Applying principles of forensic mental health assessment to capital sentencing

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I. Introduction

Perhaps no other area of law is steeped in as much controversy as capital punishment. Determining whether states have the right to execute a criminal defendant who has been convicted of a capital offense has been the subject of considerable debate among attorneys, legal scholars, legal advocacy groups, and courts of law. The controversy over capital punishment is clearly embodied in the jurisprudence relating to the death penalty, which has undergone an almost continuous process of change.

One of the most striking changes in our death penalty jurisprudence is the emergence of laws relating to capital mitigation. Since the reinstatement of the death penalty in 1976, courts have been required to consider mitigating circumstances during the sentencing phases of capital cases. Under certain circumstances, the presence of mitigating factors may render the imposition of the death penalty inappropriate in a particular case. As a result of the law’s mandate for jurors to consider mitigating factors during the sentencing phases of capital cases, the imposition of the death penalty has presumably become less arbitrary, and the class of defendants eligible for the death penalty has been considerably narrowed.

A recent case decided by the Supreme Court of the United States has further limited the imposition of the death penalty. Specifically, the most recent development in the area of capital mitigation is the prohibition of capital punishment for criminal defendants who are mentally retarded. In Atkins v. Virginia,1 the Supreme Court held that executing mentally retarded defendants

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constitutes cruel and unusual punishment in violation of the Eighth Amendment.\(^2\)

One consequence of the Supreme Court’s decision in *Atkins* was to underscore the need for mental health professionals to conduct forensic mental health assessments of capital defendants to assist the trier of fact in determining whether the defendant is mentally retarded and, therefore, ineligible for the death penalty pursuant to *Atkins*.\(^3\) As will be discussed in this article, a recent description of principles of forensic mental health assessment (FMHA) can assist forensic clinicians in this process (see Heilbrun, 2001). Because these principles of FMHA are generic, they can be applied to all types of FMHAs (see Heilbrun, Marczyk & DeMatteo, 2002; Heilbrun, 2003; Heilbrun, Marczyk, DeMatteo, et al., 2003). This article will demonstrate how the principles of FMHA can be applied to a forensic evaluation in a capital case. Before discussing the derivation of the principles of FMHA and the application of those principles to a capital forensic evaluation, this article will trace the development of the death penalty jurisprudence in the United States.

II. DEATH PENALTY JURISPRUDENCE

Although the development of the law relating to capital punishment can be traced back several hundred years, the modern era of capital litigation began in 1972, when the Supreme Court of the United States abolished the death penalty in *Furman v. Georgia*.\(^4\) By a five-to-four vote, the Supreme Court held that the capital punishment statutes of Texas and Georgia violated, *inter alia*, the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^5\) In particular, the Supreme Court prohibited death penalty statutes that left the sentencing decision to the unguided discretion of the jury.\(^6\) In response to the Supreme Court’s decision in *Furman*, thirty-five states rewrote their death penalty statutes, with about half of the states removing jury discretion by making the death penalty mandatory in specified circumstances and about half of the states establishing guidelines to assist juries in making sentencing decisions in capital cases (Reisner, Slobochin, & Rai, 2004, p. 614).

Four years after the Supreme Court’s decision in *Furman*, the U.S. Supreme Court again considered the constitutionality of the death penalty. In a series of cases in 1976, the Supreme Court held that the death penalty was constitutional under certain circumstances.\(^7\) In the 1976 cases and subsequent decisions, the

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3. *Id.* at 308-09.
5. *Id.*
6. *Id.* at 255-57.
Supreme Court clarified the distinction between permissible and impermissible (i.e., constitutional and unconstitutional) state death penalty statutes. First, the Court held that there can be no mandatory death sentences because they do not provide for the particularized consideration of the defendant’s character, the defendant’s record, and the circumstances of the offense.\textsuperscript{8} Second, the Court held that although the sentencing jury could not be given unbridled discretion in reaching a sentencing decision in capital cases, juries must be allowed to consider all potentially mitigating evidence relating to the defendant’s character and the circumstances of the offense.\textsuperscript{9} By these rulings, the Supreme Court attempted to make the imposition of the death penalty less arbitrary.

