RECORD NO. 07-9

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

KEVIN GREEN,

Petitioner-Appellant,

v.

GENE M. JOHNSON, Director of
the Virginia Department of Corrections,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, AND THE ARC OF VIRGINIA IN SUPPORT OF PETITIONER

James W. Ellis
Norman C. Bay
Steven K. Homer
April Land
Carol M. Suzuki
1117 Stanford Drive NE
MSC 11 6070
Albuquerque, New Mexico 87131
(505) 277-2146
(505) 277-0068 (telecopier)

September 4, 2007

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

ARGUMENT 2

I. ASSESSING MENTAL RETARDATION CLAIMS UNDER *ATKINS* INVOLVES BOTH PSYCHOMETRIC TESTING AND CLINICAL JUDGMENT 2

II. DETERMINING WHETHER A DEFENDANT HAS DEFICITS IN ADAPTIVE BEHAVIOR REQUIRES CAREFUL ASSESSMENT OF HIS DISABILITY 4

A. Adaptive Behavior Has Long Been a Component of the Definition of Mental Retardation 4

B. The Role of Adaptive Behavior in Mental Retardation Evaluations 6

C. Identifying Deficits in Adaptive Behavior 8

D. The Relationship Between Adaptive Deficits and Adaptive Strengths 11

E. Particular Issues in Adaptive Behavior for *Atkins* Evaluations 16

III. THE RECORD CLEARLY INDICATES THAT KEVIN GREEN HAD SIGNIFICANT DEFICITS IN ADAPTIVE BEHAVIOR 19

A. Conceptual Adaptive Skills 20

B. Social Adaptive Skills 23

C. Practical Adaptive Skills 25

D. The Deficits in Green's Adaptive Behavior Were Clearly Significant 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

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

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 4, 6, 13

Heller v. Doe,
509 U.S. 312 (1993) 3

Walker v. True,
399 F.3d 315 (4th Cir. 2005) 1, 3

STATUTES AND RULES:

Fed. R. Evid. 403 18

Va. Code Ann. § 19.2-264.3:1.1 (2003) 2, 8, 9, 10, 16

MISCELLANEOUS AUTHORITIES:

American Association on Intellectual and Developmental Disabilities, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* (2007) 8, 16, 17, 19

American Association on Mental Deficiency, *Classification in Mental Retardation* (Herbert J. Grossman ed., 1983) 15

American Association on Mental Deficiency, *A Manual on Terminology and Classification in Mental Retardation* (1961) 5

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) ..... *passim*

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2000) 3, 8, 13

Page

Bonnie, Richard J., & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811 (2007) 11

Edgerton, Robert B., *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967) 19

Ellis, James W. & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L. Rev. 414 (1985) 13, 18

Fernald, W.E., *The Burden of Feeble-mindedness*, 17 J. Psycho-Asthenics 85 (1912) 4

Fitz-herbert, Anthony, *The New Natura Brevium of the Most Reverend Judge, Mr. Anthony Fitz-herbert* (1666) 4

Fowler, Anne E., *Language in Mental Retardation: Associations with and Dissociations from General Cognition*, in *Handbook of Mental Retardation* (Jacob A. Burack et al. eds., 1998) 14

Greenspan, Stephen, & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, *What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century* (Harvey N. Switzky & Stephen Greenspan eds., rev. ed. 2006) 17, 19

Kasari, Connie & Nirit Bauminger, *Social and Emotional Development in Children with Mental Retardation*, in *Handbook of Mental Retardation* (Jacob A. Burack et al. eds., 1998) 14

Loveland, Katherine A., & Belgin Tunali-Kotoski, *Development of Adaptive Behavior in Persons with Mental Retardation*, in *Handbook of Mental Retardation and Development* (Jacob A. Burack et al. eds., 1998) 13, 14

Miller, Leon K., *The Savant Syndrome: Intellectual Impairment and Exceptional Skill*, 125 Psychological Bulletin 31 (1999) 15

Page

Nihira, Kazuo, *Adaptive Behavior: A Historical Overview*, in AAMR, *Adaptive Behavior and its Measurement: Implications for the Field of Mental Retardation* (Robert L. Schalock ed., 1999) 5, 9

Noble, Jr., John H., & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, in *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley et al. eds., 1992) 15

Report of the Virginia State Crime Commission: Atkins v. Virginia*: A Study to the General Assembly of Virginia* (Jan. 2003) 11

Schalock, Robert L., & Ruth Luckasson, *Clinical Judgment* (2005) 3

Schalock, Robert L., et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007) 1

Spreat, Scott, *Psychometric Standards for Adaptive Behavior Assessment*, in *Adaptive Behavior and Its Measurement* (Robert L. Schalock ed., 1999) 16

Trent, Jr., James W., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* (1994) 4

Widaman, Keith F., & Kevin S. McGrew, *The Structure of Adaptive Behavior*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* (John W. Jacobson & James A. Mulick eds., 1996) 6

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association on Intellectual and Developmental Disabilities (AAIDD) was formerly known as the American Association on Mental Retardation (AAMR),[1] and under that name has appeared as *amicus curiae* in numerous cases, including *Atkins v. Virginia*. Founded in 1876, AAIDD is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

The Arc of Virginia is a chapter of the Arc of the United States, and consists of twenty-one local chapters throughout the Commonwealth. The Arc of Virginia appeared as *amicus curiae* in this Court in *Walker v. True*, 399 F.3d 315 (4th Cir. 2005).

