

Dealing With Experts on Competence to Stand Trial: Suggestions and Approaches — Part One

Since the publication in 1988 of Dr. Thomas Grisso's discussion of the competence to stand trial assessment process, there have been a number of developments aimed at improving the performance of defense counsel in the competence assessment process.¹ The need for lawyers to be familiar with the definitions, assessment processes, and methods of adjudication of the accused's (in)competence to stand trial has been underscored by rulings from the U.S. Supreme Court on competence to stand trial definitions, the development of state-specific case law amplifying existing state statutory definitions of the competence assessment process, scholarly research on that process leading to several influential publications, and ongoing training for defense counsel.

The objective of this article is to review basic information that should be integrated into the evidence presented in a hearing or trial of a person's incompetence to stand trial. Part one of this article will emphasize background information that counsel should be aware of and should collect to better understand who conducts competence assessments, and how to probe the qualifications, professional competence, and methodology employed by experts. Part two will review how lawyers can "operationalize" the definitions of competence to stand trial and the standards applicable to the mental health assessment process in order to either effectively present evidence of incompetence or attack unreliable or invalid opinions of competence.

Participating in the Assessment Process

The basic premise is, admittedly, both simple and simplistic. When lawyers understand the educational and training foundations of mental health experts, the professional standards on which they rely, and the structure of the practice of competence assessment as defined in the literature, they can effectively present (or where necessary attack) competence assessment evidence. There is enough written about competence assessments to allow lawyers a measure of control over, and input into, the competence adjudication process. Conversely, problems arise where lawyers are unable to participate in a standardized assessment process and a knowledgeable adjudication of competence because they have failed to educate themselves.

Frequently, defense counsel in jurisdictions in which there is a centralized mechanism for competence evaluations — such as a designated forensic assessment center, a state hospital, or a court forensic assessment unit — will lament that their opportunity for input into the assessment process is minimal and access to qualified independent experts is limited. These complaints are often valid, though part of the problem is that the defense bar in a number of geographical areas has not developed a proactive approach to the competence assessment process. It often comes as a surprise to some members of the defense bar that their colleagues will make a record of communications with state hospital doctors while sending packets of information and referral questions

BY JOHN T. PHILIPSBORN

to be addressed. Certain lawyers will make the effort to request to be present during “staffings” of particular clients. These lawyers will request the opportunity for input into the assessment process and an opportunity to present data. Where such legitimate requests are rebuffed, as noted below, the basis for foundational objections emerge, as do opportunities to attack the integrity and reliability of the process.

The approach encouraged here, besides advising defense counsel to be involved in the assessment process (whether as active participant or active observer is a strategic and tactical issue not addressed here), is for lawyers to carefully assess the principal foundational aspects of competence assessments so that valid and reliable work can be recognized, and “bad” science and unprofessional approaches can be unmasked and effectively challenged.

In order to deal effectively with the issue of (in)competence to stand trial, it is critical to understand: (1) how experts are trained; (2) how to assess the significance of their training and professional affiliations; (3) where to find the standards that apply to their work; and (4) how to prepare to present or challenge their opinions.

History of the Diagnostic And Forensic Assessment Process

One useful starting point to this discussion is the history of the endeavor. Competence to stand trial, according to the U.S. Supreme Court’s opinion in *Cooper v. Oklahoma*, is a concept that has been around our legal tradition for at least 300 years.² It was some time, however (and often not until the middle of 20th century in the United States), before legislatures enacted the “modern” competence tests in this country. Moreover, it was not until the latter part of the 20th century that the U.S. Supreme Court reiterated, in its current formulation, the basic elements of competence to stand trial.

The legal concepts have been around much longer than the sciences, diagnostic criteria, professional education curricula, and assessment methodologies in use by those charged with evaluating the competence to stand trial of defendants in criminal cases. Thus, it is helpful to have some notion of how well established some of these important aspects of the foundation for compe-

tence opinions are. For example, the lawyer who goes into session without the vaguest idea of the development of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM) may be surprised by a cross-examination that points out that when the *Manual* was first published in 1952 it covered a limited number of diagnostic criteria. The DSM underwent significant changes in each edition, most dramatically between the second and third editions — and it can be described as a work in progress not particularly well suited for literal use in courtrooms.

Therefore, one could use the DSM as a sword or a shield in the examination of an expert to point out that as the DSM has “aged,” it has changed. This demonstrates that mental illnesses and conditions are the subject of ongoing inquiry, and mental health experts continue to refine their approaches to them. Moreover, the DSM explains, when “. . . employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”³ And since many mental health evaluators use the DSM as a diagnostic gold standard, both the history of its evolution and knowledge of its stated limitations are important.

It is also important to know that there has been an evolution in the level of development and professional regulation of the forensic mental health sciences up to the present time. Having in mind a few significant historical reference points, and discussing them to provide a context to the assessment in the case in question, will be helpful.

Here are a few of these reference points.

- ❖ **1952** Publication of *DSM-I*.
- ❖ **1965** Robey’s Research and Basic Inventory on Competence to Stand Trial (one of the first instruments developed specifically for forensic mental health).
- ❖ **1967** Classification of psychiatric illnesses is addressed in the *Comprehensive Textbook of Psychiatry*.
- ❖ **1968** *DSM-II* published.
- ❖ **1968** The American Academy of

Psychiatry and the Law founded.

- ❖ **1969** The American Board of Forensic Psychology founded.
- ❖ **1973** *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* published by the American Psychiatric Association.
- ❖ **1980** *DSM-III* published, involves a large expansion of diagnostic categories.
- ❖ **1986-1988** Thomas Grisso begins publishing on the evaluation of competency to stand trial, and urges regard for standards in the assessment and report writing.
- ❖ **1987** Melton et al., publish updated edition of *Psychological Evaluation for the Courts*, covering protocols and methods to be applied to a wide variety of examinations (updated and newly published in 2003 in its Third Edition).

Concentrating on Education, Ongoing Training, and Experience

Every legal system in the United States has some basic statement of the requirements applicable to experts. Under the California Evidence Code, an expert is a person who has “. . . special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates.”⁴ The Federal Rules of Evidence set forth a similar threshold definition, providing that an expert is “a witness qualified . . . by knowledge, skill, experience, training, or education. . . .”⁵

Too many practitioners involved in the competence assessment process concede that a proffered expert is possessed of the basic qualifications to testify regarding the assessment of competence to stand trial — either in preparing to present, voir dire, or otherwise cross-examine that expert. Often they do so out of expediency, because the report is “favorable,” or so “negative” that it seems impossible (or impractical) to fight. But even an experienced mental health expert may be an inadequate and unqualified expert on trial competence.

A few observations are in order regarding the training and credentials of psychologists. Psychologists often have (though not always) a Ph.D. obtained

after completion of a course of graduate study of between five and seven years. A dissertation helps to define the expert's area of concentration as a doctoral student. Rarely will it have been on the subject of the assessment of competence to stand trial — or even on some related topic.

This observation leads to this point: other than obtaining some school-based training that provided a foundation for forensic work, little in the expert's academic education may have centered on material of direct use to forensic work, and especially to the assessment of competence to stand trial. The exception may be the graduate of some of the newer programs in forensic mental health.

But for the "mainstream" expert, the process of preparing for the hearing should include the careful review of the expert's course of study and consideration of its relevance to the establishment of expertise in competence assessments. With the exception of those who happened to have studied in areas that are obviously relevant, it is possible that either for the purposes of direct examination or cross-examination, the expert's academic training will prove to be of little use in establishing relevant expertise.

It was not until relatively recently that the American Board of Professional Psychology (ABPP) began awarding specialty certificates in several fields of psychology, including: clinical psychology; forensic psychology; clinical neuropsychology; counseling and school psychology. Those possessed of ABPP certificates demonstrate credentials including the appropriate doctorate; post-doctoral training in their area of specialty; at least five years of experience; recommendations and endorsements from people in the field; and suitable results on a field-specific examination.

Psychiatrists follow different courses of study than do psychologists. Many, though not all, study medicine and complete medical internships before going on to further study and residency programs in psychiatry as part of a course of medical studies. Not all psychiatrists, however, are licensed physicians. Training courses other than medical school education may provide a basis for practice as a psychiatrist, including (at least in some states) obtaining a final degree as a Doctor of Osteopathy.

Some physicians who completed residency programs in psychiatry may

not have received prolonged exposure to areas of study such as psychopharmacology or neurochemistry (beyond basic courses). Thus, these experts may not have easily demonstrable academic training in the effects of certain classes of medications that may be of issue in a given case. Their initial training and continuing education may not have emphasized areas that are critical to a given competency inquiry. These are matters into which counsel should inquire.

Several specialty organizations certify physicians in specialty areas. For example, the American Board of Psychiatry and Neurology certifies physicians in psychiatry, neurology, and child neurology. The American Academy of Psychiatry and the Law emphasizes forensic practice and forensic credentials. It is one of the organizations that has coordinated with the American Medical Association and the American Psychiatric Association in the development of sub-specialty expertise, specialty certificates, standards for education, and requirements for continuing education.

Each of the pertinent organizations or boards explains its relationship (if any) to the predominant organizations. Some of these credentialing bodies publish materials that are useful either in establishing or attacking the approaches and methods used by a given examiner. For example, the American Board of Psychiatry and Neurology commissioned reports on *Core Competencies for Psychiatric Practice*, which are published by the American Psychiatric Press. The title speaks for itself.⁶

Psychiatrists who have completed their residency in psychiatry and have acquired the relevant experience may develop sub-specialty expertise and be awarded either specialty certificates or Board certifications (depending on the credential-awarding organization). Not all of those who conduct forensic examinations will possess board certification or specific training in forensic psychiatry. Establishing how a given expert has demonstrated his or her expertise in forensic examinations may prove to be a critical part of the competence adjudication proceeding.

There are various groups providing credentials to psychiatrists and psychologists. Some are highly legitimate and professionally prized, and others less so. The major organizations mentioned here, including the American

Medical Association, American Psychiatric Association, and American Psychological Association, all have Web sites that explain the information set forth here (as does some of the pertinent literature).⁷ The American Academy of Psychiatry and the Law sets forth standards specific to forensic psychiatry. Similarly, Division 41 of the American Psychological Association provides a wealth of information about forensic psychology, including the standards applicable to forensic assessments.

The reason for this tour of the sources of information (and credentialing bodies) is that lawyers are sometimes not fully aware of what training psychiatrists or psychologists may have had. Both the American Psychiatric Association and American Psychological Association (and their sub-specialty affiliates) regularly publish practice-related standards and information about continuing education. They maintain and publish ethical codes and standards. The failure to pay attention to these sources of information will deprive a lawyer either of the ability to demonstrate a given expert's adherence to, or departure from, current standards of practice.

Academic programs in psychiatry and psychology changed over a period of time. The advent of programs that offer concentrated training in forensic psychiatry or forensic psychology has changed the educational "baggage" that experts possess, depending on when or where they were trained.

For example, many psychologists trained and licensed in clinical psychology, particularly more than 20 years ago, may have had no academic or supervised training at all in forensic psychology and no clinical experience that would have involved competence to stand trial examinations. Thus, their knowledge of the competence to stand trial assessment process may have been learned on the job and as a result of *some* continuing education. Indeed, it is surprising to note how many "experts" on competence assessments have little formal training of any kind specific to such endeavors. Similarly, psychiatrists may have had little or no forensic training. Furthermore, they may have had no exposure to the competence to stand trial assessment process until after they left their residency programs and were in practice — and they may not be able to establish any formal relevant training.

People v. Ary

The importance of inquiries into qualifications can be illustrated by a brief description of the evidentiary hearing held in *People v. Ary*, a case remanded by a California Court of Appeal to a trial court for a retrospective competence assessment.⁸ James Ary was evaluated at the time of his initial trial proceedings (though not specifically for his competence to stand trial). Evidence of his possible incompetence, however, was argued as a critical issue on appeal. During the post-conviction retrospective competence assessment, at least eight mental health professionals, the majority of them psychologists, gave an opinion about Ary's competence to stand trial. Some of the experts were retained by the state, others by the defense. Two were considered "court experts," though they were nominated by the parties. Not all of the experts actually examined Ary, but several did. All of the experts professed to have some opinion about his competence.

The most recently educated psychologist had obtained doctoral training (and a doctorate in clinical psychology), and then had completed a post-doctoral program in forensic psychology that added 2,000 hours of specific training in forensic issues, including the assessment of competence to stand trial. The majority of the other experts had obtained their doctoral degrees at least 20 years before the commencement of the hearing (one had been a practicing psychologist for at least 40 years). None of these experts had any training during the course of their education that touched either on forensic issues or on the assessment of competence to stand trial. Only three of the experts professed to have ever been asked about their training in, and knowledge of, the assessment of competence to stand trial in any detail during their careers prior to the hearing.

Four of the experts purported to have recently read cases involving the definition of competence to stand trial, though most recognized that *Dusky v. United States* and *Drope v. Missouri* were case names related to the definition of competence to stand trial.⁹ Only two of the eight could even state the formulation of the basic competence test by the U.S. Supreme Court. Three of the eight professed to be aware of the discussion of the attributes of competence as discussed in *Godinez v. Moran* — though all three had been asked to review the decision by counsel.¹⁰

Almost all of these experts were aware of and described Dr. Thomas Grisso as an acknowledged expert on the assessment of competence. Only three, however, professed any recent review of Grisso's *Evaluating Competencies*, Melton's *Psychological Evaluations for the Courts*, or Sadock and Sadock's *Comprehensive Textbook of Psychiatry* — and each of these had been asked about these sources in advance of the hearing.

Prior to the hearing, two of the experts indicated awareness of the research on the CAST-MR (the Competency Assessment for Standing Trial of Defendants with Mental Retardation). Half of the experts had reviewed literature pertinent to the CAST-MR (which had been administered to the accused). Only two of the experts professed to be conversant on the limitations of competency assessment instruments, including the CAST-MR.¹¹

All of the experts at issue had previously qualified as experts in criminal cases, some on many occasions. The experts quizzed on the reasons for the variation in their foundation noted the differences in the approaches of the lawyers they were working with to prepare their testimony.

Admittedly, evidence from one case is an insufficient basis from which to generalize. Anecdotal information from mental health experts and lawyers alike, however, suggests that both professions have highly varied knowledge of competence assessment tools and methodologies — to say nothing of the variations of knowledge about the combination of the definitions of (in)competence found in statutes and case law. There is some reason to be concerned that it is uninformed lawyering that is allowing uninformed experts to continue to operate without the need for current knowledge. Anecdotal information from lawyers handling criminal appeals indicates that it is relatively rare for there to be an extensive inquiry into the basic expertise of a psychiatrist or psychologist testifying on the question of competence to stand trial.¹²

Assuming that defense counsel prepares by reviewing relevant literature and case law, the defense can bear its burden of proof in part by defining the standard of practice that applies to an expert's assessment of competence to stand trial. The expert who can specifically link the elements of a given competence assessment to the U.S. Supreme Court's rulings on competence (as well

as to any seminal state rulings) and to the state statutory scheme will establish the necessary baseline.

Approaching the presentation of evidence of competence (at least from the defense's viewpoint) with these basics in mind has another advantage — it diminishes the possibility that counsel will rely on essentially uninformed experts to set the tone in the competence assessment adjudications. It is rarely helpful to endorse an expert's "I know it when I see it" approach. If an expert is unable during preparation sessions to make the basic connections between the legal definitions and the assessment process that he or she used, that expert is unlikely to make a good impression on cross-examination. Why do experts get away with displays of blissful ignorance of the legal definitions and contents of relevant professional literature? Part of the reason is that lawyers let them do so.

Prepare the Packet

There is a way to avoid the problem of the experienced expert whose foundation on competence issues seems weak. Counsel should prepare a relevant packet of information about the competence assessment process. The packet should include not only copies of the pertinent statutes and relevant case law, but also copies of the literature, including Grisso, Melton, and others whose information will be useful to establishing the adequacy of the work done by the defense expert and the standards that should be used in a competence assessment process. While this seems to be a basic insight into the obvious, few lawyers seem to do it. Unlike other areas of expertise that could involve extensive preparation, the task just outlined can be accomplished by accessing a few easily available legal standards and a few excerpts from widely available literature. Some lawyers will make it a point to make the packet part of the record so that the judge reviews it as well.

Using such a packet can also force opposing counsel to pay careful attention to phrasing questions in terms of the actual language of the cases and quoted literature. Also, it is a relatively easy way of showing a jury (in those jurisdictions that allow the question of competence to be tried by a jury) that there is a body of written information that plays a part in defining terms and processes applicable to competence to stand trial.

In addition to the materials just described, this packet might include materials on standards of practice applicable to the relevant areas of mental health expertise — an area often overlooked.

Conclusion

We have now looked at the basic issues that must be reviewed in dealing with an expert on the assessment of competence to stand trial. The emphasis here has been on understanding what background that expert brings to the assessment, and what gaps in the expert's understanding of the issues may have to be addressed early in the interaction between counsel and expert. In part two of the article, we will focus more specifically on methodology and approach, and how to ensure that an expert is either properly supported or appropriately challenged in rendering a competence-related opinion.

Excerpts from this piece appeared in Matthew Bender's California Criminal Defense Practice Reporter in November 2006. They are reproduced by permission.

Notes

1. Thomas Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* (1988).
2. 517 U.S. 348, 356-357 n.9 (1996), noting that the concept was recognized in reported cases in the 17th century, and embodied in the Criminal Lunatics Act of 1800.
3. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., text revision (DSM-IV-TR) at xxxii-xxxiii.
4. CAL. EVID. CODE § 720(a).
5. FED. R. EVID. 702.
6. *Core Competencies for Psychiatric Practice: What Clinicians Need to Know* (Stephen Scheiber et al. eds., 2003).
7. As with psychologists, a good primer on the credentials available to psychiatrists can be found in Virginia Sadock & Benjamin Sadock's *Comprehensive Textbook of Psychiatry* (8th ed.).
8. *People v. Ary*, 118 Cal.App.4th 1016 (2004).
9. *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975).
10. *Godinez v. Moran*, 509 U.S. 389 (1993).
11. See Richard Rogers & Daniel Shuman, *Fundamentals of Forensic Practice* 175-176 (2005).

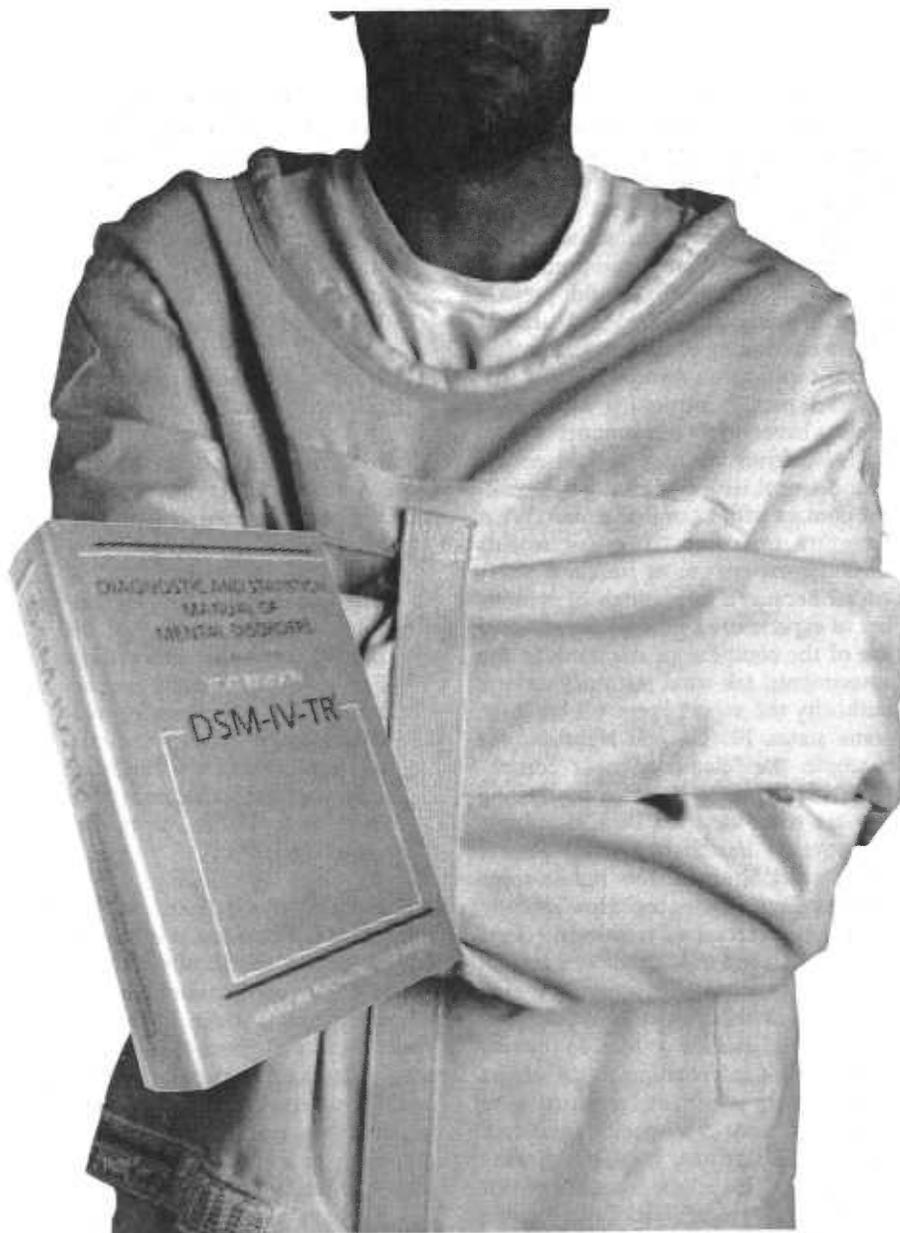
12. The anecdotes were not collected in a methodical way, but involved the writer's contacts with lawyers litigating competence to stand trial issues in several California state and federal cases. ■

About the Author

John T. Philipsborn has been a criminal defense lawyer for almost 30 years. For the past 15 years, he has been the amicus curiae committee chair for the California Attorneys for Criminal Justice. Philipsborn has authored (and co-authored) numerous publications on competence to stand trial, and has presented competence-related evidence in connection with several published cases.



John T. Philipsborn
 507 Polk Street
 Suite 350
 San Francisco, CA 94102
 415-771-3801
 Fax 415-771-3218
 E-MAIL JPhilipsbo@aol.com



Dealing With Experts on Competence to Stand Trial: Suggestions and Approaches — Part Two

Standards Related to Experts and Opinions

In many court systems, the same experts are involved in competence assessments time and time again. A number of lawyers hold the view that judges and juries (where juries make competence determinations) generally disfavor contested competence adjudications, in part because they are viewed as an unnecessary challenge of a usually familiar expert's views by the defense.

Thus, some lawyers counsel against contesting a client's incompetence even where it likely could be contested because the systemic "realities" are felt to work against the defense. A similar, though more strategic, issue raised by lawyers concerned with the competence adjudication process is that the state (or federal government) obtains insight into the client that would otherwise not have been provided had there been no competence inquiry.

It appears that some of these concerns are raised because lawyers feel they cannot control the competence assessment process well enough to ensure the correct outcome where the client is indeed incompetent.

Some of this lack of "control" is attributable to lawyers' lack of familiarity with the standards of practice and ethical rules pertinent to psychiatry and psychology. While there are indeed many variables in any given case that lawyers cannot control, they *can* point out where mental health professions do not adhere to their own rules in conducting an assessment, in arriving at a diagnosis or opinion, or in offering courtroom testimony. Armed with some sense of how to define proper from improper practice in the mental health professions, lawyers can more effectively address the process and outcome of a competence assessment.

The Ethical Principles of Psychologists and Code of Conduct, published by the American Psychological Association, covers a number of issues involved in the practice of psychology, including the assessment process, bases for assessments, test construction, and interpretation of test results. *Ethical Principles* defines a number of the limitations that psy-

Editor's Note: Part One appears in the January/February 2008 issue. The first part of this article emphasized the importance of a defense lawyer understanding the training and professional credentials of psychologists and psychiatrists when issues arise involving the assessment of competence to stand trial. The second part of this piece discusses: (1) the advantage of a lawyer's familiarity with the ethical standards for mental health professionals, and (2) the necessity of counsel having a basic, fact-driven explanation of how a client's mental state has compromised the conduct of criminal proceedings.

BY JOHN T. PHILIPSBORN

chologists should reflect in stating opinions depending on what data is available.

Similarly, for psychiatrists, the *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* is viewed as defining standards of practice applicable to the profession. It has been referred to not only in some of the leading publications, but also in rulings of the U.S. Supreme Court.¹

A legitimate question can arise about how influential these organizational ethical principles are to an expert who professes not to belong to a given organization. Nevertheless, both in decisions of reviewing courts on constitutional law and criminal procedure issues, as well as in civil case decisions pertinent to practice and malpractice by psychologists and psychiatrists, courts have made reference to the predominant ethical codes and standards of practice of the dominant organizations. In specialty areas, several well known professional groups publish ethical guidelines or specialty guidelines. For example, the American Academy of Psychiatry and the Law publishes *Ethical Guidelines for the Practice of Forensic Psychiatry*. Likewise, guidelines are also published by organizations such as the American Academy of Forensic Psychology as well as the American Board of Forensic Psychology.

As is pointed out in the Federal Judicial Center's *Reference Manual on Scientific Evidence*, the American Medical Association (AMA) issued a report and a set of recommendations to state licensing boards urging that erroneous testimony by physicians be included as a type of malpractice and be subject to discipline.² These recommendations clearly would affect psychiatrists. Indeed, the AMA and several states essentially define providing expert medical testimony as a form of medical practice. This is an important development, as it emphasizes the concern for adherence to standards.

The advantage of a lawyer's familiarity with ethical rules for psychology and psychiatry, as well as the announced standards of practice for these professions, is that they form the basis not only of establishing for the trier of fact that there is a baseline, but also that departure from these standards must be viewed as demonstrating questionable practices. For example, the evaluator of competence to stand trial who professes to function under pertinent rules should be the subject of a wide-ranging voir dire or cross-examination where he or

she: (1) has not maintained his or her knowledge of the field, including knowledge of pertinent literature and case law, and (2) has failed to obtain continuing education on the assessment of competence to stand trial. Counsel who have previously asked limited questions on an expert's qualifications should prepare more detailed inquiries and should obtain continuing education and professional certification records for the proposed expert. A surprising number of experts have simply not kept up.

A defense attorney should review foundational issues — even when making contact with a familiar expert. What literature on competence assessments does the expert use as standard references? Because a surprisingly high number of experts use a general understanding of the competence standards in the assessments, ask what statutory or case authority the expert keeps on hand. In some states, Florida and Nebraska for example, the “elements” of a competence inquiry as set forth in controlling law are more detailed than elsewhere. Moreover, other than Richard Rogers and Daniel Shuman, few publications address these differences.³ How recently has the expert received training on competence to stand trial either as a subject or as an assessment process? It makes sense to ask these questions, and they provide the basis for counsel to provide a “packet” of information to the expert that includes pertinent literature, legal standards, and case-specific material. (See THE CHAMPION, January/February 2008 at 15.) This is true (tactical considerations aside) regardless of whether the expert is friendly or adverse.

In addition to the general standards of practice and generalized ethical standards pertinent to the mental health professions, there are a number of standards that govern in the arena of competence to stand trial assessments.

Standards Exist for Competence Assessments

Many mental health experts familiar with the courts will profess some knowledge of generally accepted literature. Experienced lawyers will seek to have an expert define how he or she approaches the assessment of competence. Is it done the same way in every case? Is the design of the assessment case specific? How did the examiner decide how to structure the examination or assessment in this case? This is not a matter of guesswork; it is a subject addressed in the literature. According to

Gary B. Melton, while the assessment of competence to stand trial is rooted in the U.S. Supreme Court's definitions, it is conducted in a specific context:

With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges . . . may be grossly insufficient when a more complicated offense is involved. . . .⁴

Melton is not alone in this observation. A similar observation appears in the *Comprehensive Textbook of Psychiatry*:

The impairment must be considered in the context of the particular case or proceeding. For example, mental impairment that renders an individual incompetent to stand trial in a complicated tax fraud case may not render that individual incompetent for a misdemeanor trial.⁵

Because of the dearth of detailed analysis in the case law, it is hard to find language that specifically anoints this view of a competence assessment (though there is some in certain state court decisions). Since this is the literature often relied upon by the mental health professions, however, such language is important, if for no other reason than to establish what an expert knows or has not bothered to consider.

There is another important issue that often arises in a competence assessment, particularly when it is conducted by a court-appointed expert who is paid a flat (usually low) rate and thus can devote only little time to it. The issue arises even when the assessment is undertaken in a state hospital setting where time should not be as precious. The issue is whether contact should be made with the attorney of record to obtain data pertinent to competence. The literature recommends contact between the evaluator and the attorney representing the accused — particularly on the question of ability to assist counsel. Melton is quite clear:

The consultation process should not be conceptualized as unidirectional, however. The clinician also needs to obtain information from the attorney. . . . More important, only the attorney can provide the clini-

cian with information about the length, substance, and nature of previous attorney-client contacts.⁶

Indeed, it is important to note that Melton acknowledges the phrasing contained in *Medina v. California* that it is defense counsel who will "... often have the best informed view of the defendant's ability to participate in his defense..."⁷

This same point was made by Dr. Thomas Grisso in his 1988 pamphlet titled *Competency to Stand Trial Evaluations*, though at that point his view on the subject was narrower than as stated since. He noted that in attempting to obtain background information, "... the examiner should attempt to learn from the defendant's attorney those specific behaviors of the defendant that raised doubt concerning the defendant's competency."⁸

While other mental health professionals have published primers and practice guides related to the assessment of competence to stand trial, the above quoted sources are significant. It is surprising, particularly when the problem revolves around the accused's ability to assist counsel (or cooperate in the preparation of a defense), that lawyers do not focus on an expert's failure to contact them.

Many experienced lawyers will proactively contact competence examiners to try to spur communication, or at least to make a record that counsel tried to make the contact. Lawyers in those jurisdictions in which competence assessments are conducted in a hospital or locked ward setting, or where competence restoration "work" is done in such settings, should formulate a specific strategy on communication with the mental health experts. Today, however, the practices of the legal profession in this area vary a great deal. Clearly, examiners in state or federal hospital settings have no better gauge than do their colleagues in the community on what issues are encountered by defense counsel in a specific attorney-client relationship. They have little understanding of the demands of a specific case, or how the communication between the lawyer and client has occurred.

The lawyer who has created a trail of communication with the examining expert, or who has at least created a paper trail evidencing efforts at communication, is supported by the relevant literature with respect to signifi-

cant omissions by the mental health experts.

Knowledge of Available Formats of Competency Evaluations

In establishing or testing expertise in this area, counsel should become familiar with the various approaches to competence evaluations. Richard Rogers and Daniel Shuman, two well known scholars in the field of forensic mental health, have noted that there are basically three approaches to the diagnostic process in forensic practice. The first is *unstandardized*, depending on a clinical interview, plus some record review and collateral interviews as well (i.e., interviews of people other than the defendants). An unstandardized approach emphasizes the "I know it when I see it" type of expertise. It is difficult to validate because it is dependent on one person's judgment. And it is not unusual for experts relying on an unstandardized approach not to write very detailed reports, making their opinions even more subject to individual judgment rather than verifiable work.

This unstandardized approach can be contrasted with the *standardized diagnosis* based on structured interviews empirically validated for use in competence assessments (and including collateral interviews and record review as well as examination of the accused). The notion is that these diagnoses are based in some verifiable methodology and in techniques that can be replicated by another examiner.

Third, according to the Rogers and Shuman view, there are *extrapolated diagnoses*. These are based on investigating the relationship between results on psychological tests designed and associated with broad diagnostic groups that are related to a clinical assessment process of the individual at issue.⁹

While other scholars have described the diagnostic process in other ways, the Rogers and Shuman description has a great advantage for lawyers. It is simple and easily establishes that a mental health evaluation is a process that can be subjected to some level of analysis. Lawyers often miss the point in this area. Lawyers often question how a mental health professional arrived at a given opinion, but they do not know how to ask what process was involved. Did you do something that another expert can review and try to validate? Did you use techniques that

have been subject to research and review? Did you write a report according to any published standards or approaches? (Grisso points out the importance of standardized report writing methods.)

Having a compact and easy way to describe the diagnostic process is important in a hearing or competence trial. Counsel has to find a way to differentiate between the methods used by examiners, and to introduce language into the court hearing or trial that differentiates between approaches used by experts. Basically put, lawyers have to be able to explain why the "drive by" evaluation — consisting of some time spent with the accused and some time spent reviewing records — does not produce an easily verifiable opinion. Developing the ability to explain to the trier of fact with explanations of how a diagnostic process can be verified (and where it cannot) is what results from understanding the various approaches to competence assessments.

Competence to stand trial assessments often involve the use of fairly well known instruments that may be described as structured interviews, inventories, or tests. Usually, such instruments — such as the Competence Assessment Instrument (CAI), the MacArthur assessment tools (including the MacCAT), and Rogers' Evaluating Competence to Stand Trial-Revised (ECST-R) — are *an* ingredient in a more methodical process than the "drive-by."

Expertise is established when the following items are included as part of the statement of an expert's background: (1) knowledge of the different categories and types of assessments; (2) knowledge of the different assessment tools; and (3) varied opportunities for acquisition of information on competence to stand trial. (Conversely, when this information is used on cross-examination, it opens up the expertise to question.) Not only does this information establish expertise, it also serves to establish the strengths and weaknesses of any given competence to stand trial assessment process. It serves to establish a description of the science of competence evaluations, as well as their weaknesses — especially in the assessment of the so called "aid and assist" counsel element of the legal test of competence. There are no particularly well established or validated approaches in that area — particularly if one understands the need for examiner contact with counsel to mean that this is an area in

which examiners must at least try to acquire data from counsel.

Experts Offering 'Relevant' Evidence

Dr. Thomas Grisso has written that, historically, mental health examiners were viewed as failing to provide testimony that was relevant to the law's concerns, and also that many examiners seemed to be ignorant of the nature of the legal inquiry.¹⁰ As he puts it:

Something more is needed, therefore, than a mere diagnosis of mental disorder, a reference to an individual's inadequate contact with reality, or a statement about general mental retardation. For clinical information to be relevant in addressing legal questions of competence, **examiners must present the logic that links these observations to the specific abilities and capacities with which the law is concerned.**¹¹

Others have explained that "... forensic clinicians must consider individually the clinical issues associated with each *Dusky* prong."¹² Attention needs to be paid to the "clinical operationalization of the competency standard."¹³

These comments frame some inter-related points that will be lost on lawyers who approach competence to stand trial hearings as though the objective were simply to present some expert opinions on an individual's disorders and how they are manifested — with the legal issues left to be explained through counsel's arguments. Even relatively experienced judges often do not have in mind all of the essential formulations and phrases of the U.S. Supreme Court's competence definitions. They may reference a statute, ruling, or (where employed) jury instruction that is clearly out of step with the Supreme Court's requirements. This is true, for example, of the California statutory definition that was formulated in 1967 but has not been updated. It is a significant oddity since the statutory definition has not been changed to incorporate the more recent rulings.

From a tactical standpoint, the failure to make use of an expert's understanding of the various competence to stand trial definitions, and to have the expert explain how each activity engaged in during the assessment (the

interview, record review, testing, consultation with counsel, observation of the accused with counsel, etc.) relates to an understanding of *this* individual's competency to stand trial, represents a failure to explain basic linkages between definitions in an assessment process.

It is in part for this reason that counsel are urged to work carefully with experts to ensure that they are fully aware of the content of the case law. Counsel must make sure they have thought how their work as psychologists or psychiatrists in the particular case has addressed the salient questions set forth in the law.

Supporting the Basic Showing of Incompetence

It has been pointed out that the U.S. Supreme Court has never required proof of a specific disorder to establish incompetence or otherwise specified what evidence will establish incompetence. Some state statutes, however, create a linkage between proof of an underlying mental disorder or developmental disability and incompetence to stand trial. Whether this linkage would pass constitutional muster if properly challenged is beyond the scope of this piece. Suffice it to say that when contemplating the presentation of evidence of incompetence, lawyers often contemplate calling one or more mental health experts who are important to the process, in part because they provide the diagnostic information.

Some thorough examiners and lawyers will also call upon a variety of supporting witnesses to flesh out their understanding of the client's functioning, including family members; jail and prison visitors, inmates, staff, and mental health experts; witnesses (including experts) from prior hospitalizations; and prior diagnosticians.

It appears that in the cases in which counsel have been successful in establishing incompetence, the trier of fact was presented with ample, sometimes redundant, testimony from a wide variety of witnesses. Indeed, often the government will seek to rebut the defense evidence by calling the same types of witnesses the defense will call — notably jail, prison, or state hospital personnel who are often offered as sources of information about an individual's behavior when the light of a mental health examination is not on them, and when (according to the arguments usually proffered) the accused's guard is down. Clearly, proactive counsel who undertake the burden of demon-

strating the existence of incompetence should avail themselves of this wide range of evidence.

Exercise care in choosing lay witnesses on competence. Without doubt, some triers of fact will believe a credible lay witness over an expert. But some care should be taken to develop specific parts of the evidence of incompetence through the corroborating witnesses. Often, these witnesses are called to establish that the accused is demonstrating confusion, incoherence, or paranoia (to name a few) even when no lawyers, doctors, or other "officials" are looking.

Several reported cases discuss, in some detail, the witnesses called on the issue of competence or restoration to competence in a way that may assist counsel in formulating plans. One series of such cases centered on New York's Vincent Gigante. Over a period of time, Gigante was the subject of several different competence adjudications.¹⁴ The Gigante saga is of importance because it involved well known psychologists and psychiatrists who lined up on the two sides of the issue, and because it chronicled the various lay witness opinions that were introduced.

After the tortured litigation of the competence issues, Gigante eventually made certain admissions on the record in his federal case to the effect that he had been faking certain aspects of his apparent incompetence. This admission led, among other things, to editorials and commentaries by well known mental health professionals questioning (once again) the usefulness of the injection of mental health opinion evidence in forensic settings.

Another useful discussion of the subject is found in *United States v. Dubon*, another federal district court case that offers a rich discussion of competence law and literature pertinent to competence inquiries, as well as a review of the testimony of various witnesses in a competence restoration proceeding.¹⁵ *Dubon* also involved the use of an attorney-expert, i.e., a lawyer called to explain how defense of the case necessitated attorney-client communication.

The suggestion to use lawyer-experts in competence proceedings has been made over a period of time.¹⁶ The attorney-expert contemplated is one who would explain, either specifically (in the appropriate case) or generally: the demands placed on a client in that type of case; the components of the effective representation of an individual

given the charges; the existence of the various standards, including **ABA Standards** (or **ABA Guidelines** in death penalty cases) that require the lawyer to do specified things to assist the client; the various choices and decisions defined by the Fifth and Sixth Amendments that clients face; the nature of the discussions that take place between counsel and client in a given type of case; and the strategic decisions that would need to be discussed as well, according to the case law.¹⁷

Use of an attorney-expert provides an alternative for lawyers who are of the view that some evidence from counsel is needed but where counsel of record may not be an appropriate source of information.

Defining the Problem; Setting the Stage For a Solution

There is an overarching theme that defense counsel may need to address in a competence case. This involves describing how the competence issue impacts the integrity of the process, and what the prospects for restoration of competence may be. Indeed, many of the suggestions offered above might be viewed as secondary to the one discussed here, which is that counsel should have a basic, fact-driven, explanation of how a client's paranoia, psychosis, or other symptom has compromised the conduct of the criminal proceedings.

Focusing on this theme is particularly important when the issue of competence is left to a jury's determination, as well as where the case law requires proof of changed circumstances before a second or third competence to stand trial determination may be undertaken in the same case.

Lawyers who practice in jurisdictions (such as California) where a jury ultimately decides competence have expressed concerns that jurors will view the competence issue as a way of avoiding criminal liability. Surprisingly, however, counsel often do not elicit evidence (through mental health professionals, lawyers, or retired judges, all of whom have been called on such issues) that the systemic response to declarations of incompetence is to try to achieve restoration of competence with the aim of finishing the case. Such evidence would help defuse the notion that the process involves an "out" for the accused.

Counsel who are used to making

proportionality and comparison of punishment arguments at sentencing often censor themselves in the presentation of data that can remind a trier of fact that the actuarial tables favor the resumption of the case when competence is at issue.

This theme may be less dubious to a trier of fact where the underlying disorder can be treated with medication, and where there is evidence that the accused has "gotten better" when medicated. Some experienced lawyers have recommended that their own experts consult with others who work in competence restoration programs that are likely to receive the accused. Competence restoration staffers are often more than happy to review their relative success rates, thus providing the foundation for some testimony on the issue. Hearsay objections can be circumvented through use of official records and official reports, as well as through the calling of administrators responsible for the programs at issue. This is not an area to neglect, as judges or jurors may have little idea what actually happens in the aftermath of a determination of incompetence.

It is also of some importance for counsel to be specific in describing how an accused's incompetence is compromising the defense — even if this statement is made in a submission under seal or in some other protected format. A generalized statement that the accused is unable to assist may be useful at an early time of crisis in the case, but it becomes less useful if it becomes necessary for the same lawyer to raise the client's incompetence a second or third time in the same case. Case law often requires a showing of change in circumstances, and the possibility that competence may have to be addressed again should be contemplated by counsel.

Conclusion

In many jurisdictions, the adjudication of an accused's incompetence to stand trial is taken care of through stipulations to the admission of experts' reports and other devices that have avoided the need for lawyers to get involved in and become acquainted with contested competence hearings or trials. Defense lawyers often assume that there is significant resistance to finding an accused incompetent even though the facts merit such a finding. While this may be a provable assumption, available evidence suggests that well-prepared lawyers have been able to demonstrate a

client's incompetence by exhibiting care in preparing to present the relevant evidence. Some of the valuable lessons learned from successful competence litigations have been described in this writing in the hope of assisting other counsel when it comes to clients who are mentally incompetent to stand trial.

Excerpts from this piece appeared in Matthew Bender's California Criminal Defense Practice Reporter in November 2006. They are reproduced by permission.

Notes

1. In *Washington v. Harper*, 494 U.S. 210, 223 fn.9 (1990), the Court noted that it assumes psychiatrists (and other physicians) obey the ethics of the medical profession, citing specifically the "annotations especially applicable to psychiatry" of the American Psychiatric Association; see also the discussion of medical ethics in Virginia Sadock and Benjamin Sadock's *Comprehensive Textbook of Psychiatry* (8th ed.).

2. Federal Judicial Center, *Reference Manual on Scientific Evidence* 448 fn.37 (2d ed. 2000). The *Reference Manual* is considered an authoritative resource in the federal courts. It devotes an entire chapter to medical testimony.

3. Richard Rogers & Daniel Shuman, *Fundamentals of Forensic Practice* 157-161 (2005).

4. Gary B. Melton et al., *Psychological Evaluations for the Courts* 122 (2d ed. 1997). This subject is also covered in the new Third Edition.

5. Virginia Sadock & Benjamin Sadock, *Comprehensive Textbook of Psychiatry* 3285-86 (7th ed. 2000).

6. See Melton et al., endnote 4, at 150.

7. *Id.* at 130, relying on *Medina v. California*, 505 U.S. 437 (1992), which affirmed *People v. Medina*, 51 Cal.3d 870 (1990). The observation at issue was actually first set forth by the California Supreme Court in its *Medina* opinion.

8. Thomas Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* 41 (1988).

9. Rogers & Shuman, *Fundamentals of Forensic Practice* 405 (2005).

10. Thomas Grisso, *Evaluating Competencies* 12-13 (2d ed. 2002).

11. *Id.* at 13, emphasis in original.

12. Rogers & Shuman, *Fundamentals of Forensic Practice* 167 (2005); see *Dusky v. United States*, 362 U.S. 402 (1960).

13. *Id.* at 161.

14. *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997); *United States v. Gigante*, 996 F. Supp. 194 (E.D.N.Y. 1998).

15. *United States v. Duhon*, 104 F. Supp.

2d 663 (W.D. La. 2000). This is a very useful case that has been cited with approval, usually on other issues. See, for example, *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1227 (10th Cir. 2007).