In response to these Supreme Court decisions, modern death penalty statutes typically specify aggravating and mitigating factors that are designed to assist juries in reaching a sentencing decision (Reisner et al., 2004, pp. 614-17). To impose a death sentence, the jury must find at least one aggravating factor and also find that no mitigating factors make the imposition of the death penalty inappropriate (Reisner et al., 2004, pp. 614-17). The Supreme Court has indicated that the purpose of aggravating factors is to “genuinely narrow the class of persons eligible for the death penalty”\textsuperscript{10} and to “reasonably justify the imposition of a more severe sentence”\textsuperscript{11} than is usually given for the crime of murder. There are two categories of aggravating factors—those relating to the offense (e.g., murdering certain categories of people, such as police officers and judges; committing murder during the course of another felony; committing murder in a heinous, cruel, or vile manner); and those relating to the offender (e.g., history of violent felonies; considered likely to be dangerous in the future) (Reisner et al., 2004, pp. 614-17). With respect to mitigating factors, the Supreme Court requires the sentencing jury to consider all relevant mitigating circumstances to ensure that: (1) the decision to impose death is particularized to the defendant and the specific offense, and (2) death is not excessive or disproportionate (Reisner et al., 2004, pp. 614-17).

\textit{A. Mental Retardation and the Death Penalty}

When considering the relationship between mental retardation and the death penalty, the logical starting point is the Supreme Court’s decision in \textit{Penzey v. Lynaugh}.\textsuperscript{12} In October 1979, twenty-two-year-old Pamela Mosely Carpenter was raped, beaten, and stabbed to death with scissors in her home.\textsuperscript{13} Before dying,
Carpenter provided a description of her assailant, who was later identified as twenty-two year-old Johnny Paul Penry. On parole for a rape conviction at the time of the offense, Penry confessed to the crime and was subsequently charged with capital murder.

A Texas trial court found Penry guilty of capital murder. During the sentencing phase, the defense argued, inter alia, that the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment because of Penry's mental condition. Penry, who reportedly had organic brain damage resulting from trauma to the brain at birth (a breach birth), had an IQ estimated to be between 50 and the low 60s (which when combined with his deficits in adaptive functioning would place him in the mild to moderate range of mental retardation). Penry was unable to read or write, state the days of the week, count to one hundred, or say how many nickels were in a dime. In addition, Penry was reportedly severely abused by his mother, who burned him with cigarettes, forced him to eat his feces and drink his urine, and threatened to cut off his penis if he continued to wet his bed. Prior to killing Carpenter, Penry was convicted of rape at age twenty-one and paroled one year later. Penry was convicted of Carpenter's murder and sentenced to death. On appeal, the Texas Court of Criminal Appeals affirmed the trial court's conviction and the sentence of death, concluding that the death penalty is not prohibited based on Penry's mental retardation.

The Supreme Court of the United States granted certiorari to determine, inter alia, whether the Eighth Amendment's ban on cruel and unusual punishment prohibited the execution of a defendant who is mentally retarded. The defense made two arguments. First, the defense argued that executing a mentally retarded defendant violated the Eighth Amendment because individuals with mental retardation do not possess a level of moral culpability sufficient to justify a death sentence. Second, it argued that there was an emerging national consensus against executing the mentally retarded. The prosecution countered by arguing that there was insufficient evidence of a national consensus against executing the mentally retarded, and that existing procedural safeguards (e.g., competence to
stand trial proceedings, mental state defenses) adequately protected the interests of mentally retarded defendants.26

The Supreme Court rejected the defense's arguments and held that executing mentally retarded defendants was not per se a violation of the Eighth Amendment.27 In reaching its decision, the Supreme Court stated that mental retardation should be considered as a mitigating factor during the sentencing phase of a capital trial, which would ensure the individualized sentencing decision required by prior Supreme Court cases.28 The Supreme Court also concluded that there was no national consensus against executing the mentally retarded, as only the federal Anti-Drug Abuse Act and two state jurisdictions prohibited executing mentally retarded defendants.29

One of the most recent cases to address the relationship between mental retardation and the death penalty is Atkins v. Virginia.30 In August 1996, Daryl Atkins and William Jones were drinking and smoking marijuana in a house that Atkins shared with his father.31 Later that evening, Atkins and Jones went to a convenience store to buy beer.32 After unsuccessfully begging for money from passers-by, Atkins and Jones carjacked Eric Nesbitt, an airman from Langley Air Force Base who had just walked out of the convenience store.33 Atkins and Jones robbed Nesbitt of sixty dollars, drove him to an automatic teller machine, and ordered him to withdraw two hundred dollars.34 After driving Nesbitt to a secluded area, Atkins ordered Nesbitt out of the truck and shot him eight times with a semiautomatic handgun.35