---

[1] *See* Robert L. Schalock et al., *The Renaming of* Mental Retardation: *Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007) (explaining that the change in terminology within the AAIDD involves no change in the definition). While clinicians in the field are increasingly using the term "intellectual disability," this brief will refer to "mental retardation," since that is the term employed by *Atkins* and by the Virginia legislature.

ARGUMENT

I. ASSESSING MENTAL RETARDATION CLAIMS UNDER *ATKINS* INVOLVES BOTH PSYCHOMETRIC TESTING AND CLINICAL JUDGMENT.

The Supreme Court has held that the execution of any individual who has mental retardation "is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). This conclusion was based on the evidence of a national consensus against the practice demonstrated by the enactment of numerous state and federal statutes, and also reflected the Court's "independent evaluation of the issue." *Id.* The Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317.

In response to *Atkins*, Virginia adopted a definition of mental retardation for this purpose:

> "Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va. Code Ann. § 19.2-264.3:1.1(A) (2003). This definition closely tracks the definition published by *amicus* American Association on Mental Retardation (now

known as AAIDD). AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) [hereinafter AAMR, *Mental Retardation 2002*]. It also follows the same basic contours as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2000) [hereinafter APA, *DSM-IV-TR*]. Like its professional counterparts, the Virginia definition has three elements: diminished intellectual functioning, deficits in adaptive behavior, and age of onset at birth or during childhood. This Court addressed some aspects of the intellectual functioning element in *Walker v. True*, 399 F.3d 315 (4th Cir. 2005). In this brief, *amici* will address only adaptive behavior.

The Supreme Court has correctly observed that diagnosing whether an individual has mental retardation is not as complex as the diagnosis of many forms of mental illness. *Heller v. Doe*, 509 U.S. 312, 321-22 (1993). However, the diagnosis is not cut-and-dried. While there are objective measures of intellectual functioning (IQ tests), and there will be a history of performance, behavior, and observations by others regarding deficits in adaptive skills, individual assessment still requires careful clinical judgment. Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* 5-6 (2005). It is particularly crucial to prevent stereotypes

about people who have mental retardation from clouding or distorting individual assessment.[2]

II. DETERMINING WHETHER A DEFENDANT HAS DEFICITS IN ADAPTIVE BEHAVIOR REQUIRES CAREFUL ASSESSMENT OF HIS DISABILITY.

A. Adaptive Behavior Has Long Been a Component of the Definition of Mental Retardation.

Deficits in an individual's practical abilities or adaptive skills have long been central to our understanding of the meaning of mental retardation. Prior to the twentieth century, description of what a person could – or more prominently, could not – do was the most frequent descriptive feature of an individual with substantial mental limitations. *See, e.g.*, Anthony Fitz-herbert, *The New Natura Brevium of the Most Reverend Judge, Mr. Anthony Fitz-herbert* 579 (rev. &

---

[2] The problems caused by stereotyping have long been recognized in the field of mental retardation. False stereotypes have played a major role in buttressing the cruel and discriminatory treatment individuals with mental retardation have too often received. *See generally* James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* (1994); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J. & Burger, C.J., concurring) ("[A] history of unfair and often grotesque mistreatment.") (internal quotations omitted). False stereotyping prompted leaders in the eugenics era to claim, e.g., that "[t]he feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. . . . They cause unutterable sorrow at home and are a menace and danger to the community." W.E. Fernald, *The Burden of Feeble-mindedness*, 17 J. Psycho-Asthenics 85, 90 (1912). History and fuller clinical understanding have thoroughly discredited such views. It is similarly false to assume or conclude that every person who has mental retardation exhibits the same lack of skills or abilities. *See* Section II(D), *infra*.

corrected ed. 1666) ("such a person who cannot account or number twenty pence, nor can tell who was his Father or Mother"). Among the terms employed in the nineteenth century were "social competency," "skills training," "social norms," "the power of fending for one's self in life," and "adaptability to the environment." Kazuo Nihira, *Adaptive Behavior: A Historical Overview*, in AAMR, *Adaptive Behavior and its Measurement: Implications for the Field of Mental Retardation* 7 (Robert L. Schalock ed., 1999) [hereinafter AAMR, *Adaptive Behavior*].

The development of the first IQ tests early in the twentieth century shifted the focus in the field to psychometric definitions of mental retardation. But within a few decades, concerns were raised that IQ testing alone was inadvertently labeling non-disabled individuals as "mentally retarded" based solely on their test-taking ability, particularly among school children. *Id.* Beginning in the 1960s, AAMR responded to these concerns by including the concept of deficits in adaptive behavior as an addition to IQ testing in the definition of mental retardation. American Association on Mental Deficiency, *A Manual on Terminology and Classification in Mental Retardation* 3 (1961). The purpose of its inclusion was to assure that the label "mentally retarded" would only be applied to individuals who had a real-world disability that accompanied their impaired intellectual performance.

