

Offenders With Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment

KAREN L. SALEKIN

Department of Psychology, The University of Alabama

J. GREGORY OLLEY

Center for Development and Learning, The University of North Carolina at Chapel Hill

KRYSTAL A. HEDGE

Department of Psychology, The University of Alabama

Although the problem of people with disabilities as victims of crime has been well recognized, the known characteristics of people with intellectual disabilities (ID) also make them vulnerable to becoming perpetrators of crimes. Most such crimes are minor, but the 2002 Atkins v. Virginia decision called national attention to people with ID and people with dual diagnoses who commit capital crimes. This article reviews the data on offenders with intellectual and dual disabilities and the challenges related to their diagnoses and their roles in the criminal justice system. Offenders with ID are overwhelmingly individuals with mild intellectual disability, and their characteristics largely resemble those of offenders who do not have an ID diagnosis. They do not engage predominantly in any one form of criminal behavior, and their readily identifiable characteristics do not set them apart from offenders without a disability. However, their intellectual limitations make it more difficult for them to understand their Miranda rights; to work effectively with their attorneys; or for those found incompetent to stand trial, to profit from formal programs to restore them to competency. Assessment methods, particularly assessment of malingering of ID, have many limitations when applied in the criminal justice setting.

Address correspondence to Karen L. Salekin, 410 Gordon Palmer, Box 870348, The University of Alabama, Tuscaloosa, AL 35487. E-mail: ksalekin@bama.ua.edu

KEYWORDS intellectual disability, offender, prevalence, forensic assessment, mental retardation

Although most people with disabilities who encounter the criminal justice system do so as victims of crime (Rand & Harrell, 2009), a small proportion of people with intellectual disability (ID; formerly “mental retardation”) commit violent crimes. In 2002, the United States Supreme Court ruled that the execution of individuals with ID is a violation of the Eighth Amendment’s protection against cruel and unusual punishment (*Atkins v. Virginia*, 2002). In part, the Court opined that

because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. (*Atkins v. Virginia*, 2002, p. 1)

The decision in *Atkins* underscores the Court’s recognition that individuals with ID demonstrate impairments that must be taken into consideration at all stages of criminal proceedings. For some defendants, the critical decisions begin with waiving their right to remain silent (*Miranda v. Arizona*, 1966), and for others the decisions are associated with trial level participation. As we discuss in this article, impaired intellectual ability and associated problems in adaptive behavior render an offender with ID more vulnerable than a non-ID offender to problems negotiating the legal system.

COMMON CHARACTERISTICS OF ID AND RELATION TO OFFENDING

At the most fundamental level, individuals with ID have problems learning, and it has been suggested that the term *general learning disorder* may be more accurate than either mental retardation or intellectual disability (Baroff, 1999). Individuals with ID learn more slowly than do typically developing individuals and have significant problems learning abstract concepts and skills. In addition to problems in learning, researchers have identified many other characteristics commonly found with ID and have grouped these varied characteristics in many ways. A brief review of available research on the characteristics of ID illustrates the ways in which these individuals struggle with the demands of independent living, work, and social relationships. The focus is on the characteristics associated with mild ID as this is the functional level for the vast majority of offenders with ID.

Research has shown that individuals with ID often exhibit cognitive rigidity (see, e.g., Dulaney & Ellis, 1997; Kounin, 1941; Lewin, 1936), have problems with attention (see, e.g., Tomporowski & Tinsley, 1997), demonstrate slow information processing, and have difficulty planning and implementing complex behavior (Ferretti & Cavalier, 1991). In addition to being rigid in their problem solving, individuals with ID have been found to learn via imitation of others and to rely more on cues from others than do typically developing individuals (see Balla & Zigler, 1979, for a review). With regard to offending, it may be that the outerdirectedness and passive learning style of individuals with ID play a role in their becoming involved in the criminal justice system. For example, they may desire to fit in with a group of individuals and may engage in illegal activities in order to do so. It is also the case that individuals with mild ID are often born into environments of poverty that may foster criminality (American Association on Intellectual and Developmental Disabilities [AAIDD], 2010). In these situations, the impairments associated with ID prevent such individuals from veering away from this path as their behavior is greatly influenced by that of their immediate and extended family members.

In addition to difficulties in formal learning, people with ID commonly have problems in social learning, and impairments in this area can present as personality characteristics. Many studies have shown the tendency of children and adults with ID to have a heightened motivation for social reinforcement (Balla & Zigler, 1979), which can be seen in their tendency to do things to please others. These individuals also tend to have low expectations of success and, consequently, often fail to take initiative (Cromwell, 1963; MacMillan, 1969; Ollendick, Balla, & Zigler, 1971). Problems with self-direction are related to deficits in multiple areas, including adapting to changing demands, making good decisions, and engaging in meaningful planning for the future. In adults, this pattern is one of aimlessness, living for each day, and vocational instability, a constellation of traits that is common in an offender population.

When considering the three areas of adaptive functioning—conceptual, social, and practical (AAIDD, 2010)—it is in the area of practical skills that the majority of people with ID are more likely to demonstrate success. Individuals with ID are likely to have relative strengths in the acquisition of basic information and in the completion of tasks that are concrete, familiar, and have practical application in everyday life. Skills that can be learned through repetition are usually easier to acquire than are skills that require abstract understanding. For example, a person with mild ID may be able to drive a car but is not likely to understand the principles of the internal combustion engine. An example of a skill set that involves both practical and conceptual skills is that of money use. Suto, Claire, Holland, and Watson (2006) demonstrated that individuals with mild ID can recognize denominations of money and make simple purchases, but they often have problems

counting change and budgeting money. Given appropriate educational support, individuals with mild ID can learn to read, write, and become gainfully employed (see, e.g., American Psychiatric Association [APA], 2000, p. 43), but without such supports, they have poor employment potential and are at increased risk for engaging in criminal activity.