In 1998, a trial court in York County, Virginia, found Atkins guilty of murder based partly on the testimony of Jones.36 During the sentencing phase, the prosecution introduced evidence of two aggravating factors: future dangerousness (Atkins had sixteen prior felony convictions) and the vileness of the offense.37 The defense countered with the testimony of a psychologist, who diagnosed Atkins as being mildly mentally retarded.38 The jury sentenced Atkins to death.39 Atkins appealed to the Supreme Court of Virginia, arguing that it is

27. Id. at 340.
28. Id.
29. Id. at 335, 340.
32. Id.
33. Id.
34. Id.
37. Id.
39. Id. at 453.
unconstitutional—a disproportionate punishment—to execute a criminal defendant with an IQ of 59.\textsuperscript{40} Citing the Supreme Court's prior decision in \textit{Penry}, the prosecution argued that it does not violate the Eighth Amendment's prohibition on cruel and unusual punishment to execute the mentally retarded.\textsuperscript{41} Relying on \textit{Penry}, the Supreme Court of Virginia rejected the defense's argument and affirmed the death sentence.\textsuperscript{42}

The Supreme Court of the United States granted certiorari to address the question again of whether executing a mentally retarded defendant would violate the Eighth Amendment.\textsuperscript{43} The Supreme Court noted that it granted certiorari because of concerns expressed by the dissenting judges in the Supreme Court of Virginia and the dramatic shifts that occurred in the legislative landscape since \textit{Penry} was decided thirteen years prior.\textsuperscript{44} Amicus curiae briefs were filed on behalf of Atkins (opposing the execution of the mentally retarded) by the American Bar Association, American Psychological Association, American Foreign Service, United States Catholic Conference, American Association on Mental Retardation, and American Civil Liberties Union.\textsuperscript{45}

In a decision reversing their holding in \textit{Penry}, the Supreme Court held in \textit{Atkins} that executing a mentally retarded defendant is excessive in light of evolving standards of decency and, therefore, violates the Eighth Amendment.\textsuperscript{46} The Court stated that although the deficiencies associated with mental retardation do not exempt the individual from punishment, they diminish personal culpability to the point where death is not an appropriate punishment.\textsuperscript{47} The Court concluded that executing a mentally retarded defendant would not further the primary goals of capital punishment—retribution and deterrence.\textsuperscript{48} Finally, the Court noted, there was (unlike at the time \textit{Penry} was decided) a national consensus against executing the mentally retarded: eighteen states and the federal jurisdiction prohibited executing the mentally retarded, numerous secular and religious organizations opposed capital punishment for such individuals, and public opinion surveys suggested that the American public opposed executing the mentally retarded.\textsuperscript{49}

\textsuperscript{40} \textit{Atkins} 2000, 534 S.E.2d at 318-20.
\textsuperscript{41} \textit{Id.} at 318-19 (citations omitted).
\textsuperscript{42} \textit{Id.} at 319 (citations omitted) 321.
\textsuperscript{43} \textit{Atkins}, at 536 U.S. at 307, 310.
\textsuperscript{44} \textit{Id.} at 310.
\textsuperscript{45} \textit{Id.} at 306 REPORTER'S NOTE.
\textsuperscript{46} \textit{Id.} at 321.
\textsuperscript{47} \textit{Id.} at 318.
\textsuperscript{48} \textit{Id.} at 319-20.
\textsuperscript{49} \textit{Atkins}, 536 U.S. at 314-16.
III. FORENSIC MENTAL HEALTH ASSESSMENT

The past two decades have witnessed significant conceptual and empirical advances in the specialty of forensic mental health assessment (FMHA) (Grisso, 1986, 2003; Heilbrun, 2001; Heilbrun, Marczyk, & DeMatteo, 2002; Melton, Petrila, Poythress, & Slobozin, 1997). These advances have occurred in both research and practice, and are driven by maturing specializations in forensic psychology and forensic psychiatry, increased recognition of such specialization by the legal system, and programmatic research funded by grants and foundations.

Forensic mental health assessment refers to psychological evaluations that are performed by mental health professionals to provide relevant clinical and scientific data to a legal decision-maker—such as a judge or jury—or the litigants in both civil and criminal proceedings. FMHA is distinct from therapeutic mental health assessment that is performed primarily for reasons such as treatment planning and diagnosis. There are a number of specific ways in which forensic and therapeutic assessment differ. An understanding of these differences can illustrate how forensic assessment can be applied in capital contexts.