B. The Role of Adaptive Behavior in Mental Retardation Evaluations.

To fall within the definition of mental retardation, an individual's impaired intellectual functioning must involve actual impairment in the skills involved in everyday living. As the Supreme Court has observed, "those who are mentally retarded have a reduced ability to cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442. The task of courts evaluating *Atkins* claims includes determining whether the reduced intellectual functioning indicated by IQ testing had a significant impact on the individual's practical skills and functioning.[3]

Determining deficits in "adaptive behavior" involves the assessment of what the person with intellectual impairment cannot do. "Adaptive behaviors are the behavioral skills that people typically exhibit when dealing with the environmental demands they confront." Keith F. Widaman & Kevin S. McGrew, *The Structure of Adaptive Behavior*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 97 (John W. Jacobson & James A. Mulick eds., 1996). An individual whose mental functioning falls within the contours of the definition of mental retardation will generally lack some basic skills and abilities that non-disabled individuals typically possess. Assessing an

---

[3] This happens in two related ways. "Low intellectual abilities may be responsible for both problems in acquiring adaptive behavior skills (acquisition deficit) and/or with the appropriate use of skills that have been learned (performance deficit)." AAMR, *Mental Retardation 2002*, at 75.

individual's deficits in adaptive behavior allows the clinician to determine what it is that the person cannot do (or cannot do at a satisfactory level).

For clinicians in the field of mental retardation, the evaluation of an individual's adaptive behavior serves two principal functions. The first, as noted, involves diagnosis and classification: to be certain that the individual has a real disability, and not merely anomalous IQ test results. The second purpose is to ascertain the actual deficits in the person's skills in order to develop and tailor individualized educational services and supports that will help address those needs and acquire whatever skills may be within the person's ability. AAMR, *Mental Retardation 2002*, at 73. This second purpose, while vitally important to clinicians, educators, and social service providers, has no direct analogue in a court's *Atkins* determination of whether an individual is eligible for the death penalty. The court's only concern is whether an individual who has reduced intellectual functioning also has "significant limitations in adaptive behavior."[4]

---

[4] As a general matter, for clinicians, the focus on when an individual experiences these deficits is relatively unimportant. In *Atkins* cases, that may not always be true. The death penalty is precluded, in large part, because of its presumed effect on the level of defendant's culpability for his criminal acts. *Atkins*, 536 U.S. at 318 ("Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."). Thus the focus is properly on the individual at the time of the crime. Some individuals who had manifested deficits in adaptive behavior at that time, may have adapted to the more structured environment of prison and no longer

The precise contours of those individual limitations and how they might best be addressed or ameliorated in the social service system are not relevant to *Atkins* eligibility.

C. Identifying Deficits in Adaptive Behavior.

The adaptive behavior prong of the definition focuses on "significant *limitations* in adaptive behavior." Va. Code Ann. §19.2-264.3:1.1(A) (2003) (emphasis added). *See also* AAMR, *Mental Retardation 2002*, at 1 (same); APA, *DSM-IV-TR*, at 41 ("significant *limitations* in adaptive functioning") (emphasis added).[5] At first glance, this exclusive clinical focus on the negative, rather than balancing an individual's strengths against weaknesses, may seem surprising and

---

demonstrate the same adaptive deficits. *See, e.g.*, AAIDD, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* 57 (2007) [hereinafter *User's Guide*] (warning against "[i]naccurately interpreting as improvement or enhanced functioning behavioral changes that occur in an undemanding or tolerant environment but do not generalize to more demanding environments"). If defendant had the requisite deficits at the time of the crime, later adaptation to prison routine is irrelevant to the diagnosis.

[5] Earlier clinical formulations of the definition had also consistently expressed the adaptive prong in the negative. *See, e.g.*, AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (9th ed. 1992) ("*limitations* in two or more of the . . . applicable adaptive skill areas") (emphasis added); American Association on Mental Deficiency [AAMD, now AAIDD], *Classification in Mental Retardation* 184 (Herbert J. Grossman ed., 1983) ("*deficits* in adaptive behavior") (emphasis added); AAMD, *A Manual on Terminology and Classification in Mental Retardation* 3 (1961) ("*impairment* in adaptive behavior") (emphasis added). *See also Atkins*, 536 U.S. at 308 n.3.

perhaps even counterintuitive. But given the role of adaptive behavior in clinical diagnosis of mental retardation, it is both sensible and essential.

First and foremost, the adaptive behavior prong is intended to assure that the IQ score is not just a testing anomaly or error. As noted, this was primarily to avoid inadvertently labeling (and thus stigmatizing) school children who performed poorly on psychometric tests but who otherwise evidenced normal development and age-appropriate skills.[6] Thus, it was the *absence* of adaptive *deficits* that made the label inappropriate for such children. The other reason for the focus on deficits is that it facilitates the development by educators and clinicians of individually targeted and appropriate educational and social service interventions to help the individual who has mental retardation improve his functioning in everyday life in the community.[7] (Again, this latter function does not have a direct analogue in assessment for *Atkins* purposes.)

The definition's adaptive prong also requires that the deficit be "significant." *See, e.g.*, Va. Code Ann. § 19.2-264.3:1.1(A) (2003). As with the focus on deficits

---

[6] Kazuo Nihira, *Adaptive Behavior: A Historical Overview*, in AAMR, *Adaptive Behavior*, at 7 ("Because of this dual criterion, a child with a low IQ who functioned well outside of school was not classified as mentally retarded.").