Once out of school, individuals with IQs at the high end of the mild ID range often blend into the general population; they have friends, marry, have children, and only need assistance during periods of personal or economic stress (APA, 2000; Baroff, 1999). As noted in the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. [DSM-IV-TR]; APA, 2000), "With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in supervised settings" (p. 43). Despite the well-documented fact that people with ID function well in some environments, those who argue in court that a defendant does not have ID often focus on specific abilities or isolated successes rather than on typical functioning.

THE OFFENDER WITH ID

Prevalence of ID in the Criminal Justice System

Prevalence rates for individuals with ID in the criminal justice system have varied over the years, with rates ranging from 0.6% (MacEachron, 1979) to 39.6% (A. J. Holland, 1991). Recent data indicate that at any time between 4% and 14% of incarcerated individuals in the United States have a diagnosis of ID (Petersilia, 2000), with rates of 0% to 2.8% reported when examining aggregate data from six countries (Fazel, Xenitidis, & Powell, 2008). Comparison of available research on the prevalence of ID in the criminal justice system is extremely difficult because research samples are not always representative of "true" ID offenders, and the method by which they obtain the data varies substantially among studies (see T. Holland, Clare, & Mukhopadhyay, 2002; W. R. Lindsay, Hastings, Griffiths, & Hayes, 2007, for comprehensive reviews of these issues). Rates of ID are often higher in secure medical facilities and at their lowest in the general prison population.

To illustrate the concerns related to classification criteria, prevalence data from of a study conducted by Hayes, Shackell, Mottram, and Lancaster (2007) are informative. In this study, the authors adhered to the diagnostic criteria of the APA (i.e., IQ = 70 and significant deficits in adaptive behavior) and found a prevalence rate of 2.9% in a UK prison. With a slight increase in the standard score (i.e., 74 or below), the prevalence rate jumped to 9.4%, and upon further increase (i.e., cut score of 79 or below), the prevalence jumped to 21.7%. Perhaps the most interesting finding of this study was not that the prevalence for ID in this sample mirrored what would be expected in the general population (i.e., 2–3% when using the strict cut score of 70)

but that the rate tripled with the application of the appropriate confidence intervals (i.e., $IQ = 70 \pm 5$). Based on the findings of this study, it appears that the prevalence of ID in the offender population may be greater than that of the general population, as is the prevalence of low cognitive ability that does not meet threshold for the diagnosis.

Characteristics of Offenders with ID

When considering the characteristics of the ID offender, it is important to be aware that these individuals are likely to be functioning at the mild level (IQ approximately 55–70). Thus, it would be expected that these individuals have had some success in independent living, have been employed in labor jobs or other jobs that require only limited cognitive skill, and have been part of a social network. Further, in comparison with their more severely disabled counterparts, individuals with mild ID are less likely to be identified as having a disability because their outward presentation is not recognizably different from the nonimpaired population. Nevertheless, due to their limitations in cognitive functioning, they are more vulnerable to the negative influences of typical offenders who reside in the community and, if raised in a home where one or more individuals engage in criminal behavior, they are more likely to follow this course rather than carving out a separate existence.

The AAIDD (2010) and the APA (2000) described ID as if it were a distinct entity in which individuals who meet this classification are easily distinguishable from those who do not. In reality, individuals with ID at the upper end of the continuum are, in most respects, no different from their counterparts who score slightly higher on an IQ test and/or who demonstrate less impairment in day-to-day functioning. Thus, it is not surprising that research has not borne out the previously held notion that ID offenders are fundamentally different from non-ID offenders. In fact, a study by March, Friel, and Eissler (1975; as cited in Russell & Bryant, 1987) found that 40% of the prison population have an IQ that is below 86, and according to the U.S. Department of Justice (2003), 40% of the state inmates had not obtained their high school diploma or GED. Furthermore data obtained in 1997 indicate that before quitting school, 25.5% of state inmates had “some high school,” and 14.2% had attained eighth grade or less. These characteristics are also present in the lives of ID offenders as are other risk factors, such as familial offending, psychosocial disadvantage, and unemployment (see, e.g., Glaser & Florio, 2004; Jones, 2007; Mannynsala, Putkonen, Lindberg, & Kotilainen, 2009; Riches, Parmenter, Wiese, & Stancliffe, 2006).

There exist a handful of prevalence studies on psychiatric illness and offenders with ID (see, e.g., Jones, 2007; Mannynsala et al., 2009; Riches et al., 2006). Data obtained from an examination of 44 pretrial reports showed that comorbidity was high (prevalence rate of psychiatric illness equal to 89%), with the three most common diagnoses being “any substance

abuse/dependence” (68%), alcohol abuse/dependence (45%), and antisocial personality disorder (25%; Mannynsala et al., 2009). Psychotic disorder, obsessive-compulsive disorder, and depressive disorder were low at 5%, 5%, and 2%, respectively. In contrast to the findings of Mannynsala et al., the prevalence rate for mental illness (i.e., psychotic disorders or major mood disorders) was far higher in the study by W. L. Lindsay et al. (2006), though the rate varied by setting. A prevalence rate of 37% was found at the high security hospital sample, 30.3% at the community forensic mental health center, and 10% at the medium/low security hospital. The samples were also highly disparate with regard to the diagnosis of antisocial personality disorder, which ranged from a high of 37.7% (high security hospital) to a low of 4.8% (medium/low security hospital).

THE ROLE OF THE FORENSIC MENTAL HEALTH PROFESSIONAL

In cases in which ID is an issue, it is likely that a mental health professional will be asked to assist the court in answering questions that are relevant to the legal proceedings. Perhaps the most typical of such questions pertain to the presence of functional deficits as they relate to a legal issue. For example, a mental health professional may be asked to lend insight into whether the offender possesses the requisite level of understanding to proceed to trial or whether the limitations that arise from ID render him or her incompetent to proceed. Similarly, the issue of whether the person possesses sufficient understanding of his or her legal rights at the time of the confession or whether the limitations that arise from ID render the confession invalid may become issues necessitating the involvement of a mental health professional. In only one situation does the presence of ID, in and of itself, play a central role in the legal proceedings. Specifically, in *Atkins v. Virginia* (2002), the United States Supreme Court ruled that offenders with mental retardation are not eligible for the death penalty; this is true regardless of their ability to function in the legal arena.

