently and quantitatively accounts for the shortcomings inherent in the application of the ABAS or any other adaptive behavior instrument to *Atkins* claimants.

While administrative procedures for some adaptive behavior measures encourage the consideration of all relevant evidence pertaining to the sample of skills that they gauge (e.g., SIB-R, VABS-II), no instrument can account for adaptive behavior that was displayed but which is not targeted directly for assessment. Since those measures were not developed for or normed on criminal defendants, they also do not account for their unique sociocultural background, especially for the impact of a criminal lifestyle. And if the past two decades are indicative, it is unlikely that an instrument will appear in the foreseeable future that is designed for and normed on criminal offenders which can capture all relevant information in any *Atkins* case. Thus, as well-illustrated by Widaman's and Siperstein's proposed evaluation model, use of extensive clinical judgment will remain the central feature of forensic adaptive behavior evaluations. Accordingly, efforts to enhance diagnostic accuracy must focus on improving the quality of the clinical judgment which drives them.

In the field of mental retardation, clinical judgment has been characterized as "being systematic (i.e., organized, sequential, and logical), formal (i.e., explicit and reasoned), and transparent (i.e., apparent and communicated clearly) (66). Our ABAS-based evaluation model is designed to systematically and formally bridge that instrument's inability to account adequately for sociocultural factors and for all relevant evidence in any criminal

case, and to do so in a manner which yields summative scores that can be subjected objectively to the -2 S.D. deficits criterion. Equally important for the adversarial *Atkins* context is the transparency that is shaped by its procedures, as these create a roadmap for reviewing psychologists and fact finders which shows exactly how clinical judgment was exercised. Despite typically vigorous rebuttal testimony, our methodology has been accorded high acceptance by fact finders in legal proceedings, which attests to its soundness. We thus consider that our procedures for accounting for the ABAS' forensic application shortcomings represent important steps that can be taken to enhance the quality of clinical judgment that must be exercised to establish the adaptive behavior of *Atkins* claimants.

AUTHOR NOTE

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