16. The writer of this piece has been involved in several publications suggesting the use of attorney-experts. Fortunately, some of these writings have been supported by other established defense counsel. See, for example, Iversen, Thomson & Philipsborn, *1368 Revisited: Can Your Client Rationally Assist You?* (CACJ Forum, 1988, in two parts); Philipsborn, *Assessing Competence to Stand Trial: Re-Thinking Roles and Definitions* (American Journal of Forensic Psychiatry, Volume II, Issue One, 1990); Burt and Philipsborn, *The Assessment of Competence in Criminal Cases: The Case for Cooperation Between Professions* (published in the June 1998 issue of THE CHAMPION, as well as in CACJ Forum and California Death Penalty Manual. The last of these articles was cited by the U.S. District Court in *Duhon*, see end-note 15.

17. Many of the activities that would be contemplated to take place between a lawyer and client, including discussions of specific pleas, waivers of rights, and strategic decisions, are found in *Godinez v. Moran*, 509 U.S. 389 (1993). A useful discussion is also repeated in *United States v. Duhon*, *supra* note 15. The ABA Standards referred to here are the *Standards on the Defense Function*. The ABA Guidelines are the 2003 *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*. ■

About the Author

John T. Philipsborn has been a criminal defense lawyer for almost 30 years. For the past 15 years, he has been the amicus curiae committee chair for the California Attorneys for Criminal Justice.

Philipsborn has authored (and co-authored) numerous publications on competence to stand trial, and has presented competence-related evidence in connection with several published cases.

John T. Philipsborn
 507 Polk Street
 Suite 350
 San Francisco, CA 94102
 415-771-3801
 Fax 415-771-3218
 E-MAIL JPhilipsbo@aol.com

**Please
 provide
 new photo**

Thank you

Evaluation of Competence to Stand Trial in Adults

PATRICIA A. ZAPF AND RONALD ROESCH

This chapter provides a review of the legal context for competency evaluations and the relevant forensic mental health concepts, a discussion of the empirical foundations and limitations of competency evaluation, and information about the evaluation process, report writing, and testimony for legal professionals involved in cases where the competency issue is raised (see Zapf & Roesch, 2009, for a more detailed review).

LEGAL CONTEXT

The legal context for competency to stand trial in the United States can be traced back to English common law dating from at least the 14th century. The competency doctrine evolved at a time when defendants were not provided with the right to assistance of counsel and, in many cases, were expected to present their defense alone and unaided.

Various legal commentators have delineated several principles underlying the rationale for the competency doctrine. The Group for the Advancement of Psychiatry (1974) summarized four underlying principles: (1) to safeguard the accuracy of any criminal adjudication; (2) to guarantee a fair trial; (3) to preserve the dignity and integrity of the legal process; and (4) to be certain that the defendant, if found guilty, knows why he is being punished (p. 889). Bonnie (1992) explained that allowing only those who are competent to proceed protects the dignity, reliability, and autonomy of the proceedings. The underlying rationale, then, concerns both the protection of the defendant as well as the protection of the state's interest in fair and reliable proceedings.

Although the term *competency to stand trial* has been used for centuries, there has begun a recent shift in terminology to reflect the fact that the vast majority of cases are plead out before getting to trial and that the issue of "trial" competency can

be raised at any stage of the proceedings—from arrest to verdict to sentencing. Bonnie (1992), Poythress and colleagues (1999, 2002), and others have suggested the use of terms such as *adjudicative competence* or *competence to proceed* to better reflect the reality of this doctrine. Throughout this chapter the terms *competency to stand trial*, *adjudicative competence*, and *competency to proceed* are used interchangeably.

Legal Standards for Competency

Legal standards for adjudicative competence clearly define competency as an issue of a defendant's present mental status and functional abilities as they relate to participation in the trial process. This distinguishes competency from *criminal responsibility*, which refers to a defendant's mental state at the time of the offense. In an extremely brief decision, the U.S. Supreme Court established the modern-day standard for competency to stand trial in *Dusky v. United States* (1960). Citing a recommendation of the Solicitor General, the Court held that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (p. 402).

Fifteen years after *Dusky*, the United States Supreme Court in *Drope v. Missouri* (1975) appeared to elaborate slightly on the competency standard by including the notion that the defendant must be able to "assist in preparing his defense" (p.171). Legal scholars, such as Bonnie (1993), as well as the *American Bar Association Criminal Justice Mental Health Standards* (1989), indicated that *Drope* added another prong to *Dusky* by requiring that defendant be able to "otherwise assist with his defense" (ABA, 1989, p. 170). Similarly, the addition of this "otherwise assist" prong to the *Dusky*

standard has been affirmed in cases such as *United States v. Duhon* (2000).

The federal standard for competency and each of the states' competency standards mirror *Dusky*, either verbatim or with minor revision, but at least five states (Alaska, Florida, Illinois, New Jersey, Utah) have also expanded or articulated the *Dusky* standard to include specific functional abilities. Since the definition of competency varies by state, it is necessary for an evaluator to consult the relevant competency statutes and definitions before proceeding with the evaluation of a defendant's competency. Legal professionals who retain competency evaluators may wish to confirm that the evaluator is familiar with the relevant jurisdictional standards and procedures.

Case Law Subsequent to *Dusky*

Case law subsequent to *Dusky* serves to offer some elaboration and interpretation of that competency standard. In *Wieter v. Settle* (1961), the United States District Court for the Western District of Missouri determined that it was improper to further detain a defendant who had been charged with a misdemeanor offense and held for 18 months for *competency restoration* since prosecution was no longer probable. In delivering the court's opinion, Chief Judge Ridge delineated a series of eight functional abilities related to *Dusky* that a defendant must possess to be competent (see p. 320).

The U.S. Court of Appeals considered the relevance of amnesia to adequate participation in legal proceedings in *Wilson v. United States* (1968). The court, in *Wilson*, delineated six factors that need to be considered (see pp. 463–464). The *Wilson* factors clearly specify a functional approach to evaluating competency, in which the specific deficits of a defendant would be related to the legal context.

All defendants are provided the Constitutional right to assistance of counsel; however, defendants may choose to waive this right and represent themselves (to appear *pro se*). This raises the question of whether competence to waive counsel should be evaluated separately from competency to stand trial. The U.S. Supreme Court considered the issue of whether a higher standard should apply for waiving counsel or pleading guilty in *Godinez v. Moran* (1993). The U.S. Supreme Court rejected the argument that although the defendant was found competent to stand trial, he was not competent to waive his right to counsel and represent himself, and held

that “while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial...Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights” (p. 2686). Thus, the Court in *Godinez* indicated that the *Dusky* standard is the Constitutional minimum to be applied, regardless of the specific legal context, and that a defendant's decision-making abilities appear to be encompassed within this standard.

The Supreme Court revisited the issue of competency to represent oneself (proceed *pro se*) in *Indiana v. Edwards* (2008), where it considered the issue of whether a State, in the case of a criminal defendant who meets the *Dusky* standard for competence to stand trial, can limit a defendant's right to self-representation by requiring that the defendant be represented by counsel at trial. The Court answered in the affirmative, thereby establishing that competence to proceed *pro se* requires a higher level of competence than competence to stand trial, but was silent on the issue of how this should be determined. The Court was clear to make the differentiation between their decision in *Edwards* and that in *Godinez* by stating that the issue in *Godinez* was whether the defendant was competent to waive counsel, not represent himself.

Competency Procedures

Legal procedures are well established to ensure that defendants are competent to proceed. In *Pate v. Robinson* (1966), the Supreme Court held that the competency issue must be raised by any officer of the court (defense, prosecution, or judge) if there is a *bona fide* doubt as to a defendant's competence. The threshold for establishing a *bona fide* doubt is low, and most courts will order an evaluation of competence once the issue has been raised. Commenting on its decision in *Pate*, the Supreme Court in *Drope v. Missouri* (1975) noted that “evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some

circumstances, be sufficient" (p. 180). The *Drope* Court added that even when a defendant is competent at the outset of trial, the trial court should be aware of any changes in a defendant's condition that might raise question about his competency to stand trial. Thus, the issue of competency can be raised at any time prior to or during a trial.

Mental health professionals are called upon to evaluate defendants with respect to their competency and once the evaluation has been completed and a report submitted to the court, a hearing is scheduled to adjudicate the issue of competence (these hearings usually take place in front of a judge but a few jurisdictions allow for a jury to hear the issue of competency in certain circumstances). *Cooper v. Oklahoma* (1996) established that incompetency must be proved by a preponderance of evidence, and not the higher standard of clear and convincing evidence. The evaluator's report is highly influential in the court's decisions. Often, the opinion of a clinician is not disputed, and the court may simply accept the recommendations made in the report. Indeed, research has shown that the courts agree with report recommendations upwards of 90% of the time (Hart & Hare, 1992; Zapf, Hubbard, Cooper, Wheelles, & Ronan, 2004). Thus, this appears to be the norm in those jurisdictions in which the court orders only one evaluator to assess competency. Hearings on the issue of competency appear to occur more often, although still relatively infrequently, in those jurisdictions where two experts are asked to evaluate competency.

Defendants determined to be competent may then proceed with trial or with another disposition of their criminal case. The trial of defendants found incompetent is postponed until competency has been restored or, in a small percentage of cases, until a determination is made that the defendant is unlikely to regain competency.

Competency Restoration

Until the landmark case of *Jackson v. Indiana* (1972), most states allowed the automatic and indefinite confinement of incompetent defendants. This resulted in many defendants being held for lengthy periods of time, often beyond the sentence that might have been imposed had they been convicted. This practice was challenged in *Jackson*. The U.S. Supreme Court in *Jackson* held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period

of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future" (p. 738). The Court did not specify limits to the length of time a defendant could reasonably be held, nor did it indicate how progress toward the goal of regaining competency could be assessed. Nevertheless, this decision resulted in changes to state laws regarding confinement of incompetent defendants.

Many states now place limits on the maximum length of time a defendant can be held and, if a defendant is determined to be unlikely to ever regain competency, the commitment based on incompetency must be terminated. However, in many states the actual impact of *Jackson* may be minimal (Morris, Haroun, & Naimark, 2004). State laws regarding treatment of incompetent defendants vary considerably, and Morris and colleagues found that many states ignore or circumvent *Jackson* by imposing lengthy commitment periods before a determination of unrestorability can be made, or tie the length of confinement to the sentence that could have been imposed had the individual been convicted of the original charge(s). Even after a period of confinement and a determination that competency is unlikely to be restored in the foreseeable future it is possible that such defendants could be civilly committed, but *United States v. Duhon* (2000) makes clear that defendants who are not dangerous must be released. Charges against defendants who are not restorable are typically dismissed, although sometimes with the provision that they can be reinstated if competency is regained.

Medication

Medication is the most common and arguably most effective means of treatment for incompetent defendants; however, defendants do have the right to refuse medication. There have been two major cases decided by the U.S. Supreme Court dealing with the issue of the involuntary medication of defendants who had been found incompetent to stand trial. In *Riggins v. Nevada* (1992), David Riggins had been prescribed Mellaril® and found competent to stand trial. He submitted a motion requesting that he be allowed to discontinue the use of this medication during trial, in order to show jurors his true mental state at the time of the offense since he was raising an insanity defense. His motion was denied and he was convicted of murder and sentenced to death. The U.S. Supreme Court

reversed his conviction, holding that his rights were violated. Specifically, the Court found that the trial court failed to establish the need for and medical appropriateness of the medication. In addition, the Court also addressed the issue of whether the involuntary use of antipsychotic medications may affect the trial's outcome (see p. 127).

The U.S. Supreme Court further specified the criteria to determine whether forced medication is permissible in the case of *Sell v. United States* (2003). In *Sell* the Supreme Court held that antipsychotic drugs could be administered against the defendant's will for the purpose of restoring competency, but only in limited circumstances. Writing for the majority, Justice Breyer noted that involuntary medication of incompetent defendants should be rare, and identified several factors that a court must consider in determining whether a defendant can be forced to take medication, including whether important governmental interests are at stake; whether forced medication will significantly further those interests (i.e., the medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to interfere significantly with the defendant's ability to assist counsel); whether involuntary medication is necessary to further those interests (i.e., alternative, less intrusive treatments are unlikely to achieve substantially the same results); and whether administering drugs is medically appropriate (see p. 167).

FORENSIC MENTAL HEALTH CONCEPTS

Evaluation of a defendant's psychological functioning is an essential component of the assessment of competency. Though not clearly specified in the *Dusky* decision, most state laws require that a finding of incompetence be based on the presence of a mental disorder. Once the presence of mental disease or defect has been established, the following must ensue: (1) evaluation of relevant functional abilities and deficits; (2) determination of a causal connection between any noted deficits and mental disorder; and (3) specification of how these deficits may have an impact upon functioning at trial.

Mental Illness as a Prerequisite for Incompetence

Determination of serious mental disorder, cognitive deficit, or mental retardation is merely the first step in finding a defendant incompetent to stand trial.

As Zapf, Skeem, and Golding (2005) noted, "the presence of cognitive disability or mental disorder is merely a threshold issue that must be established to 'get one's foot in the competency door'" (p. 433). Although evaluators a few decades ago appeared to base competency decisions largely on a finding of *psychosis* or mental retardation (see Roesch & Golding, 1980, for a review), it is now recognized that the presence of a diagnosis, even severe mental disorder, is not by itself sufficient to find a defendant incompetent. Psychosis is significantly correlated with a finding of incompetence; that is, a majority of incompetent defendants are diagnosed with some form of psychosis (mental retardation and organic brain disorders account for most of the remaining diagnoses). However, only about half of evaluated defendants with psychosis are found incompetent (Nicholson & Kugler, 1991), a clear indication that incompetence is not equated with psychosis. Rather, it is necessary for the evaluator to delineate a clear link (causal connection) between a defendant's mental impairments and his ability to participate in legal proceedings. This is referred to as a *functional assessment of competency*.

Before turning to a discussion of functional assessment, it is important to note that a defendant may have clearly demonstrable pathology, but the symptoms or observable features may be irrelevant to the issue of competency. Such features would include depersonalization, derealization, suicidal ideation, and poor insight. Even a person who meets civil commitment criteria may be considered competent to stand trial, although there does appear to be a strong relationship between incompetence and committability. For the most part, evaluators will need to determine that the level of mental disorder is severe enough to affect a defendant's ability to proceed with trial. A diagnosis is useful in this regard, but more attention should be paid to symptoms rather than broad diagnostic categories. Many incompetent defendants have a diagnosis of schizophrenia, for example, but it is the specific symptoms that will be relevant to the competency evaluation.

It is most helpful to evaluators if legal counsel is able to provide information regarding the types of symptoms (behaviors, observations) that appear to impair or limit his or her discussions or interactions with the defendant. Any observations regarding the defendant and his or her demeanor, thoughts, actions, or behaviors should be passed along to the evaluator. Although relevant symptoms can vary

widely, there are a few that tend to be more prevalent in incompetent defendants. These include formal thought disorder (as indicated by disorganized speech, loose associations, tangentiality, incoherence, or word salad); concentration deficits; rate of thinking (abrupt and rapid changes in speech or profound slowing of thought or speech); delusions (strongly held irrational beliefs that are not based in reality); hallucinations (sensory perceptions in the absence of a stimulus); memory deficits; and mental retardation or intellectual or developmental disability.

Psycholegal/Competence-Related Abilities

A review of competency case law (including *Dusky*, *Drope*, *Wieter*, *Godinez*, *Edwards*, and other relevant cases), legal commentary (such as Bonnie's reconceptualization of the construct of competence, 1992, 1993), and the available body of literature on competency evaluation and research indicates a number of psycholegal abilities relevant to the issue of competence. These include understanding, appreciation, reasoning, consulting with counsel, assisting in one's defense, and decision-making abilities. Each of these areas will be an important and relevant area of focus for an evaluation of competency.

Understanding

Within the context of competence to stand trial, factual understanding generally encompasses the ability to comprehend general information about the arrest process and courtroom proceedings. The defendant's factual understanding of the legal process includes a basic knowledge of legal strategies and options, although not necessarily as applied to the defendant's own particular case (case-specific understanding usually is encompassed by appreciation [rational understanding]; see next section). Thus, the competence-related ability to understand involves the defendant's ability to factually understand general, legally relevant information.

Appreciation

Appreciation generally refers to a defendant's rational understanding and encompasses specific knowledge regarding and accurate perception of information relevant to the role of the defendant in his or her own case. Within the context of competence to stand trial, appreciation encompasses the ability to comprehend and accurately perceive specific information regarding how the arrest and

courtroom processes have affected or will affect the defendant. The defendant's appraisal of the situation must be reality-based, and any decisions that he or she makes about the case must be made on the basis of reality-based information. Thus, the competence-related ability to appreciate involves the application of information that the defendant factually understands to the specific case in a rational (i.e., reality-based) manner.

Reasoning

Reasoning generally refers to a defendant's ability to consider and weigh relevant pieces of information in a rational manner in arriving at a decision or a conclusion. To demonstrate appropriate reasoning ability the defendant must be able to communicate in a coherent manner and make decisions in a rational, reality-based manner undistorted by pathology. It is important to distinguish between the outcome of a decision and the process by which the decision is made. What is important is not the outcome of the decision but that the defendant be able to use appropriate reasoning processes—weighing, comparing, and evaluating information—in a rational manner. In the case of a defendant who is proceeding with the assistance of an attorney, reasoning encompasses the ability of the defendant to consult with counsel and to make rational decisions regarding various aspects of participation in his or her defense.

Consulting and Assisting

Although the *Dusky* standard indicates that the defendant must be able to "consult with his lawyer," the U.S. Supreme Court in *Drope v. Missouri* (1974) used the terminology "assist in preparing his defense" and the Federal standard (U.S. Code Annotated, Title 18, Part III, chapter 13, section 4241) indicates that the defendant must be able to "assist properly in his defense." Thus, the defendant's ability to consult with and assist counsel must be considered as part of the competency assessment. The defendant must be able to engage with counsel in a rational manner; thus, effectively assisting counsel requires that the defendant be able to communicate coherently and reason.

Decision Making

Closely tied to the abilities to appreciate, reason, and assist counsel is the ability to make decisions. The U.S. Supreme Court decision in *Cooper v. Oklahoma* (1996) appeared to equate a defendant's

inability to communicate with counsel with incapacity to make fundamental decisions. In addition, the Supreme Court in *Godinez* incorporated decision-making abilities about the case into the standard for competence. Thus, a defendant's decision-making abilities with respect to specific, contextually relevant aspects of the case need be considered in the trial competency evaluation. It is important to note that research examining the content of competency evaluation reports has shown that certain abilities important and relevant to competence to stand trial, such as decision-making abilities, have rarely been addressed by evaluators in their reports (LaFortune & Nicholson, 1995; Skeem, Golding, Cohn, & Berge, 1998). Thus, legal counsel should ensure that competency evaluators are including this information in their evaluation reports.

Functional and Contextual Nature of Competency and its Evaluation

A functional assessment dictates that competency to stand trial cannot simply be assessed in the abstract, independent of contextual factors. Thus, an evaluation of contextual factors should always take place. This is the essence of a functional approach to assessing competence, which posits that the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. The open-textured, context-dependent nature of the construct of competency to stand trial was summarized by Golding and Roesch (1988):

Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, in *light of existing* evidence, anticipating the substantial effort of a *particular* attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome. (p. 79)

The importance of a person–context interaction has also been highlighted by Grisso (2003), who defined a functional assessment in the following manner:

A decision about legal competence is in part a statement about *congruency or incongruency*

between (a) the extent of a person's functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case. Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for competence decisions. (pp. 32–33)

Obviously, a functional assessment requires evaluators to learn about what may be required of a particular defendant. Some of this information may be provided by the defendant but other information will need to come from court documents and from the defendant's legal counsel. Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. As Rogers and Mitchell (1991) note, the requisite level of understanding for a complex crime is higher than for a less complex one. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In cases in which a trial is likely, a defendant's demeanor in court and the ability to testify will certainly be of relevance. A defendant who is likely to withdraw into a catatonic-like state if required to testify, or one who may appear to jurors as not caring or not paying attention to the trial due to medication side effects, may not be capable of proceeding. But these same defendants may be able to proceed if the attorney intends to plea bargain.

Unfortunately, research has indicated that evaluators often fail to relate specific abilities and deficits to the particular case (Heilbrun & Collins, 1995) and that they often fail to provide a discussion of the link between symptomatology and legal abilities in their evaluation reports (Skeem et al., 1998). Legal counsel should expect an evaluator to ask for detailed information regarding those abilities that will be required of the particular defendant in the particular case so as to guide their competency-related inquiries. In addition, legal counsel should expect that evaluators might ask to observe their interactions with the defendant so as to truly perform a functional evaluation of the defendant's ability to relate to counsel, communicate with counsel, and participate in his or her own defense. If these requests do not occur, legal counsel should feel comfortable in raising these issues with the evaluator so as to ensure that a contextual and functional evaluation, in line with current best practices, is conducted.

EMPIRICAL FOUNDATIONS AND LIMITS

Prior to 1980, research on competency to stand trial was limited; however, the past few decades have witnessed a surge in research on this issue and there currently exists a robust literature in this area. In addition to research on various aspects of competency, structured and semi-structured instruments for assessing competency to stand trial have been developed. A review of this literature is well beyond the scope of this chapter, but this section will highlight those areas in which a literature base exists and attempt to provide a representative sample of the findings. More detailed information about all aspects of this section can be found in Zapf and Roesch (2009).

Research on Adjudicative Competence

The available research on adjudicative competence has mainly focused on procedural and assessment issues, the characteristics of referred and incompetent populations, the reliability and validity of competency evaluation, and the development and validation of instruments for the evaluation of competency. In addition, a limited but growing literature is developing on the restoration of competence. We will attempt to highlight representative findings in each of these areas.

Procedural Issues

Poythress and colleagues (2002) reported a series of studies of defense attorneys in several jurisdictions who responded to questions about their perceptions of the competence of their clients. These researchers found that the lawyers had concerns about the competency of their clients in 8% to 15% of the cases; however, competency evaluations were requested in less than half of these cases (in some of those cases where competency evaluations were not requested, the attorney tried to resolve the concerns through informal means, such as including a family member in the decision-making process). Poythress and colleagues noted that the attorneys indicated that their concerns were based on the functional abilities of the clients, such as communicating facts and decision-making capacity.

Reasons other than a concern about a defendant's competency may at least partially account for the consistent finding that only a small percentage of defendants referred for competency evaluations are found incompetent. Roesch and Golding (1980) reported on 10 studies conducted prior to

1980 and found an average incompetency rate of 30%. They also noted a considerable range of rates, with some jurisdictions finding almost no referred defendants to be incompetent while others reported rates as high as 77%. A recent meta-analysis of 68 studies found the rate of incompetence to be 27.5% (Pirelli, Gottdiener, & Zapf, 2011).

Characteristics of Referred and Incompetent Defendants

A vast amount of the competency research has examined the characteristics of both referred individuals as well as those found incompetent. Defendants *referred* for competency evaluations are often marginalized individuals with extensive criminal and mental health histories. Research has indicated that the majority of these defendants tend to be male, single, unemployed, with prior criminal histories, prior contact with mental health services, and past psychiatric hospitalizations. Viljoen and Zapf (2002) compared 80 defendants referred for competency evaluation with 80 defendants not referred and found that referred defendants were significantly more likely to meet diagnostic criteria for a current psychotic disorder, to be charged with a violent offense, and to demonstrate impaired legal abilities. In addition, referred defendants were less likely to have had previous criminal charges. Notably, approximately 25% of non-referred defendants demonstrated impairment on competence-related abilities. In addition, approximately 20% of referred defendants either did not meet criteria for a mental disorder or demonstrated no impairment of competence-related abilities.

With respect to the characteristics of defendants found incompetent, a recent meta-analysis found that unemployed defendants were twice as likely to be found incompetent as those who are employed and those diagnosed with a psychotic disorder were approximately eight times more likely to be found incompetent as those without such a diagnosis (Pirelli et al., 2011).

Reliability and Validity of the Evaluation Process

Since evaluators are assessing a defendant's present ability to perform a series of relatively clearly defined tasks, it seems reasonable to expect that competency evaluations would be highly reliable. In fact, this is precisely what the numerous studies on reliability have shown, with agreement about

the ultimate opinion regarding competency being reported in the 90% range (Golding et al., 1984; Rosenfeld & Ritchie, 1998; Skeem et al., 1998). However, a reliable system of evaluation is not necessarily a valid one. For example, at one time it was the case that evaluators equated psychosis with incompetency (Roesch & Golding, 1980). Thus, if clinicians agreed that a defendant was psychotic they would also agree that the defendant was incompetent. As noted in this chapter, while psychosis is highly correlated with incompetency, it is also the case that a large percentage of competent defendants experience psychotic symptoms. The view that psychosis and incompetency are not inextricably entwined has changed as evaluators have become better trained and more research is available to guide decisions.

The problem of evaluating validity is that there is no gold standard for competence against which to compare evaluator decisions/opinions. Relying on court decisions is not particularly helpful since agreement rates between evaluator recommendations and court determinations have been shown to be well over 90% (Cox & Zapf, 2004; Cruise & Rogers, 1998; Hart & Hare, 1992). How, then, can the issue of construct validity be assessed? Golding and colleagues (1984) suggested the use of a panel of experts, referred to as a "blue ribbon panel," to serve as an independent criterion. In their study, they asked two experts to make judgments about competency based on a review of records, reports from hospital evaluators, and evaluations using the Interdisciplinary Fitness Interview (IFI). Golding and colleagues found that "for the 17 cases seen by the blue-ribbon panelists, they agreed with the IFI panelists 88% of the time, with the hospital staff 82% of the time, and with the courts 88% of the time" and they concluded that "on the basis of these data it would be hard to argue for one criterion definition over another" (p. 331).

The aforementioned study illustrates the methodological problems inherent in studies of competency evaluations, particularly in terms of the lack of a "correct" outcome against which to compare different methods of decision making. We are left with the reality that there can be no hard criterion against which to test the validity of competency evaluations because we do not have a test of how incompetent defendants would perform in the actual criterion situations. Since incompetent defendants are not allowed to go to trial until

competency is restored, there is no test of whether a defendant found incompetent truly would have been unable to proceed with a trial or other judicial proceedings. Short of the provisional trial, the ultimate test of validity will never be possible.

Restoration of Competence

Empirical research on competency restoration indicates that most defendants are restorable: Nicholson and McNulty (1992) reported a restoration rate of 95% after an average of two months; Nicholson, Barnard, Robbins, and Hankins (1994) reported a rate of 90% after an average of 280 days; Cuneo and Brejle (1984) reported a restoration rate of 74% within one year; and Carbonell, Heilbrun, and Friedman (1992) reported a rate of about 62% after three months. Thus, regardless of the upper time limits on competency restoration allowed by state statute, it is now the case that most incompetent defendants are returned to court as competent within six months (Bennett & Kish, 1990; Nicholson & McNulty, 1992; Pinals, 2005; Poythress et al., 2002) and the vast majority of incompetent defendants are restored to competency within a year.

Research has also examined the issue of non-restorability. Mossman (2007) found that individuals with a longstanding psychotic disorder with lengthy periods of prior psychiatric hospitalizations, or irremediable cognitive deficits such as mental retardation, were well below average in terms of their chances of restoration.

The most common form of treatment for the restoration of competence involves the administration of psychotropic medication. Some jurisdictions have also established educational treatment programs designed to increase a defendant's understanding of the legal process or individualized treatment programs that confront the problems that hinder a defendant's ability to participate in his or her defense (Bertman et al., 2003; Davis, 1985; Siegel & Elwork, 1990). In addition, some jurisdictions have implemented treatment programs specifically targeted towards those defendants with mental retardation who are found incompetent to proceed.

The success of treatment programs for the restoration of competence is variable and dependent upon the nature of the treatment program and the type of defendant targeted. Anderson and Hewitt (2002) examined treatment programs designed to restore competency in defendants with mental retardation and found that only 18% of their

sample was restored. Treatment programs that target defendants with various other types of mental disorders have met with more success in that larger proportions of the defendants are restored to competency; however, it is not clear that individualized treatment programs that target specific underlying deficits for each defendant are any more effective than educational programs that teach defendants about their legal rights (Bertman et al., 2003). What appears to be accurate is that successful restoration is related to how well the defendant responds to psychotropic medications administered to alleviate those symptoms of the mental disorder that initially impaired those functional abilities associated with trial competency (Zapf & Roesch, 2011).

Competency Assessment Instruments

Prior to the 1960s no forensic assessment instruments (a term coined by Grisso in 1986) existed to assist experts in the evaluation of various legal issues. Trial competency was the first area for which forensic assessment instruments were developed. The evolution of forensic assessment instruments for the evaluation of competency has gone from early checklists (e.g., Robey, 1965) and sentence-completion tasks (e.g., Lipsitt, Lelos, & McGarry, 1971) to self-report questionnaires (e.g., Barnard et al., 1991) to interview-based instruments without, and then with, criterion-based scoring. Suffice it to say, this is a large area of research and the interested reader should consult the following resources for more information: Grisso (2003); Melton, Petrila, Poythress, and Slobogin (2007); Zapf and Roesch (2009); and Zapf and Viljoen (2003).

Three instruments show a great deal of promise in terms of their utility in the evaluation of competency to stand trial: the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA; Poythress, et al., 1999), the Evaluation of Competency to Stand Trial—Revised (ECST-R; Rogers, Tillbrook, & Sewell, 2004), and the Fitness Interview Test—Revised (FIT-R; Roesch, Zapf, & Eaves, 2006). Each of these instruments can be used to assist in the evaluation of a defendant's competency status and each has its strengths and weaknesses. All three of these instruments show evidence of sound psychometric properties.

The MacCAT-CA uses standardized administration and criterion-based scoring, which increases its reliability and provides scores on three competence-related abilities—understanding, reasoning,

and appreciation—that can be compared to a normative group of defendants. The methodology used, however, involves a vignette format that limits the ability to extrapolate to a defendant's own particular case.

The ECST-R uses a hybrid interview approach, containing both semi-structured and structured components, designed to assess competency to stand trial generally as well as specific competencies such as competency to plead and competency to proceed *pro se*. The ECST-R yields scores in four different areas—rational understanding, factual understanding, consulting with counsel, and overall rational ability—and also includes scales that screen for feigned incompetency.

Like the MacCAT-CA, the ECST-R is a norm-referenced instrument, which means that the scores obtained by a particular defendant can be compared to a normative group of defendants to provide an indication of how this particular defendant compares to other defendants on the various abilities measured. The structured approach of these two instruments limits the types of questions that can be asked of a particular defendant (of course, the evaluator should ask about all relevant contextual issues in addition to administering either the MacCAT-CA or the ECST-R).

The FIT-R provides an interview guide for assessing the relevant competency-related issues in three different areas—factual understanding, rational understanding (appreciation), and consulting/decision making. Its semi-structured format allows for broad discretion in the types of inquiries made so all contextual elements can be evaluated for each defendant.

THE EVALUATION

Selecting an Evaluator

Legal counsel able to select and retain forensic evaluators of their choice (as opposed to having them court-ordered) will want to consider the potential evaluator's knowledge, training, and education as well as his or her skill set and experience. The evaluation will typically consist of three elements—an interview, testing, and collateral information review—and so legal counsel may wish to inquire with potential experts regarding the methods they use for conducting competency evaluations, the instruments that they typically use (if any), their experience with competency evaluation in general, as well as their experience in the relevant jurisdiction.

Defense Counsel's Role in the Evaluator's Preparation

There are four ways in which defense counsel will play a role in the competency evaluator's preparation and evaluation. First, defense counsel should expect the competency evaluator to clarify the referral question. This is one of the first tasks that an evaluator should complete and so it will require a conversation with the referring party (which we assume to be the defense counsel since this is the most common referral source) about the basis for the referral. The evaluator will want to know what defense counsel has observed about his or her interactions and conversations with the defendant, whether the defendant has displayed any odd or unusual behaviors or beliefs, whether the defendant has been communicative with counsel, whether the defendant holds any animosity or mistrust for defense counsel, and the extent of the defendant's understanding of his or her charges as displayed to defense counsel. In addition, defense counsel should be prepared to provide information regarding why the referral for competency evaluation was requested.

Aside from information needed to clarify the referral question, evaluators will also look to defense counsel for specific information regarding the defendant's current charges and allegations. Providing information to the evaluator about the formal charges as well as a police report or some other report regarding the allegations for those charges will be an important initial step in assisting the evaluator in his or her preparation. Along with this, the evaluator will require information about the nature of the dispositions that the defendant might face in light of any previous criminal history, the likelihood of the defendant begin acquitted or convicted, and the likelihood of a plea deal being offered. This information will assist the evaluator in determining whether the defendant is able to provide a realistic view of his or her case and the possible outcomes. In addition, current best practices for competency evaluation require that the evaluator be able to assess the degree of congruence or incongruence between the defendant's capacities and the abilities required of him or her at trial (or for his or her relevant adjudicative proceedings). Thus, in order to do so, the evaluator must collect information regarding what will be required of the defendant for his or her proceedings. Defense counsel should expect the evaluator to ask a series of questions or obtain information using a standardized questionnaire regarding whether the defendant

will be expected to make a decision regarding a plea bargain; whether evidence against the defendant is such that mounting a defense will depend largely on the defendant's ability to provide information (or whether there are additional information sources, aside from the defendant, that can be used); whether the case will involve a number of adverse witnesses; whether the defendant will be required to testify; whether the adjudication process will be lengthy; whether the adjudication hearing will be lengthy; and whether the adjudication hearing will be complex (i.e., difficult to follow, complicated evidence). Any information that the defense counsel can provide to the evaluator regarding the abilities that will be required of the defendant will assist in guiding the evaluation process.

The third way in which defense counsel will play a role in the evaluation process is by assisting the evaluator in obtaining relevant collateral records and information. Every competency evaluation requires that the evaluator review collateral information and/or interview collateral information sources to determine the weight to be given to the defendant's self-report. Competency evaluators are expected to go through legal counsel to obtain this information so as to meet the relevant requirements for discovery and attorney work product. Even in those situations where records are to be released directly to a mental health professional (as is sometimes the case with psychological test results), the initial request for information should be funneled through the defense attorney (the mental health professional can provide a release-of-information form to be signed by the defendant and used by the attorney to obtain the relevant documents).

Finally, the evaluator may request that he or she be allowed the opportunity to observe interactions between the defendant and defense counsel. This is to satisfy the functional component of competency evaluation whereby direct observation of the defendant and defense attorney engaging in discussion of the defendant's charges or defense strategy allows for a direct assessment of the defendant's abilities in this regard. Defense counsel can, of course, decide whether he or she will grant this request, but direct observation of these interactions will assist the evaluator in extrapolating to the trial context. Of note here is that information about the specific *content* of these discussions would be left out of the evaluation report; rather, observations regarding the *process* is the focus of these interactions.

The Goal of the Evaluation

The goal of the evaluation is for the evaluator to assess the degree of congruence or incongruence between the defendant's capacities and the abilities required of the defendant at trial (or his or her proceedings). To do this, the evaluator will assess the defendant's current mental status and his or her competence-related capacities (i.e., understanding, appreciation, reasoning, assisting/consulting, and decision making) within the specific context of the defendant's case (thus including any relevant abilities that will be required of the defendant for his or her proceedings); determine whether the cause of any noted deficits is a result of mental illness or cognitive impairment; and specify how the defendant's mental illness or cognitive symptoms may interact or interfere with his or her competence-related abilities by describing how this may present at trial. In addition, the evaluator should delineate the ways in which the court or defense counsel can assist the defendant in his or her functioning at trial (i.e., providing prescriptive remediation such as instruction regarding how best to work with the client to improve his or her functioning). Finally, many jurisdictions require the evaluator to include information regarding the likelihood and length of restoration and treatment recommendations for those defendants who appear to be incompetent.

The evaluator will use the data gathered through the evaluation process (interview, testing, and collateral information review) to arrive at a conclusion regarding the defendant's competency status; however, many evaluators believe that it is beyond their role to explicitly state their opinion regarding the defendant's competency status. That is, many evaluators are hesitant to speak to the ultimate legal issue, believing instead that this is for the court to determine. While the ultimate legal issue (competency status) is certainly a legal issue for the court to decide, counsel who desire the evaluator to provide an ultimate opinion should feel comfortable in making this request of the evaluator. Many evaluators will not provide such opinions unless explicitly asked or statutorily required to do so.

REPORT WRITING AND TESTIMONY

Court-ordered evaluators are required to complete a written report of their evaluation along with their opinions regarding the defendant's mental status and competence-related abilities. In most

jurisdictions these written reports will be distributed to the prosecution and the defense as well as the court. In situations where the evaluator has been privately retained, however, there is no requirement for a written report and so the determination of whether a written report is to be provided is left with defense counsel. In these situations, the evaluator is expected to provide an oral report of his or her findings and opinions to defense counsel and await further instruction from counsel as to whether a written report is desired. Regardless of whether the evaluator was court-ordered or privately retained, the expectation is that the evaluator is an objective, neutral party who will include all relevant information in the written report. If the privately retained evaluator uncovers information that could be damaging or detrimental to the defense, he or she should provide this information to counsel in an oral report. If a written report is requested, it would be unethical for the evaluator to leave out relevant information not favorable to the defense.

Report Contents

Although there are numerous different ways to organize a forensic evaluation report, any competency evaluation report should contain the following types of information: relevant case and referral information; a description of the notification of rights provided to the defendant; a summary of the alleged offense (this should be from official documents and not the defendant's self-report); the data sources that were used or reviewed for the purposes of the evaluation (including any collateral interviews and the dates on which they occurred); background information on the defendant (typically a social history); a clinical assessment of the defendant (typically this will include a mental status exam as well as any relevant information or observations about the defendant's mental health and functioning); a forensic assessment of the defendant (with all relevant information regarding the defendant's competence-related abilities and/or deficits); and a summary and recommendations section (including any prescriptive remediation or information regarding treatment recommendations).

Forensic Evaluation

The forensic evaluation component of the written report is perhaps the most relevant and important to legal counsel and the court. This section of the

report should include a description of the defendant's competence-related abilities and deficits; the cause for any noted deficits; the impact of symptoms on the defendant's performance or participation in the case; possible prescriptive remediation; conclusions or opinions regarding each of the jurisdictional criteria; and the prognosis for restorability.

The best forensic evaluation reports are those that explicitly delineate the linkage between the defendant's mental illness or cognitive impairment and any noted competence-related deficits *as well as* describe how these deficits might affect the defendant's functioning at trial. For example, it would not be enough to simply state that the defendant has delusional disorder and therefore is unable to rationally understand (appreciate) his or her role as a defendant. Instead, the evaluator should clearly delineate the necessary linkages for the court and describe how these might affect the defendant's functioning at trial. For example, the defendant displays a fixed delusional belief system whereby he believes that his father "owns" all of the judges in the State and therefore no judge in the State would ever convict him. This delusion compromises the defendant's ability to make rational decisions regarding his defense.

In addition to a clear delineation of the linkage between any mental illness or cognitive deficit and any noted deficits in competence-related abilities and a description of how these could affect the defendant's functioning at trial or in various relevant proceedings, the report should also include some form of prescriptive remediation for any noted deficits. For example, the evaluator might indicate that the defendant demonstrates lower cognitive functioning, which might affect his ability to fully understand and engage in his defense strategy, and then indicate that the defendant's understanding might be improved by using concrete, as opposed to abstract, examples and by using shorter sentences with smaller words.

Most jurisdictions require that the evaluator include additional information in the report for those defendants opined incompetent. This additional information typically includes the cause of the incompetence, the probability and estimated length of restoration, and treatment recommendations for restoration. Evaluators are expected to understand and abide by the various jurisdictional requirements for competency evaluation reports; however, legal professionals should be aware that

some research has indicated that not all evaluation reports include these statutorily required elements (Zapf et al., 2004). Legal consumers should not hesitate to bring any missing elements to the attention of the evaluator.

Inappropriate Report Contents

Two types of content are not appropriate for inclusion in a competency evaluation report. The first is the defendant's version of the circumstances surrounding the offense. A functional evaluation of competency requires that the evaluator inquire about the charges and allegations; however, evaluators are expected to exercise caution when writing the evaluation report so as not to include potentially incriminating information provided by the defendant. General statements regarding whether the defendant's account of events differs substantially from official accounts and whether this reflects an incapacity or deficit on the part of the defendant should be used instead of a summary of the defendant's account or the defendant's verbatim answers. Similarly, the *content* of observed interactions and/or discussions between defense counsel and the defendant is not appropriate for inclusion in the written report; rather, a description of the *process* of these interactions is what should be highlighted.

The second type of inappropriate report content involves the inclusion of information or opinions related to other legal issues. Evaluators should be careful to address only those referral questions that have been asked and to refrain from offering unsolicited information about other, possibly relevant, legal issues in the competency evaluation report. Opinions or conclusions regarding a defendant's future risk for violent behavior, or any other legal or psychological issue, have no place in a competency evaluation report. In many jurisdictions, competency evaluations and assessments of mental state at the time of the offense are often ordered simultaneously. In this situation, the evaluator may choose to prepare a separate report for each referral question or to address both referral questions within the same report. Legal consumers desiring two separate reports in this instance should make this clear to the evaluator.

Importance of Providing the Bases for the Opinion/Conclusions

The importance of delineating the linkages between mental illness, competence-related deficits, and functional abilities at trial (or for the purposes of

the defendant's proceedings) has been highlighted throughout this chapter but with good reason. In a survey of forensic diplomates of the American Board of Forensic Psychology (ABFP), Borum and Grisso (1996) found that 90% of respondents agreed that detailing the link between mental illness and competence-related deficits in competency reports was either recommended or essential. However, an examination of competency-to-stand-trial reports from two states indicated that only 27% of the reports provided an explanation regarding how the defendant's mental illness influenced his or her competence-related abilities (Robbins, Waters, & Herbert, 1997). Further, in another study, only 10% of competency-evaluation reports reviewed provided an explanation regarding how the defendant's psychopathology compromised required competence-related abilities (Skeem et al., 1998). In addition to the issue of the linkage between mental illness and competence-related deficits, the extant research also indicates that examiners rarely (Skeem et al.) or never (Robbins et al.) assess the congruence between a defendant's abilities and the specific case context. Thus, legal consumers should be aware of the necessity for evaluators to provide the bases for their opinions and conclusions through clear indication of these linkages in the written report.

Testimony

In the majority of cases where the issue of competency is raised, a legal determination is made without a competency hearing (both parties typically stipulate to the evaluator's report). When a competency hearing is necessary, the forensic evaluator(s) will be called to testify about the evaluation. If the evaluator was privately retained, as opposed to court-ordered, it is helpful for the defense attorney to conduct a pretrial conference to inform the evaluator about relevant issues, such as the theory of the case, how the attorney would like the evaluator's testimony presented, and any relevant information about what the opposing side may try to prove. During this conference (if not before), the evaluator should inform the retaining attorney about any possible weaknesses in his or her evaluation methods, opinions, or conclusions as well as any possible weaknesses with the opposing side's opinion (if known). It is helpful to the evaluator if defense counsel also share issues that may be subject to scrutiny or become the focus of

cross-examination. In complex or high-profile cases the legal defense team may wish to ask the evaluator practice questions (both direct and cross-examination) to assist in preparing the evaluator for his or her testimony.

The evaluator should have provided a copy of his or her curriculum vitae to defense counsel (when privately retained) or the court (for court-ordered evaluations) prior to the day of the competency hearing, but he or she should also come prepared to testify with multiple copies of his or her CV. In cases where the evaluator was privately retained, the defense team may wish to go over the evaluator's CV with the evaluator ahead of time so the evaluator can highlight relevant experiences and qualifications to smooth the process of becoming qualified as an expert.

Regardless of whether the expert was court-ordered or privately retained, he or she is required to remain objective and neutral and to answer all questions in a straightforward manner. The evaluator should be well prepared to take the stand, having reviewed all relevant materials to the competency evaluation in addition to his or her written report.

SUMMARY

The purpose of this chapter was to present material relevant to legal consumers regarding the evaluation of competency to stand trial (adjudicative competence). The interested reader is directed to additional resources for further discussion of the information contained within this short chapter, including Grisso (2003); Melton, Pettila, Poytress, and Slobogin (2007); Pirelli, Gottdiener, and Zapf (2011); and Zapf and Roesch (2009).