The primary purpose of FMHA is to assist either a legal decision-maker or litigant by providing scientifically based information about an individual’s relevant capacities underlying the specific civil or criminal legal question at hand. Common examples in a criminal context include competence to stand trial, sanity at the time of the offense, and capital and non-capital sentencing. Common civil issues include child custody, workplace disability, personal injury, and guardianship. Unlike FMHA, the purpose of a therapeutic evaluation is usually to meet the mental health needs of an individual, couple, group, or family, with respect to diagnosis and/or treatment planning.

The nature of the examiner-examinee relationship is another difference between forensic and therapeutic assessment. In FMHA, the evaluator assumes an objective role that typically requires using a higher standard for assessing the accuracy and relevance of information. The emphasis in a forensic context is thus on objectivity rather than the therapeutic interests of the client. In therapeutic assessment, by contrast, the evaluator is in a helping role, where the best interests of the client are paramount.

The nature of the examiner-examinee relationship also has a direct bearing on the notification of purpose for the assessment. All FMHA evaluations begin with a formal notification that clarifies the purpose of the assessment and the relationship between the examiner and examinee. This is to convey and emphasize that the evaluator will be conducting the assessment on behalf of the court or an attorney. This notification is particularly important in forensic assessment because the evaluator is not representing the individual being assessed, and the results of the FMHA will not always be in the best interests of
the examinee. This is in contrast with therapeutic assessment, in which the purpose is to provide information intended to enhance mental health functioning.

The standards used in forensic and therapeutic assessment are also distinct. Standards in therapeutic assessment facilitate diagnosis and treatment, and serve organizing, condensing, and orienting functions (Heilbrun, 2001). These are mental health standards that are concerned with classification and treatment and are more circumscribed than the standards considered in FMHA. Unlike therapeutic assessment, however, FMHA requires the evaluator to address both a mental health and a legal standard.

As noted earlier, the role of the evaluator in FMHA requires a more objective stance. This need for objectivity underscores another important difference between the sources of information used in forensic and therapeutic evaluation. The two kinds of evaluation share some common data domains, including clinical data and psycho-social information. The most common sources of such information include self-report, psychological testing, and behavioral assessment (Heilbrun, 2001). Although these sources of information are typically sufficient for therapeutic assessment, additional information must be used in forensic evaluations. The more rigorous requirements of FMHA require the use of collateral information to assess the accuracy and consistency of information provided in the evaluation.

Although important to the overall accuracy of the evaluation, collateral information is particularly valuable in assessing the response style of the individual being evaluated in a forensic context. Response style refers to the nature and accuracy of the information provided by individuals being evaluated regarding their own thoughts, feelings, and behaviors (Rogers, 1997, pp. 1-13). In most types of therapeutic evaluations, it is not necessary to consider the possibility of deliberate distortion of self-report through exaggeration or minimization of certain symptoms or experiences. In FMHA, however, there is a consistent expectation that the individual being assessed might present themselves in a manner that would have the most favorable impact on their current situation. In terms of the importance of response style, it is this consistent presence of situational incentives in the context of litigation that distinguishes forensic from therapeutic evaluation (Heilbrun, 2001, pp. 9-14).

The process of clarifying the reasoning and the limits on knowledge also differs between forensic and therapeutic evaluation. Therapeutic evaluations tend to be collaborative in nature and based on the professional expertise and knowledge of the evaluator. Given this, there is little expectation that the assumptions and methods employed will be challenged, except under very unusual circumstances. This is not the case in forensic assessment. Forensic evaluations are conducted in an adversarial legal context, and are subject to challenge through rules of evidence or by cross-examination by opposing counsel. Accordingly, there is an expectation that relevant assumptions and methods will be challenged.
The differences between forensic and therapeutic assessment are also apparent in the documentation and communication of results, typically via report writing and testimony. Given the wide range of theoretical approaches, choices of instruments, and levels of expertise, there are no well-established expectations about the structure, format, and content of the written report needed to document a therapeutic evaluation. Conversely, the expectations for the documentation and communication of forensic evaluations are far more demanding and extensive. Forensic reports tend to be lengthy and detailed, because the legal issue being considered requires extensive documentation that clearly describes the procedures, findings, and reasoning used in the assessment (Heilbrun, 2001). There is a comparable distinction between the two types of evaluation in terms of verbal communication of the results, or expert testimony. Only rarely will a therapeutic evaluation be entered into evidence in a legal proceeding, so the likelihood of having to provide testimony is small. By contrast, the forensic evaluator should always anticipate that testimony will be associated with the assessment.