Regardless of the basis for the evaluation, the role of the mental health professional within the legal realm is to provide the trier of fact with “scientific, technical, or other specialized knowledge” (Federal Rules of Evidence Rule 702; hereafter referred to as Rule 702) that assists the Court in making a determination in that case. Moreover, mental health professionals should be “qualified by knowledge, skill, experience, training, or education” (Rule 702) in the field in which they are testifying. The authors are not aware of case law that dictates requirements for qualification in cases in which ID is an issue, but if one were to follow the premise of Rule 702, the expert should demonstrate a depth of knowledge that goes beyond the basic definitions put forth by the AAIDD (2010) and the APA (2000; Olley, 2009; see Siegert & Weiss, 2007, for a relevant case study). Issues of importance

include the use of abbreviated measures of intelligence (see, e.g., Axelrod, 2002), practice effects on intelligence tests (see, e.g., Basso, Carona, Lowery, & Axelrod, 2002), variability in test scores over time and across setting (see, e.g., Bracken, 1988), validity of measurement of malingering for individuals with ID (see, e.g., Salekin & Doane, 2009), the Flynn effect (see, e.g., Flynn, 1984, 1987, 2009; Hiscock, 2007; Spitz, 1989; Truscott & Frank, 2001), and the use of clinical judgment in the assessment of ID (Schalock & Luckasson, 2005).

ASSESSMENT OF INTELLECTUAL DISABILITY IN THE LEGAL REALM: LEGAL COMPETENCIES

With regard to trial level participation, the two most common forensic evaluations are (a) comprehension of *Miranda* rights and (b) competence to stand trial; this is true regardless of whether the defendant has an ID. The rationale behind both assessments is rooted in the notion that the criminal justice system is fair, and to maintain the dignity of the system, a defendant must be able to participate meaningfully in the judicial process. Specifically, defendants must have the requisite level of cognitive ability to make voluntary decisions that are in line with the facts of their cases and in line with the legal proceedings.

Waiver of *Miranda* Rights

Miranda v. Arizona (1966) is the landmark case in which the United States Supreme Court established procedural safeguards for suspects during custodial interrogations. Specifically, suspects must be informed that they have the right to remain silent, that anything they say can and will be used against them, and that they have the right to have an attorney present during the interrogation. The Court further opined that a waiver of these rights must be made “knowingly, voluntarily, and intelligently.”

Not surprisingly, studies have found a positive relationship between measured IQ and understanding of *Miranda* rights. As part of the validation studies for the Instruments for Assessing Understanding and Appreciation of *Miranda* Rights, Grisso (1998) evaluated the relationship between IQ, age, and the three scales of the measure. Scores on the measure generally increased with both age and IQ, with IQ demonstrating the stronger relationship (i.e., correlations for the subtests Comprehension of *Miranda* Rights = .47, Comprehension of *Miranda* Rights-Recognition = .45, and Comprehension of *Miranda* Vocabulary = .59). Of import, however, is marked increase in scores on some of the subtests after the age of 26 years. For example, the mean score on the vocabulary subtest for individuals between the ages of 23 and 26, who had a measured IQ of 70 or below,

was 6.33 (52.7%), whereas the corresponding mean for those 32+ years was 9.0 (75%). As a way to illustrate the severity of deficits associated with low IQ, a mean of 6.33 on the vocabulary subtest was lower than that obtained for children 8 to 10 years of age who had measured IQ scores of 101 or higher. The mean score for the latter group was 8.75 (72.9%). Fulero and Everington (1995) found similar results, though somewhat lower, for a sample of adults with ID who had little to no criminal history and adult offenders with ID. These results were replicated by Everington and Fulero in 1999.

Research has consistently found that individuals with ID demonstrate problems understanding their rights and that their suggestibility and tendency to acquiesce make them particularly vulnerable to providing involuntary confessions (Drizin & Leo, 2004; Ellis & Luckasson, 1985; Everington & Fulero, 1999; Perske, 2000, 2005). The findings of Cloud, Shepherd, Barkoff, and Shur (2002) clearly demonstrated concern because in their study only 22% of their sample of offenders with ID understood the meaning of the most fundamental right, the right to remain silent.

A recent study found that individuals with mild ID demonstrated impaired comprehension of *Miranda* rights and were prone to change their responses when given “friendly feedback” (O’Connell, Garmoe, & Goldstein, 2005). Moreover, their results showed that individuals with mild ID fell prey to leading questions; these findings were noted to be similar to those found by Gudjonsson (1997). Of note, Beail (2002) challenged the interpretation of research in this area as well as the validity of the Gudjonsson Suggestibility Scales with adults with ID.

Competence to Stand Trial (CST) and Restoration

In 1960 the United States Supreme Court ruled that individuals who are in the position to move forward with their trials must be able to function in the role of a defendant. In *Dusky v. United States* (1960), the United States Supreme Court stated that, to stand trial, defendants must meet a minimum level of competence; specifically, the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.” The *Dusky* standard, as it has come to be known, requires that a defendant have a certain level of cognitive ability; thus, individuals with ID could evidence deficits that impair their ability to participate in the judicial proceedings.

Discourse regarding the double-edged sword of evaluating competence in offenders with ID began shortly after the decision in *Dusky v. United States* (1960). On the one hand, a finding of incompetence could lead to prolonged detainment due to the difficulties in “restoring” someone to competence by psychiatric treatment or medication (Ellis & Luckasson, 1988). On the other hand, an inaccurate finding of competence could result in an individual’s

proceeding through the trial process without the requisite knowledge and understanding to make informed decisions. In the latter case, the outcome could be devastating (Ellis & Luckasson, 1985; Everington, 1990).