REFERENCES

- American Bar Association (1989). *ABA criminal justice mental health standards*. Washington, DC: Author.
- Anderson, S. D., & Hewitt, J. (2002). The effect of competency restoration training on defendants with mental retardation found not competent to proceed. *Law and Human Behavior*, 26, 343-351.
- Barnard, G. W., Thompson, J. W., Freeman, W. C., Robbins, L., Gies, D., & Hankins, G. (1991). Competency to stand trial: Description and initial evaluation of a new computer-assisted assessment tool (CADCOMP). *Bulletin of the American Academy of Psychiatry and the Law*, 19, 367-381.
- Bennett, G., & Kish, G. (1990). Incompetency to stand trial: Treatment unaffected by demographic variables. *Journal of Forensic Sciences*, 35, 403-412.

- Bertman, L. J., Thompson, J. W., Jr., Waters, W. F., Estupinan-Kane, L., Martin, J. A., & Russell, L. (2003). Effect of an individualized treatment protocol on restoration of competency in pretrial forensic inpatients. *Journal of the American Academy of Psychiatry and Law*, 31, 27-35.
- Bonnie, R. J. (1992). The competence of criminal defendants: A theoretical reformulation. *Behavioral Sciences and the Law*, 10, 291-316.
- Bonnie, R. J. (1993). The competence of criminal defendants: beyond *Dusky* and *Drope*. *Miami Law Review*, 47, 539-601.
- Borum, R., & Grisso, T. (1996). Establishing standards for criminal forensic reports: An empirical analysis. *Bulletin of the American Academy of Psychiatry and the Law*, 24, 297-317.
- Carbonell, J., Heilbrun, K., & Friedman, F. (1992). Predicting who will regain trial competence: Initial promise unfulfilled. *Forensic Reports*, 5, 67-76.
- Cooper v. Oklahoma, 116 S. Ct. 1373 (1996).
- Cox, M. L., & Zapf, P. A. (2004). An investigation of discrepancies between mental health professionals and the courts in decisions about competency. *Law and Psychology Review*, 28, 109-132.
- Cruise, K. R., & Rogers, R. (1998). An analysis of competency to stand trial: An integration of case law and clinical knowledge. *Behavioral Sciences and the Law*, 16, 35-50.
- Cuneo, D., & Brelje, T. (1984). Predicting probability of attaining fitness to stand trial. *Psychological Reports*, 55, 35-39.
- Davis, D. L. (1985). Treatment planning for the patient who is incompetent to stand trial. *Hospital and Community Psychiatry*, 36, 268-271.
- Drope v. Missouri, 420 U. S. 162 (1975).
- Dusky v. United States, 362 U.S. 402 (1960).
- Godinez v. Moran, 113 S. Ct. 2680 (1993).
- Golding, S. L., & Roesch, R. (1988). Competency for adjudication: An international analysis. In D. N. Weisstub (Ed.), *Law and mental health: International perspectives* (Vol. 4, pp. 73-109). Elmsford, NY: Pergamon Press.
- Golding, S. L., Roesch, R., & Schreiber, J. (1984). Assessment and conceptualization of competency to stand trial: Preliminary data on the Interdisciplinary Fitness Interview. *Law and Human Behavior*, 8, 321-334.
- Grisso, T. (2003). *Evaluating competencies: Forensic assessment and instruments* (2nd ed.). New York: Kluwer Academic/Plenum Publishers.
- Group for the Advancement of Psychiatry. (1974). *Misuse of psychiatry in the criminal courts: Competency to stand trial*. New York: Mental Health Materials Center.
- Hart, S. D., & Hare, R. D. (1992). Predicting fitness for trial: The relative power of demographic, criminal and clinical variables. *Forensic Reports*, 5, 53-54.
- Heilbrun, K., & Collins, S. (1995). Evaluations of trial competency and mental state at time of offense: Report characteristics. *Professional Psychology: Research and Practice*, 26, 61-67.
- Indiana v. Edwards, 554 U.S. 164 (2008).
- Jackson v. Indiana, 406 U. S. 715 (1972).
- LaFortune, K., & Nicholson, R. (1995). How adequate are Oklahoma's mental health evaluations for determining competency in criminal proceedings? The bench and bar respond. *Journal of Psychiatry and Law*, 23, 231-262.
- Lipsitt, P., Lelos, D., & McGarry, A. L. (1971). Competency for trial: A screening instrument. *American Journal of Psychiatry*, 128, 105-109.
- Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (2007). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (3rd ed.). New York: Guilford.
- Morris, G. H., Haroun, A. M., & Naimark, D. (2004). Assessing competency competently: Toward a rational standard for competency-to-stand-trial assessments. *Journal of the American Academy of Psychiatry and Law*, 32, 231-45.
- Mossman, D. (2007). Predicting restorability of incompetent criminal defendants. *Journal of the American Academy of Psychiatry and the Law*, 35, 34-43.
- Nicholson, R., Barnard, G., Robbins, L., & Hankins, G. (1994). Predicting treatment outcome for incompetent defendants. *Bulletin of the American Academy of Psychiatry and the Law*, 22, 367-377.
- Nicholson, R., & McNulty, J. (1992). Outcome of hospitalization for defendants found incompetent to stand trial. *Behavioral Sciences and the Law*, 10, 371-383.
- Nicholson, R. A., & Kugler, K. E. (1991). Competent and incompetent criminal defendants: A quantitative review of comparative research. *Psychological Bulletin*, 109, 355-370.
- Pate v. Robinson, 383 U. S. 375 (1966).
- Pinals, D. (2005). Where two roads met: Restoration of competence to stand trial from a clinical perspective. *New England Journal of Civil and Criminal Confinement*, 31, 81-108.
- Pirelli, G., Gottdiener, W. H., & Zapf, P. A. (2011). A meta-analytic review of competency to stand trial research. *Psychology, Public Policy, and Law*, 17, 1-53.
- Poythress, N. G., Bonnie, R. J., Monahan, J., Otto, R. K., & Hoge, S. K. (2002). *Adjudicative competence: The MacArthur studies*. New York: Kluwer Academic/Plenum.
- Poythress, N. G., Nicholson, R. A., Otto, R. K., Edens, J. F., Bonnie, R. J., Monahan, J., & Hoge, S. K. (1999). *The MacArthur Competence Assessment Tool—Criminal Adjudication*. Odessa, FL: Psychological Assessment Resources.
- Riggins v. Nevada, 504 U. S. 127 (1992).

- Robbins, E., Waters, J., & Herbert, P. (1997). Competency to stand trial evaluations: A study of actual practice in two states. *Journal of the American Academy of Psychiatry and Law*, 25, 469–483.
- Robey, A. (1965). Criteria for competency to stand trial: A checklist for psychiatrists. *American Journal of Psychiatry*, 122, 616–623.
- Roesch, R., & Golding, S. L. (1980). *Competency to stand trial*. Chicago, IL: University of Illinois Press.
- Roesch, R., Zapf, P. A., & Eaves, D. (2006). *Fitness Interview Test—Revised: A structured interview for assessing competency to stand trial*. Sarasota, FL: Professional Resource Press.
- Rogers, R., & Mitchell, C. N. (1991). *Mental health experts and the criminal courts: A handbook for lawyers and clinicians*. Scarborough, ON: Thompson.
- Rogers, R., Tillbrook, C. E., & Sewell, K. W. (2004). *Evaluation of Competency to Stand Trial—Revised professional manual*. Lutz, FL: Psychological Assessment Resources.
- Rosenfeld, B., & Ritchie, K. (1998). Competence to stand trial: Clinical reliability and the role of offense severity. *Journal of Forensic Sciences*, 43, 151–157.
- Sell v. United States, 539 U. S 166 (2003).
- Siegel, A.M., & Elwork, A. (1990). Treating incompetence to stand trial. *Law and Human Behavior*, 14, 57–65.
- Skeem, J., Golding, S. L., Cohn, N., & Berge, G. (1998). Logic and reliability of evaluations of competence to stand trial. *Law and Human Behavior*, 22, 519–547.
- United States v. Duhon, 104 F. Supp. 2d. 663 (2000).
- Viljoen, J. L., & Zapf, P. A. (2002). Fitness to stand trial evaluations: A comparison of referred and non-referred defendants. *International Journal of Forensic Mental Health*, 1, 127–138.
- Wieter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961).
- Wilson v. United States, 391 F. 2d. 460 (1968).
- Zapf, P. A., Hubbard, K. L., Cooper, V. G., Wheelles, M. C., & Ronan, K. A. (2004). Have the courts abdicated their responsibility for determination of competency to stand trial to clinicians? *Journal of Forensic Psychology Practice*, 4, 27–44.
- Zapf, P. A., & Roesch, R. (2009). *Best practices in forensic mental health assessment: Evaluation of competence to stand trial*. New York: Oxford.
- Zapf, P. A., & Roesch, R. (2011). Future directions in the restoration of competency to stand trial. *Current Directions in Psychological Science*, 20, 43–47.
- Zapf, P. A., Skeem, J. L., & Golding, S. L. (2005). Factor structure and validity of the MacArthur Competence Assessment Tool—Criminal Adjudication. *Psychological Assessment*, 17, 433–445.
- Zapf, P. A., & Viljoen, J. L. (2003). Issues and considerations regarding the use of assessment instruments in the evaluation of competency to stand trial. *Behavioral Sciences and the Law*, 21, 351–367.

Mental Competency Evaluations: Guidelines for Judges and Attorneys

Patricia A. Zapf and Ronald Roesch

Competency to stand trial is a concept of jurisprudence allowing the postponement of criminal proceedings for those defendants who are considered unable to participate in their defense on account of mental or physical disorder. It has been estimated that between 25,000 and 39,000 competency evaluations are conducted in the United States annually.¹ That is, between 2% and 8% of all felony defendants are referred for competency evaluations.²

In this article, we will present an overview of competency laws, research, methods of assessment, and the content of reports to the courts conducted by clinicians, with the aim of providing a summary of relevant information about competency issues. The purpose of this article is to inform key participants in the legal system (prosecutors and defense attorneys, as well as judges) about the current state of the discipline of forensic psychology with respect to evaluations of competency.³

BACKGROUND & DEFINITION

Provisions allowing for a delay of trial because a defendant was incompetent to proceed have long been a part of legal due process. English common law allowed for the arraignment, trial, judgment, or execution of an alleged capital offender to be stayed if he or she "be(came) absolutely mad."⁴ Over time, statutes have been created that have further defined and extended the common-law practice.

The modern standard in U.S. law was established in *Dusky v. United States*.⁵ Although the exact wording varies, all states use a variant of the *Dusky* standard to define competency.⁶ In *Dusky*, the United States Supreme Court ruled that a minimum level of rational understanding of the proceedings and ability to help one's attorney was required:

[I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."⁷

Although the concept of competency to stand trial has been long established in law, its definition, as exemplified by the ambiguities of *Dusky*, has never been explicit. What is meant by "sufficient present ability"? How does one determine whether a defendant "has a rational as well as factual understanding"? To be sure, some courts⁸ and legislatures⁹ have provided general direction to evaluators in the form of articulated *Dusky* standards,¹⁰ but the typical forensic evaluation is left largely unguided except by a common principle, in most published cases, that evaluators cannot reach a finding of incompetency independent of the facts of the case at hand.

This article was adapted from Ronald Roesch, Patricia A. Zapf, Stephen L. Golding & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, in *HANDBOOK OF FORENSIC PSYCHOLOGY* 327 (Irving B. Weiner & Allen K. Hess, eds., 2d ed. 1999)

Footnotes

1. Steven K. Hoge, et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 *LAW & HUM. BEHAV.* 141 (1997); Henry J. Steadman & E. Hartstone, *Defendants Incompetent to Stand Trial*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 39 (John Monahan & Henry J. Steadman eds., 1983).
2. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 *BEHAV. SCI. & L.* 291 (1992); STEPHEN L. GOLDING, *INTERDISCIPLINARY FITNESS INTERVIEW-REVISED: A TRAINING MANUAL* (1992); Steven K. Hoge, et al., *Attorney-client Decision-making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 *BEHAV. SCI. & L.* 385 (1992).
3. This article focuses on competency issues within the United States. For a review of competency issues with respect to Canadian laws and practice, the reader is referred to Patricia A. Zapf & Ronald Roesch, *Assessing Fitness to Stand Trial: A Comparison of Institution-based Evaluations and a Brief Screening Interview*, 16 *CAN. J. COMMUNITY MENTAL HEALTH* 53 (1997); and Patricia A. Zapf & Ronald Roesch, *A Comparison of Canadian and American Standards for Competence to Stand Trial*, *INTL. J. L. & PSYCH.* (in press).
4. Hale, 1973, cited in P. R. Silten & R. Tullis, *Mental Competency in Criminal Proceedings*, 28 *HASTINGS L.J.* 1053, 1053 (1977).
5. 362 U.S. 402 (1960).
6. R. J. Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 247 (John Monahan & Henry J. Steadman eds., 1983).
7. 362 U.S. at 402 (quoting from brief of U.S. Solicitor General).
8. See, e.g., *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961).
9. See, e.g., Utah Code Ann. § 77-15-1 *et seq.* (2000).
10. Standards of competence have been one area of inquiry; the conceptualization of competence is another. Some researchers and scholars have provided reconceptualizations of competence to stand trial. Bruce J. Winick has persuasively argued that, in some circumstances, it might be in the best interests of the defendant to proceed with a trial, even if he or she is incompetent. See Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921 (1985); and Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 *J. CRIM. L. & CRIMINOLOGY* 571 (1995). Winick postulated that this could take the form of a provisional trial in which the support of the defense attorney would serve to ensure protection of the defendant. This would allow the defendant to proceed with his or her case while maintaining decorum

OVERVIEW OF LEGAL PROCEDURES

The issue of competency may be raised at any point in the adjudication process.¹¹ If a court determines that a bona fide doubt exists as to a defendant's competency, it must consider this issue formally,¹² and usually after a forensic evaluation, which can take place in a jail, an outpatient facility, or in an institutional setting.

One legal issue that may concern evaluators of competency to stand trial is whether information obtained in a competency evaluation can be used against a defendant during the guilt phase of a trial or at sentencing. While some concerns have been raised about possible self-incrimination,¹³ all jurisdictions in the United States provide, either statutorily or through case law, that information obtained in a competency evaluation cannot be introduced on the issue of guilt unless the defendant places his or her mental state into evidence at either trial or sentencing hearings.¹⁴

Once a competency evaluation has been completed and the written report submitted,¹⁵ the court may schedule a hearing. If, however, both the defense and the prosecution accept the findings and recommendations in the report, a hearing does not have to take place. It is likely that in the majority of the states, a formal hearing is not held for most cases. If a hearing is held, the evaluators may be asked to testify, but most hearings are quite brief and usually only the written report of an evaluator is used. In fact, the majority of hearings last only a few minutes and are held simply to confirm the findings of evaluators.¹⁶ The ultimate decision about competency rests with the court, which is not bound by the evaluators' recommendations.¹⁷ In most cases, however, the court accepts the recommendations of the evaluators.¹⁸

At this point defendants found competent proceed with their

case. For defendants found incompetent, either their trials are postponed until competency is regained or the charges are dismissed, usually without prejudice. The disposition of incompetent defendants is perhaps the most problematic area of the competency procedures. Until the case of *Jackson v. Indiana*,¹⁹ virtually all states allowed the automatic and indefinite commitment of incompetent defendants. In *Jackson*, the U.S. Supreme Court held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."²⁰ The Supreme Court did not specify how long a period of time would be reasonable nor did it indicate how progress toward the goal of regaining competency could be assessed.

The *Jackson* decision led to revisions in state statutes to provide for alternatives to commitment as well as limits on the length of commitment.²¹ The length of confinement varies from state to state, with some states having specific time limits (e.g., 18 months) while other states base length of treatment on a proportion of the length of sentence that would have been given had the defendant been convicted.

Once defendants are found incompetent, they may have only limited rights to refuse treatment.²² Medication is the most common form of treatment, although some jurisdictions have established treatment programs designed to increase understanding of the legal process,²³ or that confront problems that

Although the exact wording varies, all states use a variant of the Dusky standard to define competency.

in the courtroom and without violating the defendant's constitutional rights. As well, Richard J. Bonnie has provided a reformulation of competence to stand trial. Bonnie proposed a distinction between two types of competencies—competence to assist counsel and decisional competence. He argued that defendants found incompetent to assist counsel would be barred from proceeding until they were restored to competence. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993). Defendants found decisionally incompetent, on the other hand, may be able to proceed in certain cases where his or her lawyer is able to present a defense. Although these reformulations are consistent with psychological perspectives on competence, they have not yet been adopted by the courts. *Until the courts have accepted these ideas they will not significantly impact psychological practice.*

11. Stephen L. Golding & Ronald Roesch, *Competency for Adjudication: An International Analysis*, in *LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES* 73 (David N. Weisstub ed., Vol. 4, 1988).
12. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).
13. See, e.g., W. T. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 20 (1977).
14. *Estelle v. Smith*, 451 U.S. 454 (1981); GOLDING & ROESCH, *supra* note 11.
15. See, for a discussion of the content of these reports, Gary B. Melton, John Petrila, Norman G. Poythress & Christopher

Slobogin, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (1987); Russell C. Petrella & Norman G. Poythress, *The Quality of Forensic Evaluations: An Interdisciplinary Study*, 51 J. CONSULTING & CLINICAL PSYCH. 76 (1983); Jennifer L. Skeem, Stephen L. Golding, Nancy B. Cohn & Gerald Berge, *The Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUMAN BEHAV. 519 (1998).

16. HENRY J. STEADMAN, *BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* (1979).
17. See, e.g., *State v. Heger*, 326 N.W.2d 855 (N.D. 1982).
18. Stephen D. Hart & Robert D. Hare, *Predicting Fitness for Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REP. 53 (1992); Steadman, *supra* note 16.
19. 406 U.S. 715 (1972).
20. 406 U.S. at 738.
21. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* (1980).
22. See generally, Bruce J. Winick, *Incompetency to Stand Trial: Developments in the Law*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 3 (John Monahan & Henry J. Steadman eds., 1983).
23. L. Pendleton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 AM. J. PSYCH. 1098 (1980); Christopher D. Webster, F. A. S. Jenson, L. Stermac, K. Gardner & D. Slomen, *Psychoeducational Programmes for Forensic Psychiatric Patients*, 26 CANADIAN PSYCH. 50 (1985).

Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to general competency) averaged only 25%

hinder a defendant's ability to participate in the defense.²⁴ Laws regarding competence vary from state to state, although most jurisdictions follow procedures similar to those described above.

RESEARCH FINDINGS

Though there has been some confusion over the definition of competency per se, there nevertheless appears to be generally good

agreement between evaluators about whether a defendant is competent or not. The few studies of reliability that have been completed report that pairs of evaluators agree in 80% or more of the cases.²⁵ When evaluators are highly trained and use semi-structured competence assessment instruments, even higher rates of agreement have been reported.²⁶

When base rates of findings of competency are considered, however, these high levels of agreement are less impressive and they do not suggest that evaluators are necessarily in agreement about the criteria for a determination of competency. A psychologist, without even directly assessing a group of defendants, could achieve high levels of agreement with an examining clinician, simply by calling all defendants competent (base-rate decision). Since in most jurisdictions, approximately 80% of all referred defendants are competent, the psychologist and the examiner would have modest agreement, even with making no decisions at all. Most disturbingly, Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains.²⁷ It is the more difficult decisions, involving cases where competency is truly a serious question, that are of concern. How reliable are decisions about these cases? To date, no study has accumulated enough of these cases to answer this question.

High levels of reliability do not, of course, ensure that valid decisions are being made. Two evaluators could agree that the presence of psychosis automatically leads to a finding of incompetency. As long as the evaluators are in agreement about their

criteria for determining psychosis, the reliability of their final judgments about competency will be high. It is quite possible that the criteria used by too many evaluators inappropriately rely on traditional mental status issues without considering the functional aspects of a particular defendant's case.

As we have indicated, the courts usually accept mental health judgments about competency. Does this mean that the judgments are valid? Not necessarily, since courts often accept the evaluator's definition of competency and his or her conclusions without review, leading to very high levels of examiner-judge agreement.²⁸

We have argued that the only ultimate way of assessing the validity of decisions about incompetency is to allow defendants who are believed to be incompetent to proceed with a trial anyway.²⁹ This could be a provisional trial (on the Illinois model), in which assessment of a defendant's performance could continue. If a defendant was unable to participate, then the trial could be stopped. If a verdict had already been reached and the defendant was convicted, the verdict could be set aside.

We suspect that in a significant percentage of trials, alleged incompetent defendants would be able to participate. In addition to the obvious advantages to defendants, the use of a provisional trial could provide valuable information about what should be expected of a defendant in certain judicial proceedings (e.g., the ability to testify, identify witnesses, describe events, evaluate the testimony of other witnesses, etc.). Short of a provisional trial, it may be possible to address the validity issue by having independent experts evaluate the information provided by evaluators and other collateral information sources. In the next section, we will review various methods for assessing competency.

CURRENT STATE OF ASSESSMENT

A major change that has occurred within the past few decades has been the development of a number of instruments specifically designed for assessing competence. This work was pioneered by A. Louis McGarry and his colleagues.³⁰ Their work was the starting point for a more sophisticated and systematic approach to the assessment of competency. In 1986, Thomas Grisso coined the term "forensic assessment instrument" (FAI) to refer to instruments that provide frameworks for conducting forensic assessments.³¹

FAIs are typically semistructured elicitation procedures and

24. D. L. Davis, *Treatment Planning for the Patient Who Is Incompetent to Stand Trial*, 36 HOSPITAL & COMMUNITY PSYCH. 268 (1985); A. M. Siegel & A. Elwork, *Treating Incompetence to Stand Trial*, 14 LAW & HUM. BEHAV. 57 (1990).
25. Norman G. Poythress & H. V. Stock, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 PSYCH. & LAW 131 (1980); Roesch & Golding, *supra* note 21; Skeem, et al., *supra* note 15.
26. Stephen L. Golding, Ronald Roesch & Jan Schreiber, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 321 (1984); Robert A. Nicholson, & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research*, 109 PSYCH. BULL. 355 (1991).
27. See Skeem, et al. *supra* note 15. Competency domains might include ability to understand the nature of the proceedings, a fac-

tual understanding of the proceedings, and rational understanding of the proceedings and are set out in each state's competency statutes.

28. Hart & Hare, *supra* note 18; Skeem, et al., *supra* note 15.

29. See ROESCH & GOLDING, *supra* note 21.

30. Paul D. Lipsitt, D. Lelos & A. Louis McGarry, *Competency for Trial: A Screening Instrument*, 128 AMER. J. PSYCH. 105 (1971); A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 AM. J. PSYCH. 623 (1965); A. LOUIS MCGARRY, & W. J. CURRAN, *COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS* (1973).

31. THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986).

lack the characteristics of many traditional psychological tests. However, they serve to make forensic assessments more systematic. These instruments help evaluators to collect important and relevant information and to follow the decision-making process that is required under the law. Since the time that the term was coined, a number of assessment instruments have been developed that are designed to work in this way, and it appears that the use of FAIs has been slowly increasing.³² This trend is encouraging in that empirical data suggest that trained examiners using FAIs achieve the highest levels of inter-examiner and examiner-adjudication agreement.³³ Next, we will briefly describe a few of these recently developed instruments.

The MacArthur Competence Assessment Tool—Criminal Adjudication. This measure, known as the MacCAT-CA,³⁴ was developed as part of the MacArthur Network on Mental Health and the Law. It was developed from a number of research instruments³⁵ and assesses three main abilities: understanding, reasoning, and appreciation.

The MacCAT-CA consists of 22 items and takes approximately 30 minutes to administer. The basis of the items is a short story about two men who get into a fight and one is subsequently charged with a criminal offense. The first eight items assess the individual's understanding of the legal system. Most of these items consist of two parts. The defendant's ability to understand is first assessed and, if it is unsatisfactory or appears to be questionable, the information is then disclosed to the defendant and his or her understanding is again assessed. This allows the evaluator to determine whether or not the individual is able to learn disclosed information. The next eight items assess the individual's reasoning skills by asking which of two disclosed facts would be most relevant to the case. Finally, the last six items assess the individual's appreciation of his or her own circumstances. National norms for the MacCAT-CA have been developed and published.³⁶

Other Specialized Assessment Instruments. In recent years, there has been a move toward the development of competence

assessment instruments for specialized populations of defendants. We will not go into detail about these specialized instruments here but the reader should be aware that they exist. Carol Everington has developed an instrument designed to assess competence with mentally retarded defendants called the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR).³⁷ Recent research on the CAST-MR has indicated that this instrument shows good reliability and validity.³⁸ Other researchers have focused their efforts on another special population—juvenile defendants,³⁹ finding that younger defendants are more likely to be found incompetent.

While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency.

THE FUNCTIONAL EVALUATION APPROACH

Although there are numerous ways in which to conduct competency evaluations, we believe that the most reasonable approach to the assessment of competency is based on a functional evaluation of a defendant's ability matched to the contextualized demands of the case.⁴⁰ While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency. Rather, the mental status information must be related to the specific demands of the legal case, as has been suggested by legal decisions such as the ones involving amnesia. As in the case of psychosis, a defendant with amnesia is not per se incompetent to stand trial, as has been held in a number of cases.⁴¹ In *State v. Davis*,⁴² the defendant had memory problems due to brain damage. Nevertheless, the Missouri Supreme Court held that amnesia by itself was not a sufficient reason to bar the trial of an otherwise competent defen-

32. Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26 *PROF. PSYCH.: RES. & PRAC.* 465 (1995).

33. Golding, Roesch & Schreiber, *supra* note 26; Nicholson & Kugler, *supra* note 26; Skeem, et al., *supra* note 15.

34. STEVEN K. HOGE, RICHARD J. BONNIE, NORMAN G. POYTHRESS & JOHN MONAHAN, *THE MACARTHUR COMPETENCE ASSESSMENT TOOL - CRIMINAL ADJUDICATION (MACCAT-CA)* (1999).

35. For a complete discussion of its development, see Hoge, et al., *supra* note 1.

36. See HOGE, ET AL., *supra* note 34.

37. Carol T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 *CRIM. J. & BEHAV.* 147 (1990).

38. Carol Everington & C. Dunn, *A Second Validation Study of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)*, 22 *CRIM. J. & BEHAV.* 44 (1995).

39. Deborah K. Cooper, *Juvenile Competency to Stand Trial: The Effects of Age and Presentation of Factual Information in the Attainment of Competency in Juveniles*, 56 (10-B) *DISSERTATION ABSTRACTS INTERNATIONAL* 5761 (1995); V. L. Cowden & G. R. McKee,

Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship, 33 *U. LOUISVILLE J. FAM. L.* 629 (1995).

40. A recent Supreme Court decision (*Godinez v. Moran*, 509 U.S. 389 (1993), discussed later) has been interpreted by some as being in opposition to a functional evaluation approach and, therefore, indicative of tension between the application of good social science principles and the views of the U.S. Supreme Court. The ruling in *Godinez* indicated that the *standard* for all types of competence was to be the same (i.e., that set out in *Dusky*) to meet the constitutional minimum. In *Godinez*, the Court noted that "while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." *Id.* at 402. Therefore, it appears that the functional evaluation approach may still be used in those states that have adopted more elaborate standards of competence while still satisfying the minimum *Dusky* standard.

41. See, e.g., *Wilson v. United States*, 391 F.2d. 460 (D.C. Cir. 1968); *Ritchie v. Indiana*, 468 N. E. 2d. 1369 (Ind. 1984).

42. 653 S. W. 2d. 167 (Mo. 1983).

[C]ompetence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account

cy independent of the facts of the legal case—an issue we will return to later. Similarly, a defendant may be psychotic and still be found competent to stand trial if the symptoms do not impair the defendant's functional ability to consult with his or her attorney and otherwise rationally participate in the legal process.

Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In certain cases, a defendant may be required to testify. In this instance, a defendant who is likely to withdraw in a catatonic-like state may be incompetent. But the same defendant may be able to proceed if the attorney intends to plea bargain (the way in which the vast majority of all criminal cases are handled).

The functional approach is illustrated in the famous amnesia case of *Wilson v. United States*.⁴³ In that decision, the U.S. Court of Appeals for the District of Columbia held that six factors should be considered in determining whether a defendant's amnesia impaired the ability to stand trial:

- The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonable possible alibi.
- The extent to which the government assisted the defendant and his counsel in that reconstruction.
- The strength of the prosecution's case. Most important

here will be whether the government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

- Any other facts and circumstances that would indicate whether or not the defendant had a fair trial.⁴⁶

One could substitute any symptom for amnesia in the above quote. If this were done, the evaluation of competency would certainly be one based on a determination of the manner in which a defendant's incapacity may have an effect on the legal proceedings. In fact, some states, such as Florida⁴⁷ and Utah,⁴⁸ already specify that the evaluators must relate a defendant's mental condition to clearly defined legal factors, such as the defendant's appreciation of the charges, the range and nature of possible penalties, and capacity to disclose to the defense attorney pertinent facts surrounding the alleged offense.⁴⁹ Utah's statute goes the furthest in this direction, specifying the most comprehensive range of psycholegal abilities to be addressed by evaluators (including the negative effects of medication as well as decisional competencies) and also requiring judges to identify specifically which psycholegal abilities are impaired when a defendant is found incompetent.

The most important aspect of assessing competence, therefore, is an assessment of the specific psycholegal abilities required of a particular defendant. That is, competence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. This contextual perspective was summarized by Stephen Golding and Ronald Roesch⁵⁰ as follows:

Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing evidence*, anticipating the substantial effort of a *particular* attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.⁵¹

The importance of a contextual determination of specific psycholegal abilities has been repeatedly demonstrated by empirical findings that competency assessments in one area of functioning are rarely homogeneous with assessments in other areas of functioning.⁵² For example, assessments of compe-

43. 641 P. 2d. 1373 (Mont. 1982).

44. *Morrow v. Maryland*, 443 A. 2d. 108 (Md. 1982).

45. 391 F. 2d. 460.

46. *Id.* at 463-64.

47. Fl. R. Crim. Pro. § 3.21 (a)(1); see Bruce Winick, *supra* note 22, at 38.

48. Utah Code Ann. § 77-15-1 *et seq.* (2000).

49. Winick, *supra* note 22, at 38.

50. Golding & Roesch, *supra* note 11.

51. *Id.* at 79 (emphasis in original).

52. Bonnie, *supra* note 2; Bonnie, *supra* note 10; Thomas Grisso, Paul Appelbaum, Edward Mulvey & K. Fletcher, *The MacArthur Treatment Competence Study II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995); Skeem, et al., *supra* note 15; Karen E. Whittemore, James R. P. Ogloff & Ronald Roesch, *An Investigation of Competency to Participate in Legal Proceedings in Canada*, 42 CANADIAN J. PSYCH. 1 (1997); Patricia A. Zapf, *An Investigation of the Construct of Competence in a Criminal and Civil Context: A Comparison of the FIT, the MacCAT-CA, and the MacCAT*, DISSERTATION ABSTRACTS INTERNATIONAL (1998).

tency to stand trial may not necessarily correspond with assessments of competency to plead guilty. Likewise, assessments of competency to waive *Miranda* may not correspond with assessments of competency to stand trial or competency to plead guilty.

A more recent Supreme Court decision, however, has confused this issue by finding that the standard by which competency to be judged is not context-specific. In *Godinez v. Moran*,⁵³ the United States Supreme Court held that the standard for the various types of competency (i.e., competency to plead guilty, to waive counsel, to stand trial) should be considered the same. Justice Thomas wrote for the majority:

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for "reasoned choice" among the alternatives available to him. How this standard is different from (much less higher than) the *Dusky* standard—whether the defendant has a "rational understanding" of the proceedings—is not readily apparent to us. . . . While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. . . . Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than the defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.⁵⁴

In his dissent, Justice Blackmun argued that the "majority's analysis [was] contrary to both common sense and long-standing case law."⁵⁵ He reasoned that competency could be considered in a vacuum, separate from its specific legal context. Justice Blackmun argued that "[c]ompetency for one purpose does not necessarily translate to competency for another purpose"⁵⁶ and noted that prior Supreme Court cases had "required competency evaluations to be specifically tailored to the context and purpose of a proceeding."⁵⁷ What was egregiously missing from the majority's opinion in *Godinez*, however, was the fact that Moran's competency to waive counsel or plead guilty to death penalty murder charges was never assessed by the forensic examiners, regardless of which standard (rational choice or rational understanding) was employed.

The *Godinez* holding has been subsequently criticized by legal scholars⁵⁸ and courts alike. In a concurring opinion, one federal appellate judge wrote that the case under review "presents us with a window through which to view the real-world effects of the Supreme Court's decision in *Godinez v. Moran*,

and it is not a pretty sight."⁵⁹ The problem is not whether or not the standards for various psycholegal competencies are higher, different, or the same, but rather, more fundamentally, whether or not the defendant has been examined with respect to these issues in the first place.

The *Godinez* holding has been subsequently criticized by legal scholars and courts alike.

REPORTS

In this final section, we will outline the information that should be contained in reports that are submitted to the court with respect to the issue of competence. One of the first pieces of information that should be contained in the report is the defendant's identifying information. This usually includes the defendant's demographics, the circumstances of the referral, the defendant's criminal charges, and some statement about the current stage of proceedings. Another piece of information that should be included relatively early in the report is some statement about the procedures that were used for the competency evaluation. This should include the dates and places that the defendant was interviewed, any psychological tests or forensic assessment instruments that were administered to the defendant, other data gathered, collateral information or interviews used, documents reviewed, and the techniques used during the evaluation. A section on the defendant's relevant history, usually including psychiatric/medical history, education, employment, and social history, is necessary to give the defendant's background and to note any important aspects of the defendant's background that may impact upon his or her case in some way.

There are two areas that *must* be addressed in a competency report: the defendant's current clinical presentation (including the defendant's presentation and possibly his or her motivation, test results, reports of others, and diagnosis) and some statement about the defendant's ability to proceed to trial (or the next stage in the proceedings). These two areas are the focal point of the evaluation.

Since we advocate for a functional assessment of a defendant's competencies, we believe that it is necessary that the evaluator ask questions that are pertinent to the individual defendant's case. A good competency report will set out each of the specific criteria that are required within the jurisdiction and will offer an opinion as to whether the defendant meets each of the specific criteria. These statements should be supported with the evaluator's behavioral observations of the defendant or through illustrative dialogue between the defendant and the evaluator. In addition to these two areas that must be addressed, a useful report will also contain a section

53. 509 U.S. 389 (1993).

54. *Id.* at 397-99.

55. *Id.* at 409.

56. *Id.* at 413.

57. *Id.* at 2694.

58. Michael L. Perlin, "Dignity Was the First to Leave": *Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61, 81 (1996).

59. Government of the Virgin Islands v. Charles, 72 F.3d 401, 411 (3rd Cir. 1995)(Lewis, J., concurring).

[A] functional evaluation of competence is consistent with psychological theory and research.

Competence is not a global construct, but rather is context-specific.

accepts the recommendation of the evaluator.⁶⁰

A poorly prepared report is one that does not include the basic information described above. Those components of a report that are considered to be essential include names, relevant dates, charges, data sources, notification to defendant of the purpose of the evaluation, limits on confidentiality, psychiatric history, current mental status, current use of psychotropic medication, and information specific to each forensic question being assessed.⁶¹ With respect to the use of forensic assessment instruments or formal psychological testing, Randy Borum and Thomas Grisso found, in a survey of assessment practices, that one-third of respondents reported using forensic assessment instruments regularly, whereas most respondents reported using general psychological instruments (such as the Wechsler Adult Intelligence Scale) in forensic assessments.⁶² In light of the advances in the area of forensic assessment and the development of specialized forensic assessment instruments, the practice of routinely using only general psychological instruments, in lieu of forensic assessment instruments, appears to be inadequate.

A poorly prepared report will include opinions that have no basis. If the author of a report states opinions without also including the bases for the opinion, one should be skeptical. It is good psychological practice to back up any stated opinion with observations, descriptions, and justifications for why that opinion was reached. It is also good practice to detail behavioral observations and descriptions that lend support for an opinion as well as any other observations that may be in opposition to the opinion reached. That is, any inconsistencies that were noted throughout the evaluation as well as any alternative hypotheses that may be reached will also be documented in a good report.

The Florida Rules of Criminal Procedure⁶³ provide a useful report checklist by requiring that each of the following elements must be contained in a written report submitted by an expert:

- the specific matters referred for evaluation,

where the evaluator will present his or her opinion regarding the defendant's competency to proceed. Although evaluators are prohibited from speaking to the ultimate legal issue of competency, they are expected to arrive at some conclusion about a defendant's competency. A good report should include the evaluator's final opinion as to whether or not a defendant meets the required criteria to proceed. As we indicated earlier, in the majority of cases, the court

- the evaluative procedures, techniques and tests used in the examination and the purpose or purposes for each,
- the expert's clinical observations, findings and opinions on each issue referred for evaluation by the court, indicating specifically those issues, if any, on which the expert could not give an opinion, and
- the sources of information used by the expert and the factual basis for the expert's clinical findings and opinions.

In some jurisdictions, if the evaluator concludes that the defendant could be considered incompetent to proceed, some statement about the restorability of the defendant is required to be included in the report. In addition, some jurisdictions require evaluators to include an opinion regarding whether the defendant would meet criteria for commitment. Finally, some jurisdictions require the evaluator to include other recommendations, such as the possibility of counseling for the defendant, treatment for the defendant while incarcerated, or other special observation precautions.

SUMMARY AND CONCLUSIONS

To conclude, we leave the reader with a summary of the five main points discussed in this article. First, the *Dusky* standard sets the foundation for every state's competency-to-stand-trial standard. In addition, as per the decision in *Godinez*, the *Dusky* standard also sets the foundation for every state's standards for other types of criminal competencies (e.g., competency to waive Miranda rights, competency to plead guilty, competency to confess). Each state is free to elaborate standards for different types of competencies; however, the *Dusky* standard is the minimum constitutional requirement.

Second, there is no true way to assess the validity of competency determinations short of a provisional trial. The only way to truly determine that an individual is not able to participate in his or her own defense is to allow that individual to proceed. As we have described, some states have these provisions but they are not utilized.

Third, a functional evaluation of competence is consistent with psychological theory and research. Competence is not a global construct, but rather is context-specific. It is possible for an individual to be competent with respect to one area of functioning but incompetent with respect to another. A good forensic evaluation will assess a specific individual's competence with respect to a particular set of abilities, in light of the specific characteristics of the individual and the circumstances of the individual's case.

Fourth, there have been a number of forensic assessment instruments developed to assist evaluators in the assessment of competency. In general, reliability increases with the use of these instruments.

Fifth, a good forensic report must include information about the defendant's current clinical presentation as well as information about the specific forensic question being assessed

60. Hart & Hare, *supra* note 18.

61. Randy Borum & Thomas Grisso, *Establishing Standards for Criminal Forensic Reports: An Empirical Analysis*, 24 BULL. AMER.

ACAD. PSYCH. & L. 297 (1996).

62. Borum & Grisso, *supra* note 32.

63. Fl. R. Crim. Pro. § 3.211 (a).

(i.e., competency to proceed). In addition, a good forensic report should include descriptions and observations that serve as the basis for the opinions or conclusions stated in the report.

The purpose of this article was to present an overview of competency laws, research, methods of assessment, and the content of competency reports submitted to the courts by expert evaluators. We believe that by informing legal professionals of the current state of the discipline with respect to competency evaluations we will begin to bridge the gap that often exists between psychology and the legal profession. There exists a body of research and literature that examines issues that are at the heart of both psychology and the law; however, often this literature is only accessed by one set of professionals or another. We hope that publishing articles such as this, in sources that are easily accessed by legal professionals, and in a format familiar to legal professionals, will facilitate a better understanding of psychology as it pertains to the legal system.



Patricia A. Zapf is an assistant professor of psychology at the University of Alabama. She received her Ph.D. in psychology in 1999 from Simon Fraser University in Canada. Her prior publications in the field of psychology have included ones concerning the assessment of competency to stand trial and the usefulness of various methods of competency assessment.



Ronald Roesch is a professor of psychology at Simon Fraser University in Burnaby, British Columbia, Canada. From 1988 to 1996, he was the editor of *Law and Human Behavior*, one of the leading journals in law and psychology; he presently edits a series of books sponsored by the American Psychology-Law Society (APLS), a division of the American Psychological Association. Roesch was president of the APLS in 1993-94. He has studied and written about issues involving the assessment of competency to stand trial for more than two decades.

AMERICAN JUDGES ASSOCIATION Future Conferences

2001 Midyear Meeting
March 29-31, 2001
Hot Springs, Arkansas
Austin Hot Springs Convention Center
(\$90 single or double)

2001 Annual Conference
September 30-October 5, 2001
Reno, Nevada
Silver Legacy Resort
(\$89 single or double)

2002 Midyear Meeting
Biloxi, Mississippi
(Dates and hotel to be determined)

2002 Annual Conference
September 8-13, 2002
Maui, Hawaii
The Westin Maui
(\$155 single or double, golf/mountain view;
\$169 single or double, ocean view)

2003 Midyear Meeting
Billings, Montana
(Dates and hotel to be determined)

2003 Annual Conference
Montreal, Quebec
(Dates and hotel to be determined)

JUDICIAL ROBES

GAVELS

In Stock For Immediate Delivery

****Tailored for Men and Women****

Call, Write or Fax:

CRAFT ROBE COMPANY

247 West 37th Street, New York, NY 10018

800#: (800) 95-CRAFT

PHONE: (212) 764-6122

FAX: (212) 997-7318

There is a baseline here

Examples:

- Heilbrun et al, *Foundations of Forensic Mental Health Assessment*
- Parry, *Criminal Mental Health And Disability Law, Evidence and Testimony*
- FJC/NRC, *Reference Manual On Scientific Evidence, 3rd Ed*
- Faust, *Coping With Psychiatric and Psychological Testimony*; Rogers & Shuman, *Fundamentals of Forensic Practice*

There are ways of getting to the ethical and professional practices

- Are there *ethical & standard of practice* issues where a psychologist fails to use appropriate instruments—or uses the wrong norm set, or scoring approach ? *APA Ethical Principles of Psychologists and Code of Conduct* – modified in 2010, Standard 9.02 “Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in light of the research on or evidence of the usefulness and proper application of the techniques”

This includes pointing out the vague ethical principles application to

MH/FMH

- American Psychological Association; also Division 41 (American Psychology-Law Society)
- American Psychiatric Association (Principles of Medical Ethics)-also, AAPL Ethical Guidelines for the Practice of Forensic Psychiatry
- The knowledgeable expert, and lawyer, both know that the contours of ethical practice are not that vague...

There are works on assessment

- Rogers and Shuman, *Fundamentals of Forensic Practice*; Melton et al, *Psychological Evaluations for the Courts*
- Simon and Gold, *Textbook of Forensic Psychiatry*
- Lezak et al, *Neuropsychological Assessment*
- Boone, *Clinical Practice of Forensic Neuropsychology*

Direct/Cross—the law...

- “The two cases that set forth the Constitution’s ‘mental competence’ standard, *Dusky* [...] and *Drope* [...], specify that the Constitution does not permit trial of an individual who lacks ‘mental competence.’”

Indiana v. Edwards, 554 U.S. 164, 170-1 (2008)

Cooper v. Oklahoma 517 US 348 (96)

- The 4 decisions the accused must be able to make:
 - “the profound choice whether to plead guilty,”
 - “waiver of his privilege against compulsory self-incrimination . . . by taking the witness stand,
 - waiver of “his right to trial by jury,” and
 - waiver of his “right to confront [his] accusers” by omitting cross-examination of prosecution witnesses.

The Individual Who Goes To Trial Must Have Decision Making Abilities In Several Domains

Godinez v. Moran, 509 U.S. 389, 398 (1993)

- “These decisions include whether to waive the privilege against self-incrimination, whether to take the witness stand,
- whether to waive the right to trial by jury,
 - whether to decline to cross-examine certain witnesses,
 - whether to put on a defense, and whether to raise one or more affirmative defenses.”

How often is the USSC ignored in competence evaluations ?

- *Ryan v. Gonzales*, 568 U.S. ____ (2013)

-USSC: “It stands to reason that the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney... For example, an incompetent defendant would be unable to assist counsel in identifying witnesses and deciding on a trial strategy”—
568 U.S. ____ --slip opinion at p. 6

The Black Hole of Competence Evaluations

- “... where the focus is on defendant’s ability to assist counsel... ‘one of the most evident issues is whether the assessing professional... really knows what would normally go into the defense of the case.’” *U.S. v. Duhon*, 104 F. Supp. 2d 663, 669-670 (W.D., La. 2002)

Where the competence 'expert' fails to try to consult with defense counsel

- *Drope v. Missouri*: "We do not suggest that courts must accept without question a lawyer's representation...an expressed doubt by one with 'the closest contact with the defendant' [citation omitted] is unquestionably a factor which should be considered." 420 U.S. 162, 178-179 (1975).