The process of forensic assessment differs substantially and in important ways from therapeutic assessment. Consequently, any set of general principles that guide therapeutic assessment will be insufficient when applied to FMHA (Heilbrun, 2001). If the general principles that guide therapeutic assessment have a very limited role in the general context of FMHA, then this role in the area of capital mitigation must certainly be even more circumscribed.

It might be helpful, therefore, to consider how these principles apply to forensic evaluations conducted in the context of capital mitigation. This article will now describe how a set of recently derived principles of FMHA can improve the quality and consistency of FMHA conducted post-Atkins, and for capital cases more generally, in which the presence of mental retardation is not necessarily an issue. The application of these principles is also consistent with the guidelines and substantive criteria for capital mitigation first articulated by the United States Supreme Court in Furman v. Georgia, requiring an individualized consideration of aggravating and mitigating factors. As we will now discuss, the application of these principles should help to minimize arbitrariness in the decision-making process through promoting thoroughness, consistency, clarity, and impartiality.

A. The Value of a Principle-Centered Approach

This principle-centered approach to FMHA holds considerable promise for improving the quality of forensic practice; it has value at both a broad and specific level of analysis. At the broadest level, these principles could serve three important functions. The first concerns the training of mental health professionals in the understanding and practice of FMHA. This "bread

principles” model would provide trainees with a generalized approach to FMHA that would also allow for the later development of expertise with specific populations and legal issues.

Second, the identification of core principles should have a positive impact on research and theory development in forensic assessment. Some of the principles discussed in this article have limited empirical support because little research has yet been conducted. Such research could clarify the importance and appropriate application of these principles and contribute to theory development and refinement in FMHA. Research might provide empirical support for some principles, but not for others. If so, then modifications to the core principles would be needed to reflect the changing pattern of empirical evidence. Some principles might be amended or even dropped, others might be retained intact, and yet other new principles might emerge. However these principles evolve, having a core set of principles can also serve as an essential step in the larger process of theory development.

Third, this set of principles is relevant to policy. A broad set of principles could be helpful in the shaping or interpretation of legislation, legal standards, or administrative code relevant to performing and presenting the data obtained from FMHA. Similarly, a set of general principles could also provide guideposts for the development and implementation of policy intended to increase the consistency and quality of FMHA (Heilbrun, 2001).

These principles, properly applied, can theoretically improve the quality of FMHA. Poorly conducted FMHA in an adversarial context can be especially problematic, given the importance and possible consequences of litigation. Poor assessments may fail to address the appropriate legal standard, exceed the scope of the evaluation and render opinions that are more appropriately left to the legal decision-maker, or fail to provide adequate, credible information consistent with the conclusions drawn from the results of the evaluation (Grisso, 1986, 2003). A general set of principles would provide guidance for avoiding such problems, and should increase the uniformity and quality of FMHA, which should in turn improve the quality of legal decision-making in this arena (Heilbrun, 2001; Heilbrun et al., 2002).

In sum, the application of these principles can potentially enhance the quality of any FMHA from the initial referral, through data collection and interpretation, and to the final communication of results in the form of a report or testimony. Some principles, however, are especially important when conducting FMHA in the context of capital cases. Consider that the quality of any forensic evaluation is directly related to the quality and accuracy of data collection and interpretation. Accordingly, the principles relevant to these areas would receive particular emphasis in the context of a capital case. We will now summarize each of the twenty-nine principles and comment on their applicability to FMHA in capital sentencing cases.
B. Deriving Principles of Forensic Mental Health Assessment

Until recently, a set of sufficiently broad principles that could be applied to the
shared features of different types of FMHA was conspicuously absent. Although
several clinical-legal scholars (e.g., Melton et al., 1997) have addressed this issue
in recent years, the applicability of their proposed principles was fairly
circumscribed and largely limited to the specific types of FMHA being described
in their respective works. Despite the usefulness of their detailed descriptions
and recommendations, a set of general principles broadly applicable to FMHA
was still needed. Heilbrun (2001) provided a detailed description of such a set
of broadly applicable principles.