Though the exact date research began in this area is unknown, it appears that the first published article relating to the evaluation of trial competence was by Robey in 1965. Over time others have evaluated existing measures of competence on samples of individuals with ID and generally found these measures to be inappropriate due to problems in the format of the assessment (e.g., sentence completion) and with regard to the abilities that are tapped. Appelbaum and Appelbaum (1994) noted that individuals with ID have problems with cognition (e.g., logical reasoning, attention, learning, rigidity of thought), conation (e.g., failure to engage in purposeful or driven behavior), and communication and that these problems are not mutually exclusive. Instead, they interact with one another to impair different aspects of competency. In 1992, Everington and Luckasson developed and validated the only measure of competence to stand trial for offenders with ID (Competence Assessment for Standing Trial for Defendants with Mental Retardation; CAST-MR). A review of the PSYCINFO database (February 2010) yielded few references for the CAST-MR, which suggests that the measure has not yet been extensively evaluated.

A review of the literature reveals few empirical studies regarding restoration of competence for defendants with ID; however, those that have been conducted have found that these individuals are much less likely than non-ID offenders to reach adequate levels of competence. Anderson and Hewitt (2002) found that only 18% of defendants with ID ($n = 75$) were found competent after having received training. Of note, the results indicated that ethnicity and IQ were predictors of outcome, such that African American defendants and those with higher measured IQs (i.e., within the mild ID range of intellectual disability) were more likely to be found competent to move forward with legal proceedings. The difference in measured IQ between the two groups was substantial with a mean IQ of 57.5 for the incompetent group and 66.9 for the restored group. Morris and Parker (2008) found a much higher percentage of individuals with ID reaching competence at 6 months (61.1%) and at 1 year (75.6%). Comparative rates for defendants with a psychotic disorder were 72.8% and 83.8%, respectively. Of note, Morris and Parker also found that defendants with comorbid ID and mental illness were significantly less likely to be restored to competence than defendants who did not carry a diagnosis of mental illness (50% at 6 months and 60% at 1 year).

Although there are many programs geared toward restoring the competency of non-ID defendants, there are few specifically designed for defendants with ID. A review of the literature yielded information on only two restoration programs specifically designed for defendants with ID. The first is The Slater Method (Wall, Krupp, & Guilmette, 2003), and the

second is The Trial Competency Training Program (TCTP; Mentally Retarded Defendant Program, Florida State Hospital). Interestingly, in the Wall et al. study, 5 of 15 individuals (approximately 33%) with mild ID were restored to competency using the Slater Method, whereas only 21% were restored to competence using the TCTP (Ho & Henderson, 1998). At present, the body of research is simply not large enough to come to any conclusions regarding the effectiveness of any program. The percentages vary across study and setting, and it is likely that the effectiveness of the programs is inextricably linked to the level of intellectual impairment. The more severe the impairment, the less likely it is that any competence restoration program will be effective. Of course, researchers and clinicians alike must be careful not to confuse “knowledge” and “understanding” with rote memorization; in essence, people may be able to parrot back enough information to appear competent, but their comprehension may be no better than it was at pretraining.

RISK ASSESSMENT

Since the 1950s there has been a movement toward fostering independence in individuals with mental illness and ID, and as part of this movement, individuals with these conditions have been moved from institutions into community environments. The process of deinstitutionalization has resulted in an increase in the number of individuals with ID living in the community and an associated increased risk for offending. A necessary outgrowth of this movement is the development and/or refinement of measures that are effective in predicting recidivism with this population; unfortunately research has been slow in coming (W. R. Lindsay & Beail, 2004; Mikkelsen & Stelk, 1999).

The study of risk assessment dates back approximately 15 years at which time researchers began to search for actuarial risk factors that predict general and serious recidivism as well as sexual recidivism. Some of the most commonly cited risk assessment measures are the Violence Risk Appraisal Guide (VRAG; Quinsey, Harris, Rice, & Cormier, 1998), the Sex Offender Risk Appraisal Guide (SORAG; Quinsey et al., 1998), and the HCR-20 (Webster, Eaves, Douglas, & Wintrup, 1995). Included in the VRAG and the SORAG is the Psychopathy Checklist-Revised (PCL-R; Hare, 1991), and research suggests that, when used alone, the PCL-R is good at predicting general and serious recidivism but is less effective when predicting sexual recidivism.

In 2004, Quinsey, Book, and Skilling conducted the first study of the VRAG in an ID offender sample. The study evaluated the validity of predictions of antisocial behavior and found that the measure was not as effective as it was with a non-ID population but did predict antisocial behavior at a rate better than chance. These results were supported in a study by Gray,

Fitzgerald, Taylor, MacCulloch, & Snowden (2007) in which the VRAG, Psychopathology Checklist-Screening Version (PCL-SV; Hart, Cox, & Hare, 1995), and HCR-20 were studied in a sample of offenders with ID. The results of this study showed that the VRAG and PCL-SV predicted reconviction rates equally well in an ID sample and a non-ID sample. These researchers also found that the HCR-20 was a better predictor of reconviction for nonviolent offenses in the ID sample than in the non-ID sample.

In a recent study, W. L. Lindsay et al. (2008) examined the discriminative and the predictive validity of risk assessment instruments (those evaluating both static and dynamic factors) for offenders with ID who were sentenced to maximum security, medium security, low security detainment, or community service. The results of this study are extensive and therefore will not be detailed here, but overall the results suggested that some of the existing measures may be appropriate for use with an ID population. Though not inclusive, among the dynamic variables that have been found to be useful are inappropriate anger, anxiety, sadness, poor social supports, hostile attitude, and noncompliance with treatment (see, e.g., W. R. Lindsay et al., 2004; Quinsey, Book, & Skilling, 2004).

Harris and Tough (2004) conducted a study of sexual recidivism in which they concluded that “there is no scientific reason to believe that static and stable factors that reliably predict risk for a normal offender will not reliably predict risk for offenders from the intellectually disabled population” (p. 237). The results of their study supported this belief, and the authors found that the Rapid Risk Assessment of Sexual Offence Recidivism (Hanson, 1997, as cited in Harris & Tough, 2004) and the STABLE-2000 (Hanson & Harris, 2000), which were developed on a non-ID sex offender population, were appropriate for use with sex offenders with ID.