Cite as: Skeem, J., Golding, S.L. & Emke-Francis, P. (2004), Assessing adjudicative competency: Using legal and empirical principles to inform practice. In Donohue, W. T. & Levensky, E. R. (Eds.). Forensic psychology: A handbook for mental health and legal professionals. Pp. 175-211. New York: Academic Press

Assessing Adjudicative Competency:

Using Legal and Empirical Principles to Inform Practice

[1]

Jennifer Skeem
University of Nevada, Las Vegas

[2]

Stephen L. Golding
University of Utah

[3]

Paula Emke-Francis
University of Nevada, Las Vegas

A simplified form of competency to stand trial was recognized as early as the Thirteenth Century. Trial procedure of the day required that a defendant enter a plea, and when one could or did not, the issue^[1] was whether the defendant was Amute by malice@ as opposed to Amute by visitation by God@ (Roesch & Golding, 1980 p. 2). As sociopolitical conceptions of justice and scientific understanding of mental disorder matured, so did conceptualizations of competency. By the Eighteenth Century, Hale, in his *Pleas of the Crown* articulated the essential principle of competency: AIf it appear that [a defendant] is mad, the judge, in his discretion, may discharge the jury of him, and remit him to gaol [jail], to be tried after the recovery of his understanding@ (as quoted in Silten and Tullis, 1977, p. 1053). During that period, the trial of an incompetent defendant was viewed as an unjust adversarial contest, Ain which the defendant, like a small boy being beaten by a bully, is unable to dodge or return the blows@ [Frith=s Case, 1790]. In 1899, these principles were drawn into American case law when the conviction of a defendant was reversed on the basis that his epilepsy at trial and inability to provide information to counsel should have been considered and investigated (*Youtsey v. United States*, 1899).

The modern constitutional standard for competency to stand trial was established in *Dusky vs. the United States* (1960). In this case, the U.S. Supreme Court ruled that it was a fundamental violation of fairness and due process to proceed against a defendant who, by virtue of mental or physical impairment, did not possess “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” or “ a rational as well as factual understanding of the proceedings against him” (at 402). Years later, the Court added that a defendant must also possess an ability to “assist in preparing his defense” (*Drope v. Missouri*, 1972, at 171). Competency to stand trial, now commonly referred to as adjudicative competency (Golding & Roesch, 1988; Bonnie, 1992), refers to a jurisprudential construct and an accompanying set of procedures that allows for the postponement of criminal proceedings for individuals who are unable to take part in their own defense because of Amental disease or defect.@^[2]

The evaluation of adjudicative competence is arguably the single most significant mental health inquiry pursued in criminal law (Nicholson & Kugler, 1991), in part because Amore defendants are evaluated for competency and more financial resources are expended for their evaluation, adjudication, and treatment than for any other class of forensic activities@ (Golding, 1992, p. 77). Thus, legal@ and mental health professionals who work at the interface between psychology and criminal law are likely to encounter issues related to adjudicative competency. This chapter is designed to familiarize these professionals with (a) modern conceptualizations of the competency construct and relevant legal procedures, (b) forensic assessment instruments specifically designed to operationalize adjudicative competency, and (c) basic recommendations for practice based on available research.

Table 1: Adjudicative Competency Domains and Subdomains

1. Capacity to comprehend and appreciate the charges or allegations

2. Capacity to disclose to counsel pertinent facts, events, and states of mind

Domain

Note. CST = competency to stand trial.

Subdomain

- a. Factual knowledge of the charges (ability to report charge label)
- b. Understanding of the behaviors to which the charges refer
- c. Comprehension of the police version of events
- a. Ability to provide a reasonable account of one's behavior around the time of the alleged offense
- b. Ability to provide information about one's state of mind around the time of the alleged offense
- c. Ability to provide an account of the behavior of relevant others around the time of the alleged offense
- d. Ability to provide an account of police behavior
- e. Comprehension of the *Miranda* warning
- f. Confession behavior (influence of mental disorder, suggestibility, and so forth on confession)
- a. Knowledge of penalties that could be imposed (e.g., knowledge of the relevant sentence label associated with the charge, such as "5 to life")
- b. Comprehension of the seriousness of charges and potential sentences
- a. Understanding of the meaning of alternative pleas (e.g., guilty and mentally ill) b. Knowledge of the plea bargaining process
- a. Capacity to comprehend legal advice
- b. Capacity to participate in planning a defense strategy
- c. Plausible appraisal of likely outcome (e.g., likely disposition for one's own case) d. Comprehension of the implications of a guilty plea or plea bargain (i.e., the rights waived on entering a plea of guilty)
- e. Comprehension of the implications of proceeding pro se (e.g., the rights waived and the ramifications)
- f. Capacity to make a reasoned choice about defense options (e.g., trial strategy, guilty plea, proceeding pro se, pleading insanity) without distortion attributable to mental illness (an ability to rationally apply knowledge to one's own case)
- a. Understanding of the roles of courtroom personnel (i.e., judge, jury, prosecutor) b. Understanding of courtroom procedure (the basic sequence of trial events)
- a. Appreciation of appropriate courtroom behavior
- b. Capacity to manage one's emotions and behavior in the courtroom
- a. Capacity to track events as they unfold (not attributable to the effects of medication)
- b. Capacity to challenge witnesses (i.e., recognize distortions in witness testimony)
- a. Recognition that counsel is an ally
- b. Appreciation of the attorney-client privilege
- c. Confidence in and trust in one's counsel
- d. Confidence in attorneys in general
- e. Particular relationship variables that may interfere with the specific attorney-client relationship (i.e., attorney skill in working with the client; problematic socioeconomic or demographic differences between counsel and client)
- a. Capacity to track proceedings given sedation level on current medication
- b. Potentially detrimental effects of medication on the defendant's courtroom demeanor

3. Capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings

4. Basic knowledge of legal strategies and options

5. Capacity to engage in reasoned choice of legal strategies and options

6. Capacity to understand the adversary nature of the proceedings

7. Capacity to manifest appropriate courtroom

THE COMPETENCY EVALUATION

Best Practices / Professional Standards

- Best Practices Series by Oxford
 - Evaluation of Competence to Stand Trial (2009)
- AAPL Practice Guidelines (2007)
- APA Ethical Principles of Psychologists and Code of Conduct (2002, 2010)
- Specialty Guidelines for Forensic Psychology (2013)

Competency Evaluation

- Data sources:
 - Interview
 - Testing
 - Collateral information
- Nature: Functional / Contextual
- Purpose: Assess Congruence v. Incongruence

Grisso (2003) *Evaluating Competencies*

“A decision about legal competence is in part a statement about **congruency or incongruency between (a) the extent of a person’s functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case.** Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for competence decisions.” (p. 32-33)

Contextual & Functional Nature

- Case law & legal statute have attempted to elaborate on the specific abilities required for competency
 - Some states have developed articulated standards for CST
 - Competency is an open-textured construct (not a bright line construct); not defined by a fixed set of criteria since it is contextual in nature

“Mere presence of severe disturbance is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing* evidence, anticipating the substantial effort of a particular attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.”

Golding & Roesch (1988)

Context Matters

- Evaluator's role is to *describe* for the court the degree of congruence/incongruence between the defendant's functional abilities and the abilities required of the defendant to proceed with his/her case
- Competency cannot really be assessed independent of the context of the case
 - Need to find out as much as possible about what is expected of the defendant for his/her particular case

Defense Expectations of the Expert

- **Crucial to get info from defense counsel about required abilities, expected outcomes, and case-specific details**
- Expect evaluators to ask detailed information about:
 - Abilities required of D for the specific case
 - Possible penalties, pleas, defense strategy, likely outcome
 - Anything relevant for guiding competence-related inquiries
- Expect evaluators to ask about interactions with D and to request the opportunity to observe

Philipsborn on Godinez & Cooper

- The list of tasks that a defendant might be called upon to make (relying on *dicta* from leading cases, which, he argues, would hold more weight with a judge than secondary sources); arguably all of these matters are either covered or closely related to the decision-making elements described in the most recent competence-related cases (see p. 428)
 - What is the spectrum of defenses available in this particular case?
 - How will the defenses be presented, and which witnesses will be involved?
 - How could the prosecution's cross-examination, or rebuttal, influence the guilt and penalty phase outcomes?
 - What are the legal, strategic, and tactical implications of proceeding with a mental state expert at the guilt phase?
 - If a particular defense there is not developed during the guilt phase, will the jurors accept it during the penalty phase—for example, evidence of mental impairment not amounting to a full guilt phase defense?
 - Can a specific defense, such as imperfect defense or mental disorder aggravated by voluntary intoxication, be presented to jurors without testimony from the accused?
 - If so, will calling an expert who has interviewed the client present the prosecutor with a basis for widening the stream of evidence of penalty-related aggravating circumstances beginning in the guilt phase?

Philipsborn (2004)

- Some court decisions suggest that it is incumbent on defense counsel to seek out the expert to relay this pertinent and relevant information about the case and abilities required of the accused, rather than wait for the expert to seek out defense counsel on these matters
- *Duhon*: “one of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would go into the defense of a case”
 - Expert and lawyer need to work together to ensure that the expert has a full understanding of the case and the abilities to be evaluated in the particular defendant

New Disorders Added - V

- Mild Neurocognitive Disorder
 - ◆ Modest cognitive decline based on concerns of individual, family member or clinician plus modest impairment in cognitive performance that is not severe enough to interfere with the capacity for independence but greater effort, compensatory strategies, or accommodation may be required

Intellectual Disability (Intellectual Developmental Disorder) - I

- Although deficits in intellectual functioning is still required, IQ scores no longer included in diagnostic criteria (in DSM-IV, stated “an IQ of 70 or below on an individually administered IQ test) although still mentioned in the text
- DSM-IV required “concurrent deficits in adaptive functioning in at least two areas” whereas DSM-5 indicates that the deficits, without support, limit functioning in one or more areas

Intellectual Disability - II

- DSM-5 text notes that adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures
- Severity specifiers in DSM-IV defined in terms of overlapping IQ ranges (e.g., Moderate= 35-40 to 50-55); in DSM-5, defined according to levels of adaptive functioning, not IQ scores (using table).

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 303-663-7200	COURT USE ONLY
THE PEOPLE OF THE STATE OF COLORADO v. TYLER ANTHONY SANCHEZ, Defendant.	
Attorney for Defendant: Iris Eytan, #29505 Reilly Pozner LLP 511 16 th Street, Suite 700 Denver, Colorado 80202 Tele: (303) 893-6100 Fax: (303) 893-6110 E-mail: ieytan@rplaw.com	Case Numbers: 09CR445 10CR10 Division: 1 Hon. Paul King
MEMORANDUM IN SUPPORT OF MOTION TO APPOINT STATE-FUNDED SPEECH AND LANGUAGE DISABILITY SPECIALIST TO MR. SANCHEZ (Δ20a)	

Mr. Tyler Sanchez, by and through undersigned counsel, hereby submits this memorandum in support of his motion requesting the Court to appoint a specialist in speech and language disabilities in order to assist Mr. Sanchez in every stage of the judicial proceeding.

SUMMARY

1. The Americans with Disabilities Act of 1990 (“ADA”), codified in title 42 of the United States Code, prohibits discrimination against individuals with disabilities. The ADA’s major goal is to assure that disabled are provided with equal opportunity to fully participate in and contribute to our society. 42 U.S.C. § 12101(a)(8) (2006).

2. As to the responsibility of decision-makers in the judicial system, the most important provision of the ADA is subchapter II of title 42, styled “Public Services.” The Public Services subchapter prohibits public entities, such as courts, from discriminating against, excluding or denying disabled individuals the benefits of public services, programs, or activities. 42 U.S.C. § 12132.

3. The ADA was enacted not only to remedy discrimination in the form of intentional exclusion, but also to mandate modifications to existing policies or otherwise to reasonably accommodate individuals with disabilities. 42 U.S.C. § 12101(a)(5); *Thompson v. Colorado*, 278 F.3rd 1020 (10th Cir. 2001) (title II's primary focus is to remedy the failure of public entities to make reasonable accommodations for persons with disabilities).

4. Additionally, public entities must ensure that communications with persons with disabilities are as effective as communications with non-impaired persons. 28 C.F.R. § 35.160(a). Such equal communication requires a public entity to provide appropriate auxiliary aids where necessary to achieve effective communication, taking into account the expressed choice of individuals with disabilities. 28 C.F.R. § 35.160(b)(1).

5. Mr. Sanchez suffers from a speech and language disability and a hearing impairment. Conditions effecting speech, language and hearing are covered under the ADA. *See* 28 C.F.R. § 35.104(1)(i)(B) and (1)(ii). Mr. Sanchez' condition requires accommodations in order to ensure his meaningful participation in the court proceedings.

6. For accommodation purposes, Mr. Sanchez requests the Court to tailor its policies, practices, and procedures to match Mr. Sanchez' unique abilities so that he may successfully attain the objective of equality of opportunity and full participation in the judicial process. Furthermore, Mr. Sanchez requests this Court to appoint a specialist in speech-language disabilities in order to ensure that communication with Mr. Sanchez is as effective as communications with non-impaired individuals.

INTRODUCTION

1. Mr. Sanchez is accused of sexual assault on a child/aggravated, first degree burglary, unlawful sexual contact by force, attempted second degree burglary and second degree criminal trespass.

2. Mr. Sanchez has not and does not intend to enter a plea of not guilty by reason of insanity. Such a plea is the only affirmative defense related to culpable mental states. Further, Mr. Sanchez is competent to stand trial.

3. Mr. Sanchez suffers from a speech and language disability and a hearing impairment. His condition is well-documented in his school records. Furthermore, during the August 6, 2010 hearing, the Court had an opportunity to observe the current state of Mr. Sanchez's disability and made orders to accommodate Mr. Sanchez' obvious speech and language disabilities.

4. The nature of his disability makes it difficult for Mr. Sanchez to process spoken/written language and to accurately convey information. Further, Mr. Sanchez is hard of hearing. Accordingly, Mr. Sanchez's ability to meaningfully participate in the court process is hindered.

5. Mr. Sanchez's condition commands appropriate accommodations and auxiliary aid to ensure his full participation in the judicial proceeding.

ASSERTION OF CONSTITUTIONAL AND STATUTORY RIGHTS

1. Mr. Sanchez asserts the following state and federal constitutional rights: the right to effective assistance of counsel, including the right to confidential consultation with his attorneys and all persons acting as agents of his attorneys; the right to be free from compulsory self-incrimination; the right to testify; the right to present evidence in his own defense; the right to equal protection under the law; other rights guaranteed by the due process clauses, including but not limited to, the right to investigate and prepare a defense to the charges, the right to require the state to prove every element of the charges beyond a reasonable doubt, the right to be presumed innocent until proven guilty, the right to a fair trial before an impartial jury, the right to exercise any of his constitutional rights without being penalized for doing so, the right to be free from having to choose to exercise one constitutional right at the cost of forfeiting another; and the right to be free from cruel and unusual punishment.¹ See U.S. Const. amends. V, VI, VIII, IX, XIV; Colo. Const. Art. II, §§ 3, 6, 16, 18, 20, 23, 25.

2. Mr. Sanchez also enjoys similar, if not more protective, rights under the various Colorado statutes governing the conduct of criminal proceedings. See *e.g.*, §§ 18-1-401 through -410, C.R.S. (2002).

APPLICABLE LAW AND ANALYSIS

A. Americans with Disability Act: Scope and Applicability

1. Scope

1. The Public Services subchapter of the ADA provides, in pertinent part: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

2. Applicability to Mr. Sanchez

2. The Act states that the term "qualified individual with disability" means an individual with a disability who, with or without reasonable modifications of rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

The Act operates under a single definition of "disability":

¹References to Mr. Sanchez's "state and federal constitutional rights," or "constitutional rights," refers to all of the rights asserted above.

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; [or]
- (B) a record of such an impairment; or
- (C) **being regarded as having such an impairment.** 42 U.S.C. § 12102(2). (emphasis added)

i. Mental Impairment Prong

3. The first prong has two elements: (1) a physical or mental impairment, and (2) a requirement that the impairment must limit one or more major life activities. The Department of Justice² expanded upon the notion of mental impairment by defining “physical or mental impairment” to include *speech* and *hearing impairments*. 28 C.F.R. § 35.104(1)(i)(B) and (1)(ii).

4. The second element of the impairment prong states that the impairment must substantially limit one or more major life activities. The phrase “major life activities” means “functions such as caring for one’s self, performing manual tasks, walking, seeing, *hearing*, *speaking*, breathing, *learning*, and working.” 28 C.F.R. § 35.104(2).

5. Accordingly, Mr. Sanchez’s hearing and speech/language impairments fit the definition of “disability” under the mental impairment prong of the ADA.

ii. Record of Disability Prong

6. The second prong of the definition of “disability” includes individuals who have “a history of, or have been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 28 C.F.R. § 35.104(3). The requisite “record” may result from either an ongoing condition or a prior condition from which the individual has recovered. For example, in *Sch. Bd. of Nassau County Fla. v. Arline*, 480 U.S. 273, 281 (1987), the Supreme Court ruled that hospitalization of a woman for tuberculosis twenty-one years prior was sufficient to establish that she had “a record of . . . impairment” and was entitled to protection from discrimination under section 504 of the Rehabilitation Act.³

² Title 28 of the Code of Federal Regulations, section 35, *Nondiscrimination on the Basis of Disability in State and Local Government Services*, was enacted by the Department of Justice pursuant to the ADA clarifying the ADA by providing further detail. Title 28 of the CFR, § 35 states its purpose as “to effectuate subtitle A of the title II of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131), which prohibits discrimination on the basis of disability by public entities.” 28 C.F.R. § 53.101.

³ All state and local government facilities, services, and communications must meet the accessibility requirements established under section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. § 794)). *See* 42 U.S.C. § 12134(b). Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in federally assisted programs and activities, covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of the Federal financial assistance. 28 C.F.R. app. A to § 35.102.

7. Mr. Sanchez's hearing and speech/language disabilities are well-documented. Mr. Sanchez was first identified by his second grade teacher as having hearing and speech/language impairments and consequently referred for special education in 1998, when he was seven years old.

8. The special education process involves several discrete steps, including identification and evaluation of disabilities. The evaluation procedures must meet statutory criteria for fairness, accuracy, and completeness. 20 U.S.C. § 1412 (a),(b),(c). If the evaluations establish that the student is eligible for special education, school personnel must develop an Individualized Education Program (IEP) to accommodate such student's weaknesses. 20 U.S.C. § 1412 (d)(2)(A); 34 C.F.R. § 300.342.

9. Mr. Sanchez's IEP record catalogues in detail his speech-language and hearing disability. Particularly relevant is the record of Mr. Sanchez's Clinical Evaluation of Language Fundamentals (CELF) test scores. CELF test evaluates a student's general language ability and whether or not a language-based disorder is present. CELF test was first administered to Mr. Sanchez in 1998. The test results revealed that Mr. Sanchez's receptive⁴ language score was 72 (3rd percentile); his expressive⁵ language score was 78 (7th percentile), and his total language score was 73 (4th percentile). The same test was administered to Mr. Sanchez again in 2001. He scored 86 (18th percentile) in receptive language; 80 (9th percentile) in expressive language; and 82 (12th percentile) in total language score.

10. Mr. Sanchez's language scores plummeted to the bottom of the charts from already low in upper grades, when the need for speech-language skills increased rapidly as the testing became more dependent on understanding and using more sophisticated speech-language concepts. Consequently, in 2004 and in 2007, his receptive, expressive, and total language scores were at the 1st percentile.

11. Mr. Sanchez's IEP also contains a full record of his hearing impairment. Mr. Sanchez's hearing was frequently tested. Mr. Sanchez consistently failed every hearing test.

12. Based on the IEP testing and recommendations of the school doctors, Mr. Sanchez's disability was accommodated. For example, the teachers were required to never take for granted that Mr. Sanchez understood the teacher's message. Instead, the teachers were instructed to frequently test his comprehension by requiring Mr. Sanchez to re-state the directions in his own words; to provide extra explanations; to quiz his understanding; to assist him in making inferences, to provide him breaks in long assignments, to use simple short sentences and one-step directions; and to provide repetition and extra time to formulate his

⁴ Receptive language scores refer to a person's ability to process language and understand meaning of words and sentences. See Diane Paul-Brown and Charles C. Diggs, *Recognizing and Treating Speech and Language Disabilities*, American Rehabilitation, Winter 93/94, Vol. 19 Issue 4, p.30, 8p.

⁵ Expressive language scores refer to a person's ability to convey information, and to use and combine correct words. *Id.*

answer; etc. To accommodate his hearing problems, Mr. Sanchez was required to sit close to the teachers and away from high traffic areas, and to use FM system to amplify teacher's voice.

13. Accordingly, in addition to the mental impairment prong, Mr. Sanchez's hearing and speech/language impairments also fit the definition of "disability" under the record of disability prong of the ADA. Further, the fact that Mr. Sanchez's hearing and speech-language disability has not been tested for the past three years is irrelevant, pursuant to *Arline*, 480 U.S. at 281.

iii. Being Regarded Prong

14. The third prong of the definition of disability applies to a person who is "regarded as having an impairment." This prong includes individuals who (1) have "a physical or mental impairment that does not substantially limit major life activities but that is treated by public entity as constituting such a limitation," 28 C.F.R. §35.104(4)(i); or (2) have "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment," 28 C.F.R. §35.104(4)(ii); or have "none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment." 28 C.F.R. §35.104(4)(iii). The Senate Committee report explains this third prong as addressing limitations upon individuals that result primarily from "negative reactions," "myths and fears," "misinformation" and "negative attitudes towards disability," rather than from any inherent impairment." Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil rights Statute*, 26 Harv. C.R.-C.L.L. Rev. 413, 450 (1991), quoting S. Rep. No. 116, 101st Cong., 1st Sess. 23-24 (1989) (hereinafter Burgdorf, *The Americans With Disabilities Act*).

15. In addition to having a disability covered under the ADA and having a record of such disability, Mr. Sanchez has certainly been regarded as being disabled.

3. Applicability to State Courts

16. The Public Services subchapter prohibits discrimination by any "public entity." 42 U.S.C. § 12132. The term "public entity" is defined by the Act as:

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other *instrumentality of a State or States or local government* 42 U.S.C. § 12131(1).

17. In its ADA report, the House Committee on Education and Labor expressly noted that the term "instrumentality of a state and local government" encompasses a wide range of instrumentalities, including school boards, *courts*, county or city councils, police departments, or other means by which a state or local government takes action. Burgdorf, *The Americans with Disabilities Act* at 465, citing H. R. Rep. No. 485, 101st Cong., 2d Sess., pt.2, at 86 (1990).

18. Furthermore, numerous authorities recognize that courts are subject to the non-discrimination requirements of the ADA. For example, hearing-impaired litigant who alleged that he had been refused hearing aid by a trial judge, and was consequently unable to follow court proceedings, stated prima facie claim under the ADA. *Santiago v. Garcia*, 70 F. Supp. 2d 84 (D. Puerto Rico 1999). Similarly, in *Turgeon v. Brock*, 1994 WL 529919 (D. N. H. Sept. 29, 1994), a district judge approved a counsel's demand for state-court accommodation of a litigant's vision, staggering, and neurological impairments. Also, in *Engle v. Gallas*, Civ. No. 93-3342, 1994 WL 263347 (E. D. Pa. June 10, 1994), a district court denied summary judgment against a class of disabled persons who claimed that the municipal court of Philadelphia violated the ADA by not making it possible for them to prosecute or defend civil actions without going to the courthouse.

19. Accordingly, the Court is subject to the non-discrimination requirements of the ADA.

B. The ADA Prohibits Courts from Denying Participation or Offering Unequal Participation to Disabled

20. Courts, as public entities, are prohibited from denying "a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service [.]" 28 C.F.R. § 35.130(b)(1)(i). Further, 28 C.F.R. § 35.130(b)(1)(ii) prohibits public entities from affording "a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others[.]"

21. Ability to understand and convey information is indispensable for adequate participation in a judicial proceeding. However, for individuals with speech-language disability, even seemingly simple and straightforward sentences and questions may be difficult to understand. See generally, Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier. J. Child.& Fam. Advoc. 3, 73 (2003-2004) (hereinafter, Tulman, *Disability and Delinquency*). Such individuals experience extreme difficulty in deciphering meaning from words and verbalizing their thoughts. *Id.*

22. Speech-language disability, compounded by a hearing impairment, if left unaccommodated, will deprive Mr. Sanchez from an opportunity to fully participate in and benefit from the judicial proceeding. Without appropriate auxiliary aid, Mr. Sanchez's participation in the court process will be unequal to that afforded to others.

C. The Court Must Provide Mr. Sanchez with an Equal Opportunity to Obtain the Same Result and Benefit from the Judicial Proceeding as that Provided to Others

23. Public entities are prohibited from providing "a qualified individual with a disability an aid, benefit, or service that is not as effective in affording equal opportunity to

obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others[.]” 28 C.F.R. § 35.130(b)(1)(iii).

24. Mr. Sanchez is entitled to an equal opportunity obtain the same result, to gain the same benefit, and to reach the same level of achievement as that provided to others. In other words, the ADA mandates that the Court provides Mr. Sanchez with the same opportunity to defend himself against the State’s accusations as is provided to others.

D. The Court is Required to Evaluate and Modify Services, Policies, and Practices in Order to Meet the Non-Discrimination Mandates of the ADA

25. Public entities are required to “administer services, programs, and activities in the most integrated setting appropriate to the needs of a qualified individual with disabilities.” 28 C.F.R. §35.130(d). Accordingly, a public entity must make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability” 28 C.F.R. § 35.130(b)(7).

26. For purposes of the ADA, a “reasonable accommodation” is one that gives the otherwise qualified individual with disabilities “meaningful access” to the program or services sought. *Henrietta D. v. Bloomberg*, 331 F.3d 261,273 (2nd Cir. 2003); *see generally Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1196 (10th Cir. 2008).

27. In the context of speech and language disabilities, a public entity is required to “take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.” 28 C.F.R. § 35.160(a).

28. Accordingly, based on the ADA, the Court is required to conduct the judicial proceeding in the setting most appropriate to the needs of the disabled participant, Mr. Sanchez. Further, the Court must make reasonable modifications of its policies, practices, and procedures to avoid discrimination and to allow Mr. Sanchez to have a meaningful access to the court process. Finally, the accommodations must ensure that the communications with Mr. Sanchez are as effective as communications with non-impaired individuals.

E. The ADA Requires the Court to Furnish Auxiliary Aids and Services to Mr. Sanchez to Enable His Participation in Court Proceedings

29. The ADA mandates public entities to “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefit of, a service, a program, or activity conducted by a public entity.” 28 C.F.R. § 35.160(b)(1). The statute provides a not all-inclusive list of possible or available “auxiliary aids and services,” including:

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of equipment of services; and
- (D) other similar services and actions.” 42 U.S.C. § 12102(1).⁶

30. Further, “[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.” 28 C.F.R. § 35.160(b)(2).

31. The nature and extent of Mr. Sanchez’s disabilities necessitate the help of auxiliary aids and services. The justice system relies heavily on the assumption that the involved individuals understand and produce language with ease. This is not the case with individuals who suffer from speech-language disability. People that have a language-based disorder, by definition, are likely to misunderstand or inaccurately process what other people say to them. *See generally*, Tulman, *Disability and Delinquency* at 56-65. They, therefore, relatively frequently do not comprehend instructions. *Id.* at 53. They may not be able to relate facts in a linear or comprehensible fashion. *Id.* Conversely, others may not be able to understand the disabled person’s response or may not understand that the disabled is unable to convey critically-important information. *Id.*

32. The need to accommodate in the context of speech-language disabilities is “similar to the need to protect a young witness from confusing questioning and the need to provide an interpreter for a foreign-language speaker.” Tulman, *Disability and Delinquency* at 50. Accommodations are especially relevant in Mr. Sanchez’s case, as his speech-language abilities are at the bottom of the charts, literally.

33. Accordingly, to ensure his meaningful participation in the judicial proceeding, Mr. Sanchez respectfully requests this Court to appoint a specialist in speech-language disabilities in order to assist Mr. Sanchez in every stage of the judicial proceeding. The appointment of a specialist is necessary to assist Mr. Sanchez in understanding the proceedings, state-ordered exams, and the testimony of the witnesses. That accommodation may also require frequent breaks throughout the proceeding to allow the specialist sufficient time to confer with Mr. Sanchez.

34. Also, from the outset of the proceeding, the jury should be carefully instructed about the need to proceed more slowly and that Mr. Sanchez’s condition requires special procedures/accommodations.

35. Further, reasonable accommodation might require that Mr. Sanchez reformulate and restate each cross-examination question prior to answering. And, such accommodation may include a requirement that the prosecution submits cross-examination questions in advance so that the specialist can “translate” the questions into a language that Mr. Sanchez would be able to comprehend.

⁶ This list is not all-inclusive or exhaustive catalogue of possible or available auxiliary aids and services. *See* 28 C.F.R. app. A to § 35.104.

36. Additionally, the appointed specialist should be permitted to recommend additional accommodations as becomes necessary during the course of the judicial proceedings.

37. Finally, much like a foreign-language interpreter, the court-appointed specialist must not serve as a conduit of information to the prosecution. All confidential communications between the specialist and Mr. Sanchez must remain privileged.

F. Public Entity is Required by the ADA to Bear the Cost of the Auxiliary Aid and Services

38. A public entity is prohibited from placing “a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as provision of auxiliary aids or programs accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.” 28 C.F.R. § 35.130(f).

39. Accordingly, pursuant to the ADA, public entity is required to bear the cost of the accommodations and auxiliary aids and services required to provide Mr. Sanchez with non-discriminatory treatment.

CONCLUSION

1. For the reasons and authorities cited above, as well as all other reasons and authorities discussed in this motion, Mr. Sanchez is entitled to be accommodated through the judicial proceeding. Further, Mr. Sanchez requests this Court to enter an order appointing a specialist in speech and language disabilities to Mr. Sanchez in order to facilitate him in every stage of the criminal proceeding.

2. Mr. Sanchez requests this Court to schedule a hearing for oral argument on this motion. The hearing requested by counsel on this motion will consist only of legal argument, and will not necessitate the calling of any witnesses. Finally, Mr. Sanchez requests this Court to stay the notice requirements of § 16-8-107(3)(b) C.R.S. until after resolution of this motion because, without the Court's rulings, he cannot intelligently, knowingly, or voluntarily determine how to proceed.

3. Mr. Sanchez makes this motion, and all related motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the ADA, the Due Process, Trial by Jury, Right to counsel, Equal Protection, Cruel And Unusual Punishment, Confrontation, Compulsory Process, Right to Remain Silent, and Right to Appeal Clauses of the Federal and Colorado Constitutions, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution and Article II, Sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution.

Respectfully submitted this 3rd day of September, 2010.



Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2010, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO APPOINT STATE-FUNDED SPEECH AND LANGUAGE DISABILITY SPECIALIST TO MR. SANCHEZ (Δ20a)** was hand delivered to:

Brian Sugioka
John Topolnicki
18th Judicial District Attorney's Office
4000 Justice Way, Suite 2525A
Castle Rock, CO 80109



Iris Eytan

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 303-663-7200	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
THE PEOPLE OF THE STATE OF COLORADO, v. TYLER ANTHONY SANCHEZ, Defendant.	
Attorney for Defendant: Iris Eytan, #29505 Reilly Pozner LLP 1900 16 th Street, Suite 1700 Denver, Colorado 80202 Telephone: (303) 893-6100 Facsimile: (303) 893-6110 E-mail: ieytan@rplaw.com	Case Numbers: 09CR445 Division: 1 Hon. Paul King
SCOPE OF STATE MENTAL CONDITION EXAMINATION (Δ22)	

Notwithstanding Mr. Sanchez' prior objections, and constitutionality concerns, Mr. Sanchez may introduce expert testimony to rebut the State's evidence which concerns his mental condition at both the suppression hearings and/or trial. However, Mr. Sanchez' expert testimony on the issue of mental condition will be limited.

1. On June 28, 2011, counsel for both parties conferred and agreed that the Court's Order regarding the scope of the mental condition examination was ruled on August 6, 2010. The Court ordered that the State's examination should be limited to the scope of defense' expert evidence as follows:

"With respect to the scope, location, and conditions of the examination, the Court-appointed expert is to determine whether the defendant suffered from a mental condition, intellectual disability, or cognitive functioning impairment or speech and language disability that affected his ability to understand what he was told by law enforcement to include any Miranda advisement and affected his ability to provide accurate

information and caused him to provide false, inculpatory statements at the suggestion of law enforcement. This is the only purpose of examination, and the defendant shall not be examined concerning competency, insanity, or impaired mental condition.

See Hr. Transcript, August 6, 2010, p. 94.

2. On June 27, 2011, defense counsel provided the following scope of examination for the prosecution's review, and the prosecution does not have an objection to the following being incorporated for the State examiner to ensure that the mental condition examination is limited and specifically to address the issues Mr. Sanchez' raised in his motions and argument regarding the mental condition examination.

A. Suppression Hearing

The defense intends to rebut any evidence the State presents concerning Mr. Sanchez' mental or emotional state, comprehension, understanding, suggestibility, susceptibility, stress-sensitivity to authorities and to interrogation techniques, regarding the voluntariness of statements made during the interrogations and the validity of any purported *Miranda* waiver.

B. Trial

The defense intends to rebut any evidence the State presents concerning the reliability of Mr. Sanchez' statements made during the interrogations as affected by Mr. Sanchez' mental or emotional state, comprehension, understanding, suggestibility, susceptibility, stress-sensitivity to authorities and to interrogation techniques.

Respectfully submitted this 29th day of June, 2011.


Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2011, a true and correct copy of the foregoing **SCOPE OF STATE EXAMINATION (Δ22)** was delivered via electronic mail to:

Brian Sugioka @ bsugioka@da18.state.co.us
John Topolnicki @ jtopolnicki@da18.state.co.us
18th Judicial District Attorney's Office
4000 Justice Way, Suite 2525A
Castle Rock, CO 80109


Shellee S. Lawson



UNITED STATES OF AMERICA versus JOSEPH SMITH

CRIMINAL ACTION NO. 04-17 SECTION "C"

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA**

790 F. Supp. 2d 482; 2011 U.S. Dist. LEXIS 68677

June 23, 2011, Decided

June 23, 2011, Filed

PRIOR HISTORY: *United States v. Johnson, 2011 U.S. Dist. LEXIS 63601 (E.D. La., June 16, 2011)*

COUNSEL: **[**1]** For John Johnson, Defendant: Julian R. Murray, Jr., LEAD ATTORNEY, Chehardy, Sherman, Ellis, Murray, Recile, Griffith, Stakelum & Hayes, Metairie, LA; Ronald Jacobs Rakosky, LEAD ATTORNEY, Ronald J. Rakosky, Attorney at Law, New Orleans, LA; Christine Marie Lehmann, Louisiana Capital Assistance Center, New Orleans, LA; G. Benjamin Cohen, Capital Appeals Project, New Orleans, LA.

For Herbert Jones, Jr, Defendant: Robert S. Glass, LEAD ATTORNEY, Glass & Reed, New Orleans, LA; Stephen David London, Stephen D. London, Attorney at Law, New Orleans, LA.

For Joseph Smith, Defendant: Dane S. Ciolino, LEAD ATTORNEY, Dane S. Ciolino, LLC, New Orleans, LA; Steven Lemoine, Steven Lemoine, Attorney at Law, New Orleans, LA.

For NAACP Legal Defense & Educational Fund, Inc., Movant: Christina A. Swarns, LEAD ATTORNEY, Debo Patrick Adegbile, John Payton, Vincent M. Southerland, NAACP Legal Defense & Educational Fund, Inc. (New York), New York, NY.

For United States of America, Plaintiff: Richard Burns, LEAD ATTORNEY, U. S. Department of Justice, Criminal, Civil Rights Division, Washington, DC; Abram McGull, Michael William Magner, Michael Edward McMahon, Michael M. Simpson, U. S. Attorney's Office, New Orleans, **[**2]** LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION

[*484] I. BACKGROUND

- a. The AAMR/AAIDD & DSM-IV-TR Definitions of Mental Retardation**
- b. The Expert Witnesses**

II. ANALYSIS

- a. Factor One: Significantly Subaverage Intellectual Functioning**

1. Smith's IQ Scores

2. Criticism of IQ Scores
by Dr. Hayes

and
Inconsistent
Answers

- i.
*Malingering
and Bias*
- ii. *Other
Testimony*

4. Dr. Hayes' s Adaptive
Functioning Assessment

3. The Court's Finding re:
Smith's Intellectual
Functioning

- i.
*Discipline
Issues
Unrelated to
Mental
Deficits*
- ii. *Clinical
Interview*
- iii. *Use of
Correctional
Officers as
Respondents*
- iv. *Drug
Use and
Brain
Injury/Truancy*

**b. Factor Two: Significant Limitations
in Adaptive Functioning**

- 1. Retrospective
Diagnosis
- 2. Clinical Judgment in
Adaptive Functioning
Assessment
- 3. Dr. Swanson's
Adaptive Functioning
Assessment

5. School, Job Corps, U.
S. Navy and Employment
Records

- i. *Adaptive
Probes*
- ii. *VABS-II
and ABAS-II
Scores*
- iii.
*Questions
re: Dora
Smith's
Credibility*
- iv.
*Criticism of
Dr.
Swanson's
VABS-II and
ABAS-II
Scores*

- i.
*Elementary
and High
School*
- ii. *Job
Corps*
- iii. *U.S.
Navy*
- iv.
*Employment
History*

- A.
Norming
- B. Bias

6. The Court's Finding re:
Smith's Adaptive
Functioning

c. Factor Three: Age of Onset

III. [3] CONCLUSION**

APPENDIX A

Additional Findings re: Dr. Swanson's Adaptive Behavior Assessment

APPENDIX B

Additional Examples re: Dr. Hayes' Interview

APPENDIX C

Additional Findings re: Dr. Hayes' Adaptive Behavior Assessment

This matter comes before the Court on pre-trial determination whether the defendant, Joseph Smith ("Smith") is mentally retarded for purposes of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) and the Federal Death Penalty Act, 18 U.S.C. § 3596(c).¹ An evidentiary hearing was held on June 7-10, 2010, and the matter was taken under advisement. Having thoroughly considered the record, the evidence and testimony adduced at trial, and the law, the Court now issues its opinion.

1 Section 3596(c) provides in relevant part: "A sentence of death shall not be carried out upon a person who is mentally retarded."

I. BACKGROUND

Smith faces four counts contained in the Second Superseding Indictment pertaining to his role in a 2004 attempted bank robbery and death of a bank security officer.² Two of those counts are capital.³ Smith asserts that he is mentally retarded and is therefore ineligible for the death penalty under *Atkins* and § 3596(c). This issue will be determined before trial by the [**4] Court without a jury. Smith has the burden of proof by a preponderance of the evidence.

2 Rec. Doc. 157.

3 Rec. Doc. 161.

a. The AAMR/AAIDD & DSM-IV-TR Definitions of Mental Retardation

Mental retardation is a developmental disability, the definition of which the Court derives from the two

sources recognized by the Supreme Court in *Atkins*: The American Association on Mental Retardation ("AAMR"), now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD"), as of January 1, 2007, and the American Psychiatric Association ("APA"). At the time of the hearing, Smith was 59 years old.

Because the timing of the various expert evaluations, opinions and the hearing involving this defendant spanned the transition between two versions of the relevant AAMR/AAIDD definitions from two sequential manuals, the Court's analysis will involve both. The AAMR defines mental retardation in the 10th edition of its standard reference work as follows:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before [**5] age 18.

MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (2002) ("AAMR 10TH EDITION").⁴ In 2007, ROBERT L. SCHALOCK, ET AL, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS--10TH EDITION 18 (AAIDD 2007) ("USER'S GUIDE") was published for use in conjunction with the AAMR 10TH EDITION, pertaining to "the condition currently referred to as mental retardation (MR) or intellectual disabilities (ID)" and with the advice that "throughout the User's Guide, both mental retardation [**485] (MR) and intellectual disabilities (ID) will be used to reflect the national and international use of these terms." As of the time of the hearing in June 2010, the AAIDD had published the most recent manual, INTELLECTUAL DISABILITY DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, 51-52 (2010) ("AAIDD 11TH EDITION"). For purposes of completion, that definition provides:

Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.⁵

Because the Supreme Court issued its decision [**6] in *Atkins* prior to the most recent publication and change of terminology by the AAIDD, the Court will use the term "mental retardation" throughout this opinion when referring to the term intellectual disability as used in the AAIDD 11TH EDITION.

4 The AAMR definition is accompanied by five assumptions:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors.

3. Within an individual, limitations often coexist with strengths.

4. An important purpose of describing limitations is to develop a profile of needed supports.

5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

AAMR 10TH EDITION AT 13; USER'S GUIDE at 3. The AAIDD 11TH EDITION's includes the same five assumptions, with the term "intellectual disability" substituted for the term "mental retardation" in the last assumption.

5 AAIDD 11TH EDITION at 1.

The definition and diagnostic criteria for mental retardation [**7] of the APA is contained in its standard reference work, the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION TEXT REVISION (2000) ("DSM-IV-TR"). It provides in relevant part that a diagnosis of mental retardation requires:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ

test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, Social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

C. The onset is before age 18 years.⁶

⁶ DSM-IV-TR at 49.

The DSM-IV-TR categorizes mental retardation as mild, moderate, severe, and profound, with a residual category of "mental retardation, severity unspecified."⁷ Mild Mental Retardation is associated with an IQ of 50-55 to 70-75,⁸ and the DSM-IV-TR further describes it as follows:

Mild [**8] Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable [*486] from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with

Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

DSM-IV-TR at 43.

7 *Id.* at 42-44.

8 According to the DSM-IV-TR:

Borderline Intellectual Functioning describes an IQ range that is higher than that for Mental Retardation (generally 71-84). . . . [A]n IQ score may involve a measurement error [**9] of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

Id. at 48.

The American Psychological Association's Division of Mental Retardation and Developmental Disabilities ("Division 33") echoes this point and further elaborates:

People classified with mild MR evidence small delays in the preschool years but often are not identified until after school entry, when assessment is undertaken following academic failure or emergence of behavior problems. Modest expressive language delays are evident during early primary school years, with the use of 2- to 3-word sentences common. During the later primary school years, these children develop considerable expressive speaking skills, engage with peers in spontaneous interactive play, and can be guided into play with larger groups. During middle school, they develop

complex sentence structure, and their [**10] speech is clearly intelligible. The ability to use simple number concepts is also present, but practical understanding of the use of money may be limited. By adolescence, normal language fluency may be evident. Reading and number skills will range from 1st- to 6th- grade level, and social interests, community activities, and self-direction will be typical of peers, albeit as affected by pragmatic academic skill attainment. Baroff (1986) ascribed a mental age range of 8 to 11 years to adults in this group. This designation implies variation in academic skills, and for a large proportion of these adults, persistent low academic skill attainment limits their vocational opportunities. However, these people are generally able to fulfill all expected adult roles. Consequently, their involvement in adult services and participation in therapeutic activities following completion of educational preparation is relatively uncommon, is often time-limited or periodic, and may be associated with issues of adjustment or disability conditions not closely related to MR.

AM. PSYCHOL. ASS'N, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 17-18 (John W. Jacobson & James A. Mulick eds., [**11] 1996)[hereinafter APA MANUAL].