[7] The AAMR definition "maintains a strong commitment that classification based on intensities of needed supports should be the primary focus of a classification system and the preferred direction for the field." AAMR, *Mental Retardation 2002*, at xii.

rather than strengths, the requirement that the deficit be significant makes sense in light of the definition's clinical purpose. For diagnostic purposes, clinicians have wanted to make sure that the label is not applied to mentally impaired individuals whose actual disabilities have only an inconsequential impact on their ability to function in society. (Similarly, for purposes of planning educational or habilitation interventions, clinicians obviously wish to focus their attention on impairments or deficits that are more than *de minimis*.) It is widely agreed among professionals in the field that isolated or trivial impairments do not satisfy the diagnostic requirements for mental retardation. But when an intellectually impaired individual does have significant impacts on his ability to function, the diagnosis is clinically warranted and appropriate.[8]

Finally, the adaptive prong of the definition requires that the deficits include those that are "expressed in conceptual, social, and practical adaptive skills." AAMR, *Mental Retardation 2002*, at 1; Va. Code Ann. § 19.2-264.3:1.1(A) (2003). The identification of these three "domains" is intended to provide guidance to diagnosticians who are evaluating the practical impact of intellectual

---

[8] And, of course, the adaptive deficit in a particular area does not have to be total in order to satisfy the test of significance. For example, if a student in the 8th grade is reading at a 3rd grade level, it would be a significant impairment even though he is not completely unable to read.

disability on an individual's actual functioning in life.[9] This guidance is not intended to hamper the ability of clinicians to identify adaptive deficits, but rather to focus attention on the areas of particular significance that may be impaired in the lives of persons with intellectual disabilities.[10]

D. The Relationship Between Adaptive Deficits and Adaptive Strengths.

One of the central truths about mental retardation is that people who have the disability vary widely in their skills and abilities, and that every individual with mental retardation has some things that he can do, which coexist with the things that he cannot do. The AAMR classification manual states, as one of the five

---

[9] AAMR, *Mental Retardation 2002*, at 73 ("The three broad domains of adaptive behavior in the definition represent a shift from the requirements in the . . . [earlier] definition that a person have limitations in at least 2 of the 10 specific skill areas listed in the 1992 definition. The three broader domains of conceptual, social, and practical skills in the new definition are more consistent with the structure of existing measures and with the body of research evidence on adaptive behavior."). Clinicians expect and believe that this change in the way adaptive deficits are described and organized, while increasing their ability to understand an individual's disability and to plan and provide appropriate services, will not substantially change the number or identity of individuals who are properly diagnosed as having mental retardation.

[10] Efforts in the Virginia legislature to make the identification of deficits in these domains somewhat more restrictive than the AAMR definition were ultimately rejected. *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811, 853-54 (2007). *See also Report of the Virginia State Crime Commission:* Atkins v. Virginia*: A Study to the General Assembly of Virginia* 3 (Jan. 2003) (Recommendation 4) (recommending that Virginia adopt a definition based upon the AAMR definition).

paramount principles that inform the definition, "[w]ithin an individual, limitations often coexist with strengths." AAMR, *Mental Retardation 2002*, at 1. "This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things." *Id.* at 8. This fact has long been recognized within the field of mental retardation. For example, the previous diagnostic manual similarly listed as a key application of the definition, "[s]pecific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (9th ed. 1992). As the authors of the manual explained,

> Individuals frequently have strengths in personal capabilities independent of mental retardation. Examples include: (a) an individual may have strengths in physical or social capabilities that exist independently of the adaptive skill limitations related to mental retardation (e.g., good health); (b) an individual may have a strength in a particular adaptive skill area (e.g., social skills) while having difficulty in another skill area (e.g., communication); and (c) an individual may possess certain strengths within a particular specific adaptive skill, while at the same time having limitations within the same area (e.g., functional math and functional reading, respectively). Some of a person's strengths may be relative rather than absolute; thus, the strengths may be best understood when compared to the limitations in other skill areas.

Id. at 6-7.

Therefore, it is not surprising that persons who have mental retardation present a mixed picture, including both their individual deficits in adaptive skills

and those adaptive areas where their functioning is somewhat stronger. But it is equally true that the particular combination of skills and deficits reveals no identifiable pattern shared by all individuals who have mental retardation. As the Supreme Court has observed, there is a "wide variation in the abilities and needs" of people with mental retardation. *Cleburne*, 473 U.S. at 445. This is true in two separate ways. Most obviously, there is a spectrum of disability, ranging from individuals with the most profound level of impairment to those whose disability, while significant and sufficient to constitute mental retardation, is less global.[11] Perhaps less obvious is the fact that individuals whose intellectual impairment is at roughly the *same* level will often have quite *different* deficits in adaptive behavior. *See, e.g.*, Katherine A. Loveland & Belgin Tunali-Kotoski, *Development of Adaptive Behavior in Persons with Mental Retardation*, in *Handbook of Mental*

---

[11] Mental retardation professionals previously described that spectrum by categorizing individuals as having "mild," "moderate," "severe," or "profound" mental retardation. Although this taxonomy has been retained by some, *see* APA, *DSM-IV-TR*, at 42-44, *amicus* AAIDD and other professionals have abandoned it, in part because of its perceived over-emphasis on IQ scores, in comparison to adaptive skill needs. AAMR, *Mental Retardation 2002*, at 114-15. Under that earlier four-part classification system, approximately 90% of all individuals who had mental retardation (and thus included within the protection of *Atkins*) were classified in the "mild" range. In the criminal justice system, that percentage would be even higher (because of the multiple handicaps typical of individuals in the "severe/profound" range). *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423 (1985) ("Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability.").