MALINGERING

Before the ruling in *Atkins v. Virginia* (2002), there was a virtual absence of discussion of the possibility of feigned ID in forensic evaluations. With the exception of faking a disability in order to collect Social Security benefits, it was believed that few people would want to feign a disorder that made them look “stupid,” and perhaps because of this, there had been little interest in the topic. Whatever the cause, the oversight is surprising because the prevalence of individuals with ID in the criminal justice system has been well documented over many years, and the incentive to feign has been readily apparent (e.g., having a confession suppressed; being found incompetent to stand trial; providing a potential mitigating circumstance during a capital sentencing phase). Though no one can say for sure, it is possible that the incentive value of preventing an execution has resulted in an increase in the number of evaluations of ID conducted in all criminal proceedings. In

his dissent to the *Atkins* decision, Justice Scalia was clear in stating his dissatisfaction with the ruling and his belief that widespread malingering was about to ensue:

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of [sic] Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, *ante*, at 2–3, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), *Jones v. United States*, 463 U.S. 354, 370, and n. 20 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded. . . . (*Atkins v. Virginia*, 2002, p. 17)

In recent years, the question of whether the condition of ID can be feigned has been argued in the literature (Baroff, 2003; Ellis, 2003; Mossman, 2003; Stevens & Price, 2006), with empirical data demonstrating the limited utility of effort tests and other measures of cognitive malingering (for reviews see Dean, Victor, Boone, & Arnold, 2008; Graue et al., 2007; Salekin & Doane, 2009). Only one empirical study has been conducted on the ability to feign deficits in adaptive behavior (Doane & Salekin, 2009). One of the arguments against successful feigning of the disorder is that the diagnosis requires the presence of deficits in ID and adaptive behavior that were evident before the age of 18 years. It would follow then that a person who asserts a claim of ID in a criminal proceeding would have documentation of impaired cognitive and adaptive functioning before the age of 18 years (e.g., special education records; disability documents; prior psychological evaluations) and/or would be able to provide collateral sources to support this assertion. In short, those who challenge the idea that ID can be feigned in the criminal justice system base their belief on the notion that people do not feign this disorder during a time in which there is no incentive to do so.

As previously mentioned, only one empirical article exists regarding malingering adaptive behavior deficits. In 2009, Doane and Salekin evaluated the ability of undergraduate students to feign deficits in adaptive functioning on two widely used measures, the Adaptive Behavior Assessment System–2nd Edition (ABAS-II; Harrison & Oakland, 2003) and the Scales of Independent Behavior-Revised (SIB-R; Bruininks, Woodcock, Weatherman, & Hill, 1996). Results showed that participants were able to successfully manipulate the ABAS-II, resulting in scores within the requested range of functioning (e.g., mild ID), whereas they were not able to fake the SIB-R, as dissimulation was easily detected by unbelievably low scores.

Research on the use of existing measures of malingering has produced disappointing results and overall has demonstrated that existing measures and methods, when used according to the current standards of practice, often misclassify people with bona fide ID as malingerers. The reader is directed to an article by Graue et al. (2007) in which the findings of prior research are detailed and the results are presented regarding malingering on tests of intelligence, malingered mental illness, and neurocognitive measures. Some of the main findings of the Graue et al. study include the following: (a) IQ scores obtained on the Wechsler Adult Intelligence Scale–3rd Edition (WAIS-III) can be reduced to a level commensurate with a diagnosis of mild ID; (b) WAIS-III malingering indices, such as reliable digit span and Mittenberg Discriminant function, did not differentiate between feigned ID and genuine ID; (c) measures of psychiatric malingering demonstrate low overall hit rates (attributed to low specificity); and (d) the use of current measures of neurocognitive feigning, without altering cut scores, misclassifies bona fide ID individuals as malingerers (e.g., 69% of the ID sample fell below the recommended cut score on at least one neurocognitive measure). In short, Graue and colleagues documented the questionable validity of existing measures of malingering when used with an ID population.

Everington, Notario-Snull, and Horton (2007) conducted the only study that evaluated the ability of ID offenders to feign “poor performance on a test of competence to stand trial” (p. 545). These authors used the CAST-MR (Everington & Luckasson, 1992) as their psycholegal measure and found that those malingering ID scored significantly lower than nonmalingerers and lower than individuals adjudicated incompetent to stand trial. These authors recommended an evaluation of malingering in cases in which a defendant scores below chance on Section I or Section II of the CAST-MR and in cases in which the score is incongruent with other data. This study was an important first step in the evaluation of malingering with this population; however, replication of the findings is important, as is the investigation of the utility of more typical measures of competence to stand trial, such as the MacArthur Competence Assessment Tool–Criminal Adjudication (MacCAT-CA; Poythress et al., 1999) and the newer Evaluation of Competence to Stand Trial–Revised (ECST-R; Rogers, 2004).

Although additional research is needed regarding the ability to malingering ID successfully, the malingering of ID, no matter how poorly done, will be attempted in some criminal cases. The authors further believe that individuals who would attempt to feign ID are limited to those who have true scores that fall between one and two standard deviations below the mean on either or both prongs of the ID diagnostic criteria. Offenders who fall in the average range of cognitive ability and/or adaptive behavior would not have demonstrated the requisite level of deficits in adaptive behavior in the community to meet the criteria for the diagnosis (this would be true even if they successfully reduced their score on an IQ test). Nevertheless,

in light of the possibility that a person can successfully feign the disorder, it has become important to find ways to evaluate this response style while maintaining a very low rate of false positives.

CONCLUSIONS

Research presented in this review demonstrates that offenders with ID are, in many respects, similar to those who do not have ID. In comparison with nonoffenders, the general offender population tends to have lower measured intelligence, be less educated, come from lower socioeconomic status, and come from chaotic home environments. All of these characteristics are also prevalent in the population of offenders with ID. Research has not borne out the notion that offenders with ID have a propensity to act out violently or to engage in any one particular criminal endeavor; this is also true of the general offender population. In fact, we cannot “see” the offender with ID any more obviously than we can “see” the offender without ID. There are no labels on their backs, and there are often no obvious signs that they are impaired enough to warrant attention. That said, underneath what appear to be typical offenders lie true differences in cognitive abilities that can dramatically affect their ability to function within the criminal justice system.