The Supreme Court in *Atkins* recognized that the two "official" definitions of mental retardation are similar, but left to states the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317. In doing so, it noted that:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded 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, [*487] to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings [**12] they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

The AAIDD recognizes that, with regard to persons with mental retardation or intellectual disabilities in the criminal justice system,

some criminal defendants fall at the upper end of the MR/ID severity continuum (i.e. people with mental retardation who have a higher IQ) and [they] frequently present a mixed competence profile.⁹ They typically have a history of academic failure and marginal social and vocational skills. Their previous and current situations frequently allowed formal assessment to be avoided or led to assessment that was less than optimal.¹⁰

According to the AAIDD 11TH EDITION,¹¹ the higher IQ mentally retarded are also "more likely to mask their deficits and attempt to look more able and typical than they actually are." Moreover, "persons with ID typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding."¹²

9 As this Court previously noted, "[m]ost individuals with mental retardation who commit criminal acts display mild mental [**13] retardation." *United States v. Hardy*, 762 F.Supp.2d 849, 854 (E.D.La. 2010) (quoting J.G. Olley & A.W. Cox, *Assessment of Adaptive*

Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment Systems-II, in ADAPTIVE BEHAVIOR ASSESSMENT SYSTEM: ASSESSMENT AND APPLICATIONS FOR PROFESSIONAL AND PARAPROFESSIONAL PRACTICE 381, 383 (P.L. Harrison & T. Oakland 2008)).

10 USER'S GUIDE at 18 (citations omitted).

11 AAIDD 11TH EDITION at 51-52. The fundamental principles relevant here are present in both editions and both terms, so the Court will try to cite to both, while recognizing the Supreme Court's reference to "mental retardation" in *Atkins*.

12 *Id.* at 52.

b. The Expert Witnesses

This is the Court's second *Atkins* determination. The first case involved expert testimony from three of the four psychologists who testified at the hearing in this matter.¹³ *Hardy*, 762 F.Supp.2d at 855-56.

13 As to those three witnesses, the parties here stipulated to the inclusion herein of certain testimony from the *Hardy* hearing, a transcribed copy of which is stored with the exhibits from this hearing. Rec. Docs. 1530, 1536. Included in that stipulated testimony was testimony as to the respective qualifications [**14] of the three experts. Rec. Docs. 1530, 1536.

The only expert not to testify at the *Hardy* hearing, Marc L. Zimmerman, Ph.D., was the first to testify at this hearing and was accepted by the Court as an expert in the field of psychology without objection from the government.¹⁴ According to his curriculum vitae, he received his bachelor's degree in psychology from North Texas State University, a master's degree in education from Out Lady of the Lake University, master's and doctorate degrees in psychology from Texas A & M University - Commerce, and a masters degree in clinical psychopharmacology from the California School of Professional Psychology. [*488]¹⁵ He received his Texas license in 1978 and his Louisiana license in 1979.¹⁶ According to his testimony, he has administered "[h]undreds, if not thousands" of WAIS IQ tests during his career.¹⁷

14 Rec. Doc. 1583 at 15.

15 Deft. Exh. 3.

16 *Id.*

17 Rec. Doc. 1583 at 14-15.

The other three experts were recognized by the Court in *Hardy* as experts in psychology, although their varied professional experience with the mentally retarded was also discussed. The second expert, Victoria Swanson, Ph.D., was called by the defendants at both hearings. According [**15] to stipulated testimony, Dr. Swanson is a licensed psychologist who was accepted by the Court without objection as an expert in mental retardation. She has specialized in the field of mental retardation and developmental disabilities throughout her 35 year career. She received her bachelor's degree in psychology from the University of Southwestern Louisiana in 1973 and then began working with the intellectually disabled in rural Louisiana. Dr. Swanson received her master's degree from Northwestern State University in 1991, writing her thesis on the Vineland test, a test of adaptive behavior. She has continued her work in the area of mental retardation and received a doctorate degree in psychology in 1999 from Louisiana State University. She is licensed in Louisiana.

According to stipulated testimony, Dr. Swanson has either performed or supervised approximately 6,000 assessments for mental retardation, and has administered approximately 300 IQ tests a year, and estimated her career total number of Vineland tests of adaptive behavior "in the 10,000s." ¹⁸ She estimated that less than one percent of those assessments related to litigation in court, less than that related to an *Atkins* determination [**16] and that she estimated that she has given opinions with regard to approximately 18 *Atkins* hearings. ¹⁹ Numerous awards and distinctions from the AAMR and AAIDD are included on her curriculum vitae, and she has served as the President of the National Psychology Division of the AAMR. ²⁰ As an expert in mental retardation, she does not work primarily in the forensic field. ²¹

18 Rec. Doc. 1530, att., tab 2 at 586-87; Rec. Doc. 1536.

19 Rec. Doc. 1530, att., tab 2 at 596; Rec. Doc. 1536; Rec. Doc. 1583 at 227.

20 See also Deft. Exh. 1.

21 Rec. Doc. 1583 at 190.

The third psychologist who testified, Jill S. Hayes, Ph.D., was called by the government at both hearings. ²² She was accepted without objection at this hearing as an

expert in forensic psychology as well as mental retardation. ²³ According to stipulated testimony, Dr. Hayes received a bachelor's degree in psychology from Armstrong State College in 1990, a master's degree in applied psychology from Augusta State College in 1992, a master's degree [*489] in clinical psychology from Louisiana State University in 1995 and a doctorate degree in clinical psychology with a specialty in neuropsychology and a minor in behavioral neurology from Louisiana [**17] State University in 1998. She did a one-year internship at the Medical University of South Carolina in 1997-1998, followed by a one-year fellowship at Louisiana State University Health Sciences Center in 1998-1999. She is licensed in Louisiana as a neuropsychologist and clinical psychologist, and is licensed as a clinical psychologist in Arizona.

22 At this hearing, Dr. Hayes' report was co-authored by John W. Thompson, Jr., M.D., who did not testify and who was not otherwise qualified as an expert. Dr. Thompson was also present at the videotaped interview of Smith. Govt. Exh. 42; Rec. Doc. 1584 at 405.

23 Rec. Doc. 1584 at 404. As indicated in the stipulated testimony from the *Hardy* hearing, the Court accepted Dr. Hayes as an expert in the area of mental retardation based on her publications, education, teaching and court experience over the defendant's objection at the *Hardy* hearing. Rec. Doc. 1530, tab 3 at 981-82; Rec. Doc. 1536. It considered the defense objection as relevant to the weight to be given her testimony regarding mental retardation, not its admissibility. *Hardy*, 762 F.Supp.2d at 856.

Dr. Hayes's stipulated testimony indicates that she has performed about 20 mental retardation [**18] assessments and ten Vineland tests since receiving her license in 1998. She identified at least five articles authored by her that involved some aspect of mental retardation, three of which concerned malingering, at the *Hardy* hearing. ²⁴

24 See also Govt. Exh. 42.

The last psychologist, Mark D. Cunningham, Ph.D., was called by the defendant and accepted by the Court as an expert in forensic and clinical psychology at the *Hardy* hearing and as an expert in forensic psychology and mental retardation evaluation at this hearing without objection. ²⁵ According to stipulated testimony, Dr.

Cunningham received his bachelor's degree in psychology from Abilene Christian College in 1973. He received his master's and doctorate degrees in clinical psychology from Oklahoma State University in 1976 and 1977, respectively. He had a clinical internship at the National Naval Medical Center in 1977-1978, and participated in part-time post doctoral training at Yale University School of Medicine between 1979 and 1981. He is licensed in sixteen states including Louisiana, and he is board certified in clinical psychology and forensic psychology by the American Board of Professional Psychology.

25 Rec. Doc. 1585 [**19] at 596.

Dr. Cunningham testified that he has performed many mental retardation assessments in a forensic context, including determinations of competency to stand trial, social security eligibility and for *Atkins* purposes, including testifying in *Atkins* hearings once or twice.²⁶ He has co-authored papers on mental retardation issues in capital cases and has testified in federal capital cases.²⁷

26 *Id.* 1585 at 708.

27 *See also* Def't. Exh. 11.

II. ANALYSIS

As previously indicated, the Court is guided by the diagnostic criteria for mental retardation developed by the APA and AAMR/AAIDD. Those criteria contain three essential factors: significantly subaverage intellectual functioning, significant limitations in adaptive behavior, and onset prior to age 18. Each will be separately discussed.

a. Factor One: Significantly Subaverage Intellectual Functioning

Intelligence is defined as "a general mental ability."²⁸ "It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience."²⁹ The determination of intellectual functioning and significant limitations is assessed by standardized instruments.³⁰

28 AAMR 10TH EDITION at 51; [**20] AAIDD 11TH EDITION at 31.

29 AAMR 10TH EDITION at 51; AAIDD 11TH EDITION at 31.

30 AAMR 10TH EDITION at 51; AAIDD 11TH

EDITION at 31.

[*490] In general, the first criterion for a diagnosis of mental retardation requires "significant limitations . . . in intellectual functioning," or put another way, "significantly subaverage intellectual functioning."³¹ The APA and AAMR/AAIDD define this to mean an IQ score approximately two standards deviations below the mean of 100, taking into consideration the standard error of measurement for the IQ test used.³²

31 AAMR 10TH EDITION at 1; AAIDD 11TH EDITION at 5; DSM-IV-TR at 49.

32 DSM-IV-TR at 41-42, 48-49; AAMR 10TH EDITION at 57-59; AAIDD 11TH EDITION at 31.

Two standard deviations below the mean of the test relevant here would be a score of 70. That is not, however, the cutoff score typically used, because the APA and AAMR/AAIDD direct that the test's measurement error must be taken into account when interpreting its result.³³ The AAMR/AAIDD has noted that the standard error of measurement "which has been estimated to be three to five points on well-standardized measures of general intellectual functioning" should be considered, resulting in a range of [**21] scores with an attendant range of confidence.³⁴ "Thus an IQ standard score is best seen as bounded by a range that would be approximately three to four above and below the obtained score."³⁵

33 AAMR 10TH EDITION at 57 ("The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement."). *See also* AAIDD 11TH EDITION at 36 ("Understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual function.").
34

"This means that if an individual is retested with the same instrument, the second obtained score would be within one *SEM* (i.e., ± 3 to 4 IQ points) of the first estimate about two thirds of the time. . . . Therefore, an IQ of 70 is

most accurately understood not as a precise score, but as a range of confidence with parameters of at least one *SEM* (i.e., scores of about 66 to 74; 66% probability), or parameters of two *SEMs* (i.e., scores of 62 to 78; 95% probability). . ."

AAMR 10TH EDITION at 57 [**22] (citations omitted). *See also* AAIDD 11TH EDITION at 36.

35 AAMR 10TH EDITION at 57. *See also* AAIDD 11TH EDITION at 36.

There is also general agreement among the APA, AAMR and the testifying experts in *Hardy* that a score of 75 should be used as the upper bound of the IQ range describing mild mental retardation.³⁶ The Court therefore again finds as a factual matter that a diagnosis of mental retardation requires an IQ score of 75 or less on one of the standard IQ tests.

36 DSM-IV-TR at 48; AAMR 10TH EDITION at 58-59; *see, e.g., Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145, 2149-50, 173 L. Ed. 2d 1173 (2009) (describing expert testimony that set the cutoff at 75); *In re Hearn*, 376 F.3d 447, 454 n.6 (5th Cir. 2004) (citing with approval the AAMR's definition). The Court notes that the AAIDD replaces establishing a cutoff score, with the caution "given that the diagnostic process involves drawing a line of inclusion/exclusion, it is important to use a range as reflected in the test's standard error of measurement." AAIDD 11TH EDITION at 40.

1. Smith's IQ Scores

Both Dr. Zimmerman and Dr. Swanson administered the WAIS-III to Smith, on October 28, 2004 and April 19, 2006, respectively.³⁷ The WAIS-III was the current [*491] version of [**23] the test at the time of each assessment, and consisted of two general components or scales.³⁸ The verbal scale in turn consisted of six subscales or subtests, and the performance component consists of five subscales.³⁹ Psychologists use IQ testing to measure intelligence and the WAIS-III is a gold standard for this testing.⁴⁰

37 Deft. Exhs. 1 & 3.

38 The WAIS-III also satisfies the

AAMR/AAIDD that "intellectual functioning should be measured using individually administered standardized psychological tests and administered by appropriately trained professionals." AAMR 10TH EDITION at 52. *See also* AAIDD 11TH EDITION at 41; DSM-IV-TR at 41.

39 Deft. Exhs. 1, 3 & 4; Rec. Doc. 1583 at 16.

40 Rec. Doc. 1583 at 100-01; Rec. Doc. 1584 at 491.

Both psychologists found Smith to have a Full Scale IQ of 67. In addition, Dr. Zimmerman found Smith to have a Verbal IQ of 68, and a Performance IQ of 74.⁴¹ Dr. Swanson assessed Smith's Verbal IQ at 67, and his Performance IQ at 73.⁴² The results were nearly identical as to the Verbal and Performance IQs and were identical as to the Full Scale IQ. This alone supports the reliability of the results.

41 Deft. Exh. 3.

42 Deft. Exh. 1 at 2.

Assuming these scores [**24] are correct, they satisfy the first criteria for mental retardation without correction for the Flynn Effect. The Court however finds the Flynn Effect should be applied to the WAIS-III scores.⁴³ This produces a corrected IQ score of 64-65.⁴⁴

43 The Court's analysis of the Flynn Effect and reasons for accepting it as a valid correction are the same as those set forth in greater detail in *Hardy*, 762 F.Supp.2d at 857-63.

44 Deft. Exh. 2 at 4; Rec. Doc. 1583 at 69-70; Rec. Doc. 1584 at 495; Rec. Doc. 1585 at 678-79. The Court notes that Dr. Cunningham's report calculated the Flynn-corrected score at 62. Deft. Exh. 2 at 4.

The WAIS-III is made up of a number of different subtests. A chart was introduced by the defense comparing Smith's raw scores and standard scores on eleven of the subtests from Dr. Zimmerman and Dr. Swanson's administration.⁴⁵ The raw scores are the actual scores achieved on each subtest; these are then converted into standard scores which represent a range. For example, a raw score of 7 or 8 on Picture Arrangement yields the same standard score of 7. A raw score of 11 or 12 on Block Design yields the same standard score of 4.

45 Deft. Exh. 34. Dr. Swanson did not complete [**25] the WAIS-III with Smith, not reaching the last three of the fourteen subtests. Hence the comparison is of the eleven subtests both doctors completed. *See also* Rec. Doc. 1585 at 623-25.

The raw scores Smith achieved on the two administrations of the tests were remarkably consistent. For two of the subtests, the score was identical under Dr. Zimmerman and Dr. Swanson, and six others have only a one digit difference. This clustering of scores was even more pronounced when converted to standard scores. With that conversion, Smith's scores were identical for Dr. Zimmerman and Dr. Swanson on five of the eleven subtests, with only a one digit difference on five others. The only subtests where a greater disparity occurred was Vocabulary, where Dr. Zimmerman's standard score was a 6 and Dr. Swanson's was a 4. But even with that disparity, the difference was still within the standard error of measurement, and therefore statistically insignificant. 46 In addition, Dr. Cunningham testified that the Vocabulary section [*492] of the test constituted only 9% of the IQ score, with the other 91% of the results substantial similar, if not identical. 47 Dr. Zimmerman testified that this consistency between test [**26] results indicates they are an accurate measure Smith's actual functioning. 48 Dr. Swanson also testified that this consistency indicated "inter-rater reliability between testers" which means consistent effort on both tests. 49 Finally, Dr. Cunningham likewise testified that the consistency of the results, all the way down to the subtest standard scores, indicate good effort and reliability. 50

46 Rec. Doc. 1583 at 20-21.

47 Rec. Doc. 1585 at 624-25.

48 Rec. Doc. 1583 at 22.

49 *Id.* at 70-71.

50 Rec. Doc. 1585 at 621-25.

2. Criticism of IQ Scores by Dr. Hayes

Dr. Hayes, nonetheless, found several aspects of the comparative IQ testing to criticize which she asserted undermined their reliability. First, she pointed out that Smith was unable to consistently repeat three digits backwards from memory on one subtest, while he was able to reorder four and five digit letter combinations into a sequential order on another subtest. 51 To put this in context, the Digit Span recitation is part of the IQ test. A series of numbers are read to the individual and they are to recite them back from memory, either in the same

forward sequence, or backwards, depending on the instructions. With Dr. Zimmerman, Smith [**27] was able to recite up to five digits forward correctly, and just up to two digits backwards correctly. 52 With Dr. Swanson, Smith likewise was able to remember up to five digits forward and again only two digits backwards. 53 Since these are identical results, the Court finds they indicate reliability. Dr. Hayes, however, chose to compare these *consistent* scores on the Digit Span to results from a *different* test, Letter-Numbering Sequencing, arguing inconsistency *between them*. As a threshold, the Court questions the appropriateness of comparing the results of one subtest with a different subtest and then arguing they are somehow inconsistent. It is akin to the proverbial comparing of apples with oranges. Dr. Cunningham testified persuasively that it is not accepted practice in the professional community to compare answers to even the *same* question from one administration to another since natural variations occur within the same person from test to test. 54

51 Rec. Doc. 1584 at 423-24.

52 Govt. Exh. 36 at 9.

53 Govt. Exh. 35 at 7.

54 Rec. Doc. 1585 at 614-15.

In any event, in the Letter-Numbering Sequencing subtest, the person is read several numbers and letters and told to recite them back [**28] in the proper numbering order followed by the proper letter order. With Dr. Zimmerman, Dr. Hayes stated that Smith was able to get three trials of four digit sequencing correct and one out of three attempts at five digit sequencing. 55 Dr. Hayes also testified that Dr. William Gouvier administered the same test to Smith and Smith successfully sequenced two of the four digit combinations and two of the five digit combinations. 56 The Court finds the comparison between Dr. Zimmerman [*493] and Dr. Gouvier noteworthy because again Smith performed roughly the same between the same two tests. The Court finds that Dr. Hayes' comparison of *different* tests highly questionable, and concludes that the consistency between the *same* test administrations-Dr. Zimmerman and Dr. Swanson as to Digit Span and Dr. Zimmerman and Dr. Gouvier as to the Letter-Number Sequencing-supports the reliability of the testing.

55 Rec. Doc. 1584 at 425.

56 Dr. Gouvier's results were not offered as an exhibit by either the government or the defense so

the Court has no means of verifying the results, but presumes them reliable based on Dr. Hayes' representation. Dr. Swanson did not administer this particular test. Govt. Exh. 35 [**29] at 10.

The next challenge Dr. Hayes had to the WAIS-III administrations dealt with vocabulary. According to Dr. Zimmerman's testing, when he asked Smith what a ship was, Smith said it moves cargo and people from place to place on water.⁵⁷ With Dr. Swanson, the response was "metal" followed by a pause, then something inaudible and then an "I don't know."⁵⁸ Since Smith had been in the Navy, Dr. Hayes thought his response completely illogical.⁵⁹ She testified when she asked Smith the same question during their lengthy interview, more specifically what another name for a ship was, he correctly answered vessel.⁶⁰ Dr. Hayes' recitation of what happened during the interview, however, is significantly truncated. During that interview, when she first asked Smith what a ship was, he paused and said "What is a ship? A ship...how can I put this?" shaking his head, followed by a long pause. The interview was interrupted by someone knocking on the door. After the interruption, Smith suggested to Dr. Hayes that she ask him another question.⁶¹ So she asked him a different question, but then returned a short while later to the definition of a ship, specifically saying, "Now what is a ship? What's [**30] a ship mean? Or what's another word for a ship?" Dr. Hayes herself admitted that her prompting him for an alternative word for a ship is not allowed on the WAIS-III.⁶² Smith nonetheless continued to struggle: "What's the other word for a ship?" And then finally said, "I don't know. A vessel."⁶³ The Court does not doubt that Smith knows what a ship is, but the whole purpose of this hearing was to determine his level of intelligence and cognition. The fact that a person who served in the Navy would still have difficulty defining a ship and needed prompts to finally come up with even a hesitant answer is a significant indicator of cognitive deficits. Dr. Hayes completely glossed over this in her account, which calls into question both her qualifications and her credibility. Additionally, the fact that Smith likewise struggled in defining a ship to Dr. Swanson, who presumably administered the test correctly, without prompts, reinforces this conclusion. And with regard to Dr. Zimmerman's account, while Smith gave a correct definition, it is unknown how long it took him to do so.

⁵⁷ Govt. Exh. 36 at 3; Rec. Doc. 1583 at 43; Rec. Doc. 1584 at 426.

⁵⁸ Govt. Exh. 35 at 1.

⁵⁹ Rec. Doc. 1584 at 426.

⁶⁰ *Id.* at 427.

⁶¹ This [**31] statement is not in the transcript of the interview but is clearly stated in the video. Deft. Exh. 5 at 000356; Govt. Exh. 42, att. Disc 5 at 50:58.

⁶² Rec. Doc. 1584 at 529-30. Dr. Cunningham testified that Dr. Hayes' idiosyncratic use of the WAIS items, without the standard instructions and with impermissible prompts, was unacceptable in the scientific community. Rec. Doc. 1585 at 617-18.

⁶³ Deft. Exh. 5 at 182, 000356.

Dr. Hayes also focused on two other "vocabulary" discrepancies between Dr. Zimmerman's testing and Dr. Swanson's.⁶⁴ [**494] The vocabulary subtest consisted of some 25 items to define, of which Dr. Hayes picked out three to challenge. However, the vast majority of the answers were consistent between the two tests, again supporting reliability.⁶⁵

⁶⁴ Rec. Doc. 1584 at 427. When asked by Dr. Zimmerman what "yesterday" meant, Smith answered "the day before" whereas with Dr. Swanson, he said "past tense, and with Dr. Hayes he said "a past day." Dr. Zimmerman asked him the meaning of "designate" and he said "a specific area or place" while with Dr. Swanson he said he did not know. Govt. Exh. 36 at 4; Govt. Exh. 35 at 2; Deft. Exh. 5 at 182, 000356.

⁶⁵ Consistent answers on the two tests [**32] include the definition of "repair"("to fix"), "terminate" ("get rid of"), "consume" ("take in" and "take it all in"), "confide" ("trust somebody" and "tell something you don't want told to others"), "compassion" ("feel for a person; sorrow" and "sympathize") and "sanctuary" ("place where go to meditate, be by self" and "safe place"). See Govt. Exh. 35 at 3-4; Govt. Exh. 36 at 1-2.

Dr. Hayes also highlighted one discrepancy in Smith's responses in the subtest regarding "similarities."⁶⁶ When asked by Dr. Zimmerman how a table and chair are alike, he correctly said that both were furniture, but when asked by Dr. Swanson, he said they are both used for a purpose, then said he did not know.⁶⁷ Regardless of how they might have been scored, both initial answers

correctly described how they were in fact similar. And, again, the remaining answers were largely consistent on that subtest as well.⁶⁸

⁶⁶ Rec. Doc. 1584 at 428.

⁶⁷ Govt. Exh. 36 at 6; Govt. Exh. 35 at 4.

⁶⁸ "Piano-Drum" were "instruments" & "make music"; "Orange-Banana" were "fruit" on both tests; "Boat-Automobile" were "transportation" and "transport"; "Steam-Fog" were "both smokey" and "cloudy." And on both tests, Smith was unable [^{**33}] to identify how "Work-Play" were similar nor how "Egg-Seed" were similar. Govt. Exh. 35 at 4; Govt. Exh. 36 at 6.

Under the Information subtest, Dr. Hayes found a discrepancy in the response to who Martin Luther King was. With Dr. Zimmerman, Smith said he was a black man while with Dr. Swanson, he said he was a freedom fighter.⁶⁹ Dr. Hayes, as did Dr. Zimmerman, considered the answer of a "black man" to be unacceptable.⁷⁰ Nonetheless, it was not an incorrect answer.

⁶⁹ Govt. Exh. 35 at 7; Govt. Exh. 36 at 9.

⁷⁰ Rec. Doc. 1584 at 428-29.

Citing these individual examples, Dr. Hayes claimed it showed that Smith was not responding consistently, even though she conceded that the discrepancies were not of statistical significance.⁷¹ The Court concludes to the contrary. The overwhelming evidence is that Smith's responses on both tests were entirely consistent at every meaningful level. As Dr. Zimmerman testified, one should look to the overall response pattern, which is reflected in the raw scores and the scale scores, to assess consistency and reliability.⁷² Dr. [^{**34}] Hayes' idiosyncratic picking apart of a few isolated responses to challenge the overall results was overreaching and simply not credible.

⁷¹ *Id.* at 429.

⁷² Rec. Doc. 1583 at 45.

As further support for the reliability of the Dr. Zimmerman-Dr. Swanson testing, their results are consistent with other IQ-related assessments of Smith's cognitive capacity. Unquestionably, as already noted, the WAIS-III is recognized as a gold standard for IQ testing.⁷³ Smith's Full Scale Score of 67 was identical on both Dr. Swanson's and Dr. Zimmerman's test and falls within the range of mild mental retardation. In earlier years,

while a student, [^{**495}] Smith had taken two Otis IQ tests, which are group administered, hence less reliable than individual testing but nonetheless useful as corroboration.⁷⁴ When Smith was in the 7th grade, at the age of 13, he took an Otis Beta test which resulted in an IQ score of either 69 or 65 (the IQ score is obscured).⁷⁵ Either score falls into the mild mental retardation range. This is also significant as supporting the third requirement for a diagnosis of mental retardation - onset before the age of 18.⁷⁶ In 1964, when Smith was 16 years old and in the 10th grade he took an [^{**35}] Otis Gamma Test, scoring a numeric IQ of 75 which was classified by the document as "borderline" (sic).⁷⁷ With consideration of the typical standard error of measurement for IQ tests, a score of 75 is the outer edge of mild mental retardation. While both of these tests were group administered, they were done so in a school setting, which required certain prior training and the following of proper protocols for administration.⁷⁸ Prior to entering the military, Smith took the Navy General Classification Test which measures verbal intelligence.⁷⁹ Smith scored a 34 of that test, which Dr. Hayes indicated was at the 5th percentile, meaning 95% of the prospective enlistees who took the test scored higher.⁸⁰ Dr. Swanson testified that the GCT is not an IQ test but it does highly correlate with IQ scores.⁸¹ She explained that the mean of the test is 50 (as compared to 100 for an IQ test), with a standard deviation ranging from 7.5 to 10, depending on which the military was using at the time, which unfortunately could not be determined. This would place Smith's score at least one "and probably two" standard deviations below the mean.⁸² Two standard deviations below the mean on an IQ test [^{**36}] is in the mild mental retardation range. Dr. Cunningham testified similarly, estimated the GCT score to be analogous to either a 70 or a 76, depending again on the standard deviation in use at the time.⁸³

⁷³ Dr. Hayes concurs. Rec. Doc. 1584 at 491. *See also* Rec. Doc. 1585 at 625-26 (Dr. Cunningham).

⁷⁴ Govt. Exh. 2 at 2 (bottom); Deft. Exh. 6 at 372 (bottom); Rec. Doc. 1583 at 100-01.

⁷⁵ Rec. Doc. 1583 at 7-9.

⁷⁶ *Id.* at 100-02.

⁷⁷ Govt. Exh. 2 at 2 (bottom).

⁷⁸ Rec. Doc. 1583 at 101.

⁷⁹ Rec. Doc. 1585 at 626.

⁸⁰ Govt. Exh. 42 at 22.

⁸¹ Rec. Doc. 1583 at 150, 153.

82 *Id.* at 150-51.

83 Rec. Doc. 1585 at 629. *See generally id.* at 626-29.

As Dr. Cunningham testified, all of these scores cluster within a range of 69 (possibly 65 on the Otis Beta) to perhaps a 76, dating back to when Smith was 13 years up through his 50's. All but the 76 are within the range of mild mental retardation, which cuts off at 75.

One more test must be considered. In 1977, after Smith was convicted of robbery and sentenced to prison, his tested IQ was 93, which would be in the average range, well distant from mild mental retardation.⁸⁴ According to Dr. Hayes, this was a Revised Beta Examination, which is a nonverbal test, akin to the [**37] performance items of the WAIS, and used to quickly estimate IQ. She acknowledged it was less reliable than a WAIS test.⁸⁵ Dr. Swanson testified that while the Beta is not a gold standard for IQ testing, it is usually good corroborative information. Her concern about the validity of this particular test was the institutional prison setting and whether the [**496] testing was actually properly supervised so the results could be considered reliable.⁸⁶ Since the results of that test were so different from the cluster of the five other scores, she found it suspicious, an "outlier."⁸⁷ Dr. Cunningham concluded likewise.⁸⁸ The Court agrees. The five other scores ranged from 65 or 67 to a possible high of 76 and essentially bookended Smith's life, beginning with three tests as a youth and culminating in two gold standard tests in his 50's. They are all in the mild mental retardation range, with the Navy GCT possibly on the cusp, depending on what the standard deviation actually was. The 93 from the Department of Corrections stands in stark contrast, indicating to this Court that the test was not administered with adequate supervision to assure the integrity of the results. The Court therefore disregards [**38] it.⁸⁹

84 Govt. Exh. 9.

85 Rec. Doc. 1584 at 445-46, 519.

86 Rec. Doc. 1583 at 117-19.

87 *Id.* at 119.

88 Rec. Doc. 1585 at 631, 641-43; Deft. Exh. 2 at 5.

89 Dr. Hayes cited a number of studies indicating that the Revised Beta Examination correlates closely with various WAIS tests. Rec. Doc. 1584 at 446-50. However, the relevance of

those studies depends on the Texas Department of Corrections score being a valid one. For the reasons stated above, the Court finds it to be unreliable.

i. Malingering and Bias

Concurrent with Dr. Hayes' claims of inconsistency between isolated items on the two WAIS test administrations, she also contended that neither Dr. Zimmerman nor Dr. Swanson adequately considered malingering or biased responding by Smith.⁹⁰ According to the DSM-IV, malingering should be strongly suspected if any combination of the following are observed:

1. Medicolegal context of presentation;
2. Marked discrepancy between the person's claimed stress of disability and the objective findings;
3. Lack of cooperation during the diagnostic evaluation and in complying with prescribed treatment regimen;
4. Presence of Antisocial Personality Disorder.⁹¹

Obviously, in an *Atkins* situation, the context is [**39] medicolegal with potentially a life or death consequence hinging on the outcome. Also, Dr. Hayes testified that Smith showed traits of antisocial personality disorder.⁹²

90 Govt. Exh. 42 at 19.

91 DSM-IV-TR at 739.

92 Rec. Doc. 1584 at 408-09.

On the other hand, Dr. Swanson in her report stated that Smith was "cooperative during the testing and demonstrated good effort throughout the throughout the assessment."⁹³ Further on, she elaborated that "Mr. Smith put forth good effort. He worked to the time limit on timed subtests and gave maximum time to untimed items. He often self-corrected in an effort to get a higher score. The WAIS-III results appear to be a valid estimate of current cognitive functioning..."⁹⁴

93 Deft. Exh. 1 at 2.

94 *Id.* at 3.

Dr. Zimmerman and Dr. Swanson both testified at the *Atkins* hearing and made clear they *did* consider the possibility of malingering or biased responding and found

no evidence of it. Dr. Zimmerman was qualified as an expert in psychology, with over thirty years experience, and testified that he has administered "hundreds, if not thousands" of WAIS version IQ tests [*497] in his career.⁹⁵ Specifically, with respect to malingering or response bias, Dr. Zimmerman [**40] testified that he administers these tests frequently, including for the Office of Disability Determinations where people *do* attempt to malingering, and he considers himself "pretty adept" at picking such people out. Having given so many such tests, he has the "normative data" in his brain on how people typically respond when they are misrepresenting themselves.⁹⁶ For example, Dr. Zimmerman testified that malingerers will frequently answer "I don't know" to the questions, or "I can't do it" on the performance items, or will stop after several questions and claim they can not do anymore.⁹⁷ He did not see those patterns with Smith. As an example of Smith's effort, Dr. Zimmerman testified concerning a particular performance subtest of the WAIS in which the person is asked to look at a series of pictures and identify what is missing in the picture. The pictures become progressively more complex, and the person has just 20 seconds to study and identify what is missing in each successive one. In Smith's case, he correctly answered several simpler ones, then made mistakes on several more difficult ones, but then answered correctly, but too late on even more difficult ones. Dr. Zimmerman testified [**41] that this shows good effort, as Smith "doesn't quit, he keeps trying and trying" and "tries hard enough to get the correct answer" even though he has run out of time.⁹⁸ This parallels Dr. Swanson's similar comment in her expert report, already noted, that Smith worked to the time limit on the timed subtests and gave maximum time to the untimed items.

⁹⁵ Rec. Doc. 1583 at 14-15.

⁹⁶ *Id.* at 23-24.

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 24-25.

Dr. Zimmerman further testified that had he detected that Smith was not putting forth his best effort, he would have called him on it. And if Smith had continued to answer with "suboptimal effort," Dr. Zimmerman would have given him a malingering test and also noted his suspicions in his report.⁹⁹ He did not give any malingering test to Smith because he believed Smith put forth his best performance. Dr. Zimmerman had "no question" that the WAIS-III results were a valid and

accurate measure of Smith's IQ.¹⁰⁰

⁹⁹ *Id.* at 31.

¹⁰⁰ *Id.* at 32, 33, 37, 40-41.

Dr. Swanson likewise testified that when she administered the WAIS-III to Smith a year and a half later, she perceived him "giving a hundred percent" and trying very hard to do well on the test.¹⁰¹ She pointed out that malingerers [**42] will frequently give up early in a timed test, saying they do not know the answer, while Smith would persist, asking for more time, even if the ultimate answer was incorrect, or, if correct, came too late for her to give him credit for it.¹⁰² She saw no indication that Smith was deliberately trying to dial down his answers.¹⁰³ She also pointed out that someone trying to deliberately feign lesser ability on the first test, not knowing a second test was coming over a year later, would have great difficulty in trying to [*498] remember to feign in the same manner, considering all the subtests involved.¹⁰⁴

¹⁰¹ *Id.* at 68-69, 72.

¹⁰² *Id.* at 72. Dr. Cunningham testified that deliberately slowing down on the timed performance items would not be a good malingering strategy since it would create a suspicious disparity with the untimed verbal items; the items become progressively more difficult, alerting the examiner to feigned responses on the easier items. Rec. Doc. 1585 at 620-21.

¹⁰³ Rec. Doc. 1583 at 71.

¹⁰⁴ *Id.*

On the other hand, both Dr. Swanson and Dr. Zimmerman acknowledged that in Mississippi, the law requires that a malingering test be given in all instances.¹⁰⁵ Dr. Zimmerman testified that giving [**43] a specific malingering test would have taken less than a minute to administer.¹⁰⁶ In light of the seriousness of this issue, and the brevity that such a test would take, the Court is disappointed that neither Dr. Zimmerman nor Dr. Swanson choose to administer such a test in connection with the WAIS-III.

¹⁰⁵ *Id.* at 32, 192.

¹⁰⁶ *Id.* at 52.

One of the defense psychologists, Dr. William Gouvier, did in fact administer malingering tests to

Smith. Dr. Gouvier was retained to assess Smith for possible brain damage and did not administer an IQ test. However, he did administer two malingering tests and the result indicated that Smith put forth good effort and was not malingering.¹⁰⁷

¹⁰⁷ *Id.* at 141-43; Rec. Doc. 1584 at 506-10. Again, Dr. Gouvier did not testify and his actual report was not made a part of the record by either the government or the defense.

The Court concludes that Smith did not in fact mangle or evidence response bias during the administration of Dr. Zimmerman's or Dr. Swanson's tests. The Court comes to this conclusion in part out of deference to both Dr. Zimmerman's and Dr. Swanson's vast experience in administering the test and their clinical ability to spot subpar performance. [**44] They both testified emphatically that in their judgment Smith gave full effort during the testing. More importantly, the test results themselves, although a year and a half apart, were entirely consistent with each other, not just in the final IQ assessment but in the scoring of the subtests as well. Dr. Hayes attempted to discredit the results by picking out isolated inconsistent responses, but her limited criticisms only underscored the remarkable consistency between the two administrations.

The Court must also point out one other concern it has with regard to Dr. Hayes' testimony. As discussed earlier, the Digit Span test is part of the WAIS-III test. It is also significant as a so-called embedded measure to assess whether a person is putting forth good effort.¹⁰⁸ Dr. Cunningham testified that the Digit Span test is where feigners frequently try to suppress their performance.¹⁰⁹ Smith's total score for the digit span on both tests was at the higher end, indicating he was likely responding honestly.¹¹⁰ Dr. Cunningham further confirmed this by comparing Smith's Digit Span score to the Vocabulary Score, as feigners will usually have a higher Vocabulary Score than Digit Span. In Smith's [**45] case, the score was the same on Dr. Zimmerman's administration and for Dr. Swanson, the Digit Span score was the higher one, a finding also contrary to feigning.¹¹¹

¹⁰⁸ Rec. Doc. 1585 at 631-34.

¹⁰⁹ *Id.* at 634.

¹¹⁰ *Id.* at 633-34.

¹¹¹ *Id.* at 634-35. Worth noting is that Dr. Hayes took issue with the discrepancy in the Vocabulary

subtest score between the two WAIS-III administrations. Dr. Cunningham testified that within the standardization groups that took the test, with no incentive to mangle, 5% likewise dropped the same amount in the vocabulary retest. Rec. Doc. 1585 at 615.

The Court finds disturbing that Dr. Hayes glossed over consideration of this [**499] embedded measure, which indicated Smith put forth good effort. She did not mention it on direct examination and when questioned on cross-examination, she acknowledged the Digit Span test as an embedded measure used to assess effort, she said she looked at his results on the two administrations, but acknowledged she did not report on his level of effort.¹¹² Her explanation for not reporting on it was that for persons who may be in the mentally retarded range, the results are not reliable.¹¹³ This, however, is a questionable explanation. Dr. [**46] Hayes is correct that if a mentally retarded person does *poorly* on the Digit Span test, it may be a result of deficient intelligence rather than feigning, hence the test results would be inconclusive.¹¹⁴ But since she did clearly look at Smith's Digit Span performance, as she used it to compare with his Letter-Number Sequencing, she had to have seen that his score was at the higher end, indicating *good* effort. This failure, at a minimum, reflects on her qualifications but also indicates a resistance, similar to the "ship" episode already cited, to recognize evidence of cognitive deficits, which undermines her credibility.

¹¹² Rec. Doc. 1584 at 519-22.

¹¹³ *Id.* at 521-22.

¹¹⁴ Rec. Doc. 1585 at 631.

Lastly, the Court is not persuaded that malingering tests are particularly effective in populations suspected of possible mental retardation. The reason should be obvious. If a person is genuinely mentally retarded, his responses may be similar to a person of normal intelligence who is trying to feign mental retardation. Dr. Cunningham testified that formal effort assessments have not been standardized against a mentally retarded population, and Dr. Swanson testified that formal malingering tests [**47] are not very reliable with persons in the lower cognitive functioning range.¹¹⁵ Therefore, using those formal assessments to determine malingering prior to first determining whether Smith is mentally retarded in the first place in effect puts the cart before the horse.

115 *Id.* at 611-13; Rec. Doc. 1583 at 71, 192.

ii. Other Testimony

Dr. Hayes did not herself administer an IQ test.¹¹⁶ She stated that the Court's requirement that the testing be video-taped caused her ethical problems. She explained that the possibility that the questions would become public would undermine the validity of future testing. She contended that even if the testing was sealed and available only to the attorneys that was not good enough to assure confidentiality.¹¹⁷ While the Court presumes Dr. Hayes' ethical concerns are genuine, the Court is not persuaded that her conclusion is a reasonable one. The Official Position Statement of the National Academy of Neuropsychology, which she referenced, counsels against "uncontrolled" test release, but goes on to suggest as "potential resolutions....protective arrangements or protective orders from the court."¹¹⁸ Furthermore, in the summer of 2008, the next generation [****48**] of WAIS IQ [***500**] testing became available--the WAIS-IV.¹¹⁹ The *Atkins* hearing was not until almost a year later, in 2009. Dr. Hayes could have administered the older WAIS-III during that interim period, the same test administered by Dr. Zimmerman and Dr. Swanson, since it had in effect become obsolete for future testing purposes.

116 Dr. Hayes testified she drew her conclusions as to Smith's intellectual functioning from his school, Job Corps, military, and prison records. Rec. Doc. 1584 at 432-34, 438, 441-42, 443. While the Court considers all of this data relevant to the second prong of a mental retardation determination--adaptive behavior--the Court finds them no substitute for a properly administered IQ test, which is a prerequisite for prong one.

117 *Id.* at 492, 493-94; Rec. Doc. 1585 at 576-79, 585-88.

118 Govt. Arts. 17, 18.

119 Rec. Doc. 1585 at 581.

Two other points raised by Dr. Hayes need brief attention. In her report, she included an analysis of Smith's IQ based on demographic characteristics,¹²⁰ coming up with an IQ in the Average range.¹²¹ Dr. Cunningham testified that the lowest possible score a 59 year old black man could receive--"(e)ven if he's been hospitalized and is in a coma [****49**] his whole life"--was a 73.9.¹²² When asked if this figure was correct, Dr. Hayes resisted conceding it, but ultimately could not deny it since it is an objectively calculable finding.¹²³

She did acknowledge that the Barona formulas are less accurate in the lower ranges of intelligence and that the formula has a "pretty large standard of error."¹²⁴ That is an understatement as Dr. Cunningham estimated the standard of error to be plus or minus 20 points. In Smith's case, that would mean that there was a 95% likelihood of his IQ being between 50 and 95, which is essentially meaningless as a calculation. The Court has rejected this imputation based on the Barona Study from Dr. Hayes before, and does so again.¹²⁵

120 Andres Barona, Cecil R. Reynolds & Robert Chastain, *A Demographically Based Index of Premorbid Intelligence for the WAIS-R*, 52 J. CONSULTING & CLINICAL PSYCHOL. at 885 (1984)[hereinafter Barona Study]. Although a copy of this study was not offered for inclusion in this record, it was included in the *Hardy* record. See *Hardy*, 762 F.Supp.2d at 878.

121 Govt. Exh. 42 at 26.

122 Rec. Doc. 1585 at 675-76.

123 Rec. Doc. 1584 at 530-34.

124 *Id.* at 531-32.

125 See *Hardy*, 762 F.Supp.2d at 878.

In [****50**] addition, Dr. Hayes testified at the hearing to an extrapolation of IQ based on data from an unscored neuropsychological test, the Wechsler Memory Scale ("WMS-III"), which had been administered by Dr. Gouvier.¹²⁶ She testified that the manual allows for an extrapolation from IQ scores to predicted WMS scores, and she testified that she simply did the reverse, producing from the WMS score an implied predicted IQ of 91.¹²⁷ When asked if this was a standard practice of psychologists to do the reverse extrapolation, she thought that many would but she did not know in fact if any actually did.¹²⁸ Dr. Cunningham, on the other hand, was able to shed light on the problem with Dr. Hayes' reverse extrapolation.¹²⁹ He explained that the purpose of using an established IQ score to extrapolate to an estimated score on the WMS is to determine if a person has an impaired memory relative to his overall intelligence. An IQ score represents a broad range of cognition. Memory is only one aspect of intelligence, and the WMS only covers about one-third of what goes into an IQ score. The remaining two-thirds are not memory related. So while it may well be appropriate to take a known IQ score to predict [****51**] whether that single factor of memory is impaired, it is not appropriate to use that one single factor of memory capacity and backtrack to a full scale IQ. For

that reason, Dr. Cunningham [*501] stated emphatically that her reverse extrapolation was not acceptable in the professional and scientific community.¹³⁰ The Court agrees.

126 Rec. Doc. 1584 at 452-56.

127 *Id.* at 456.

128 *Id.* at 538.

129 Rec. Doc. 1585 at 616-17, 735-36.

130 *Id.* at 616.

3. The Court's Finding re: Smith's Intellectual Functioning

The issue of IQ should have been a non-issue in this case based on the clear guidelines of the APA and AAMR/AAIDD and the evidence. The Court finds that all of the credible evidence lends full support to the WAIS-III scores, and that the defendant has established well beyond a preponderance of the evidence that his intellectual functioning is more than two standard deviations below the mean, with or without correction for the Flynn Effect. The Court finds that Smith therefore possesses significantly subaverage intellectual functioning as that term is used to diagnose mental retardation. The Court now turns to the other criteria relevant to this diagnosis.

b. Factor Two: Significant Limitations in Adaptive [*52] Functioning

The Court next considers whether Smith has proven that he exhibits the significant limitations in adaptive functioning required for a finding of mental retardation. That factor is defined as follows:

Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.¹³¹

The AAMR/AAIDD echoes this requirement: "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."¹³² Those two standards underpin what is referred to as the

"adaptive behavior" prong of the diagnosis of mental retardation developed by APA and AAMR/AAIDD. The focus is on "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Wiley*, 625 F.3d at 216 (quoting [*53] DSM-IV-TR at 42).