Retardation and Development 521, 523 (Jacob A. Burack et al. eds., 1998) [hereinafter *Handbook of Mental Retardation*] ("It is increasingly evident that persons with mental retardation do not form a homogeneous group with respect to behavioral or biological development, and that even when persons with milder, so-called familial retardation are separated from those with retardation thought to be of organic etiology, there remain developmental differences among identifiable subgroups.").[12]

A corollary of these differences in the adaptive skills of individuals with the disability is that clinicians have not identified a list of skills or tasks that *no* person with mental retardation can do. *If an individual has deficits in adaptive behavior that are of sufficient magnitude to satisfy the requirements of the definition, the presence of other skills or activities does not negate the diagnosis of mental retardation.* Attempting to identify such an activity, particularly by non-clinicians,

---

[12] These differences begin during childhood and are observed regarding both specific skills and adaptive domains. *See, e.g.*, Anne E. Fowler, *Language in Mental Retardation: Associations with and Dissociations from General Cognition*, in *Handbook of Mental Retardation* 290 (noting "the growing appreciation that children of different etiologies but similar IQ scores may have dramatically different linguistic profiles"); Connie Kasari & Nirit Bauminger, *Social and Emotional Development in Children with Mental Retardation*, in *Handbook of Mental Retardation* 411 (social development varies substantially among children who have the same level of cognitive impairment). The development of adaptive skills during adulthood also appears to vary widely. *See* Loveland & Tunali-Kotoski, in *Handbook of Mental Retardation*, at 535 ("Many people with mental retardation appear to continue to acquire or to maintain adaptive skills well into adulthood, although others may exhibit plateaus or even declines in skills.").

is particularly unwarranted because it slides so easily into popular stereotypes about mental retardation. If one's mental image of a person with mental retardation conjures up an individual with multiple impairments, or a person with a particular etiology (such as Down Syndrome), it may be tempting (although erroneous) to conclude an actual defendant "couldn't possibly have mental retardation because people with mental retardation cannot" (drive a car, be employed, have a romantic relationship, etc.).[13] Such a conclusion is unsupported by the clinical literature and is inconsistent with our experience with the diversity in manifestations among people who have mental retardation.[14]

---

[13] In addition to being stereotypes, such views are also often outdated. *See, e.g.*, John H. Noble, Jr., & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, in *The Criminal Justice System and Mental Retardation: Defendants and Victims* 17, 20 (Ronald W. Conley et al. eds., 1992) ("In fact, the service system for people with mental retardation is currently undergoing major changes based on accumulating evidence that individuals with severe mental limitations are capable of far greater social adjustment (e.g., living and participating in the community, working in integrated jobs, and so on) than was previously believed.").

[14] The peril of trying to identify common tasks that no person with mental retardation could do is, perhaps, illustrated by the atypical but documented cases of individuals with mental retardation who have the ability to perform isolated, *un*common tasks. *See, e.g.*, Leon K. Miller, *The Savant Syndrome: Intellectual Impairment and Exceptional Skill*, 125 Psychological Bulletin 31 (1999), and sources cited therein. *See also* AAMD, *Classification in Mental Retardation* 179 (Herbert J. Grossman ed., 1983). *Amici* are not suggesting that there are savants among identified *Atkins* claimants; rather, they are merely reiterating the more general principle that strengths, even unanticipated strengths, coexist with adaptive deficits.

E. Particular Issues in Adaptive Behavior for *Atkins* Evaluations.

In most respects, the evaluation of an *Atkins* defendant's deficits in adaptive behavior will involve similar clinical issues and assessment practices to those encountered in other adaptive behavior assessments.[15] But there are a few specific considerations to bear in mind.

In selecting an instrument and methodology for evaluating adaptive deficits, it is important to focus on the diagnostic inquiry involved in the case. A multitude of adaptive behavior scales are now available, and not all will be equally helpful in the context of capital cases. In particular, instruments focused on designing and implementing educational or habilitation services may be less valuable for straightforward diagnostic purposes.[16]

A second issue arises from the previously discussed principle that the focus of the assessment is on *deficits* in adaptive behavior, and the corollary that all individuals who have mental retardation have both things they can do and other things they cannot do. In *Atkins* cases, these principles are particularly relevant to

---

[15] For general guidance regarding adaptive behavior assessments, see AAMR, *Mental Retardation 2002*, at 73-91; AAIDD, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* (2007). The relevant portion of the statute is Va. Code Ann. § 19.2-264.3:1.1(B)(2) (2003).

[16] *See generally* Scott Spreat, *Psychometric Standards for Adaptive Behavior Assessment*, in *Adaptive Behavior and Its Measurement* 103, 105 (Robert L. Schalock ed., 1999) (more than 200 instruments are available, and they vary in their usefulness for purely diagnostic purposes).

attempts, by either the prosecution or the defense, to reach conclusions about a defendant's claim based on the facts of the crime of which he stands accused or convicted. There are substantial clinical problems raised by this practice. The first is that it tends to confuse "deficits in adaptive behavior" with *maladaptive* behavior. AAMR, *Mental Retardation 2002*, at 79 ("Correlational relationships between domains of adaptive behavior and maladaptive behavior are generally low ($r < .25$), with a tendency to be higher in samples of people with more severe forms of mental retardation."); *User's Guide*, at 13 ("[P]roblem behavior that is 'maladaptive' is not a characteristic or dimension of adaptive behavior."); *id.* at 20 (It is important to "understand that adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum"); *id.* at 22 ("Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior or about having [mental retardation/intellectual disability]."); *see also* Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, *What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century* 283, 290-92 (Harvey N. Switzky & Stephen Greenspan eds., rev. ed. 2006) [hereinafter AAMR, *What is Mental Retardation?*] (cataloguing reasons, for *Atkins* purposes, "why one should avoid basing diagnostic inferences about a defendant's level of adaptive functioning, and about having MR, on information about his or her past criminal acts").