Deficits in reasoning and judgment make offenders with ID particularly vulnerable to becoming involved in the criminal justice system and can seriously impede their ability to negotiate the adversarial system successfully. Research is replete with data that indicate that many individuals with ID do not understand that they have the right to remain silent and that exercising this right will not be used against them. They have trouble grasping some of the most rudimentary information required of a defendant. Competency restoration programs are sometimes effective and sometimes not, and we don't seem to have a grasp on what makes the difference.

At present, our assessment strategies are far less than optimal, and evaluations of comprehension of *Miranda* rights and competence to stand trial for offenders with ID are conducted with instruments that may not be appropriate for this population. Data are virtually nonexistent with regard to how much knowledge or what type of knowledge is necessary to move forward in the legal process, and despite the one-size-fits-all approach dictated by *Godinez v. Moran* (1993), intellectual impairments are going to have a greater impact on functioning in cases that are more complex and those in which the stakes are high. Moreover, malingering instruments, at least in their current form, are generally not working, but determining future dangerousness using available measures appears to hold promise.

What we do know from the literature is that many individuals in the criminal justice system have impaired intellectual ability, some of whom meet diagnostic criteria for ID. We know that impairments in reasoning and

understanding are not categorical and that each offender presents with his or her own strengths and weaknesses; the uniqueness of the offender results in the need for individualized services, something that is more rare than common in most criminal justice systems. We also know that individuals with ID are vulnerable to exploitation and influence. Officers of the court must be aware of the vulnerabilities of this population and be able to respond appropriately to maintain the fairness and dignity of the system.

REFERENCES

- American Association on Intellectual and Developmental Disabilities. (2010). *Intellectual disability: Definition, classification, and systems of supports* (11th ed.). Washington, DC: Author.
- American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., text rev.). 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.
- Appelbaum, K. L., & Appelbaum, P. S. (1994). Criminal-justice-related competencies in defendants with mental retardation. *Journal of Psychiatry & Law, 22*, 483–503.
- Atkins v. Virginia, 536 U.S. 304 (2002).
- Axelrod, B. N. (2002). Validity of the Wechsler Abbreviated Scale of Intelligence and other very short forms of estimating intellectual functioning. *Assessment, 9*, 17–23.
- Balla, D., & Zigler, E. (1979). Personality development in retarded persons. In N. R. Ellis (Ed.), *Handbook of mental deficiency, psychological theory and research* (2nd ed., pp. 143–168). Hillsdale, NJ: Erlbaum.
- Baroff, G. S. (with Olley, J. G.). (1999). *Mental retardation: Nature, cause, and management* (3rd ed.). Philadelphia: Taylor & Francis.
- Baroff, G. S. (2003). Establishing mental retardation in capital cases: An update. *Mental Retardation, 41*, 198–202.
- Basso, M. R., Carona, F. D., Lowery, N., & Axelrod, B. N. (2002). Practice effects on the WAIS-III across 3- and 6-month intervals. *The Clinical Neuropsychologist, 16*, 57–63.
- Beail, N. (2002). Interrogative suggestibility, memory, and intellectual disability. *Journal of Applied Research in Intellectual Disabilities, 15*, 129–137.
- Bracken, B. A. (1988). Ten psychometric reasons why similar tests produce dissimilar results. *Journal of School Psychology, 26*, 155–166.
- Bruininks, R. H., Woodcock, R. W., Weatherman, R. F., & Hill, B. K. (1996). *SIB-R—Scales of Independent Behavior—Revised: Comprehensive manual*. Itasca, IL: Riverside.
- Cloud, M., Shepherd, G. B., Barkoff, A. N., & Shur, J. V. (2002). Words without meaning: The constitution, confessions, and mentally retarded suspects. *University of Chicago Law Review, 69*, 495–624.
- Cromwell, R. L. (1963). Assorted imbalances on retardation. *PsycCRITIQUES, 8*, 162–164.

- Dean, A. C., Victor, T. L., Boone, K. B., & Arnold, G. (2008). The relationship of IQ to effort test performance. *The Clinical Neuropsychologist, 22*, 705–722.
- Doane, B. M., & Salekin, K. L. (2000). Susceptibility of current adaptive behavior measures to feigned deficits. *Law and Human Behavior, 33*, 329–343.
- Drizin, S., & Leo, R. (2004). The problem of false confessions in the post-DNA world. *North Carolina Law Review, 82*, 891–1007.
- Dulaney, C. L., & Ellis, N. R. (1997). Rigidity in the behavior of mentally retarded persons. In W. E. MacLean (Ed.), *Ellis' handbook of mental deficiency, psychological theory and research* (3rd ed., pp. 175–195). Mahwah, NJ: Erlbaum.
- Dusky v. United States, 362 U.S. 402 (1960).
- Ellis, J. W. (2003). Mental retardation and the death penalty: A guide to legislative issues. *Mental and Physical Disability Law Reporter, 27*(1), 11–24.
- Ellis, J. W., & Luckasson, R. (1985). Mentally retarded criminal defendants. *George Washington Law Review, 53*, 414–493.
- Ellis, J. W., & Luckasson, R. (1988). If your client is retarded. *Criminal Justice, 2*, 12–15.
- Everington, C. T. (1990). The Competence Assessment for Standing Trial for Defendants With Mental Retardation (CAST-MR): A validation study. *Criminal Justice and Behavior, 17*, 147–168.
- Everington, C. T., & Fulero, S. M. (1999). Competence to confess: Measuring understanding and suggestibility of defendants with mental retardation. *Mental Retardation, 37*, 212–220.
- Everington, C. T., & Luckasson, R. (1992). *Competence Assessment for Standing Trial for Defendants With Mental Retardation (CAST-MR)*. Worthington, OH: IDS.
- Everington, C., Notario-Smull, H., & Horton, M. L. (2007). Can defendants with mental retardation successfully fake their performance on a test of competence to stand trial? *Behavioral Sciences & the Law, 25*, 545–560.
- Fazel, S., Xenitidis, K., & Powell, J. (2008). The prevalence of intellectual disabilities among 12,000 prisoners: A systematic review. *International Journal of Law and Psychiatry, 21*, 369–373.
- Federal rules of evidence, 28 U.S.C. (1974).
- Ferretti, R. P., & Cavalier, A. R. (1991). Constraints on the problem solving of persons with mental retardation. In N. Bray (Ed.), *International review of research in mental retardation* (Vol. 17, pp. 153–192). New York: Academic Press.
- Flynn, J. R. (1984). The mean IQ of Americans: Massive IQ gains 1932 to 1978. *Psychological Bulletin, 95*, 29–51.
- Flynn, J. R. (1987). Massive IQ gains in 14 nations: What IQ tests really measure. *Psychological Bulletin, 101*, 171–191.
- Flynn, J. R. (2009). The WAIS-III and WAIS-IV: *Daubert* motions favor the certainly false over the approximately true. *Applied Neuropsychology, 16*, 98–104.
- Fulero, S. M., & Everington, C. (1995). Assessing competency to waive *Miranda* rights in defendants with mental retardation. *Law and Human Behavior, 19*, 533–543.
- Glaser, W., & Florio, D. (2004). Beyond specialist programmes: A study of the needs of offenders with intellectual disability requiring psychiatric attention. *Journal of Forensic Sciences, 48*, 591–602.
- Godinez v. Moran, 509 U.S. 389 (1993).