131 DSM-IV-TR at 49.

132 AAMR 10TH EDITION at 8; *see also* AAIDD 11TH EDITION at 6.

The definition of this prong is less settled than that for intellectual functioning.¹³³ For IQ, the APA and AAMR/AAIDD are in substantial agreement on the standard to be used: a score of 75 or below on one of the generally accepted tests of intelligence. For adaptive behavior, the current version of the APA's guidance requires concurrent deficits in at least two of eleven relatively specific areas of adaptive functioning.¹³⁴ The AAMR/AAIDD takes a more holistic approach and treats adaptive behavior as a global characteristic that finds expression in three relatively abstract areas of functioning--conceptual, social, and practical--and requires deficits in just one of these three general domains to reach a finding of mental [*502] retardation.¹³⁵ That is, "the three broad domains of adaptive behavior in [the AAMR's] definition represent a shift from the requirement . . . that a person have limitations in at least 2 of the 10 specific skill areas listed in [the AAMR's] 1992 definition," which was the model for the approach still used by the APA.¹³⁶ The AAMR/AAIDD moved away from that model because [*54] "[t]he three broader domains of conceptual, social, and practical skills . . . are more consistent with the structure of existing measures and with the body of research on adaptive behavior."¹³⁷

133 Since there has been no change in the guidance given by the APA and AAMR/AAIDD in the interim, this definitional section for adaptive functioning is largely duplicative of that set forth in the opinion issued by this Court in *Hardy*, 762 F.Supp.2d at 879-81.

134 *See* DSM-IV-TR at 49.

135 *See* AAMR 10TH EDITION at 13; AAIDD 11TH EDITION at 6.

136 AAMR 10TH EDITION at 73.

137 *Id.* at 73, 78; AAIDD 11TH EDITION at 43-45.

While these differences in definition are noteworthy, they encompass the same range of behaviors. See *Wiley*, 625 F.3d at 216. Both the APA and the AAMR/AAIDD direct clinicians to the same standardized measures of adaptive behavior, such as the Vineland Adaptive Behavior Scales--II (VABS-II) and the Adaptive Behavior Assessment Scale-Second Edition (ABAS-II).¹³⁸ Still, as evidenced by the DSM-IV-TR's referral of clinicians to the AAMR's instruments, the AAMR/AAIDD has taken the lead in developing the guidelines for interpreting the results of those tests. The Court finds it appropriate therefore [**55] to primarily rely on the AAMR/AAIDD's procedures for evaluating the defendant's level of adaptive functioning.¹³⁹

138 See DSM-IV-TR at 42; AAMR 10TH EDITION at 76-78; AAIDD 11TH EDITION at 43-48. Referred to as the AAMR ABS, before the change in name, it is now in a second edition, the ABAS-II.

139 See DSM-IV-TR at 42. This does not mean that the APA's approach deserves less weight, but only that the AAMR/AAIDD's is better developed. The APA devotes only two paragraphs to adaptive behavior in its standard reference work and refers the reader elsewhere for information concerning the relevant tests; the AAMR/AAIDD, on the other hand, devotes chapters to the concept and has played a key role in developing the assessment instruments used.

The AAMR/AAIDD uses the following criteria for determining whether someone has significant limitations in adaptive functioning:

[P]erformance [must be] at least two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.¹⁴⁰

The AAMR/AAIDD repeatedly emphasizes that a diagnosis of significant [**56] limitations should be made whenever a person has performed at least two standard deviations below the mean in any of the three domains or in the total score.¹⁴¹

140 AAMR 10TH EDITION AT 14; AAIDD

11TH EDITION at 43.

141 See AAMR 10TH EDITION AT 74, 76, 78; AAIDD 11TH EDITION at 43, 46-47.

A person is evaluated by using a standardized test, including the VABS-II and ABAS-II.¹⁴² As with the tests of IQ, the scores on these tests for each domain, as well as the overall score, must be evaluated in light of the standard errors of measurement for the test.¹⁴³ "If a person has a score that does not meet the cutoff but is within one standard deviation of the cut-score, it is advised that the score be reevaluated for reliability or the individual [**503] should be reassessed with another measure."¹⁴⁴

142 See AAMR 10TH EDITION at 77, 87-90.

143 *Id.*; AAIDD 11TH EDITION AT 47-49; USER'S MANUAL at 12-13.

144 AAMR 10TH EDITION at 79.

"The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance. ... This is a critical difference between the assessment of adaptive behavior and the assessment of intellectual functioning, where best [**57] or maximal performance is assessed."¹⁴⁵

145 AAIDD 11TH EDITION at 47.

None of the generally accepted scales of adaptive behavior rely on direct observation of the person nor upon his own self-report of what he is capable of doing. Rather, the clinician is to gather adaptive behavior information from third parties.¹⁴⁶ In selecting the informants, it is "essential that people interviewed about someone's adaptive behavior be well-acquainted with the typical behavior of the person over an extended period of time, preferably in multiple settings."¹⁴⁷ "Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends."¹⁴⁸ "Observations made outside of the context of community environments typical of the individual's age peers and culture warrant severely reduced weight."¹⁴⁹ The informants should also be asked to provide information about the person's day-to-day level of functioning, as well as data on the amount of support the person needs in order to carry out any of the relevant functions.¹⁵⁰

146 AAMR 10TH EDITION AT 85; AAIDD 11TH EDITION at 47.

147 AAMR 10TH EDITION AT 85; SEE ALSO AAIDD 11TH EDITION AT 47.

148 AAIDD 11TH EDITION AT 47.

149 AAMR [**58] 10TH EDITION AT 85; SEE ALSO AAIDD 11TH EDITION AT 47.

150 AAMR 10TH EDITION AT 74-75; AAIDD 11TH EDITION AT 45, 47.

2. Retrospective Diagnosis¹⁵¹

151 Again, this section is largely unchanged from that set forth in the opinion issued by this Court in *Hardy*, 762 F.Supp.2d at 881-82.

Unlike in a medical, educational, or social services context, the law is concerned with what was rather than what is. The point of an *Atkins* hearing is to determine whether a person was mentally retarded at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded and therefore in need of special services. Because of this, the diagnosis of mental retardation in the *Atkins* context will always be complicated by the problems associated with retrospective diagnosis.

These problems are only compounded by the fact that both the APA and AAMR/AAIDD define mental retardation as a developmental disability and limit the diagnosis to those persons who exhibited the required characteristics prior to age 18. As those under the age of 18 are already constitutionally ineligible for the death penalty, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), no clinician evaluating a [**59] person for purposes of an *Atkins* hearing will ever be evaluating the person prior to age 18. Mental retardation in the *Atkins* context, if it is to be diagnosed at all, must therefore be diagnosed retrospectively.

So, while the APA speaks of "[c]oncurrent deficits or limitations in present adaptive functioning,"¹⁵² it is clear that the assessment of mental retardation for purposes of *Atkins* looks backwards--beyond even the time of the crime and back into [**504] the developmental period.¹⁵³ Certainly a person's level of adaptive functioning in the present might provide some information about his abilities during the developmental period as a person without limitations in the present is less likely to have had limitations before, and a person with limitations today is more likely to have had them during the developmental period. But particularly with the mildly mentally retarded, who tellingly used to be labeled the

"educable,"¹⁵⁴ the AAMR/AAIDD has been clear that a person's current strengths and weaknesses are not the best evidence of the relevant facts in an *Atkins* hearing.¹⁵⁵

152 DSM-IV-TR at 49.

153 The concurrence of deficits in intellectual functioning and adaptive behavior referred to [**60] in the DSM-IV-TR is best understood as meaning that, during the developmental period, a person must exhibit deficits in both categories at the same time. Understood that way, the language excludes from the diagnosis those who, despite a low IQ, did not develop deficits in adaptive functioning until later (or vice versa, for example if an injury causes a low IQ after the developmental period). Even if a person's level of adaptive functioning outside of the developmental period were relevant, it is clear from *Atkins* that it would be the level of adaptive functioning at the time of the crime, not the time of hearing, that is relevant. See *Atkins*, 536 U.S. at 315-21; see also *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642, 648 (Idaho 2008) ("*Atkins* prohibited] the imposition of a death sentence upon offenders who are mentally retarded at the time of their crime.>").

154 DSM-IV-TR at 43.

155 See, e.g., AAIDD 11TH EDITION at 95-96 (relegating contemporary assessment to a possible additional tool); *id.* at 46 (noting retrospective diagnosis requires evaluation of subject's "previous functioning").

With IQ, which is a relatively stable, immutable trait,¹⁵⁶ the problems associated with retrospective diagnosis mostly [**61] disappear. Absent intervening trauma or injury, a person's IQ tested after the developmental period is likely to be quite close to the IQ that would have been obtained had the person been tested prior to age eighteen.¹⁵⁷ The closest that retrospectivity comes to influencing the IQ prong of the test is the Flynn Effect. But that phenomenon is an artifact of the instruments used to assess intelligence, not a consequence of retrospective diagnosis *per se*. Evaluating someone's adaptive behavior, on the other hand, is less stable even in theory, and difficult to assess in practice, and all the more so when done retrospectively.

156 See, e.g., Rec. Doc. 1583 at 75; AAMR 10TH EDITION AT 51-59; AAIDD 11TH EDITION

at 31-42.

157 See Gilbert S. Macvaugh III & Mark D. Cunningham, "Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*," 37 J. OF PSYCH. & L. 131, 148, 151 (citing Caroline Everington & J. Gregory Olley, *Implication of Issues in Atkins v. Virginia, Defining and Diagnosing Mental Retardation*," Vol. 8 Forensic Psychol. Practice 1, 7 (2008) (Def. Art. 1). This is not to say that *assessments* of IQ, such as performance on an IQ test, may not vary. See *id.*

The committee [**62] of the APA responsible for mental retardation, Division 33, as well as the AAMR/AAIDD have developed guidelines to help clinicians navigate the difficulties associated with retrospective diagnosis. The guidelines in the AAIDD's USER'S GUIDE are the most detailed. Relevant to adaptive behavior, they direct clinicians to:

- (1) Conduct a thorough social history;
- (2) Conduct a thorough review of school records;
-
- (6) Recognize that self-ratings have a high risk of error with regard to adaptive behavior;
- (7) Conduct a longitudinal evaluation of adaptive behavior; and

[*505] (8) Not use past criminal or verbal behavior in assessing adaptive behavior.¹⁵⁸

In addition, the assessment of adaptive behavior should:

- (a) use multiple informants and multiple contexts; (b) recognize that limitations in present functioning must be considered within the context of community environments typical of the individual's peers and culture; (c) be aware that many important social behaviors, such as gullibility and naivete, are not measured on current adaptive behavior scales; (d) use an adaptive behavior scale that

assesses behaviors that are currently viewed as developmentally and socially relevant; (e) understand [**63] that adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum; (f) realize that adaptive behavior refers to typical and actual functioning and not to capacity or maximum functioning.¹⁵⁹

Finally, the third-party respondents should focus on the defendant's adaptive behavior closest to the developmental period about which the informant is confident discussing, and, whatever age it is, the examiner should log that age as the date of the defendant's functioning for purposes of scoring and comparison with age-normed tables.¹⁶⁰

158 USER'S GUIDE at 18-22. See also AAIDD 11TH EDITION at 46.

159 USER'S GUIDE at 20; see also AAIDD 11TH EDITION AT 46. THE AAIDD 11TH EDITION did not include in the list the AAMR USER'S GUIDE factor "(e)"; instead, that factor received separate discussion outside of the realm of retrospective diagnosis as "Adaptive Behavior Versus Problem Behavior." AAIDD 11TH EDITION at 46, 49.

160 See, e.g., Rec. Doc. 1584 at 364, 417.

2. Clinical Judgment in Adaptive Functioning Assessment

The Court has previously noted how objective the first prong of the APA and AAMR/AAIDD assessments is--an IQ measured on a recognized standardized test--as [**64] compared to the second prong, which relates to adaptive behavior. The second prong involves significantly more subjective clinical judgment. *Hardy*, 762 F.Supp.2d at 883. As noted by the Fifth Circuit, "The assessment of adaptive functioning deficits is no easy task. Because its conceptualization 'has proven elusive,' adaptive functioning 'historically has been assessed on the inherently subjective bases of interviews, observations, and professional judgment.'" *Wiley*, 625 F.3d at 218 (internal citation omitted).

This greater degree of subjectivity has two consequences. First, as the degree to which a matter is left to an individual clinician's judgment increases, so does the degree to which the Court must rely on its assessment of the relative competence and credibility of

the individual experts to resolve disputes between them. Second, as the need for clinical judgment increases, so does the opportunity for disputes between clinicians.

The defense and government experts are diametrically opposed with regard to adaptive behavior, echoing the Court's previous experience with Dr. Swanson and Dr. Hayes in *Hardy*. *Hardy*, 762 F.Supp.2d at 884. Dr. Swanson found that "Mr. Smith has substantial [**65] limitations in the areas of self-care, understanding and use of language, learning, self-direction, capacity for independent living, and economic self-sufficiency with evidence of onset prior to the age of 18 that meet the criteria for a diagnosis of Mental Retardation in DSM-IV-TR, the AAMR 10TH EDITION and *La.C.Cr.P. art. 905.5.1(H)(1)*," and that Smith's conceptual, social and practical [*506] adaptive skills scores, as well as his overall score, were similarly low. ¹⁶¹ On the other hand, Dr. Hayes found "no significant adaptive functioning deficits . . . [w]hen heroin use and legal difficulties are factored out of Mr. Smith's day-to-day functioning." ¹⁶² As in *Hardy*, the Court finds that such a drastic disagreement from two experts in the same field can be attributed, in part, to the relative subjectivity involved in the assessment of adaptive behavior, the fact that the deficits of a mildly mentally retarded person are not extreme, and the varying experience and competence of the experts called to testify. *Hardy*, 762 F.Supp.2d at 884.

¹⁶¹ Def. Ex. 1 at 5; Rec. Doc. 1583 at 223-24.

¹⁶² Govt. Ex. 42 at 45.

3. Dr. Swanson's Adaptive Functioning Assessment

i. Adaptive Probes

Dr. Swanson testified [**66] that she did some adaptive probes with Smith during her interview with him on April 19, 2006. ¹⁶³ The probes were practical testing to see what Smith could do and how long it takes him. ¹⁶⁴ She administered an abbreviated version of the Kaufman Test of Educational Achievement-II ("KTEA-II"), a gold standard in achievement testing, to assess and screen Smith's functioning with certain mathematics, reading and spelling skills. ¹⁶⁵ Dr. Swanson found that his deficits outweighed his strengths, and that his current functioning was the same as reflected in school and Job Corps records that indicate a 4th grade mathematics level, meaning he had not improved in the ensuing years and continued to qualify as mentally

retarded in Functional Academics. ¹⁶⁶ She testified that he was able to identify approximately 214 out of 220 sight or "Dolch" words, which are words that children learn quickly by the 3rd grade. Children will, however, commonly mix up the letters--saying "but" instead of "put," but will grow out of that tendency. She saw such reversals with Smith, unusual for his age, some of which he self-corrected, some of which he did not. In addition, she found that he reads so slowly that he [**67] forgets information, indicating reading comprehension problems consistent with earlier records indicating a 3rd grade reading level. ¹⁶⁷

¹⁶³ Rec. Doc. 1583 at 73.

¹⁶⁴ *Id.* at 74.

¹⁶⁵ *Id.* at 75-76, 81-82. Dr. Swanson testified that she did not score the KTEA-II for her report, but did forward the score sheet to Dr. Gouvier's at his request for his use as a "rough estimate" during his assessment. *Id.* at 78.

¹⁶⁶ *Id.* at 80-82, 106-08.

¹⁶⁷ *Id.* at 83-84; Rec. Doc. 1584 at 332-33.

ii. VABS-II and ABAS-II Scores

Dr. Swanson's choice of respondents for her assessment of Smith's adaptive functioning was appropriate, ¹⁶⁸ albeit in a retrospective context. On May 15, 2006, she performed VABS-II assessments using Smith's mother, Doris Smith, his older sister, Nell Murray, and his younger sister, Patricia Smith, as respondents. ¹⁶⁹ Because Dr. Swanson determined that Smith's mother did not have the 4th or 6th grade reading ability required for the [*507] ABAS-II, that assessment was given to the sisters only. ¹⁷⁰ Dr. Swanson testified that she does between twenty-five and forty retrospective assessments per month and that approximately twelve per year involve persons who previously had not been diagnosed as mentally [**68] retarded. ¹⁷¹

¹⁶⁸ "Very often, these respondents are parents, older siblings, other family members, teachers, employers, and friends." AAIDD 11TH EDITION at 47.

¹⁶⁹ Rec. Doc. 1583 at 132-33; Def. Ex. 1 at 3-4.

¹⁷⁰ Rec. Doc. 1583 at 131; Def. Ex. 1 at 3-4.

¹⁷¹ Rec. Doc. 1583 at 127-28.

Dr. Swanson also testified that she did consider malingering, the possibility that the family members

would try to portray Smith as more impaired than he really was. She interviewed the three separately ¹⁷² and used two different measures for two of them, in order to check for inter-relater as well as cross-relater reliability. ¹⁷³ She acknowledged that the use of the ABAS-II and VABS-II in retrospective assessments is controversial, and agreed with other experts in the field that the results should be interpreted with caution. ¹⁷⁴ She also testified that she had asked the defense team to find other reporters, such as teachers, coaches, employers, but that effort was unsuccessful because Smith was over fifty years old at the time of the offense. ¹⁷⁵

¹⁷² This was also confirmed by Tanzanika Ruffin, the defense paralegal who was present when the interviews took place and confirmed

that each was done separately. ¹⁷⁶ Rec. Doc. 1586 at 833-35.

¹⁷³ Rec. Doc. 1583 at 195-96.

¹⁷⁴ Rec. Doc. 1583 at 245-47.

¹⁷⁵ *Id.* at 234-37.

An evaluation using the VABS-II involves an interview format and provides standardized scores in four areas or domains of adaptive functioning, communication, daily living, socialization, and motor skills, as well as an overall standardized score, called the Adaptive Behavior Composite (ABC). Based on family members' responses, Dr. Swanson calculated the VABS-II scores for Smith at age 17 as follows: ¹⁷⁶

	Mother		Patricia		Nell	
Age	17-0-0		17-0-0		17-0-0	
Domains/Subdomains	SS	Level	SS	Level	SS	Level
Communication	64	Mild	63	Mild	67	Severe
Receptive Language		Low		Low		Low
Expressive Language		Low		Low		Moderately Low
Written Language		Low		Low		Low
Daily Living	69	Mild	68	Mild	69	Mild
Personal		Low		Low		Low
Domestic		Low		Moderately Low		Low
Community		Adequate		Moderately Low		Adequate
Socialization	63	Mild	60	Mild	64	Mild
Interpersonal Relations		Low		Low		Moderately Low
Play & Leisure Time		Low		Low		Low
Coping Skills		Low		Low		Low
Motor Skills	100	Adequate	100	Adequate	100	Adequate
Gross Motor Skills		Adequate		Adequate		Adequate
Fine Motor Skills		Adequate		Adequate		Adequate
ABC	63	Mild	62	Mild	64	Mild

¹⁷⁶ [508] The ABAS-II provides standardized scores in three adaptive domains, Conceptual, Social ¹⁷⁷ and

Practical Skills, that correspond to the AAMR/AAIDD and DSM-IV-TR specifications, and also provides an overall estimate of adaptive functioning with a Generalized Adaptive Composite ("GAC") standard score, with a mean of 100 and standard deviation of 15.

Dr. Swanson calculated Smith's ABAS-II Composite Scores for his level of adaptive behavior at age 17 as follows:¹⁷⁷

ABAS-II Composite Scores	Patricia		Nell	
	Standard Score	Level	Standard Score	Level
Conceptual	63	Mild	69	Mild
Social	66	Mild	68	Mild
Practical	63	Mild	75	Moderately Low
GAC	58	Mild	63	Mild

¹⁷⁷ *Id.* at 4.

Smith's adaptive functioning at age 17 in the

ABAS-II skill areas indicate the following with a mean of 10 and standard deviation of 3, according to Dr. Swanson:

ABAS - II Skill Areas	Patricia			Nell		
	Scaled Scores	Level in SDs	Range	Scaled Scores	Level in SDs	Range
Communication	3	-2.33	Low	4	-2.00	Low
Community Use	4	-2.00	Low	6	-1.33	Moderately Low
Functional Academics	3	-2.33	Low	6	-1.33	Moderately Low
Home Living	4	-2.00	Low	5	-1.67	Moderately Low
Health & Safety	4	-2.00	Low	5	-1.67	Moderately Low
Leisure	3	-2.33	Low	4	-2.00	Low
Self-Care	2	-2.67	Low	5	-1.67	Moderately Low
Self-Direction	4	-2.00	Low	3	-2.33	Low
Social	4	-2.00	Low	4	-2.00	Low

Based on the scores, Dr. Swanson found cognitive impairment prior to the age of [**71] 18, that constituted Mild Mental Retardation.¹⁷⁸ More specifically, she found "substantial limitations in the areas of self-care, understanding and use of language, learning, self-direction, capacity for independent living, and economic self-sufficiency with evidence of onset prior to

the age of 18."¹⁷⁹

¹⁷⁸ Rec. Doc. 1583 at 222.

¹⁷⁹ Def. Exh. 1 at 5; Rec. Doc. 1583 at 223.

Dr. Swanson testified that she found the final test scores reliable for a number of reasons. The scores from the respondents did not vary beyond one standard

deviation or 15 points, as required for statistical purposes and inter-rater reliability.¹⁸⁰ [*509] In fact, the VABS-II scores deviated no more than *four* points between the respondents,¹⁸¹ and in several instances the scores were identical or varied by only one point.

180 Rec. Doc. 1583 at 135-36.

181 The widest discrepancy was Patricia's score of 60 in Socialization compared to Nell's score of 64.

Because of Dr. Hayes' criticism, the Court undertook an independent examination the VABS-II responses to evaluate consistency on individual questions. For each question, four responses were possible: (2) usually performs the behavior independently; (1) sometimes performs [**72] the behavior independently; (0) never performs the behavior independently and (4) don't know. Of the nearly one hundred fifty (150) questions that all three respondents answered, 72% of their answers were the same. Of the remainder, usually two scores were identical with a one level difference for the third. Dora and Nell's scores were identical for 88% of their answers; Dora and Patricia's scores were identical for 77% of their answers and Nell and Patricia were likewise identical for 77% of their answers. Again, where a discrepancy occurred, it was usually no more than one ranking. A two point discrepancy between the three scorers occurred only about a dozen times, or about 8% of the total, and even in those instances, two of the respondents usually concurred on a score, with the third being the outlier. This consistency strongly supports the reliability of the tests and the conclusion that the respondents were not deliberately exaggerating his deficits. Since none of the three women had ever been asked these specific questions before, they had no opportunity to conspire in advance to answer in the same way, yet their answers were in fact strikingly consistent. Furthermore, a significant [**73] majority of the scores for all three was category "2," which indicated the person could perform the function independently most of the time. Were they attempting to exaggerate his deficits, the results would likely have not been so positive on so many questions. Indeed, the adaptive behavior scores on the three VABS-II, which ranged from 63 to 69, mirrored Smith's IQ assessment of 67, without correction for the Flynn Effect.¹⁸²

182 Rec. Doc. 1584 at 377.

Dr. Swanson testified that the ABAS-II data was also fairly consistent within the respondent, across the

domains and between respondents.¹⁸³ The Court likewise found that on the ABAS-II, approximately 54% of the answers Patricia and Nell gave were identical, approximately 43% were a one level difference and only 3% more than one level.

183 Rec. Doc. 1583 at 136-37.

As already noted, Dr. Swanson's "conclusion, based on these adaptive instruments, was that there was strong evidence to indicate that prior to the age of 18 there were adaptive deficits."¹⁸⁴

184 *Id.* at 138, 222.

iii. *Questions re: Dora Smith's Credibility*

The government raised a serious challenge to the credibility of Smith's mother, Dora, based on a taped prison telephone conversation [**74] between Smith and his mother on February 24, 2008. In this conversation, Dora Smith indicated her willingness to lie on the stand at an upcoming hearing, on the advice of Smith's lawyer, Steven Lemoine, who she believed wanted to argue that Smith was "cuckoo."¹⁸⁵ Dora Smith stated that Lemoine told her several [**510] times he was "for Joseph," not wanting to lose the case by lethal injection, which Dora Smith construed as "[t]hat's as good as to tell us we got to lie on the thing, you know." She said that "whatever he tells that what's me to say, I'm saying it you know." The disclosure of this recording caused the first *Atkins* hearing in this matter to be canceled on March 6, 2008, in open court.¹⁸⁶ The telephone call began with a recorded caution that "[t]his call is subject to monitoring and recording."¹⁸⁷

185 Govt. Exh. 43 at 5-7 (2-24-08).

186 Rec. Doc. 756.

187 Govt. Exh. 43 at 1(2-24-08).

Dr. Swanson administered the VABS-II to Dora Smith in May 2006, almost two years *before* the "advice" from Lemoine to lie at the upcoming hearing, which diminishes some of the impact the conversation with Lemoine may have had with respect to Dora Smith's previous answers on the VABS-II, despite the disturbing [**75] references to toilet training issues both in those answers and during the recorded conversation. Dr. Swanson testified that she reevaluated everything after hearing the taped telephone conversation and concluded her original opinion was still valid.¹⁸⁸ As already

discussed, Dora Smith's VABS-II scores were very consistent with the two other respondents. Nevertheless, the Court remains troubled by this conversation and, in an abundance of caution, will set aside the VABS-III administered to Dora Smith and assess whether the evidence was sufficient without it to find Smith to have sufficient deficits to warrant a finding of Mild Mental Retardation.

188 Rec. Doc. 1583 at 61-64, 259.

The Court begins that process by observing that Dr. Swanson testified that she had adequate data to give the same opinion even if the VABS-II of Smith's mother was totally disregarded.¹⁸⁹ With respect to the remaining scores, specifically Patricia and Nell's VABS-II scores and both of their ABAS-II scores, the Court finds them to be valid, consistent and reliable.

189 Rec. Doc. 1584 at 402-03.

iv. Criticism of Dr. Swanson's VABS-II and ABAS-II Scores

A. Norming

The government argues that Dr. Swanson did not norm the [**76] tests for Smith at age 17. Both the VABS-II and ABAS-II can be normed back to that age.¹⁹⁰ Dr. Swanson testified that she normed the scores for Smith at age 17 years. Identifying the age is important as the same data yields a different adaptive behavior score at different chronological ages.¹⁹¹ These differences are logical since adaptive behavior is learned over a period of time. A person who cannot consistently do certain things at age 17, that his same aged peers can do, such as make a bed, or cook a simple meal, or follow basic instructions, might have a score in the mildly mentally retarded range, but if he still had not learned to do those things by age 45, his score would be even lower.

190 *Id.* at 334.

191 *Id.* at 340.

Dr. Swanson testified that she sent Dr. Gouvier, at his request, the full raw scores on the VABS-II and that the data was normed at 55 years, Smith's true age at the time.¹⁹² Dr. Gouvier was the neuropsychologist assessing Smith for possible [**511] brain damage.¹⁹³ Dr. Swanson repeatedly explained that the data was provided to Dr. Gouvier for that different purpose and

that she simply gave him what he requested.¹⁹⁴ The Court is satisfied with this explanation.

192 *Id.* at 341-43. [**77] The record is unclear as to whether Dr. Gouvier requested only the raw data, and the calculations based on age 55 were sent as well, or whether he requested the calculations at 55 as well.

193 *Id.* at 343.

194 *Id.* at 337-38, 342-43; 348-50. The Court also rejects the government's suggestion that Patricia and Nell, by affirmatively answering questions on the ABAS-II about Smith's employment, must have answered as if he were 55 years old. *Id.* at 347. Even Dr. Hayes conceded that Smith had odd jobs as a teenager. *Id.* at 477. At the time Patricia and Nell completed the ABAS-II, however, Smith had been incarcerated several years and was obviously not employed.

The government also challenged certain erasure marks by Dr. Swanson on the original VABS-II and ABAS-II forms, claiming they indicated that the respondents were answering the questions at Smith's current chronological age. Dr. Swanson had originally written in pencil Smith's then-current age of 55 on the forms. She readily agreed that she later erased that number and put in 17-0-0.¹⁹⁵ Dr. Swanson explained that at the time she gave the assessments, she logged in his chronological age, as she had routinely done in the past. Subsequently, [**78] she attended a number of conferences on how to handle *Atkins* issues, and learned that she needed to make clear on the face of the protocol what *norms* were being used. That information caused her to change the age on the forms to reflect that they were *normed* at 17-0-0.¹⁹⁶

195 *Id.* at 354-58.

196 *Id.* at 361-63.

Most importantly, Dr. Swanson testified several times that she clearly instructed each of the respondents to answer the questions as if Smith were 17 years old.¹⁹⁷ This is supported by the testimony of Tanzanika Ruffin, who was the defense paralegal assigned to talk with the family members regarding mitigation, who testified that she told the family members they would be meeting with Dr. Swanson who wanted to "talk to them about Joseph's past."¹⁹⁸ The Court is likewise satisfied that each respondent was properly instructed.

197 *Id.* at 363-66; Rec. Doc. 1585 at 593-94.
198 Rec. Doc. 1586 at 833, 839-41.

Dr. Swanson also acknowledged that she initially entered the scores into the computer to be calculated at Smith's chronological age of 55, and when the computer generated the figures, she realized the mistake and corrected it by changing the norm to age 17. ¹⁹⁹ The Court finds that this explanation [^{**79}] likewise satisfactory and credible, rendering the initial mistake a nonissue.

199 Rec. Doc. 1584 at 366-67.

Dr. Hayes testified as to four reasons why it did not appear to her that the ABAS-II and VABS-II assessments were normed at age 17 years and that they should have been re-done. ²⁰⁰ First, she noted that Dr. Swanson herself admitted she initially entered his scores based on age 55, which placed Smith in the severe range of mental retardation and apparently alerted Dr. Swanson to correct her obvious error in entering the wrong age. ²⁰¹ Dr. Hayes' second reason for concluding the respondents were not answering the questions as if Smith were 17 years old was because they answered questions regarding checking accounts, and signing [^{*512}] business forms and leases. ²⁰² However, Dr. Swanson instructed each respondent that even if the person had not had the opportunity yet to perform the behavior, they were still to estimate, based on his abilities, whether they thought he had the capacity to do it. ²⁰³ Both Patricia and Nell answered "never" on Smith's capacity to handle a checking account responsibly or manage his own money through checks or money orders. ²⁰⁴ On the ABAS-II, which is self-administered, [^{**80}] Nell answered "sometimes" to Smith's ability to complete a form for business, such as a lease, and Patricia answered "never." ²⁰⁵ In addition to Dr. Swanson's verbal instructions, the protocol of the ABAS-II itself states in bold letters: "Please read and answer ALL items." ²⁰⁶ Patricia and Nell were doing what they were instructed to do by both Dr. Swanson and the protocol in providing answers to all the questions. However, their skepticism about their brother's capacity to complete a business form, such as a lease, was evident. Dr. Hayes' third basis for her conclusion that Patricia and Nell assessed their brother at his current age was because Patricia and Nell completed the work section of the ABAS-II which they should not have, as he had not worked full-time. ²⁰⁷ Again, the Court notes that this is a self-administered test and the

protocol instructs the respondent to answer "ALL" questions, and the particular protocol on work mentions full *or* part-time employment. ²⁰⁸ Dr. Hayes was aware that Smith had odd jobs as a teenager. ²⁰⁹ As the final reason why Dr. Hayes testified that she believed the data was normed at age 55 was because Dr. Swanson sent to Dr. Gouvier the raw data and the [^{**81}] scores, normed at 55, which has already been discussed.

200 *Id.* at 418, 584-85.

201 *Id.* at 419.

202 Rec. Doc. 1585 at 568-69, 584.

203 Rec. Doc. 1583 at 207; Rec. Doc. 1584 at 369.

204 Def't. Exh. 1B at 69 (VABS-II Item 37, 41), 111 (same items). While the Court has, in an abundance of caution, chosen to disregard Dora Smith's VABS-II in determining whether a finding of Mild Mental Retardation is appropriate, the Court does note that she likewise answered "never" to the same items. Def't. Exh. 1B at 39.

205 *Id.* at 91 (Item 23), 134 (same item).

206 *Id.* at 88 (emphasis original).

207 Rec. Doc. 1585 at 588-89; Rec. Doc. 1584 at 367.

208 Def't. Exh. 1B at 96, 138.

209 Rec. Doc. 1584 at 477.

The Court finds Dr. Hayes' criticisms to be largely speculative and nonexpert in nature. The Court agrees the erasures and initial norming errors raised legitimate concerns about the validity of the scores, but Dr. Swanson's explanation put those concerns to rest. In fact, Dr. Hayes acknowledged that the tests, if normed at 55, would indicate that Smith was either profoundly or severely retarded. ²¹⁰ No one asserts that. On the other hand, she also agreed that if the respondents did answer honestly regarding Smith's capacities at the [^{**82}] age of 17, that the results correctly showed he was in the mild mental retardation range. ²¹¹

210 Rec. Doc. 1585 at 589.

211 *Id.* at 589-91.

The Court concludes that Dr. Swanson properly instructed all three respondents to answer the questions from the perspective of Smith at the age of 17, as she repeatedly testified. The results themselves are the proof in the pudding since they placed Smith in a range consistent with his IQ scores. The Court finds it inconceivable that Dr. Swanson, with her [^{*513}]

extensive history of administering thousands of these tests, would suddenly "forget" that the third criteria is onset prior to the age of 18, particularly in such a high-stakes capital case.

B. Bias and Inconsistent Answers

In her report, Dr. Hayes challenges the choice of family members as respondents, because of their vested interest in the outcome. ²¹² Dr. Swanson readily acknowledged that all three family members had an interest in the outcome. ²¹³ She testified that she took steps to address this by separately interviewing the respondents and administering two separate instruments to assess inter-respondent reliability. ²¹⁴ The Court has already set forth its own findings of the remarkable consistency [**83] in answers across all three respondents on the VABS-II and the two respondents on the ABAS-II. Since none of the women had any advance notice of what questions they were to be asked, their identical responses to the vast majority of the questions supports their honesty and reliability. Also, as already pointed out, had any of the three wished to deliberately downplay Smith's capacities, they would not have given him the highest score on the majority of the questions, as they did. Likewise, had even one of them deliberately exaggerated his disabilities, it would have shown in a marked deviation from the other two.

²¹² Govt. Exh. 42 at 19-20.

²¹³ Rec. Doc. 1583 at 229.

²¹⁴ *Id.* at 195-96. Dr. Hayes acknowledged that there are no malingering tests for adaptive assessments. Rec. Doc. 1585 at 575.

Most of Dr. Hayes' and the government's criticism was focused on the minority of answers where some discrepancy existed between the respondents. Since hundreds of questions are involved in the VABS-II and ABAS-II, a significant amount of time at the hearing was spent on isolated questions where answers varied. The Court finds such variances to be insignificant except to indicate that each of the respondents [**84] had their own unique perspective on Smith as he was growing up. The Court has already highlighted the remarkable similarity in answers between all respondents, despite their different perspectives, and agrees with Dr. Swanson in this regard. Moreover, with so many questions being asked, the issue is whether the outcome is statistically consistent, not whether an answer varied on a particular question. ²¹⁵ However, because of the extended attention

spent on these alleged discrepancies, they are addressed in " Appendix A," attached to this opinion.

215 Rec. Doc. 1583 at 132.

4. Dr. Hayes' Adaptive Functioning Assessment

Dr. Hayes' opinion as to adaptive functioning was based on a similar documentary data set as Dr. Swanson's opinion along with Dr. Hayes' semi-structured interview of Smith. ²¹⁶ Dr. Hayes testified she asked to interview the same family members that Dr. Swanson interviewed and was told that would not be possible, although it was unclear who told her that. ²¹⁷ She did not speak to any of Smith's prior employers nor any of his friends. She said she tried to locate school personnel from the 1970's but was told no one from that period was available. ²¹⁸ Again, this is not surprising, [**85] considering Smith's age at the time of the offense.

²¹⁶ Govt. Exh. 42 at 16.

²¹⁷ Rec. Doc. 1584 at 545-46.

²¹⁸ *Id.* at 546, 547.

[*514] *i. Discipline Issues Unrelated to Mental Deficits*

Dr. Hayes testified that much of Smith's difficulties were the result of behavioral misconduct rather than indicative of mental deficits. For example, she cited his truancy from school as likely to be a behavioral deficit rather than an academic deficit. ²¹⁹ She noted that Smith's work records included references to failing to follow instructions, being tardy or not showing up at all, and insubordination, which she said could be lack of self-direction but also simply antisocial behavior. ²²⁰ Dr. Hayes likewise attributed Smith's failure to complete the Job Corps program as a "discipline" issue rather than inability to do the work. ²²¹ Finally, she asserted that Smith's failures in the U.S. Navy were unrelated to mental retardation, but instead were again discipline issues. ²²² As will be discussed later in this opinion, the Court finds that all of these so-called behavior problems are equally consistent with a person with Mild Mental Retardation.

²¹⁹ *Id.* at 465.

²²⁰ *Id.* at 472-73.

²²¹ *Id.* at 479-80.

²²² *Id.* at 485.

ii. Clinical Interview

Dr. [**86] Hayes testified that Smith did not "present himself as a person with mental retardation" during the February 22, 2008, interview. ²²³ She acknowledged some mildly retarded people can hide their deficits, but said she is trained to be alert to that circumstance. She claimed to have looked for evidence of mental retardation during the lengthy interview, however, the only stated "deficit" she discerned was that Smith was not up to date on current events. ²²⁴ Citing other sources, she concluded he was not good with grammar, spelling, or math. ²²⁵ Her report catalogued a series of Smith's alleged strengths rather than any deficits. ²²⁶ She testified, for example, that Smith "absolutely" had a "sophisticated vocabulary." ²²⁷ The Court agrees that one of Smith's strengths is that he has learned several specific sophisticated words, such as "colleague," "counteracting," "ultimatum," "speculating," and "forfeited."

²²³ *Id.* at 459.

²²⁴ *Id.* at 458-59.

²²⁵ *Id.* at 459, 466.

²²⁶ Govt. Exh. 42 at 27-44.

²²⁷ Rec. Doc. 1584 at 459.

The first noticeable aspect of the lengthy video is how slowly Smith answered questions, and how often he had to pause before answering. ²²⁸ The Court discovered that his responses were so slow [**87] that the recording could actually be accelerated to a higher speed during the second viewing, with his responses then resembling what this Court considers a more normal conversational pace.

²²⁸ *See also* Rec. Doc. 1583 at 73.

Dr. Cunningham testified that Dr. Hayes went into the interview with an assumption that Smith had intact intellect, and she did not adjust when his responses indicated otherwise. ²²⁹ Dr. Cunningham based this opinion on a number of her interview techniques. First, while he noted she took an extensive history from Smith, obtaining a great deal of objective factual data, she did not explore issues that would show whether he had cognitive deficits. The Court agrees. For example, [**515] Dr. Hayes asked Smith to name the places where he had lived over the years, what jobs he had, and the names of his various siblings, but she did not question him about how he arranged for his lodgings, or how he found jobs, or how he managed his finances, or how he perceived various relationships, both familial and otherwise, other than to elicit the response that he was

close to his mother. ²³⁰

²²⁹ Rec. Doc. 1585 at 644.

²³⁰ *Id.* at 644-46; Deft. Exh. 5 at 18-19; Deft. Exh. 12 at 56.

Another reason Dr. [**88] Cunningham opined that Dr. Hayes assumed Smith's intellect to be normal was her use of multi-part compound questions. ²³¹ The Court again agrees that many of the questions would be difficult for a person with normal intelligence to answer. Dr. Cunningham illustrated this observation with reference to a portion of the video interview in which Dr. Hayes told Smith that, with reference to everyone in his family, she wanted to know their names, how old they are, when they were born, what their relationship was to him, what they did for a living, whether they had any mental health problems, or medical problems or substance abuse problems, and whether they had ever been jailed. ²³² She then said, "Let's...start off with...your mama and daddy, tell me about them." ²³³ He responded, "[w]hat do you want to know?" ²³⁴ The compound question had clearly gone over his head. ²³⁵ Eventually Dr. Hayes provided Smith with a "cheat-sheet" to remind him of the different data she wanted. ²³⁶ In her report, Dr. Hayes made no mention of Smith's difficulties with responding to these questions. ²³⁷ Instead, she testified that he was a "good conversationalist." ²³⁸ Dr. Swanson, on the other hand, testified persuasively [**89] that when she asked Smith something, she would break it down into simple steps, using simple language, and would ask it in more ways than one, to make sure he understood. ²³⁹ Dr. Hayes did not employ those precautions.

²³¹ Rec. Doc. 1585 at 646.

²³² Deft. Exh. 5 at 8.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Rec. Doc. 1585 at 646-47; Deft. Exh. 5 at 8. Other examples were given by Dr. Cunningham. Rec. Doc. 1585 at 647-49. *See also* Deft. Exh. 5 at 40-42.

²³⁶ Rec. Doc. 1585 at 648-49, 660-61; Deft. Exh. 5 at 21, 112.

²³⁷ Rec. Doc. 1585 at 649.

²³⁸ Rec. Doc. 1584 at 458, 649.

²³⁹ Rec. Doc. 1583 at 255.

A further shortcoming of the interview, according to Dr. Cunningham and with which the Court agrees, was Dr. Hayes' failure to acknowledge Smith's lack of

conciseness and clarity in some of his explanations, indicating disorganized thought.²⁴⁰ At one point, Smith said that he liked to play marbles when he was a child.²⁴¹ Dr. Hayes appropriately asked him to explain how the game is played. What followed was a convoluted description by Smith, with Dr. Hayes repeatedly asking him additional questions because the explanation was so unclear.²⁴² At the *Atkins* hearing, however, Dr. Hayes testified simply that Smith "gave her a fairly [**90] good description [*516] of how to play marbles."²⁴³ This was similar to Dr. Hayes' truncated rendition of whether Smith was able to define a "ship" already discussed under the IQ section of this opinion.²⁴⁴ A similarly jumbled explanation came when Smith was asked to explain welding and welding tools, which finally ended when Dr. Thompson stepped in to explain what Smith could not.²⁴⁵ The Court agrees with Dr. Cunningham that Smith's description of the one job he had intermittently for about eight years was "surprisingly disorganized."²⁴⁶ This is not mentioned in Dr. Hayes' accounting. On the other hand, Dr. Hayes did make a point of noting the things Smith was able to explain well, such as crawfishing, cleaning a bathtub, cooking smothered chicken and making a roux.²⁴⁷

²⁴⁰ Rec. Doc. 1585 at 655.

²⁴¹ Def. Exh. 5 at 46-48.

²⁴² *Id.* at 46-48. As Dr. Cunningham noted, "it takes him three pages to say you thumb one of your marbles at the ones that are in the ring and if it knocks it out you get to take that marble and you keep shooting until you miss." Rec. Doc. 1585 at 657.

²⁴³ Rec. Doc. 1584 at 470.

²⁴⁴ Def. Exh. 5 at 182.

²⁴⁵ *Id.* at 93-97.

²⁴⁶ Rec. Doc. 1585 at 752.

²⁴⁷ Rec. Doc. 1584 at 462, 467; Def. [**91] Exh. 5 at 82-83.

A significant criticism of Dr. Hayes' interview technique according to Dr. Cunningham, with which the Court also agrees, is that she failed to explore deficits that Smith himself clearly acknowledged.²⁴⁸ For example, Smith volunteered he had difficulty with English, spelling and math when he was in the Job Corps and as a result did not complete the program.²⁴⁹ Instead of probing to find out what specifically he was struggling with, which would be relevant to the Functional Academics prong of an adaptive behavior assessment, Dr.

Hayes only asked if he nonetheless received a certificate for welding, which he did not.²⁵⁰ Similarly, Smith relayed to Dr. Hayes a litany of problems he had in boot camp in the U.S. Navy with academic testing and "cloth folding," relevant to Functional Academics and Daily Living Skills, respectively, but she only asked him how long it took him to complete boot camp.²⁵¹ She also failed to investigate his determination to stay in the Navy despite all these difficulties.²⁵²

²⁴⁸ Rec. Doc. 1585 at 661-62; Def. Exh. 12 at 86-87.