Given these concerns raised by clinicians in the field, it is difficult to see how the probative value of using evidence about the crime could outweigh its prejudicial effect in a proceeding on the sole issue of whether a defendant had mental retardation. *See generally* Fed. R. Evid. 403.

The other major point that emerges clearly from the literature is the problematic nature of relying on self-reports by the individual who is being assessed regarding his own abilities and adaptive skills. Such self-reporting has long been recognized as unreliable. Individuals who have intellectual impairment are often questionable sources on the subject of their skills and abilities. But while people in the criminal justice system might anticipate that the unreliability would take the form of exaggerating the individual's adaptive deficits, the opposite is more frequently true. Individuals who have mental retardation frequently exaggerate their *abilities* and experiences in order to avoid the stigma they perceive in the label of mental retardation.[17] As a result, AAIDD recommends to

---

[17] "It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities or out of defensiveness about their handicap." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 430 (1985). The aversion to the label "mental retardation" and to any suggestions that an individual has a mental disability are remarkably intense and strongly felt. *See, e.g.*, Martha E. Snell & Mary D. Voorhees, *On Being Labeled with Mental Retardation*, in AAMR, *What is Mental Retardation?* 59 (collecting first person accounts). This phenomenon of attempting to mask the existence or extent of an individual's disability has been observed in a wide variety of settings. *See, e.g.*,

evaluating clinicians that they should "[r]ecognize that self-ratings have a high risk of error in determining 'significant limitations in adaptive behavior,'" *User's Guide*, at 21, because of the likelihood of the individual attempting to appear less disabled than he actually is, and because of the strong bias toward acquiescence "or inclination to say yes or agree with the authority figures." *Id.* at 22.

As a result of these considerations, courts should bring similar skepticism to conclusions based on self-reporting.[18]

III. THE RECORD CLEARLY INDICATES THAT KEVIN GREEN HAD SIGNIFICANT DEFICITS IN ADAPTIVE BEHAVIOR.

Evidence presented before the Magistrate Judge manifestly documents Green's deficits in all three domains of adaptive behavior.

Robert B. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* 148 (1967).

[18] Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, *What is Mental Retardation?* 285-86 (listing multiple reasons why reliance on self reporting tends to distort the evaluation of adaptive behavior deficits). "An individual's self-perception may be worth knowing for therapeutic purposes but has no relevance to diagnosing him as having or not having MR, except to the extent that an unrealistically positive self-image may support, rather than detract from, a diagnosis of MR. Experts in *Atkins* cases should always keep in mind that individuals with mild MR rarely are willing to see themselves as having MR, and many of the things they claim to be able to do are conscious or unconscious fictions of competent behavior." *Id.* at 286.

A. Conceptual Adaptive Skills.

Evidence in the conceptual domain involves language, reading and writing, use of money, and self-direction.

The Magistrate recognized evidence of language skills deficits including both testimony by Dr. Reschly that Green had "severe language deficiencies" and the individualized education plan (IEP) when Green was 14, indicating that he had the language skills typical of a child in the range of four to eight years old.[19] There was also additional, detailed evidence from witnesses who had known Green since childhood that he had language problems both as a child and as an adult, including an inability to tell stories coherently, difficulties in understanding instructions from adults, trouble following television programs or video games, an inability to understand jokes, and difficulty following the thread of a conversation.[20]

The only contrary evidence mentioned by the Magistrate was Dr. Pasquale's testimony for the prosecution that Green recognized Dr. Pasquale the second time they met, that they had argued about Dr. Pasquale's testimony, that Green could

---

[19] Magistrate Judge Report [hereinafter MJR] at *51. *Amici* will refer to the report of the Magistrate, since the District Judge accepted that report's factual findings and conclusions. Dist. Ct. Slip Op. at 12 (D. Va., Mar. 26, 2007).

[20] Examples in this paragraph are found in the affidavits of Emma Bright, Brenda Crockett, Lillie Edmonds, Michael Green, Deborah Lyons, Adam Murphy, Carol Roberson, April Crockett, Tyrone McCann, and Cornelious Phillips. (Several of the examples are found in more than one of the affidavits.)

state that his retrial resulted from jury problems at the first trial, and that he bragged about his supposed ability to rap. MJR at *51. The first three do not indicate the absence of *deficits* in language, and the fourth is the type of exaggerated self-report typical of many individuals with mental retardation, which here is directly contradicted by the testimony of others.