- Graue, L. O., Berry, D. T. R., Clark, J. A., Sollman, M. J., Cardi, M., Hopkins, J., & Werline, D. (2007). Identification of feigned mental retardation using the new generation of malingering detection instruments: Preliminary findings. *The Clinical Neuropsychologist*, *21*, 929–942.
- Gray, N. S., Fitzgerald, S., Taylor, J., MacCulloch, M. J., & Snowden, R. J. (2007). Predicting future reconviction in offenders with intellectual disabilities: The predictive efficacy of VRAG, PCL-SV, and the HCR-20. *Psychological Assessment*, *19*, 474–479.
- Grisso, T. (1998). *Instruments for assessing understanding and appreciation of Miranda rights*. Sarasota, FL: Professional Resource Press.
- Gudjonsson, G. H. (1997). *The Gudjonsson Suggestibility Scales manual*. East Sussex, UK: Psychology Press.
- Hanson, R. K. (1997). *The development of a brief actuarial risk scale for sexual offense recidivism* (Use Report No. 1997–04). Ottawa, Ontario, Canada: Department of Solicitor General of Canada.
- Hanson, R. K., & Harris, A. J. R. (2000). Where should we intervene? Dynamic predictors or sexual offense recidivism. *Criminal Justice and Behavior*, *27*, 6–35.
- Hare, R. D. (1991). *The Hare Psychopathy Checklist–Revised*. Toronto, Canada: Multi Health Systems.
- Harris, A. J. R., & Tough, S. (2004). Should actuarial risk assessments be used with sex offenders who are intellectually disabled? *Journal of Applied Research in Intellectual Disabilities*, *17*, 235–241.
- Harrison, P. L., & Oakland, T. (2003). *Adaptive Behavior Assessment System* (2nd ed.). San Antonio, TX: Psychological Corporation.
- Hart, S., Cox, D., & Hare, R. D. (1995). *Manual for the Psychopathy Checklist–Screening Version (PCL-SV)*. Toronto, Canada: Multi-Health Systems.
- Hayes, S., Shackell, P., Mottram, P., & Lancaster, R. (2007). The prevalence of intellectual disability in a major UK prison. *British Journal of Learning Disabilities*, *35*, 162–167.
- Hiscock, M. (2007). The Flynn effect and its relevance to neuropsychology. *Journal of Clinical and Experimental Neuropsychology*, *29*, 514–529.
- Ho, T., & Henderson, B. B. (1998). Relationship of psychological, demographic, and legal variables to court decisions of competency to stand trial among mentally retarded criminal defendants. *Journal of Criminal Justice*, *26*, 307–320.
- Holland, A. J. (1991). Challenging and offending behavior by adults with developmental disorders. *Australia and New Zealand Journal of Developmental Disabilities*, *17*, 119–126.
- Holland, T., Clare, I. C. H., & Mukhopadhyay, T. (2002). Prevalence of ‘criminal offending’ by men and women with intellectual disability and the characteristics of ‘offenders’: Implications for research and service development. *Journal of Intellectual Disability Research*, *46*, 6–20.
- Jones v. United States, 463 U.S. 354, 370 (1983).
- Jones, J. (2007). Persons with intellectual disabilities in the criminal justice system. *International Journal of Offender Therapy and Comparative Psychology*, *51*, 723–733.