²⁴⁹ Def. Exh. 5 at 66.

²⁵⁰ *Id.* at 66.

²⁵¹ *Id.* at 67-68.

²⁵² *Id.* at 69.

The Court finds some of Dr. Cunningham's criticisms [**92] were not well-founded. Dr. Cunningham criticized Dr. Hayes for using words that Smith did not appear to understand, but the Court found that Smith's answers were reasonably responsive to the questions, indicating he did understand.²⁵³ Likewise, Dr. Cunningham claimed that Dr. Hayes ignored deficits in Smith's specific knowledge, such as not knowing the name of a pill he was taking, when his father died or his father's age at his death, how far his parents went in school, and the year of the birth of his numerous siblings, among other gaps in his memory.²⁵⁴ The Court, on the other hand, finds these gaps in specific knowledge [*517] to be normal and unremarkable, and not indicative of any relevant deficit.

²⁵³ Dr. Hayes asked Smith if his father had "mental health problems or any difficulties with his nerves" and Smith related that his father and mother used to fight a lot. *Id.* at 10. Later, Dr. Hayes asked Smith if his mother had any mental health problems and specifically mentioned depression. Smith responded that his mother did some things she probably was not proud of, specifically infidelity. *Id.* at 15-16. Dr. Cunningham found these answers nonresponsive. The Court disagrees.

²⁵⁴ Rec. Doc. [**93] 1585 at 654; Def. Exh. 12 at 72-73.

Overall, the Court finds most of Dr. Cunningham's criticisms to be well-taken. In addition, the Court found other examples that even in the Court's admittedly lay opinion indicated cognitive problems that were

unmentioned in Dr. Hayes' report and her testimony. A discussion of them is incorporated into "Appendix B," attached to this opinion.

The Court concludes that Dr. Hayes, whether consciously or unconsciously, participated in the interview with a predisposition to find Smith not cognitively impaired. She overlooked significant indicators of deficits, while highlighting only his strengths. As a result, her report and testimony drawn from the interview did not give a full, accurate picture of Smith's mental abilities. This may reflect her relative inexperience in the mental retardation field, having only performed about 10 formal adaptive behavior evaluations in her career. As Dr. Swanson testified, Mild Mental Retardation is "one of the most difficult areas to diagnose."²⁵⁵

²⁵⁵ Rec. Doc. 1530, tab 3 at 617; Rec. Doc. 1536.

iii. Use of Correctional Officers as Respondents

Dr. Hayes had various correctional officers, at the jail where Smith was housed, ²⁵⁶ fill out the ABAS-II with respect to Smith's adaptive functioning. She acknowledged that their contact with Smith was limited, but nonetheless provided extensive examples of specific behavior of Smith purportedly observed by the officers. ²⁵⁶ Two correctional employees, Dr. Arthur Mauterer and Deputy Bobby Magee, both of the Tangipahoa Parish Jail, also testified at the *Atkins* hearing.

²⁵⁶ Govt. Exh. 42 at 28-43.

Dr. Swanson testified that the authors of the ABAS-II strongly recommend against using correctional officers as respondents. According to her, the primary reason is that adaptive behavior is supposed to be assessed in a "real community" where the person has to make his own choices, as opposed to a structured prison setting, where much of the inmate's daily life is scheduled by the institutional staff. ²⁵⁷ As stated in *Hardy*, "An institutional environment of any kind necessarily provides 'hidden supports' whereby the inmates are told when to get up, when to eat, when to bathe, and their movements are highly restricted." *Hardy*, 762 F.Supp.2d at 900. Dr. Swanson cited as an example the various prison forms provided to inmates, including forms for commissary items and forms to request ²⁵⁸ medical

attention. Included in the exhibits, for example, is a request by Smith for medical attention. ²⁵⁸ It asks for the inmate's name, location, various identifying data, date and time of the request and then provides two lines for "Nature of Complaint." Once filled out and turned in, the complaint is assessed by the medical personnel and action is taken, such as providing medicine to the inmate. As Dr. Swanson testified, this procedure is far different than someone sitting at home with a medical problem and trying to figure out what to do about it. ²⁵⁹ Yet it is the latter environment that is relevant to an evaluation of adaptive behavior. "Some ²⁶⁰ experts have argued in court that the structure and routine of prison life are well suited to many people with mental retardation and that they can become model prisoners and indistinguishable from the average inmate." ²⁶⁰ Dr. Hayes in her own listing of Smith's observed behaviors noted a number of examples of his ready acquiescence to the prison structure. ²⁶¹

²⁵⁷ Rec. Doc. 1583 at 217-18; Rec. Doc. 1584 at 399-400.

²⁵⁸ Govt. Exh. 27.

²⁵⁹ Rec. Doc. 1583 at 220; Rec. Doc. 1585 at 691-95. The same is true of the commissary form which lists numerous ²⁶⁰ items inmates can order divided into categories with the prices listed. Govt. Exh. 52. All the inmate has to do is fill in the dots corresponding to what they want and turn the form in. Rec. Doc. 1585 at 699-703.

²⁶⁰ J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part I*, PSYCHOL. IN MENTAL RETARDATION & DEV'L DISABILITIES, Vol. 32, No. 1 at 3 (2006); Govt. Art. 2 at 3; Rec. Doc. 1584 at 400.

²⁶¹ Govt. Exh. 42 at 31: "Correctional officers noted Mr. Smith reads and obeys signs....Mr. Smith follows the jail schedule without complaint;" *id.* at 42: "Correctional officers noted that when requested to do so, he stops whatever activity he is doing and goes to his cell without displaying any anger or untoward behavior."

Dr. Swanson also testified that correctional officers do not have the type of continuous contact with the offender that a caregiver would have, getting to know him well over a long period of time. They are there to enforce incarceration. ²⁶² They are also not trained to make assessments of adaptive behavior. ²⁶³ This is particularly relevant since Smith is a person who is not

alleged to even be moderately mentally retarded, but only mildly mentally retarded, [**97] and persons with Mild Mental Retardation "are generally able to fulfill all expected adult roles," ²⁶⁴ and "[w]ith appropriate supports...can usually live successfully in the community, either independently or in supervised settings." ²⁶⁵ These individuals often "pass" in the community, meaning neither their appearance or demeanor immediately cause others to be aware of their deficits. *Hardy*, 762 F.Supp.2d at 902. For example, Dr. Mauterer of the Tangipahoa Parish Jail testified about what jail officials did with "severely impaired" inmates, and he did not recall Smith being "tagged as anything other than normal." ²⁶⁶ In this case, the several psychologists, who *are* trained in making such assessments, disagree on what Smith's adaptive capabilities are. Prison guards can hardly be expected to be able to make that determination. Furthermore, as was noted in *Hardy*, "prison officers' observations are limited to an extremely unusual set of circumstances, and are likely to be filtered through their experience with other prisoners, many of whom may also suffer from intellectual limitations." *Hardy*, 762 F.Supp.2d at 900. A further shortcoming relating to the use of prison personnel as respondents [**98] is the bias they might have, as law enforcement officers, against a criminal, a bias which Dr. Hayes acknowledged was "certainly possible." ²⁶⁷

²⁶² Rec. Doc. 1584 at 400-01.

²⁶³ Rec. Doc. 1583 at 219.

²⁶⁴ APA MANUAL at 17-18.

²⁶⁵ DSM-IV-TR at 43.

²⁶⁶ Rec. Doc. 1585 at 695-96.

²⁶⁷ Rec. Doc. 1584 at 541.

A final difficulty with the use of correctional officers as respondents is the fact that they are observing Smith in his 50's and not at age 17, which is the age focused upon by Smith's family members with Dr. Swanson and is the age relevant to an assessment of mental retardation. The important issue of *when* a skill is learned is ignored by the use of these correctional officers as respondents. The mildly mentally retarded tellingly used to be labeled "educable," ²⁶⁸ meaning skills could in fact be learned, eventually. Dr. Swanson testified that seeing a strength in a person as an adult is insufficient without answers as to when he learned it, whether it was [**519] contemporaneous with same-age peers, how long it took to learn it and how much support had to be provided. "Not seeing a deficit at 26 doesn't mean maybe there

wasn't a deficit earlier developmentally..." ²⁶⁹ Likewise, seeing strengths at 55 [**99] or older, does not mean that relevant deficits were not present during the developmental period.

²⁶⁸ DSM-IV-TR at 43.

²⁶⁹ Rec. Doc. 1530, Tab 5 at 624, 667; Rec. Doc. 1536.

Dr. Hayes agreed with Dr. Swanson that the authors of the ABAS-II indicate that it should not be used in a correctional setting, but testified that she still "used it as a guide for an interview and to make summary statements." ²⁷⁰ Dr. Hayes provided a long list of observed behaviors by the correctional officers as support for the finding that Smith is not mentally retarded. ²⁷¹ Persons with Mild Mental Retardation clearly have strengths as well as weaknesses, allowing most of them to live in society. ²⁷² As Dr. Swanson persuasively testified, many of the behaviors Dr. Hayes listed are well within the capabilities of a person with Mild Mental Retardation, particularly someone with Smith's verbal ability. ²⁷³ In *Wiley*, the state argued that the defendant could not be found to be mentally retarded because he "often provided money to help pay household bills, possessed skill repairing vehicles and frequently helped friends and neighbors with auto repairs, provided transportation for others, volunteered for military service, [**100] and was a reliable worker who quit school to go to work to provide for his family." *Wiley*, 625 F.3d at 217. The Fifth Circuit rejected that argument, noting that several of the expert witnesses testified that mentally retarded people can in fact perform all of those functions.

²⁷⁰ Rec. Doc. 1584 at 543-44.

²⁷¹ Govt. Exh. 42.

²⁷² AAIDD 11TH EDITION AT 7; AAMR 10TH EDITION AT 13; USER'S GUIDE at 3.

²⁷³ Rec. Doc. 1583 at 221.

The vast majority of Dr. Hayes' findings regarding the correctional officers' observations of Smith's behavior fall into the category of behaviors that a mildly mentally retarded person can readily perform, and therefore are irrelevant to the ultimate determination here. A significant portion of the remaining behaviors are those which the penal institution itself provides substantial structure and support, hence, are not indicative of how Smith would have functioned in the community at large, which is the only relevant environment. Those observations are likewise irrelevant to the issue

presented. Finally, the correctional officers are simply not qualified to assess an additional number of reported observed behaviors as being either within or outside the range of mental retardation. [**101] Those observations must also be disregarded. Those specific behaviors and which of the three categories the Court concludes they fall are listed in "Appendix C," attached to this opinion.

iv. Drug Use and Brain Injury/ Truancy

Dr. Hayes also suggested that Smith's poor adaptive behavior and intellectual functioning throughout his life was caused or affected by his drug use. ²⁷⁴ Smith admitted to abusing drugs since the approximate age of 10, when he began sniffing glue. ²⁷⁵ Dr. Hayes candidly admits that "[t]he literature is emerging in the area, and it appears that neuropsychological [*520] functioning appears to be impaired when individuals are intoxicated and/or are regularly using heroin," but that "[w]hat is unclear is the long-term impact of heroin dependence on intellectual functioning following a significant period of sobriety (i.e., years vs. months)." ²⁷⁶

²⁷⁴ Rec. Doc. 1584 at 516.

²⁷⁵ *Id.* at 346, 440, 489; Govt. Exh. 42 at 27, 45.

²⁷⁶ Govt. Exh. 42 at 27.

Again, Dr. Gouvier examined Smith for neuropsychological problems relative to drug abuse and brain injury, and did not testify. According to Dr. Swanson, however, Dr. Gouvier did not find brain injury in relation to substance abuse by [**102] Smith. ²⁷⁷

²⁷⁷ Rec. Doc. 1583 at 143.

Smith indicated to Dr. Hayes that it was not until after his service in the Navy that he became involved with drugs heavier than marijuana, and more specifically, heroin. ²⁷⁸ By his own admission, Smith went through periods of heroin addiction and sobriety. ²⁷⁹ On at least one occasion, he lost potential employment at a shipyard because he failed the drug test. ²⁸⁰ Smith also said that when he was off the drugs, his mind would return to normal. ²⁸¹

²⁷⁸ Deft. Exh. 5 at 116-21, 163-66.

²⁷⁹ *Id.* at 167-68.

²⁸⁰ *Id.* at 129-30.

²⁸¹ *Id.* at 169.

By virtue of the evaluation by Dr. Gouvier, the

possibility of brain injury from drug use was considered, yet no evidence of its existence was actually presented at the hearing either by the defense or the government. As a result, the suggestion that Smith's adaptive deficits, or intellectual functioning, were caused or diminished by drugs and were not developmental in nature is entirely speculative.

5. School, Job Corps, U.S. Navy, Employment Records

The next task relevant to the assessment of adaptive behavior involves a review of school, work and other records for data that can corroborate or refute a finding of Mild Mental [**103] Retardation. ²⁸²

²⁸² Some of these facts were referenced with regard to the Court's finding of significant subaverage intellectual functioning. They are discussed here in connection with the second prong of the mental retardation test, substantial deficits in adaptive behavior.

i. Elementary and High School

Smith attended Murray Henderson Elementary School in New Orleans. ²⁸³ No records were introduced from that particular school, so the only available information comes from Smith's self-report to Dr. Hayes contained in the videoed interview lasting over five hours. ²⁸⁴ The Court has viewed the interview on several occasions and finds Smith to have been forthcoming and credible. Dr. Hayes also testified that she found him cooperative and consistent in what he told her. ²⁸⁵

²⁸³ Deft. Exh. 6.

²⁸⁴ Govt. Exh. 42.

²⁸⁵ Rec. Doc. 1584 at 501, 511-12.

Smith stated that he entered Henderson at six years old, failed 1st grade and was held back a year. ²⁸⁶ He told Dr. Hayes that he regularly attended "special classes" for students who were "slower" and that he needed the extra help. ²⁸⁷ He attended these special classes throughout most of elementary school. ²⁸⁸ He specified [*521] problems with reading and spelling. [**104] ²⁸⁹

²⁸⁶ Deft. Exh. 5 at 86-87260-61. This is substantiated by the fact that Smith ultimately graduated from high school at the age of 20, after repeating the 12th grade as well. Deft. Exh. 6 at 361, 362, 367.

287 Def. Exh. 5 at 84-85.

288 *Id.* at 85-86.

289 *Id.* at 86.

After 6th grade at Henderson, Smith attended L. B. Landry, which was a combined junior and senior high school.²⁹⁰ He testified that Landry did not have special classes. When asked by Dr. Hayes how he performed at Landry, he said:

I had trouble in school, I...I was always...it was hard for me...to learn...I was slow. I needed...I needed extra help...the teachers would, I mean, the classes were so big and, you know, the teachers would give you instructions and it was one time instruction, if you didn't get it you was on your own, if you needed somebody to help you...or...test time come.²⁹¹

I always had difficulties with...school period, you know, from, you know, I was always...I was always slow about comprehending,...you know, I would have to, in order for me to be able to...to pass certain tests I would need extra time or help or...yes.²⁹²

290 *Id.* at 86.

291 *Id.* at 87.

292 *Id.* at 87.

Smith stated that while he did not fail any other [**105] full grades, he did fail specific courses, like English and math. He was able to pass in "hands-on" type classes, like wood making and the metal shop.²⁹³

293 *Id.* at 87.

Smith did nevertheless graduate from Landry High School in 1971 at the age of 20.²⁹⁴ To pass a class at Landry, the student had to achieve a minimum score of 70.²⁹⁵ Smith's overall average was 70.89, which was barely passing and placing him 159th out of a class of 174, 15th from the bottom of the class.²⁹⁶

294 Def. Exh. 6 at 367.

295 *Id.* at 370 (bottom).

296 *Id.* at 367.

While Smith did not officially fail any other grade besides 1st grade, he did technically fail the 7th grade but was nonetheless promoted to the 8th grade. His 7th grade report card shows that he failed by scoring less than 70 in math, two reading classes and music. He had a barely passing grade of 70 in English and a 71 for physical education. His final overall average for that year was a below passing 67.²⁹⁷ School records also show that Smith was heading to failure in 12th grade before he dropped out of Landry in late March, 1970. His overall average when he withdrew was a 63.²⁹⁸

297 *Id.* at 368.

298 *Id.* at 361.

Smith eventually did graduate from Landry. The [**106] fact that he did so despite a significant number of days being absent or tardy,²⁹⁹ was "remarkable" according to Dr. Swanson's testimony.³⁰⁰ His scores were barely passing, raising the question naturally whether a student with Mild Mental Retardation could have achieved these grades. Dr. Hayes testified that it was "possible" but not "probable."³⁰¹

299 *Id.* at 368, 369, 361-62.

300 Rec. Doc. 1584 at 328.

301 *Id.* at 441.

Smith's younger sister, Patricia, told Dr. Swanson that she helped Smith with his homework when he was in high school.³⁰² Even though Patricia was still in elementary school, and Smith was in high school at the time, Dr. Swanson surmised that Smith was functioning at a grade school level, comparable to Patricia.³⁰³ Smith [**522] likewise told Dr. Swanson that his siblings helped him with schoolwork and that friends would let him cheat off of their exams.³⁰⁴ Even assuming he had such assistance, his scores were not good.

302 *Id.* at 313, 382.

303 *Id.* at 382-83.

304 Def. Exh. 1 at 1.

Other evidence indicates that Landry was not a school that challenged its students. After Smith dropped out of the 12th grade, at the age of 19, he joined Job Corps. As part of their admission process, he [**107] was academically tested. He scored at the 3.1 grade level in reading and 4.3 grade level in math.³⁰⁵ He ultimately

left the Job Corps and returned to Landry in 1970 to repeat the 12th grade, this time successfully.³⁰⁶ Dr. Cunningham noted that for someone with a 3rd grade reading level to then graduate from the 12th grade of a high school, all while missing many classes, "speaks volumes about the nature of what a high school graduation means from that high school."³⁰⁷ Dr. Hayes likewise conceded that his having graduated despite all his absences could indicate "how bad the school was."³⁰⁸

305 Deft. Exh. 7 at 436.

306 Smith attended four of the six grading periods of 12th grade at Landry in 1969-70, with some days absent, before withdrawing. He subsequently attended 12th grade in Compton, California, for some period of time, before returning to Landry. Deft. Exh. 5 at 120. Therefore, when he returned to Landry he had had a lot of experience with the 12th grade.

307 Rec. Doc. 1585 at 669. Dr. Swanson testified, based on information from one of the Landry 7th grade teachers at the time, that 7th grade math consisted primarily of only addition, subtraction, multiplication, division, indicating [**108] a watered-down curriculum. Rec. Doc. 1584 at 329-30.

308 Rec. Doc. 1584 at 441.

Dr. Hayes cited a number of studies involving just African-American adults that showed they scored very poorly on various literacy type tests,³⁰⁹ the point being presumably that not all these poor performers were in fact mentally retarded.³¹⁰ That is undoubtedly true, of course, but more significantly, the various studies cited by Dr. Hayes are illustrative of the poor quality of education that these African-Americans received from the public school system. The Court agrees with Dr. Cunningham that the studies illustrate a pattern of social promotion or a watered-down curriculum which allowed those with 3rd or 4th grade literacy to continue to advance.³¹¹ In fact, when asked specifically if she found it anomalous that someone could graduate high school when his actual achievement level is at the 3rd grade level, Dr. Hayes said it would be "unusual but it's not that unusual." She cited police officers that she has screened who read at the 3rd grade level, and even some students in junior college who read at that level.³¹² At a minimum, Dr. Hayes had to concede, in light of what she was saying, that one [**109] interpretation of Smith's successful graduation is that he was simply socially

promoted, without really earning the degree.³¹³

309 *Id.* at 434-39.

310 *Id.* at 439.

311 Rec. Doc. 1585 at 669.

312 *Id.* at 567.

313 *Id.* at 567. Dr. Hayes also presented data showing graduation rates from high schools in Louisiana a few years after Smith graduated. It showed that roughly two-thirds of students graduated, placing Smith at better than a third of the students starting in high school. Rec. Doc. 1584 at 442-43. She acknowledged these were statewide statistics, that she had no information on Landry itself, its graduation rate, nor its social promotion policy. *Id.* at 552-53.

When Smith was in the 7th grade, he took the Metropolitan Achievement Test.³¹⁴ [**523] Unfortunately, it is not known whether his comparative scores were national, statewide or citywide. Dr. Swanson speculated that they were citywide, as his scores were higher than she would have expected,³¹⁵ considering that he had actually failed 7th grade although promoted, and considering also his Otis Beta IQ scores the same year, which placed him in the mildly mentally retarded range.³¹⁶ Nevertheless, she testified that his score at the 1st percentile in [**110] spelling and the 2nd percentile in language are consistent with Mild Mental Retardation, and that the three scores in the 3rd percentile (word knowledge, reading and language study skills) were also quite low. At the same time, Smith did better in arithmetic, scoring in the 21st and 24th percentiles respectively in those categories. Dr. Swanson stated that these records, including standardized scores and grades, supported a finding that his Functional Academic skills were low.³¹⁷

314 Deft. Exh. 6 at 363.

315 Dr. Swanson indicated that the citywide norms are the least competitive of the three sets of norms, so his rankings would be inflated as a result, as compared to a national norm. In *Hardy*, Dr. Hayes acknowledged the same phenomena with respect to another similar achievement test. *762 F. Supp. 2d at 908.*

316 Rec. Doc. 1583 at 94-95, 323-24.

317 *Id.* at 139. Functional Academics is one of the subscore categories cited by the APA. DSM-IV-TR at 49. These records have already

been discussed with regard to the Court's finding of significant subaverage intellectual functioning. The records are found to be equally supportive of subaverage functioning with regard to any overlapping adaptive functioning [**111] domain.

Dr. Hayes likewise cited the Metropolitan Achievement Test scores. She again made a questionable conversion of those scores to an IQ score. Smith's highest score was in the 5th percentile, which she analogized to an IQ of 75.³¹⁸ The Court does not consider it appropriate to compare a MAT score with an IQ score, but were the Court to use Dr. Hayes' analogy, then Smith would be in the Mild Mental Retardation range, considering the standard error of measurement. It is also noteworthy that Smith scored in the 5th percentile in only two of the seven Metropolitan Achievement tests - in the other five his scores were lower which would clearly place him in the mildly retarded range, again using her own analysis.

318 Rec. Doc. 1584 at 433.

An arguably more accurate assessment of Smith's knowledge was Dr. Gouvier's administration of the Test of Adolescent and Adult Language ("TOAL- 3") to Smith in May 2007. Smith's scores were below the 1st percentile in three categories: speaking, reading and writing grammar, at the 1st percentile in listening and writing vocabulary, at the 2nd percentile in speaking vocabulary, at the 9th percentile in listening grammar and at the 25th percentile in reading [**112] vocabulary, providing the only relatively positive score.³¹⁹

319 Rec. Doc. 1583 at 140-41.

The Court concludes that Smith's school records, plus Dr. Gouvier's TOAL-3 testing, are consistent with a diagnosis of Mild Mental Retardation. The DSM-IV-TR states that mildly mentally retarded individuals can acquire academic skills up to about the 6th grade level³²⁰ and the APA's Division 33 similarly states that for the mildly mentally retarded, "(r)eading and numbers skills will range from 1st to 6th grade level."³²¹ Smith appears to have peaked at around the 5th grade level.³²² The Court also finds that Smith's graduation [**524] from Landry High School failed to establish that he achieved, in fact, a 12th grade education. Rather, the evidence instead supports the finding that Landry had an anemic curriculum and a practice of social promotion, which

masked the deficits and academic shortcomings of its students.

320 DSM-IV-TR at 43.

321 APA MANUAL at 17-19.

322 Def. Exh. 7 at 436; Rec. Doc. 1583 at 80-81, 382-83.

Other factors support the finding of Mild Mental Retardation. Smith showed determination to complete his schooling, despite his marginal grades and periodic setbacks. Even after dropping out [**113] of Landry, and then dropping out of the Job Corps program, he nonetheless returned to Landry in the fall of 1970 and graduated as the age of 20 in 1971.³²³ The Court concludes that Smith's struggles were not through lack of effort. He persisted in trying to achieve, but consistently fell short. The most plausible explanation is simple lack of ability to compete at the levels he sought. He would repeat this pattern later in the Job Corps, in the U.S. Navy and in his work history.

323 See also Rec. Doc. 1584 at 327.

In addition, despite his difficulties with school, Smith indicated he got along with the other students and teachers,³²⁴ and other than absences and tardiness, his school records do not indicate otherwise. While he did not get the academic help he truly needed, school was an environment that provided at least some structure that aided his progress. As the DSM-IV-TR advises, persons with Mild Mental Retardation can succeed "(w)ith appropriate supports."³²⁵

324 Def. Exh. 5 at 88.

325 DSM-IV-TR at 43.

Smith also recounted to Dr. Hayes an experience of allowing himself to be sexually molested by a homosexual algebra teacher, Mr. Richardson, in the 11th grade, in exchange for a better [**114] grade.³²⁶ While Dr. Hayes expressed some skepticism over whether this occurred,³²⁷ it is difficult to imagine Smith making up such an event. Smith would have been 18 years old at the time. According to the AAIDD 11TH EDITION, persons with intellectual disabilities "typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding."³²⁸ His report card for that algebra class shows he was failing until the 6th grading period, which showed a spike to a startling score of 90, lending further support to his recollection of

molestation.³²⁹ The score of 90 allowed him to pass the class for the semester.

326 Deft. Exh. 5 at 98.

327 Rec. Doc. 1584 at 553-54. Dr. Swanson testified to having reviewed an affidavit from another teacher who was at the school at that time and confirmed that Mr. Richardson was rumored to be involved in such behavior with other students. *Id.* at 330. The Court considers this reliable corroborative information, despite its hearsay nature.

328 AAIDD, 11TH EDITION at 51-52.

329 Deft. Exh. 6 at 361.

Finally, Smith did not participate in any extracurricular activities, was not involved in athletics or clubs, and received no honors [**115] or awards.³³⁰ As the Supreme Court noted in *Atkins*, mentally retarded people "in group settings...are followers rather than leaders." *Atkins*, 536 U.S. at 318.

330 Deft. Exh. 5 at 88-89.

All things considered, the Court finds, by a preponderance of the evidence, that all the data from Smith's elementary, middle and high school career support a finding of Mild Mental Retardation.

ii. Job Corps

In March 1970, when he was 19 years [*525] old, Smith enrolled in the Job Corps.³³¹ As already noted, he was academically tested and scored at the 3.1 grade level in reading, and at the 4.3 grade level in math. His records indicated he could add, subtract, multiply and divide whole numbers and that "[h]is progress, attendance, and attitude are good, except in math where his progress and attendance are poor."³³² Dr. Swanson's math probes with Smith yielded results consistent with a math capability at the 4th grade level, indicating Smith had not advanced in the ensuing decades.³³³

331 Deft. Exh. 7 at 386.

332 *Id.* at 436.

333 Rec. Doc. 1583 at 80-81.

Smith studied welding while in the Job Corps. His progress was slow at best. The Job Corps evaluated corpsmen by a three code system. "Level L" was "Limited Skill," [**116] which was described as able to

do simple tasks but needing instruction or supervision for more complex tasks. "Level M" was "Moderate Skill," which was described as able to competently perform with limited supervision but still may need help on more complicated tasks. "Level S" is "Skilled," which is defined as able to work independently and meet the demands of speed and accuracy on the job.³³⁴ In the 33 welding categories in which Smith was rated, after 114 hours of training, Smith scored an "S" in none. Most of his scores were at the "L" or lowest level, the remainder at "M."³³⁵ Dr. Swanson found that this record supported her conclusion as to poor adaptive functioning regarding Work Skills.³³⁶

334 Deft. Exh. 7 at 387.

335 *Id.*; see also Rec. Doc. 1583 at 110.

336 Rec. Doc. 1583 at 109-11. Work Skills are a subscore category of the APA's list of adaptive behaviors relevant to a diagnosis of mental retardation. DSM-IV-TR at 41.

Smith told Dr. Swanson that he dropped out of the Job Corps because he could not meet the academic requirements.³³⁷ Apparently part of the program, since he had not graduated high school, was to attend G.E.D. classes. Smith told Dr. Hayes that he could not pass [**117] math, English and spelling, so he did not finish the program.³³⁸ Smith also had attendance and attention problems. He was assessed demerits on several occasions for sleeping in class, or not showing up for class at all, including one absence because he was in jail.³³⁹ Dr. Swanson testified that this sort of irresponsible behavior is consistent with Mild Mental Retardation: "there are certain things we may not do well when we're 13 or 14, but it's expected in our culture that by the time we enter adulthood, we understand the importance of these things and we start doing them. And he had not understood -- he was not doing them at that point..."³⁴⁰

337 Rec. Doc. 1584 at 320.

338 Deft. Exh. 7 at 436, box 24; Deft. Exh. 5 at 66.

339 Deft. Exh. 7 at 400-04.

340 Rec. Doc. 1584 at 388.

The Court concludes that Smith's Job Corps experience is consistent with a person with Mild Mental Retardation. He entered the program at 19 years of age, performing only at a 3rd and 4th grade level. He began with a good attitude and effort, but was slow to master even the basics of welding, needing additional instruction

and supervision. He also struggled with the academic requirements of the G.E.D. program. Eventually, [**118] he stopped regularly attending class and was administratively discharged.

[*526] This was a pattern that repeated itself again when, after high school graduation, Smith entered the U.S. Navy.

ii. U.S. Navy

Joseph Smith enlisted in the Navy in July, 1971. As part of the qualification process he took a number of tests. Smith told Dr. Hayes that the recruiter gave him a multiple choice test, which he thought he failed three times before finally passing.³⁴¹ Perhaps this was the initial test, the Armed Forces Qualification Test. According to Dr. Hayes, that test is a measure of general ability and covers verbal ability, arithmetic reasoning, spatial relations and tool functions.³⁴² When Smith finally passed, he scored in the 17th percentile on that test, indicating that 83% of the people taking the test scored better than he did.³⁴³

341 Deft. Exh. 5 at 67. Dr. Hayes did not find that Smith malingered or "dummied down" during her lengthy interview with him. She testified that she did not catch him in any lies, that his responses were consistent with his history, and what she thought were his expected levels of functioning. Rec. Doc. 1584 at 511-12. The Court has likewise viewed the entire recorded [**119] interview and finds, as already noted, Smith to be cooperative and candid in his responses.

342 Govt. Exh. 42 at 22.

343 Govt. Exh. 4.

Dr. Swanson testified that the military divided potential inductees into five categories, with the fifth being those who score in the 1st to 9th percentile and are not admitted.³⁴⁴ Dr. Hayes concurred.³⁴⁵ Dr. Cunningham testified that Smith fell into the fourth category which would be consistent with an intellect at least in the borderline range, with intellectual abilities significantly deficient as compared to the other servicemen.³⁴⁶

344 Rec. Doc. 1583 at 152.

345 Rec. Doc. 1584 at 557.

346 Rec. Doc. 1585 at 760-62.

The Navy Applicant Qualification Test, according to Dr. Hayes, measures vocabulary, arithmetic and spatial relations.³⁴⁷ Smith's score was in the 28th percentile on that test, indicating that 72% of the Navy applicants did better than him.

347 Govt. Exh. 42 at 22.

The General Classification Test, according to Dr. Hayes, consists of verbal analogies and sentence completion items.³⁴⁸ As already noted in the earlier section on IQ, Dr. Swanson testified that the GCT is not an IQ test but it does highly correlate with IQ scores.³⁴⁹ Dr. Swanson testified [**120] that the mean of the test is 50 (as compared to 100 for an IQ test), with a standard deviation ranging from 7.5 to 10, depending on which the military was using at the time. This would place Smith's score at least one "and probably two" standard deviations below the mean.³⁵⁰ Two standard deviations below the mean on an IQ test is in the Mild Mental Retardation range. Dr. Swanson also noted that Smith's score on a separate arithmetic test was a 39, which was also low.³⁵¹ The military records themselves rank the scores on the GCT and the arithmetic score from 1-5, with 1 being high, 3 being average and 5 being low. Smith's GCT score of 5 was at the bottom rung or "low," and his arithmetic score of 4 was "below average."³⁵²

348 *Id.*

349 Rec. Doc. 1583 at 150, 153.

350 *Id.* at 150-51.

351 *Id.* at 150-51.

352 Govt. Exh. 6.

In Dr. Hayes' expert report, she declared that none of Smith's military test scores were in "the mentally retarded [*527] range," as if *all* the tests purported to measure IQ, which even she had to concede they did not.³⁵³ While the GCT result appears to be the only one arguably analogous to an IQ score, Dr. Hayes not only converted that score to an IQ score of 75, but took the highly [**121] questionable step of analogizing *all* of Smith's military test scores to IQ tests.³⁵⁴ She testified that Smith's 17% percentile rank on the Armed Forces Qualification Test "equated...on the same metric as an IQ of 100" as comparable to an IQ of 85 or 86, and that his score on the Navy Applicant Qualification Test was similarly analogous to an IQ of 91 or 92.³⁵⁵ She even converted his score on a Sonar Pitch Memory Test into an IQ of 91 and a Radio Code Aptitude Test into an IQ of 94.³⁵⁶ No testimony was presented at all as to how any

of these particular tests in fact correlate with IQ, if any do at all. Indeed, it is difficult to fathom how a sonar pitch memory test can be a measure of innate intelligence, other than peripherally on the quality of one's memory. On cross-examination, Dr. Hayes backtracked from saying she "inferred" an IQ result from the sonar test, claimed that she was not declaring his IQ was 91, but she was simply reporting "data" and a "standard score."³⁵⁷ She also conceded that she had not actually seen any of these military tests, hence did not know their content, and did not know what the mean or standard deviation or margin of error was on any of the tests. [**122]³⁵⁸ Noteworthy too is that those enlisting in the military may not be representative of the entire population and the range of intellectual ability. The Court finds Dr. Hayes' casual comparisons of these various military tests to an "IQ" to be highly inappropriate, misleading and unscientifically based, hence, unworthy of any credence.

353 Rec. Doc. 1584 at 445.

354 *Id.* at 443-45.

355 *Id.* at 443.

356 *Id.* at 444-45.

357 *Id.* at 554-57.

358 *Id.* at 556-57.

Once in the military, Smith immediately began to have difficulties. He related to Dr. Swanson that he failed the first boot camp in part because he did not master bed-making, failed the second boot camp in part because he did not store his clothes correctly or appear properly in uniform and failed the third boot camp because of academics.³⁵⁹ He relayed likewise to Dr. Hayes that he failed basic training three times.³⁶⁰ One of the tests he failed was clothes folding and the Navy eventually put him in a clothes folding company "so I was able to get that down."³⁶¹ He still struggled with the "school part."³⁶² Smith and another sailor were having difficulty with the written tests, so another sailor helped them with a study guide and finally Smith [**123] was able to pass the academic test and graduate from boot camp.³⁶³ Smith estimated it took him as long as "like, two, well, four, two, three, three, four months or something" to make it through boot camp, which, according to Smith, ordinarily takes six to eight weeks.³⁶⁴ The Navy at that point even offered to release him from military, with benefits, but he wanted to stay in the Navy.³⁶⁵ Dr. Swanson observed [**528] how motivated Smith had to have been to stay in the Navy despite all these initial and frustrating setbacks.³⁶⁶

359 Rec. Doc. 1583 at 154.

360 Def. Exh. 5 at 67.

361 *Id.* at 67-68.

362 *Id.* at 67.

363 *Id.* at 68.

364 *Id.* at 67-68. It took Smith slightly less than three months to complete boot camp. Govt. Exh. 7 at 22.

365 Def. Exh. 5 at 68-69.

366 Rec. Doc. 1583 at 154-55.

He then went to Tennessee for Fleet Preparatory School but, in October 1971, failed to advance to AIRMAN because he did not successfully complete all the requirements of AIRMAN/BMR.³⁶⁷ In March 1972, he was evaluated for the first time and received a below average mark in Professional Performance on the basis that he "is content to follow and not to exert any individual attention to a project at hand."³⁶⁸ Again, mentally [**124] retarded individuals are "followers rather than leaders." *Atkins*, 536 U.S. at 318.

367 Govt. Exh. 7 at 21; Def. Exh. 5 at 69. There appears to be a contradiction in the records as Govt. Exh. 7 at 47 indicates Smith received a mark of "Satisfactory" and graduated from Aviation Fleet Preparatory Class in October 1971. Dr. Hayes in fact cited this in her report as an indication that Smith was "inconsistently" reporting his history. Govt. Exh. 42 at 19. Dr. Swanson surmised that he passed the four week requirement but not with a high enough score to move up a grade. Rec. Doc. 1583 at 155. Smith graduated but was still not able to advance to a higher level. Hence he was not being inconsistent in what he told Dr. Hayes.

368 Govt. Exh. 7 at 20.

Smith did however, in the same month, become qualified as a Plane Captain.³⁶⁹ Dr. Hayes researched what that entailed and surmised that he worked on exterior aircraft maintenance, although not on the actual mechanics of the plane.³⁷⁰ Smith himself told Dr. Hayes that he checked the planes for fuel leaks, checked the tires and put the ladder up for the pilot to climb aboard and then "hook him up."³⁷¹

369 *Id.* at 19.

370 Rec. Doc. 1584 at 483.

371 Def. Exh. [**125] 5 at 89-90, 000263-64.

Over the succeeding months, Smith had recurring problems with simple and basic responsibilities--such as showing up on time for his assigned duties,³⁷² and staying awake when he was on duty.³⁷³ This was a recurrence of the problems he experienced in the Job Corps. In September 1972, he received a below average mark of 2.0 in Military Behavior on the basis that even though he was a well qualified plane captain, "he lacks motivation, initiative, and confidence."³⁷⁴ The report also criticized Smith for being disinterested in his daily tasks, flaunting authority and being unwilling to accept his responsibilities. Slightly over a month later, he received below average marks in Professional Performance and Adaptability for being continuously late to work, with little or no excuse, for taking the easiest method of completing his assigned tasks and needing constant reminders of the job to be done.³⁷⁵ His negative attitude towards the military was also noted.³⁷⁶ It appears at that point he was demoted as well to an inferior pay grade and rank, losing his Plane Captain status.³⁷⁷

372 Govt. Exh. 7 at 19; *see also id.* at 18, 35, 40.

373 *Id.* at 37.

374 *Id.* at 18.

375 *Id.* at 17.

376 *Id.*

377 *Id.* at 40; [**126] *see also* Rec. Doc. 1583 at 146-47.

Smith did apparently have one brief hiatus where he performed well, through the direct intervention of a Navy Boatswain Mate Chief Glen Patton. Patton was aware of Smith's disciplinary problems and requested that Smith work in his squadron as a compartment cleaner, apparently around September 1972.³⁷⁸ Smith worked [**529] for Patton for around three months. Obviously Patton was supportive, providing structure and accommodation. Smith responded in a positive way, doing his job well, creating no problems and significantly improving his attitude.³⁷⁹

378 Govt. Exh. 7 at 83.

379 *Id.*

One of Smith's diversions when he was in the U.S. Navy was gambling, specifically shooting dice. He would let the losers borrow from him until the next payday, but charged a quarter for every dollar borrowed. While the government characterized this as earning 25% interest per week, Smith simply explained it as receiving a quarter on

the dollar.³⁸⁰ Dr. Hayes and Dr. Swanson understood the arrangement the same way.³⁸¹ Dr. Swanson opined that he did not have the math skills to understand the concept of interest but he did have enough skills to concretely determine what he was owed. He would [**127] do so apparently by laying out the money, dollar by dollar, with a quarter alongside each one.³⁸² While the Court concurs that Smith did not have the math skills to comprehend interest rates, it was a strength of his that he was able to create his own method to keep track of what he was owed.

380 Deft. Exh. 5 at 71.

381 Rec. Doc. 1584 at 412, 270.

382 Rec. Doc. 1583 at 271.

One of the debts he was owed ultimately led to his discharge from the U.S. Navy. Someone failed to pay Smith back the money owed from gambling, so Smith stole the stereo system from his room.³⁸³ He was charged with both wrongful appropriation and threatening the same person with harm and was convicted of the first charge, acquitted of the second. Based on this final straw, so to speak, Smith was then processed out of the Navy for "Unfitness" but with an Honorable Discharge.³⁸⁴ He was not recommended for reenlistment.³⁸⁵

383 Deft. Exh. 5 at 71-72.

384 Govt. Exh. 3.

385 Govt. Exh. 7 at 14.

According to Dr. Swanson, the U.S. Navy records were consistent with a person who has Mild Mental Retardation and consistent with his demonstrated Functional Academic Skills.³⁸⁶ The Court agrees. Dr. Swanson noted Smith's extended stay in [**128] boot camp, and how the skills he was having difficulty mastering, at 20 years old, were basic practical Self-Care Skills-making a bed, keeping your clothes clean, neat and folded.³⁸⁷ In addition to these deficits, he consistently struggled with the academic requirements. As Dr. Swanson testified, a mildly mentally retarded person can eventually master a skill, but needs more repetitions, taking a longer period of time to do so.³⁸⁸ She also cited the October 1972, critique from Smith's superior officer for arriving to work late, having to be reminded to get to work and taking the easiest way to complete a task, all of which, according to Dr. Swanson, were relevant to deficient adaptive behavior receptive skills, the ability to understand and to follow instructions.³⁸⁹

386 Rec. Doc. 1583 at 175-76.

387 *Id.* at 85-86; Deft. Exh. 1 at 1.

388 Rec. Doc. 1584 at 389.

389 Rec. Doc. 1583 at 145-46.

Dr. Hayes, on the other hand, concluded that Smith's difficulties were not related to mental retardation, noting that one supervisor indicated he was a well-qualified Plane Captain.³⁹⁰ However, as she herself determined, being a Plane Captain did not [*530] involve difficult tasks. His tenure as a Plane Captain [**129] was not a long one before he was demoted to a lesser grade. Dr. Hayes also pointed out that Smith completed a defensive driving course and portable fire extinguisher training. The Court notes that the each training lasted only one day, indicating a rudimentary class, not difficult to complete.³⁹¹ Smith's former Navy attorney, Howard Abbott, testified at the *Atkins* hearing that Smith's low GCT/ARI score would have limited the jobs he could strive for in the Navy and that what ultimately happened to him in the Navy was in keeping with those scores.³⁹²

390 Rec. Doc. 1584 at 485.

391 Govt. Exh. 7 at 26.

392 Rec. Doc. 1586 at 810.

The Court concludes that Smith's military failures are more indicative of Mild Mental Retardation than simply discipline issues. His repeated failure to pass even the initial examination, his low marks on the GCT test, and his having to repeat boot camp three times for not mastering basic domestic and self-care skills, all indicate an initially motivated person who simply could not make the grade. His failures began to mount and he eventually turned hostile to the entire military experience, with the exception of working for several months under Boatswain Patton, who [**130] took the initiative of bringing Smith into his squadron and may have provided him with encouragement. This underscores that Smith had the desire to succeed, but simply could not absent significant supports. Even at the end of his service, he fought a dishonorable discharge and, ironically, it was an argument by his attorney that Smith had "limited capability to make value judgments as indicated by his low GCT/ARI scores" that may have won him his general discharge under honorable conditions.³⁹³

393 Govt. Exh. 7 at 82.

One final issue regarding Smith's military career needs to be addressed, which is the typed letter he signed

in connection with his Navy discharge process.³⁹⁴ His attorney at the time, Howard Abbott, testified that he had no specific recollection of the Smith representation.³⁹⁵ However, Abbott testified that most of his clients opted not to have a formal hearing and at most to submit written documentation in their favor.³⁹⁶ He would instruct the client to also go and prepare his own statement, in his own words, and bring it back.³⁹⁷ Abbott would not change the substance of the statement, other than correcting punctuation and possibly spelling.³⁹⁸

394 Govt. Exh. 5.

395 Rec. [**131] Doc. 1586 at 780, 796.

396 *Id.* at 781-83.

397 *Id.* at 784-85.

398 *Id.* at 786-87.