The second component in the conceptual domain is reading and writing skills. The Magistrate noted evidence of deficits in this area, including school reports and reports from adults who knew Green both in childhood and as an adult. MJR at *56. The Magistrate also had actual job applications completed by Green. Each of the job applications contained numerous errors, including misspellings of his city of residence, his elementary school, and repeated misspellings of common words. The applications were sloppily, incompletely, and inaccurately completed. Detailed evidence showed that Green could not sign his name, write his street address, understand word problems in math, read a newspaper, or read the name and phone number given to him by a girl.[21]

The only contrary evidence cited by the Magistrate contended that Green had filled out forms for the prison commissary and at a gun shop, and that he had requested books that would require adult reading skills. MJR at *51. Such

---

[21] Affidavits of Bobbi Hickman, Mark Johnson, James Green, Geraldine Green, Tyrone McCann, and Brenda Crockett.

requests for implausible reading materials, unsupported by evidence of actual reading or comprehension, would be consistent with frequently encountered attempts by individuals with mental retardation to claim skills they actually lack.

The third component in the conceptual domain involves understanding of money. The Magistrate made reference to Dr. Reschly's testimony that Green had never written a check, needed help paying his bills, and was easily tricked out of his money. MJR at *52. Evidence in the record also indicated that he tended to waste money purchasing too much food and letting it spoil, and detailing a long-standing pattern of people taking financial advantage of him.[22]

The only contrary evidence cited by the Magistrate consisted of testimony by one employer that Green had managed the collection of money at his job, and self-reports from Green. However, Green's employer and a co-worker testified that he hardly ever had to make change. The self-reports consist of Green's boasting that he handled his own money, competently handled drug deals, had a savings account, used money orders, and profited $250 per day selling drugs. MJR at *52.[23]

The final component of the conceptual domain involves self-direction. The Magistrate noted testimony that Green was vulnerable and easily influenced by

---

[22] Affidavits of Mark Johnson, Brenda Crockett, and James Green.

[23] Affidavits of Geraldine Belinda Gaines and Mark Johnson.

others, a detailed report from the school when Green was in the fourth grade about his need for extraordinary direction in the classroom, and the testimony in several affidavits about Green's need for structured directions in a variety of contexts. MJR at *52. Other evidence indicated that Green would give up when challenged and numerous instances in which he claimed that he would have fantastical accomplishments in the future, which were unaccompanied by any understanding of the steps that would be needed to achieve them.[24]

The only contrary indications mentioned by the Magistrate were Green's possession of a driver's license, efforts to conceal his criminal actions, and the fact that he once requested his medical records. MJR at *52. As for the driver's license, the affidavits reveal that Green failed three times before passing the written test, despite the fact that the DMV provides the answers to applicants before the exam.[25]

B. Social Adaptive Skills.

Evidence in the social adaptive skills domain includes interpersonal skills and responsibility, self-esteem, gullibility and naïveté, and the ability to follow rules and obey laws.

---

[24] Affidavits of Carla Floyd, Emma Bright, Michael Green, Damonic Griggs, and Cornelious Phillips.

[25] Affidavit of James Green.

The evidence regarding interpersonal skills is particularly abundant and telling. As a child, Green did not socialize well with other children, particularly of his own age.[26] This pattern of poor social skills continued as an adult. Numerous witnesses referred to his inappropriate approach to social interactions with family and friends, and to child-like behavior. There was testimony that Green never knew when a joke was over and did not know when his friends were making fun of him.[27]

The only contrary evidence involved the fact that Green had held jobs, that he managed to obtain the help of others for things he could not do, and that he asked deputies for quiet when the jail was noisy.[28]

---

[26] Affidavits of Emma Bright, Brenda Crockett, and Geraldine Belinda Gaines ("Kevin never wanted to spend time with kids his own age. He did not have the social skills to earn their respect . . . .").

[27] Affidavits of Emma Bright, April Crockett, Carla Floyd, James Green, Michael Green, Brenda Crockett (when he was twenty years old "he still acted like a ten or twelve year-old child"), and Lillie Edmonds (his girlfriend would give him "common sense instructions on his behavior, conversation, and manners, just like a mother might to a five-year-old child").

[28] MJR at *53. The Magistrate also alludes to Dr. Pasquale's hypothesis that Green had an "anti-social and exploitive mind set." (As noted above, clinicians are advised to be careful not to confuse maladaptive behavior with adaptive behavior.) But whatever validity there might be to such a psychiatric classification, there is no indication in the record or in the clinical literature that it is inconsistent with a diagnosis of mental retardation.

The clear portrait that emerges is that Green, both as a child and as an adult, lacked the ability to interact with others in an age-appropriate way.

This picture is fully consistent with the abundant evidence regarding Green's naïveté, gullibility, and self-image problems. MJR at *54. The evidence included a school referral to seek counseling for his self-esteem problems. As an adult, the problems continued, as evidenced by testimony that he was overly trusting and gullible with friends who repeatedly led him into trouble, took his money, and otherwise took advantage of him. He was unable or unwilling to acknowledge that he was used and mistreated by his friends. There was also abundant evidence that Green consistently hid or disguised his inability to read, and exaggerated having abilities, skills and experiences that were both false and patently implausible.[29]

C. Practical Adaptive Skills.

As in the other two domains, there is abundant evidence of Green's deficits. For example, Dr. Reschly and other witnesses noted Green's difficulty in dressing himself, and "many of the declarants stated that Green could not tie his shoes." MJR at *55. There was also testimony that he could not make Kool-Aid, or operate the on-off switch on a radio. He required detailed and repeated