- Kounin, J. (1941). Experimental studies of rigidity: I. The measurement of rigidity in normal and feeble-minded persons. *Character and Personality*, 9, 251–271.
- Lewin, K. (1936). *A dynamic theory of personality*. New York: McGraw-Hill.
- Lindsay, W. L., Hogue, T. E., Taylor, J. L., Mooney, P., Steptoe, L., Johnston, S., . . . Smith, A. H. W. (2006). Two studies on the prevalence and validity of personality disorder in three forensic intellectual disability samples. *The Journal of Forensic Psychiatry and Psychology*, 17, 485–506.
- Lindsay, W. L., Hogue, T. E., Taylor, J. L., Steptoe, L., Mooney, P., et al. (2008). Risk assessment with offenders with intellectual disability. *International Journal of Offender Therapy and Comparative Criminology*, 52, 90–111.
- Lindsay, W. R., & Beail, N. (2004). Risk assessment: Actuarial predication and clinical judgment of offending incidents and behavior for intellectual disability services. *Journal of Applied Research in Intellectual Disability*, 17, 229–234.
- Lindsay, W. R., Hastings, R. P., Griffiths, D. M., & Hayes, S. C. (2007). Trends and challenges in forensic research on offenders with intellectual disability. *Journal of Intellectual and Developmental Disability*, 32, 55–61.
- Lindsay, W. R., Smith, A. H. W., Law, J., Quinn, K., Anderson, A., Smith, A., et al. (2004). Sexual and non-sexual offenders with intellectual and learning disabilities: A comparison of characteristics, referral patterns, and outcome. *Journal of Interpersonal Violence*, 19, 875–890.
- MacEachron, A. E. (1979). Mentally retarded offenders: Prevalence and characteristics. *American Journal of Mental Deficiency*, 84, 165–176.
- MacMillan, D. L. (1969). Motivational differences: Cultural–familial retardates vs. normal subjects on expectancy for failure. *American Journal of Mental Deficiency*, 74, 254–258.
- Mannysalo, L., Putkonen, H., Lindberg, N., & Kotilainen, I. (2009). Forensic psychiatric perspective on criminality associated with intellectual disability: A nationwide register-based study. *Journal of Intellectual and Developmental Disability Research*, 53, 279–288.
- Mikkelsen, E. J., & Stelk, W. J. (1999). *Criminal offenders with mental retardation: Risk assessment and the continuum of community-based treatment programs*. Kingston, NY: NADD.
- Miranda v. Arizona, 384 U.S. 436 (1966).
- Morris, D. R., & Parker, G. F. (2008). Jackson's Indiana: State hospital competence restoration in Indiana. *The Journal of the American Academy of Psychiatry and the Law*, 36, 522–534.
- Mossman, D. (2003). *Daubert*, cognitive malingering, and test accuracy. *Law and Human Behavior*, 27, 229–249.
- O'Connell, M. J., Garmoe, W., & Goldstein, N. E. (2005). *Miranda* comprehension in adults with mental retardation and the effects of feedback style on suggestibility. *Law and Human Behavior*, 29, 359–369.
- Ollendick, T., Balla, D., & Zigler, E. (1971). Expectancy of success and the probability learning of retarded children. *Journal of Abnormal Psychology*, 77, 275–281.
- Olley, J. G. (2009). Knowledge and experience required for experts in *Atkins* cases. *Applied Neuropsychology*, 16, 135–140.

- Perske, R. (2000). Deception in the interrogation room: Sometimes tragic for persons with mental retardation and other developmental disabilities. *Mental Retardation, 36*, 532–537.
- Perske, R. (2005). Search for persons with intellectual disabilities who confessed to serious crimes they did not commit. *Mental Retardation, 43*, 58–65.
- Petersilia, J. (2000). *Doing justice? The criminal justice system and offenders with mental disabilities*. Berkeley: University of California, California Research Policy Center.
- Poythress, N. G., Nicholson, R., Otto, R. K., Edens, J. F., Bonnie, R. J., et al. (1999). *The MacArthur Competence Assessment Tool—Criminal Adjudication Professional manual (MacCAT-CA)*. Lutz, FL: Psychological Assessment Corporation.
- Quinsey, V. L., Book, A., & Skilling, T. A. (2004). A follow-up of deinstitutionalized developmentally handicapped men with histories of antisocial behavior. *Journal of Applied Research in Intellectual Disabilities, 17*, 243–254.
- Quinsey, V. L., Harris, G. T., Rice, M. E., & Cormier, C.A. (1998). *Violent offenders: Appraising and managing risk*. Washington, DC: American Psychological Association.
- Rand, M. R., & Harrell, E. (2009). *Crime against people with disabilities, 2007*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice. Retrieved from <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2022>
- Riches V. C., Parmenter, T. R., Wiese, M., & Stancliffe, R. J. (2006). Intellectual disability and mental illness in the NSW criminal justice system. *International Journal of Law and Psychiatry, 29*, 386–396.
- Robey, A. (1965). Criteria for competency to stand trial: A checklist for psychiatrists. *American Journal of Psychiatry, 122*, 616–623.
- Rogers, R. (2004). *The Evaluation of Competency to Stand Trial—Revised professional manual (ECST-R)*. Lutz, FL: Psychological Assessment Corporation.
- Russell, T., & Bryant, C. A. (1987). The effects of a lecture training program and independent study on the knowledge and attitudes of law students toward the mentally retarded offender. *Journal of Offender Counseling, Services & Rehabilitation, 11*, 53–66.
- Salekin, K. L., & Doane, B. (2009). Malingering intellectual disability: The value of available measures and methods. *Applied Neuropsychology, 16*, 105–113.
- Schalock, R. L., & Luckasson, R. (2005). *Clinical judgment*. Washington, DC: American Association on Mental Retardation.
- Siegert, M., & Weiss, K. J. (2007). Who is an expert? Competency evaluations in mental retardation and borderline intelligence. *The Journal of the American Academy of Psychiatry and the Law, 35*, 346–349.
- Spitz, H. H. (1989). Variations in Wechsler interscale IQ disparities at different levels of IQ. *Intelligence, 13*, 157–167.
- Stevens, J. R., & Price, K. B. (2006). Adaptive behavior, mental retardation, and the death penalty. *Journal of Forensic Psychology Practice, 6*, 1–29.
- Suto, W. M. I., Clare, I. C. H., Holland, A. J., & Watson, P. C. (2006). *British Journal of Clinical Psychology, 45*, 261–266.

- Tomporowski, P. D., & Tinsley, V. (1997). Attention in mentally retarded persons. In W. E. MacLean (Ed.), *Ellis' handbook of mental deficiency, psychological theory and research* (3rd ed., pp. 219–244). Mahwah, NJ: Erlbaum.
- Truscott, S. D., & Frank, A. J. (2001). Does the Flynn effect affect IQ scores of students classified as LD? *Journal of School Psychology, 39*, 319–334.
- Wall, B. W., Krupp, B. H., & Guilmette, T. (2003). Restoration of competency to stand trial: A training program for persons with mental retardation. *The Journal of the American Academy of Psychiatry and the Law, 31*, 189–201.
- Webster, C. D., Eaves, D., Douglas, K. S., & Wintrup, A. (1995). *The HCR-20: The assessment of dangerousness and risk*. Vancouver, Canada: Simon Fraser University and British Columbia Forensic Psychiatric Services Commission.

Copyright of Journal of Mental Health Research in Intellectual Disabilities is the property of Routledge and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.