Dr. Swanson testified that Smith told her that someone helped him write the letter and that he did not do it himself.³⁹⁹ Dr. Hayes testified that this letter would need a 9th grade education to be able to read and understand.⁴⁰⁰ She conceded that someone could have assisted Smith with the draft.⁴⁰¹

399 Rec. Doc. 1583 at 156.

400 Rec. Doc. 1585 at 565-66, 571-72; Govt. Exh. 42 at 24.

401 Rec. Doc. 1585 at 566.

Having assistance appears to be the only realistic explanation for the letter. When Smith was in the Job Corps, roughly a year before his enlistment, his reading level was determined to be at the 3rd grade level.⁴⁰² When he was incarcerated in the Texas Department of Corrections in 1977, [*531] several years after his Navy discharge, he tested at the 5th grade level.⁴⁰³ It is implausible to believe that he went from a 3rd grade level in 1970 to a highly unlikely 9th grade level a year later than back to a 5th grade level several years after that.⁴⁰⁴ The Court concludes that Smith had assistance in drafting the letter, even if it did not come from Abbott.

402 Deft. Exh. 7 at 436.

403 Govt. Exh. 9; Rec. Doc. 1585 at 564-65.

404 *See* [**132] *also* Rec. Doc. 1585 at 670-71.

The Court finds Smith's experience in the U.S. Navy, from his initial test experiences through his difficulties in graduating from boot camp, his lack of success in advancing up the ranks and his ultimate failure at basic responsible behavior, are all characteristic of person with

Mild Mental Retardation. As with his other earlier endeavors, Smith began motivated to succeed, but then became increasingly disillusioned as he fell further behind from meeting any goals.

iv. Employment History

According to Dr. Swanson, persons with Mild Mental Retardation can in fact have long work careers and be very productive, albeit at menial jobs.⁴⁰⁵ A person's work history can be systematically assessed to determine if it is consistent with a person who is mildly retarded. The relevant factors include: how many jobs the person has had, how frequently he changed jobs, who helped him find the jobs, what the wages were, how menial were the tasks and how the work compared with those of same age peers.⁴⁰⁶

405 Rec. Doc. 1583 at 163.

406 *Id.* at 163, 173-74.

Smith reported to Dr. Hayes that after he left the U. S. Navy, he worked for several months at a supermarket. He bagged groceries, [**133] stocked shelves, cleaned floors and at times took inventory, which consisted of counting the canned goods.⁴⁰⁷

407 Def. Exh. 5 at 113.

In spring of 1977, Smith was convicted of robbery and sent to the Texas Department of Corrections.⁴⁰⁸ His job classification was as a "Laborer" and he tested at the 5.2 grade level.⁴⁰⁹ In the fall of that year, he took a Business Law class provided in prison by Lee College and received a "D" as a grade.⁴¹⁰ In the summer of 1978, he signed up for several welding classes, receiving "C"s in three of the classes and withdrawing from the other two.⁴¹¹ Dr. Cunningham surmised that since these classes were given in prison, the courses were likely not as demanding as they would be in the open community.⁴¹²

408 Govt. Exh. 11 at 5-6, 9.

409 *Id.* at 13.

410 Def. Exh. 6 at 380B.

411 *Id.* at 380C.

412 Rec. Doc. 1585 at 671.

Smith told Dr. Hayes that when he left prison, he went to Houston Community College for several months for a refresher course on welding, which may have taught

the same skills that he purportedly studied in prison.⁴¹³ In any event, he did not complete any of the classes and withdrew.⁴¹⁴

413 Def. Exh. 5 at 91-92.

414 Def. Exh. 6 at 380A.

Smith reported [**134] that after prison he got a job as a welder in Houston, working about a year although he conceded he was an "absentee somewhat."⁴¹⁵ He next went to a Brown & Root shipyard where it took him three attempts before he passed the [*532] weld construction test.⁴¹⁶ This was, of course, after taking classes in welding in the Job Corps, through Lee College while in prison, and at Houston Community College. He reportedly worked at Brown & Root for about eighteen months, was laid off, then hired on at another shipyard where he managed to pass the welding test the first time.⁴¹⁷ His work recollection became hazy after that, although he did relay several more welding jobs which all ended with his being laid off.⁴¹⁸ He worked at Avondale Shipyard at several different times, claiming to have made as much as \$14 per hour.⁴¹⁹ On one occasion he was fired for insubordination, after arguing with his supervisor.⁴²⁰ On another occasion he was fired from a welding job for taking a day off without calling in.⁴²¹ Prior to being arrested on the current charges, he was working for Labor Ready, a contracting company for general laborers, and he was no longer welding. He said he was on drugs and failed the drug [**135] test at Bollinger Shipyard.⁴²²

415 Def. Exh. 5 at 124.

416 *Id.* at 125-26.

417 *Id.* at 126-27.

418 *Id.* at 127-28, 130.

419 This pay rate does not conform with the one provided in the work records from Avondale. Def. Exh. 9 at 605.

420 Def. Exh. 5 at 129.

421 *Id.* at 131.

422 *Id.* at 130.

Smith also reported to Dr. Hayes that he was taken advantage of by his employer when he was allegedly hurt on the job while working for the Iron Union Local 84 in Houston. He stated that he was on a ladder which slipped, causing him to fall and badly injure his wrist. He said his co-workers encouraged him to get a lawyer. However, Smith said his employer "tricked" him by telling him that workers' compensation did not pay much, and suggesting

to him he continue to work instead, with the employer putting him on light duty. ⁴²³ As noted earlier, according to the AAIDD 11TH EDITION, persons with intellectual disabilities "typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding." ⁴²⁴

⁴²³ *Id.* at 111-12.

⁴²⁴ AAIDD, 11TH EDITION at 51-52.

When asked to explain by Dr. Hayes what he actually did as a welder, Smith was not able to articulate clearly how welding works. He tried [^{**136}] to explain how a structure is built, even standing up to demonstrate, but the explanation was obscure at best. Likewise, when he was asked to explain what the welding tools were and how they functioned, he rambled through various terms, like a stamp, a chipping hammer, and a rosebud, without clarifying how any of them actually worked. Dr. Hayes' colleague, Dr. Thompson, ultimately interrupted the recorded interview to provide the explanations. ⁴²⁵

⁴²⁵ Deft. Exh. 5 at 93-97.

How good of a welder was Smith? He identified himself as a "structural welder" and when Dr. Hayes asked if he advanced to other types of welding, he said "no." ⁴²⁶ He also described what he did as "stick welding." ⁴²⁷ Among the records from Avondale is a February 1988 memo to the "Welding/Tacking School" to test and interview Smith for the position of welder. Handwritten at the top is an "F" in a circle "welding test" and at the bottom left is a handwritten note, "tacker." ⁴²⁸ This appears [^{*533}] to indicate that he failed the welding test but was hired on in the lesser role of a tacker. ⁴²⁹ This is actually confirmed by another of Avondale's records, which shows he was in fact hired in February 1988, but as a tacker, not [^{**137}] a welder. ⁴³⁰ The highest grade of tacker can spot tack, or small stick a weld but then the welder has to come in to finish it. ⁴³¹

⁴²⁶ *Id.* at 91, 93.

⁴²⁷ *Id.* at 90-91.

⁴²⁸ Deft. Exh. 9 at 635.

⁴²⁹ Rec. Doc. 1583 at 168.

⁴³⁰ Deft. Exh. 9 at 605.

⁴³¹ Rec. Doc. 1583 at 169-70.

In April 1992, Smith was again hired by Avondale, but again as a tacker and not a welder. ⁴³² In November 1996, Smith was again tested for the position of welder,

and was hired on once again as a tacker. ⁴³³ Significantly, Dr. Swanson testified that a program in Calcasieu Parish successfully trains mildly disabled individuals in these very same tacking skills, so they can work in the various plants in the area. "The tacking skills are pretty easy to teach." ⁴³⁴ Dr. Swanson surmised that Smith was a very good tacker. ⁴³⁵ She also pointed that even as a welder, a person would be expected to not only pass the welding test, but also work at a production rate. If doing one weld takes an inordinate amount of time, the person might be retained as a tacker, but not as a welder. ⁴³⁶

⁴³² Deft. Exh. 9 at 652-53.

⁴³³ *Id.* at 656.

⁴³⁴ Rec. Doc. 1583 at 169.

⁴³⁵ *Id.* at 167.

⁴³⁶ *Id.* at 165, 221.

In January 2001, Smith was hired as a welder, first class, [^{**138}] by Avondale but was terminated within a few weeks for insubordination. ⁴³⁷ This was the incident in which Smith reported having gotten into an argument with his supervisor. A first class welder is someone who can independently weld all six types of welds. ⁴³⁸ It appears from Smith's history that it is highly unlikely he ever achieved that level of competence. ⁴³⁹

⁴³⁷ Deft. Exh. 9 at 629.

⁴³⁸ Rec. Doc. 1583 at 172.

⁴³⁹ Dr. Hayes in her report contends that Smith could operate "ARC, MIG and TIG welders," but no evidence was presented in support. Govt. Exh. 42 at 46; Rec. Doc. 1584 at 467. The evidence does show that Smith did enroll in a TIG MIG class while in prison, but withdrew before completing it and likewise signed up for ARC classes at Houston Community College and withdrew again. Deft. Exh. 6 at 380A, 380C.

At Avondale, Smith's pay ranged from a little more than \$5 per hour, as a tacker, to a little more than \$10 per hour as a welder for a brief time before he was fired. ⁴⁴⁰ Dr. Swanson surmised that he spent a total of eight years in various welding related jobs, but did not keep the jobs long at any one time. ⁴⁴¹ She pointed out that he had started trying to learn welding when he [^{**139}] was 19 years old, with additional training in prison and in junior college, but "he didn't have enough to maintain those skills -- to maintain the job and keep a long job and move past the probationary period where they're moving you up." ⁴⁴² Dr. Cunningham concurred. ⁴⁴³

- 440 Def. Exh. 9 at 605.
 441 Rec. Doc. 1583 at 166.
 442 *Id.* at 174.
 443 Rec. Doc. 1585 at 671.

In addition to the welding related positions, Smith also worked a number of menial level jobs. He worked on a garbage truck, on a night crew cleaning restaurants, and for a catering service, with some of the jobs lasting just a few weeks. ⁴⁴⁴ Dr. Hayes likewise observed [*534] that Smith did not hold a lot of jobs for a long period of time, but that at least he was successful in getting jobs. ⁴⁴⁵

- 444 Rec. Doc. 1583 at 173-74.
 445 Rec. Doc. 1584 at 487.

Dr. Swanson concluded that Smith's employment history is consistent with someone with Mild Mental Retardation. ⁴⁴⁶ The Court agrees, and this finding is supported when the specific relevant factors are considered: ⁴⁴⁷

- 446 Rec. Doc. 1583 at 175.
 447 *Id.* at 163, 173-74.

1. How many jobs did the person have? In his thirty-five year working career, beginning in 1968 and ending in 2003, Smith worked almost [^{**140}] fifty different jobs. ⁴⁴⁸

- 448 Def. Exh. 9 at 508-18.

2. How frequently did he change jobs? The longest Smith appeared to work at one time was eighteen months for Brown & Root. Most of his jobs were less than a year, some only lasting a few weeks. ⁴⁴⁹

- 449 *Id.*

3. Who helped him find the jobs? It would appear that Smith himself initiated his searches for jobs, which indicates to the Court again that he was motivated to work and his failures did not result from a lack of effort. As Dr. Hayes noted, Smith was successful at getting jobs, but not at holding them very long. ⁴⁵⁰

- 450 Rec. Doc. 1584 at 487.

4. What were the wages? Smith never earned a significant amount of money. His high was around \$11,500 and in many jobs, his earnings were below \$500.

451

- 451 Def. Exh. 9 at 508-17.

5. How menial were the tasks? Smith had many jobs which were menial, with his highest successful work being as a tacker. As Dr. Swanson noted, persons with mental disabilities can in fact succeed as a tacker. ⁴⁵²

- 452 Rec. Doc. 1583 at 169-70.

6. How did his work compare with same age peers? Smith is an older offender, with a long work history. However, he never achieved a level of success beyond menial work, and work consistent [^{**141}] with the capabilities of someone with Mild Mental Retardation.

The Court finds that Smith's work history is consistent with a diagnosis of Mild Mental Retardation.

6. The Court's Finding re: Smith's Adaptive Functioning

Assessing adaptive behavior, particularly using a retrospective diagnosis, and necessarily relying on persons who care for the defendant, is fraught with difficulty, but it is also invariably necessary in an *Atkins* context. ⁴⁵³ *Atkins*, 536 U.S. at 308, 317-18.

- 453 *See e.g., id.* at 229-50.

For the reasons stated above, the 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.

On the other hand, Dr. Swanson used formal instruments with two people who did know the defendant during the developmental period. ⁴⁵⁴ Her administration of more than 10,000 adaptive behavior assessments over her long career attests to her [^{*535}] expertise and the consistency of the results confirms the validity of her [^{**142}] findings. Finally, the Court's own assessment of Smith's school records, military service and employment history supports her opinion.

- 454 As noted earlier, the Court considered the assessment without consideration of the results of the VABS-II administered to Dora Smith.

The Court finds that the credible evidence establishes

beyond a preponderance that Smith has significant impairments and concurrent deficits in adaptive functioning sufficient to diagnose him as mentally retarded with regard to the second prong of the AAMR/AAIDD and APA definitions.

c. Factor Three: Age of Onset

Since mental retardation is developmental, the final prong of the definition focuses on the age of onset. Both the AAMR/AAIDD definitions require that the significant limitations relating to intellectual and adaptive functioning originate before age 18 years.⁴⁵⁵ The finding that the deficits in intellectual and adaptive functioning originated prior to age 18 years is implicit in the Court findings relative to the first two prongs, but it also demonstrated by the following evidence in particular.

455 AAMR 10TH EDITION at 1; AAIDD 11TH EDITION at 1; DSM-IV-TR at 49.

Smith's academic records contain intelligence test [**143] scores that support intellectual impairment prior to age 18 years or close to that time, and are replete with subaverage scores, grades and academic performance. Such records of poor academic performance are the kind of information upon which the finding as to age of onset was based in *Wiley*, 625 F.3d at 221. Smith's score of 69 on an Otis Beta test in the 7th grade and his 10th grade Otis Gamma test score of 75 are particularly relevant. The same academic records also support the requisite age of onset with regard to adaptive functioning. In addition, the Job Corps and Navy records, compiled close to the age of 18 years, evidenced consistent intellectual and adaptive deficits. The ABAS-II and VABS-II standardized scores from Smith's sisters also support the finding that Smith's deficits originated before age 18 years.

The Court recognizes that prior to these capital proceedings, Smith had never been formally diagnosed as mentally retarded.⁴⁵⁶

456 Rec. Doc. 1583 at 252.

Dr. Swanson discussed an article by K. Salekin & B.M. Doane, *Malingering Intellectual Disability: The Value of Available Measures and Methods*, APPLIED NEUROPSYCHOLOGY 105, 111 (Taylor & Francis Group 2009), in which the [**144] authors stated that "[i]t's true that the disorder (mental retardation) can go

undetected or that the deficits in functioning can be misconstrued by professionals as a problem solely due to poverty, lack of access to education, limited intellectual stimulation, and/or problems in conduct."⁴⁵⁷ Dr. Swanson agreed, pointing out that Smith came from a low socioeconomic area, and attended a school with problems and no special education program.⁴⁵⁸

457 Govt. Art. 3; Rec. Doc. 1584 at 393.

458 Rec. Doc. 1584 at 393-94.

The Court also finds that Smith has established by a preponderance of the evidence that he was a person with Mild Mental Retardation prior to the age of 18, at the time of the offense, and at the time of the most current psychological evaluations, consistent with the opinion of Dr. Swanson.

III. CONCLUSION

For the foregoing reasons, the Court concludes that the evidence establishes by more than a preponderance of the evidence that at all relevant times, Joseph Smith was mentally retarded as defined by the AAMR/AAIDD and the APA.

[*536] Accordingly,

IT IS ORDERED that a sentence of death may not be imposed as to Joseph Smith. A trial date shall be set.

New Orleans, Louisiana, this 23rd day [**145] of June, 2011.

/s/ Helen G. Berrigan

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX A

Additional Findings re: Dr. Swanson's Adaptive Behavior Assessment

1. In her report, Dr. Hayes stated that the family members reported that Smith was "unable" at age 17 "to place local telephone calls, dress himself, operate small electrical appliances, order a meal at a restaurant, and cut his own meat."⁴⁵⁹ That is simply not true.

459 Govt. Exh. 42 at 20.

a. Placing telephone calls - Dora, Nell and Patricia all gave Smith the highest rating ("Usually") to "Makes telephone calls to others, using standard or cellphone" on the VABS-II.⁴⁶⁰ On the ABAS-II, both Nell and Patricia answered "Sometimes When Needed" to the question of whether Smith "Places local telephone calls" with Nell also circling "Never When Needed" but still not circling "Is Not Able,"⁴⁶¹ and both answered "Sometimes When Needed" to the question of whether Smith "Finds and uses a pay phone."⁴⁶²

460 Deft. Exh. 1B at 38, 68, 110 (Item 24).

461 *Id.* at 89, 132 (Item 8).

462 *Id.* at 90, 133 (Item 12).

b. Dressing himself - Dora, Nell and Patricia all answered "Usually" to the specific questions of whether Smith correctly buttoned his clothes [****146**] and connected zippers on jackets,⁴⁶³ and "Sometimes" on the VABS-II to the question of whether Smith wore appropriate clothing during wet or cold weather.⁴⁶⁴ On the ABAS-II, Nell scored him the highest rank ("Always When Needed") to the question of whether Smith "Dresses himself" and also the highest rating on "Puts shoes on correct feet" and "Buttons his own clothing."⁴⁶⁵ Patricia scored him as "Never When Needed" for "Dresses himself" (but not "Is Not Able") and "Sometimes When Needed" on putting his shoes on the correct feet and buttoning his own clothing.⁴⁶⁶

463 *Id.* at 36, 66, 108 (Items 28 & 29)

464 *Id.* (Item 31).

465 *Id.* at 93 (Items 4, 1 & 3 of Self Care).

466 *Id.* at 135a (Items 4, 1 & 3).

c. Operate small appliances - Dora, Nell and Patricia all gave Smith the highest score ("Usually") on the VABS-II for "Use simple appliances."⁴⁶⁷ They each gave him a "Sometimes" on using a microwave for heating, baking or cooking.⁴⁶⁸ Dora and Patricia gave him the highest rank of "Usually" for using a stove for heating, baking or cooking, while Nell said "Sometimes."⁴⁶⁹ On the ABAS-II, Nell marked "Always When Needed" for "Uses small electrical appliances, for example, a can opener or blender" [****147**] and Patricia marked "Never When Needed" but not "Is Not Able."⁴⁷⁰ Both Nell and Patricia marked "Sometimes When Needed" for "Operates a microwave oven."⁴⁷¹

467 *Id.* at 37, 67, 109 (Item 9).

468 *Id.* (Item 10).

469 *Id.* (Item 20).

470 *Id.* at 91, 134 (Item 2 of Home Living).

471 *Id.* (Item 1 of Home Living).

d. Order a meal at a restaurant - All three women gave Smith the highest ranking of "Usually" on the VABS-II for "Orders a complete meal in a fast-food restaurant."⁴⁷² On the ABAS-II, Nell marked [****537**] "Sometimes When Needed" for "Orders his own meals when eating out" and Patricia marked "Never When Needed," but again, not "Is Not Able."⁴⁷³

472 *Id.* at 39, 69, 111 (Item 25).

473 *Id.* at 90, 133 (Item 1 of Community Use).

e. Cut his own meat - All three women gave Smith the highest rank of "Usually" on the VABS-II for "Uses sharp knife to prepare food."⁴⁷⁴ On the ABAS-II, Nell marked "Sometimes When Needed" for "Cuts meats or other foods into bite size pieces" and Patricia marked "Never When Needed" but again, not "Is Not Able."⁴⁷⁵

474 *Id.* at 37, 67, 109 (Item 19).

475 *Id.* at 94, 136 (Item 19 under Self-Care).

Dr. Hayes chose to highlight the least favorable answer from each cluster, ignoring all the contrary [****148**] positive responses, and then arbitrarily downgraded the occasional "Never When Needed" to an "Is Not Able." This indicates not only a lack of accuracy but also an inappropriate advocacy on the part of an expert who should report the findings objectively. The Court also finds it disturbing because the sweeping remark appeared in her final report, while the evidence to the contrary could only be gleaned by a painstaking analysis of the underlying data, making her misrepresentation all the more misleading.⁴⁷⁶

476 Dr. Swanson carefully dissected each of Dr. Hayes' specific contentions on direct examination, as outlined above. When Dr. Hayes testified later, she modified her position to saying that the family reported Smith was "unable to consistently do certain things," still mis-speaking as to "unable" but adding "consistently" to back away from her statement in her report. Rec. Doc. 1584 at 412.

2. The government claims that individual responses of the two sisters on the ABAS-II were inconsistent, because on some questions one sibling answered "Always When Needed" and the other sibling "Never When

Needed" to the same question.⁴⁷⁷ Out of 239 questions that both of them answered, this happened [**149] a total of 7 times, or in less than 3% of all the questions. This is a remarkably low number considering that two different siblings--one older, one younger--are retrospectively evaluating their brother from their own unique perspectives. As Dr. Swanson testified, even on those very rare occasions where their answers were "Always When Needed" versus "Never When Needed," the person saying "Never When Needed" was not saying he *could not* perform the behavior, but rather the two disagreed on how many reminders or prompts he needed to get it done.⁴⁷⁸

477 Rec. Doc. 1583 at 260-61.

478 *Id.* at 265-66.

Dr. Hayes and the government likewise referenced similar disparities in answers on the VABS-II.⁴⁷⁹ Unlike the ABAS-II which is self-administered, Dr. Swanson actually completed the VABS-II through conversation with the respondent. She remembered that Patricia, who was younger than Smith, was particularly struck by the things that she was able to do but her older brother could not. In fact, even though younger, she tutored him in his school work.⁴⁸⁰ The government was also critical, as inconsistent, when the answers between the respondents were only a one level difference, claiming they are describing [**150] "a much different individual."⁴⁸¹ However, the various rating levels are not abruptly distinct, but rather are transitional. [*538] On the VABS-II, for instance, Level 0 is "Never"; Level 1 is "Sometimes or Partially," and Level 2 is "Usually." While Dr. Hayes conceded that different respondents will not produce the same exact data, she testified that too many inconsistencies existed in the answers.⁴⁸² The Court does not agree. As set forth in the main body of this opinion, the majority of responses on both the VABS-II and the ABAS-II were identical, and the vast majority of the remainder just a one level difference.

479 *Id.* at 266-67; Rec. Doc. 1584 at 414-15, 419-20.

480 Rec. Doc. 1583 at 267-68.

481 *Id.* at 263; Rec. Doc. 1584 at 422.

482 Rec. Doc. 1584 at 415.

3. Some government claims of inconsistencies resulted from a lack of understanding of Dr. Swanson's notes on the VABS-II. For example, after erroneously stating that Patricia scored Smith a "0" on preparing food

that required mixing (she actually scored a "1"),⁴⁸³ the prosecution challenged Dr. Swanson's note on the next page that said Smith could make red beans, rice and gumbo.⁴⁸⁴ Dr. Swanson explained that as she interviewed the individuals, [**151] she would gather information in general about what Smith was capable of doing throughout his life, in order to find out the best he ever achieved in adulthood, such an eventually being able to make red beans and rice, and that information would be in her notes. However, with regard to any specific questions on the VABS-II, she would ask the respondent to focus on what Smith was capable of doing at age 17, and only use that response for her score.⁴⁸⁵

483 Def. Exh. 1B at 109 (Item 21).

484 Rec. Doc. 1584 at 292-93.

485 *Id.* at 293; *see also* Rec. Doc. 1583 at 272-75; 278-79.

In another instance, the prosecution criticized Dr. Swanson for allegedly inconsistent answers within Nell's VABS-II. In answering the question of whether Smith had a best friend, Nell scored a "2" or "Usually" and told Dr. Swanson that Smith's older brother, Alfred, was his best friend.⁴⁸⁶ Dr. Swanson elaborated that Smith idolized Alfred, that he was more than a brother and they went everywhere together.⁴⁸⁷ On another question about whether Smith went places with "friends during the day without adult supervision (for example, to a shopping mall, park, community center, etc.), Nell likewise scored him a "2" for "Usually." [**152] However, on the question of whether he met with friends regularly, Nell scored a "0" for "Never," noting that he did not have "real friends."⁴⁸⁸ In the context of the questions, and with the aid of Dr. Swanson's notes, the Court does not find an inconsistency. Clearly, according to Nell, Smith did not have real friends other than his devotion to his best friend, his brother Alfred, so there were no "friends" to meet with regularly. Clearly, also, she felt at age 17, he was capable of going to a shopping mall or a park with others "without adult supervision."⁴⁸⁹

486 Def. Exh. 1B at 70 (Item 20).

487 Rec. Doc. 1584 at 300.

488 Def. Exh. 1B at 71 (Item 29).

489 *See also* Rec. Doc. 1584 at 300-01.

4. Another government criticism was that some individual answers were simply implausible. For example, Patricia answered "Never" to the ABAS-II question whether Smith tied his own shoes.⁴⁹⁰ The

prosecutor interpreted that to mean that he knew how to do it, but just "sat there and made somebody else do it." Dr. Swanson pointed out that it did not necessarily [*539] mean that, but that it could mean he simply walked around without bothering to tie his shoes or that he tucked the laces into his shoes.⁴⁹¹ Dr. [**153] Hayes particularly singled out Patricia's answers as implausible, and concluded she was trying to help her brother by presumably exaggerating his deficits.⁴⁹² For instance, she cited Patricia's response of "Never When Needed" to the ABAS-II question whether Smith could name twenty or more familiar objects.⁴⁹³ Having observed in the taped interview the difficulty Smith had as a man in his 50's had in answering even single questions, Patricia's observation from a far earlier developmental period is not surprising to the Court. Dr. Hayes interpreted the answer as meaning Patricia thought Smith had fewer than twenty words in his vocabulary. This Court construes the answer as Patricia's recognition that Smith needs considerably prompting before he could name, out of his head, 20 or more objects on his own. At another point, the prosecutor made a sweeping statement regarding what Smith "can't" do, according to his family members, declaring that "you literally would have to push (him) around in a chair..." Dr. Swanson reminded him that none of the respondents ever said he "can't" do any behavior, the distinction was in how many times he had to be reminded or prompted to do it.⁴⁹⁴

490 Deft. [**154] Exh. 1B at 135a (Item 8 of Self-Care).

491 Rec. Doc. 1583 at 262-63.

492 Rec. Doc. 1584 at 422-423.

493 *Id.* at 422.

494 Rec. Doc. 1583 at 269.

5. Dr. Hayes and the government also tried to show inconsistencies by making inappropriate comparisons between the VABS-II and ABAS-II scores and how Smith performed past the age of 17 as an adult, completely ignoring the difference in ages. An important aspect of diagnosing mental retardation is determining when a skill is learned, and how long it takes for the person to finally master it.⁴⁹⁵ For example, Dora and Patricia answered "Never" to the VABS-II question whether Smith, at age 17, "Seeks medical care in an emergency."⁴⁹⁶ Dr. Hayes then sought to undermine those answers by comparing it to an emergency room admission sought by Smith in 2000, some thirty-two years later.⁴⁹⁷ That is comparing apples with oranges.

The government tried to undermine a score of "Never" VABS-II answers that Patricia gave Smith for "Edits or corrects own written work before handing it in" with Dr. Swanson's observation that during her evaluation of Smith in 2006, he would often self-correct in order to get a higher score.⁴⁹⁸ Again, Patricia's ranking were based on [**155] Smith's capabilities at age 17, and both Dr. Swanson's and Dr. Hayes' interviews were held when Smith was in his 50's. Similarly, on the ABAS-II, Nell answered "Never When Needed" to "Says irregular plurals nouns," and then the prosecutor cited passages in Dr. Hayes' interview with Smith where he used proper plurals.⁴⁹⁹ Dr. Swanson noted again that the sisters were rating him at age 17 and Dr. Hayes interviewed him in his 50's.⁵⁰⁰ Dr. Hayes conceded that language develops after the age of 17 and vocabularies increase.⁵⁰¹ As noted earlier, the mildly [*540] mentally retarded were previously described as "educable" which indicates that improvement in adaptive behavior can well be expected. It is completely inappropriate to use later learned skills to contradict the reliability of scores based on earlier capabilities.

495 Rec. Doc. 1530, tab 2 at 624, 667; Rec. Doc. 1536.

496 Deft. Exh. 1B at 36, 108 (Item 38).

497 Rec. Doc. 1584 at 420.

498 Deft. Exh. 1B at 106; Rec. Doc. 1584 at 306.

499 Deft. Exh. 1B at 89.

500 Rec. Doc. 1583 at 276.

501 Rec. Doc. 1585 at 570.

6. The government also contended that some of Smith's behaviors were the result of cultural norms rather than diminished capacity to perform, [**156] citing how in some households, the men never wash, clean, cook or pick up after themselves. Dr. Swanson acknowledged that in the Smith home growing up, the women did those tasks, but pointed out the question asks only if the person can do it, and if so, does he need prompting or reminders to do it.⁵⁰² While the Court finds the cultural context to be relevant, it also notes that domestic chores are a very small subset of the VABS-II and ABAS-II. Additionally, from Nell, Smith received either "Always When Needed" or "Sometimes When Needed" on fifteen of the twenty-three ABAS-II items in the Home Living section that covered those type chores. Patricia gave scores of "Sometimes When Needed" on eleven, and a "Never When Needed" on twelve,⁵⁰³ indicating that Smith did in

fact at times do household chores.

502 Rec. Doc. 1584 at 297-98.

503 Deft. Exh. 1B at 91-92, 134-35.

APPENDIX B

Additional Examples re: Dr. Hayes Interview

The Court notes the following additional examples of interview answers from Smith that should have been addressed by Dr. Hayes:

1. When Smith was asked about tattoos on the video, he identified several that he has, but then paused when describing where one of them was, apparently [**157] searching for the word "arm." 504

504 Deft. Exh. 5 at 6.

2. When he was asked if he was "close to, real close to" anyone besides his mother growing up, like a grandparent, he mentioned his grandmother on his father's side. He then stated that she died when he was three or four years old and he did not really remember her. He obviously was not close to her. 505

505 *Id.* at 20.

3. When Smith disclosed that his sister was arrested for forgery, Dr. Hayes properly asked him what he meant by that term. Smith then inaccurately described forgery as "bouncing checks, writing checks that was insufficient and she couldn't cover." 506

506 *Id.* at 31; *see also id.* at 33.

4. When Smith was asked to spell his sister Patricia's name, he said he did not know. Dr. Hayes then spelled it for him. 507

507 *Id.* at 34.

5. When Dr. Hayes asked him about the medical history of his mother's side of the family, Smith told her that his grandfather had "mental problems" and he was sent to "Jackson" where 508 he died, presumably referring to East Feliciana State Hospital, a mental hospital in Jackson, Louisiana. Dr. Hayes then asked him "what about any psychiatric or mental health difficulties on either side of your family," [**158] then lists another string of mental health conditions, such as depression,

anxiety, [*541] bad nerves, schizophrenia, and anybody trying to commit suicide. She apparently had not heard what he had just said about his grandfather. Smith then inexplicably answered "No, not that I'm aware of." 509 Dr. Hayes and Dr. Thompson should have realized Smith had just contradicted himself and they should have at least sought clarification. What the Court surmises is that in the string of mental health conditions Dr. Hayes listed, Smith probably only registered the last one-suicide attempts-and was answering that specific question only.

508 In the transcript, the word "where" is erroneously recorded as "why." "Where" is what Smith actually said on the recording. *Id.* at 40, disc 2 at 2 minutes.

509 *Id.* at 40-41.

6. Dr. Hayes asked Smith to think back on his childhood and tell her what kinds of things he was interested in or liked to do. Nearly a full 30 seconds passed as Smith obviously struggled to remember. Then Dr. Hayes prompted him by asking him about riding a bike or hanging out with friends. With that prompting, he remembered playing street ball. 510

510 *Id.* at 45.

7. After Smith told Dr. Hayes about a [**159] best friend from his childhood named Stanley, Dr. Hayes asked him if he had any best friends after that. Smith had to think for nearly 30 seconds before coming up with another name. 511

511 *Id.* at 52.

8. Dr. Hayes asked Smith who was closest to him now. Smith asked if she meant a friend and she said friend or family member. He hesitated and then asked "outside my moms?" She said sure but he continued to pause. Dr. Hayes then asked him, "Who knows you better than anybody else, who would you confide in?" Smith still did not understand the question, and asked, "You mean, for my sisters and brothers, outside my mother?" She told him, "Really, anyone." And then he finally said his mother, and after his mother, his brother Alfred. 512

512 *Id.* at 52-53.

9. Dr. Hayes asked Smith when he moved back to New Orleans, how long did he stay there. A full 30 seconds passed with Smith unable to answer. She then

changed the subject to what jobs he had.⁵¹³

513 *Id.* at 76.

10. When talking about his childhood schooling, Smith told Dr. Hayes that he had trouble in school, that he was "always slow about comprehending," and needed extra help, particularly with reading, spelling and math.⁵¹⁴ Dr. Hayes did not probe [**160] any of these deficiencies in any more detail. This was relevant to the adaptive behavior subdomain of Functional Academics.

514 *Id.* at 84-87.

11. Smith told Dr. Hayes about a work incident where he fell off a ladder and badly injured his wrist. He went to a hospital where a cast was put on his hand. Dr. Hayes asked him if he had to do physical therapy and Smith told her he did not finish the therapy and furthermore, removed the cast himself after a period of time.⁵¹⁵ This failure to heed medical advice was relevant to both the Daily Living Skills and the Health and Safety subdomains of adaptive behavior.

515 *Id.* at 111-12.

12. In connection with the same accident, Dr. Hayes asked Smith if he filed a workers' compensation claim. Smith said no, and that he was tricked out of doing so by his employer. Acquiescence and gullibility are characteristics of the mildly mentally retarded.⁵¹⁶

516 AAIDD 11TH EDITION at 51-52.

[*542] 13. Smith told Dr. Hayes that when he went to apply to work at the Brown & Root Shipyard as a welder, he failed the welding construction test three times before finally passing. This was after he had been in welding training programs in the Job Corps, in the U.S. Navy, in prison [**161] and in community college, and after purportedly working for a year as a welder. This was relevant to the Work subdomain of the adaptive behavior assessment.⁵¹⁷

517 Def. Exh. 5 at 124-26.

14. Dr. Hayes questioned Smith about drug treatment. He said he went to a program once at Bridge House in New Orleans but he did not complete the treatment. This failure to complete treatment was relevant to the both the Daily Living Skills and the Health and Safety subdomains of the adaptive behavior assessment.

APPENDIX C

Additional Findings re: Dr. Hayes' Adaptive Behavior Assessment

The following are most of the adaptive behaviors listed in Dr. Hayes' expert report which she contends supports a finding that Joseph Smith is not mentally retarded. The few that are not listed are discussed independently in other parts of this opinion. Furthermore, during her trial testimony, Dr. Hayes cited numerous additional examples under the various subdomains.⁵¹⁸ The Court has reviewed those additional examples and found them all to be within the capacity of a person with Mild Mental Retardation.

518 Rec. Doc. 1584 at 457-88.

Those items that the Court has concluded are within the capacity of a person with Mild Mental [**162] Retardation are noted with an "A."

Those items that the Court has concluded are within the capacity of a person with Mild Mental Retardation who has been provided structural support are noted with a "B."

Those items which the Court has concluded are beyond the competence of the correctional officers to assess are noted with a "C."

For the reasons stated in the text of this opinion these items are irrelevant to the consideration of whether Joseph Smith is a person with Mild Mental Retardation.

COMMUNICATION⁵¹⁹

519 Govt. Exh. 42 at 28; *see also* Rec. Doc. 1584 at 457-62.

C All correctional officers noted Mr. Smith's communication skills were within normal limits;

A,B Mr. Smith wrote multiple requests for attention to his health care needs, and while those had grammatical and spelling errors, they were successful at communicating his needs, indicating he was successful at written communication despite his written language limitations;

A,B Mr. Smith followed up on unmet health care requests, providing approximate dates for when the prior

request was issued;

A Mr. Smith discussed his legal expectations with a former cellmate;

A Mr. Smith was overheard by correctional officers discussing a topic of [**163] interest (i.e. women) with another inmate;

A Mr. Smith conversed with a correctional officer about sports;

A Mr. Smith is noted to converse with other inmates;

A Mr. Smith informed the examiners of his favored activities and relayed stories from his past; and

A,B ⁵²⁰ Mr. Smith accurately completely [sic] a grievance report related to a deputy handcuffing him too tightly.

520 Gov. Exh. 42 at 29

COMMUNITY USE ⁵²¹

521 See also Rec. Doc. 1584 at 462-63.

[*543] A,B Mr. Smith signed up for and went to the law library at the St. Charles Parish Jail;

A Mr. Smith could certainly walk or ride a bike to locations within a one mile radius;

A,B Mr. Smith reviews available items for purchase from the commissary, indicates what items he would like to purchase on the commissary request form appropriately, and inventories the items when they are delivered to him. He has questioned the correctional officer responsible for the commissary about being shorted on his orders;

A,B Mr. Smith diligently reviews his commissary account balance and budgets his money accordingly;

A,B Mr. Smith can call a doctor when needed;

A Mr. Smith was noted to use the telephone to place collect telephone calls while incarcerated. Additionally, [**164] employment applications list a home telephone number, and legal records indicated following an arrest, he placed his "one telephone call."

C ⁵²² Correctional officers noted Mr. Smith's

community use was within normal limits;

A During the clinical interview, Mr. Smith relayed the locations of several establishments, including the streets where they are located and possibly the cross streets and/or nearby landmarks;

A Mr. Smith had a valid Ohio's driver's license, which required his answering 30 of 40 questions correctly;

A Mr. Smith carried identification in the past as evidenced by copies of identification and social security cards in various employment files; and

A,B Mr. Smith buys stamps from the commissary to mail letters he has written to family members.

522 Govt. Exh. 42 at 30.

FUNCTIONAL ACADEMICS ⁵²³

523 See Rec. Doc. 1584 at 463-66.

A Mr. Smith can write his first name and last name, address including zip code, telephone number, and prior employers' contact information as evidenced by several employment applications;

A,B Mr. Smith can read the commissary menu and complete the commissary request form appropriately;

C ⁵²⁴ Correctional officers noted Mr. Smith's functional academics were within [**165] normal limits;

A,B Correctional officers noted Mr. Smith reads and obeys signs;

A Employment records indicated Mr. Smith could follow a daily work schedule, though at times he did not show up for work and did not call his employer to indicate the same;

A,B Mr. Smith follows the jail schedule without complaint;

A Mr. Smith has a daily workout routine;

A John Grisham was noted to be Mr. Smith's favorite author with his favorite book being *Runaway Jury*; he is often observed by correctional officers to be reading in his cell;

[*544] A Mr. Smith plays dominos and cards with other inmates and goes to the law library;

A Mr. Smith writes letters to family members;

A,B Although Mr. Smith currently budgets his commissary account appropriately, family members indicated he never had a checking account, and when he had a savings account, he took all the money out quite quickly; and

A As part of his employment with several agencies, Mr. Smith was required to complete several forms including W4's, Employment Eligibility Verifications and other agreements and acknowledgment forms.

524 *Id.* at 31.

HOME LIVING ⁵²⁵

525 *See id.* at 466-67.

C ⁵²⁶ Correctional officers noted Mr. Smith's home living was within normal limits;

A Mr. [^{**166}] Smith correctly described to the current examiners how to clean a bathtub, cook smothered chicken and make a roux, though he indicated "kitchen bouquet" was often used now to color gravies;

A Mr. Smith had a tool box in the past;

A Correctional officers have observed Mr. Smith cleaning his cell with paper towels and napkins, as well as washing his cup out; and

A Correctional officers noted Mr. Smith makes his bed daily and puts things away when he is finished using them.

526 *Id.* at 32.

HEALTH AND SAFETY ⁵²⁷

527 *See id.* at 467-69.

A With the exception of one employment record that indicated Mr. Smith did not clean his work area before leaving, no other safety concerns were noted in any of the employment files reviewed;

A ⁵²⁸ Working as a welder is such that one would have to follow safety rules as one works around

extremely dangerous objects;

C Correctional officers noted Mr. Smith's health and safety were within normal limits;

A,B Mr. Smith's correctional records are replete with instances of his requesting medications, providing his medical history, etc. (The specific instances are not recorded here but can be found at Govt. Exh. 42 at 33-40); and

A ⁵²⁹ A correctional officer has observed Mr. [^{**167}] Smith swallow his medications routinely.

528 *Id.* at 33.

529 *Id.* at 40.

LEISURE ⁵³⁰

530 *Id.* at 40; *see also id.* at 469-71.

A,C ⁵³¹ Correctional officers noticed Mr. Smith's leisure skills were within normal limits. They have observed him reading, working out, listening to his Walkman, playing cards with other inmates and playing dominos. They have also observed him conversing with other inmates and guards, and he watches television;

A Mr. Smith endorsed enjoying reading books, staying fit, writing to family members, and playing basketball;

[*545] A Mr. Smith described having best friends as a youth and has maintained acquaintances for many years; and

A Legal records indicated Mr. Smith was associating with friends when a crime occurred (bodily injury conviction in Texas in 1996).

531 *Id.* at 41.

SELF-CARE ⁵³²

532 *See also id.* at 471-72.

A Correctional officer noted all of the above skills were within normal limits. They indicated if an inmate has a problem with hygiene, other inmates will quickly tell them. Furthermore, they described that Mr. Smith was quite neat;

A The examiners noted Mr. Smith to be well

groomed, displaying good personal hygiene;

A,B Mr. Smith completes requests for haircuts and his commissary [**168] account reflects purchases of toothpaste, lotion, soap, aftershave, batteries, stamps; and

A Mr. Smith diligently works out daily, walking around the pod and doing multiple repetitions of resistance exercises.

SELF-DIRECTION ⁵³³

533 Govt. Exh. 42 at 42; *see also* Rec. Doc. 1584 at 472-75. In her testimony, Dr. Hayes cited the fact that Smith was aware that taxes were charged on his commissary account and that people file income taxes at the end of the year. Rec. Doc. 1584 at 474. Considering Smith's long history of multiple jobs, the Court finds this knowledge to be within his realm of understanding, even if mildly mentally retarded.

C Correctional officers noted Mr. Smith's self-direction was within normal limits;

A Marshals indicated Mr. Smith is quite vigilant;

A Prior to his incarceration, Mr. Smith certainly went out alone in the daytime;

A,B Correctional officers noted that when requested to do so, he stops whatever activity he is doing and goes to his cell without displaying any anger or untoward behavior;

A Mr. Smith was noted by a correctional officer to tell a lie in an attempt to get what he wanted;

A,B Mr. Smith independently chooses his commissary items;

A Mr. Smith had the capacity [**169] to arrive at work in a timely fashion;

A One employment record indicated Mr. Smith's employment was terminated for insubordination; and

A Records indicate Mr. Smith chooses an activity and plans accordingly.

SOCIAL ⁵³⁴

534 *See* Rec. Doc. 1584 at 475-77.

C ⁵³⁵ Correctional officers noted Mr. Smith's social skills were within normal limits, with his being polite to them and other inmates;

A During the current evaluation, Mr. Smith was judged to be polite and friendly;

A Mr. Smith presumably has good relationships with his family members, including his mother, sisters, brother and cousin;

A Mr. Smith does not show good judgment in his selection of friends and/or acquaintances. For example, Mr. Smith was noted to be with John Johnson during a 1974 armed robbery and during the index crime; and

[*546] A,B Jail incident reports indicated Mr. Smith can recognize others emotions and act accordingly (i.e. back off when another individual stands up to him).

535 *Id.* at 43.

WORK ⁵³⁶

536 *See id.* at 477-88.

A (Mr. Smith's work history is summarized with his various job skills detailed. Separately, in this opinion, the Court has concluded that his work history is consistent for a person with Mild Mental Retardation; including [**170] his skills as a "tacker");

A ⁵³⁷ Employment records indicate Mr. Smith did not show up to work at times and was fired. He was also fired once for insubordination. Another write-up related to his not cleaning up his work space;

A Nevertheless, Mr. Smith had the capacity to attend work regularly (when not using drugs);

A No safety concerns were indicated in the employment records reviewed; and

A At one point, Mr. Smith earned approximately \$14.00 in regular pay and \$19.50 per hour in overtime pay.

537 *Id.* at 44.