---

[29] Affidavits of James Green, Michael Green, Emma Bright, Brenda Crockett, Geraldine Belinda Gaines, and Carla Floyd ("He bragged about dating all sorts of women, including people he had never met. He said he had dated Whitney Houston . . . .").

instructions to accomplish simple tasks. Similarly, in the area of occupational skills, while there was evidence he had worked at several low-level jobs, and on occasion received praise for some aspects of his work, he failed at others. Several low-skilled jobs proved overwhelming to him. There was also evidence that in delivering pizzas he relied on others to make his deliveries because he was unable to follow driving directions. Given his weakness understanding instructions, he particularly appreciated one manager who was patient with him and did not mind repeating instructions.[30]

Similar evidence documented Green's difficulty in maintaining a safe environment. Testimony about his abilities as a child indicated an inability to stay away from dangers that other children of his age would avoid. MJR at *56. These problems are consistent with the evidence of gullibility and naïveté and continued into his adult years. For example, testimony showed Green's aunt could not entrust her children to his care, and he did not understand, at 19, that it might

---

[30] MJR at *55-*56; Affidavits of April Crockett, Deborah Lyons ("[H]e does not follow step-by-step directions, but instead, would skip around completing the steps in random order."), Lillie Edmonds, Brenda Crockett, Emma Bright, Geraldine Belinda Gaines, Mark Johnson, Michael Green, Cornelious Phillips, Adam Murphy ("[I]t was a disaster. . . . Kevin's [ice] stacking incompetence was creating so much extra work for me that I had to remove him from the task."), and Carol Roberson ("Kevin required constant supervision and instruction.").

be unsafe to light fireworks right next to someone's chair.[31]

The evidence in the area of maintaining a safe environment was uncontested.

D. The Deficits in Green's Adaptive Behavior Were Clearly Significant.

As discussed in Section II, evaluation of an individual's adaptive deficits must focus on whether there is evidence of actual impairments in the person's functioning in the world. It is essential in conducting such an evaluation to recognize that all individuals with mental retardation possess skills along with their deficits. Much of the evidence concerning Green's deficits was uncontested. The opposing contentions credited by the Magistrate consisted largely of assertions that there were some other tasks that Green could perform, a number of which were false boasts by Green himself. (Even where true, they do not disprove the existence of the deficits.)

The deficits exhibited by Green were found in all three domains, and in every area of each domain. There can be no doubt that they have imposed substantial limitations on his functioning in the world, dating back to his childhood. There has been no contention that his impairments in areas like language, social adaptation, and daily living skills had insignificant or trivial effects on his life.

---

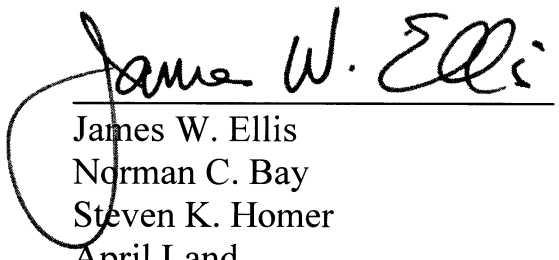
[31] Affidavits of Brenda Crockett, Geraldine Belinda Gaines, Geraldine Green, and Michael Green.

The purpose of assessing adaptive behavior is to make sure that the measured impairment in intellectual ability is accompanied by real-world consequences in the individual's life. The evidence in this case abundantly confirms that those consequences were real and substantial.

CONCLUSION

The rulings under review conflict with professionally accepted standards for evaluating deficits in adaptive behavior, as well as the terms of the Virginia statute and the Supreme Court's *Atkins* decision. For the reasons set forth herein, *amici* respectfully request that this Court reverse the rulings below.

Respectfully submitted,



James W. Ellis
Norman C. Bay
Steven K. Homer
April Land
Carol M. Suzuki
1117 Stanford Drive NE
MSC 11 6070
Albuquerque, NM 87131
(505) 277-2146

Counsel for Amici Curiae

Dated: September 4, 2007

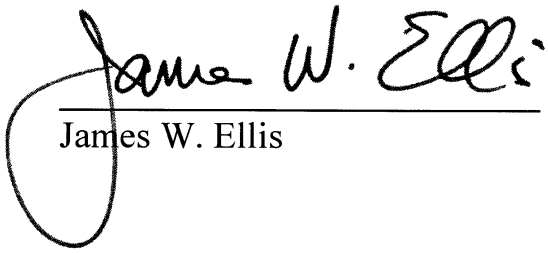
CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents, table of citations, and certificates of counsel, the brief contains 6,993 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

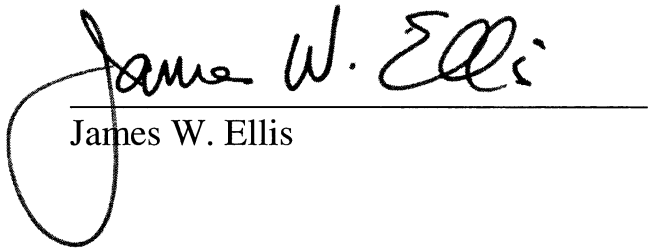
Date: September 4, 2007



James W. Ellis

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007, I caused the foregoing Brief of Amici Curiae to be served by first-class mail on Matthew P. Dullaghan, Esq., Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, and Michele J. Brace, Esq., Virginia Capital Representation Resource Center, 2421 Ivy Road, Suite 301, Charlottesville, VA 22903.



James W. Ellis