The twenty-nine principles of FMHA identified and described by Heilbrun
(2001) were organized sequentially around the four broad steps within FMHA:
(1) preparation, (2) data collection, (3) data interpretation, and (4) communication
(see Heilbrun, 2001, Table 1).

Table 1

Principles of Forensic Mental Health Assessment (Heilbrun, 2001).

Preparation

1. Identify relevant forensic issues.
2. Accept referrals only within area of expertise.
3. Decline the referral when evaluator impartiality is unlikely.
4. Clarify the evaluator’s role with the attorney.
5. Clarify financial arrangements.
6. Obtain appropriate authorization.
7. Avoid playing the dual role of therapist and forensic evaluator.
8. Determine the particular role to be played within the forensic
assessment if the referral is accepted.
9. Select the most appropriate model to guide data gathering,
interpretation, and communication.

Data Collection

10. Use multiple sources of information for each area being assessed.
11. Use relevance and reliability (validity) as guides for seeking information
and selecting data sources.
12. Obtain relevant historical information.
13. Assess clinical characteristics in relevant, reliable, and valid ways.
15. Ensure that conditions for evaluation are quiet, private, and distraction-
free.
16. Provide appropriate notification of purpose and/or obtain appropriate authorization before beginning.
17. Determine whether the individual understands the purpose of the evaluation and the associated limits on confidentiality.

Data Interpretation
18. Use third party information in assessing response style.
19. Use testing when indicated in assessing response style.
20. Use case-specific (ideographic) evidence in assessing clinical condition, functional abilities, and causal connection.
22. Use scientific reasoning in assessing causal connection between clinical condition and functional abilities.
23. Do not answer the ultimate legal question.
24. Describe findings and limits so that they need change little under cross examination.

Communication
25. Attribute information to sources.
26. Use plain language; avoid technical jargon.
27. Write report in sections, according to model and procedures.
28. Base testimony on the results of the properly performed FMHA.
29. Testify effectively.

In Heilbrun (2001), each principle was discussed in terms of the support that it received from sources of authority relevant to psychology and psychiatry: ethics, law, science, and practice. Based on an analysis using these sources of authority, Heilbrun (2001) classified each principle as either established or emerging. Established principles are largely supported by research, accepted in practice, and consistent with ethical and legal standards, while emerging principles are supported in some areas, but with mixed or absent evidence from others, or supported by some evidence, but with continuing disagreement among professionals regarding their application (Heilbrun, 2001). We will now summarize each of the twenty-nine principles and comment briefly on their applicability to evaluations conducted under Atkins, and for capital cases in general where the presence of mental retardation is not necessarily the primary issue.

C. Applying FMHA Principles in the Context of Capital Sentencing

Principle 1: Identify relevant forensic issues. This principle focuses on citing the capacities underlying the ultimate legal question. In a capital sentencing evaluation, such capacities would be enumerated by the aggravating and mitigating factors that are appropriate for expert mental health evaluation; these
can be contrasted with aggravators and mitigators for which forensic clinicians provide no special expertise (e.g., history of offending; heinousness of offense). However, Atkins has created the need for an evaluation that is solely diagnostic, since under Atkins mental retardation per se is the basis for exclusion from a death sentence. Therefore, it is important to cite the legal question in the first section of the report, as well as to cite the aggravating and mitigating factors applicable in that jurisdiction (identifying in particular those that will be the focus of the evaluation).

Principle 2: Accept referrals only within area of expertise. Both Atkins evaluations and broader capital evaluations demand a broad and a more specific expertise on the part of the evaluator. Those evaluating defendants who may be mentally retarded should demonstrate training and professional experience with individuals who are developmentally disabled. Forensic clinicians conducting capital sentencing evaluations should have broader experience with offenders, as well as individuals with severe mental illness. For either kind of evaluation, the forensic clinician should also have experience applying this expertise in a forensic context.

Specifically, the demonstration of such expertise might involve giving one's terminal degree, licensure, and board certification status. Further, the forensic clinician should be prepared to describe (through the curriculum vitae and in testimony) experience with the specific population of developmentally disabled individuals (for Atkins evaluations) or the broader populations of offenders and individuals with severe mental illness (for capital sentencing evaluations).

Principle 3: Decline the referral when evaluator impartiality is unlikely. When there is a substantial incentive—monetary, personal, or professional—for the forensic clinician to reach a conclusion in a certain direction, then the referral to conduct the evaluation should probably be declined. In capital contexts, such motivation is occasionally monetary (as when, for example, a forensic clinician is privately retained by defense counsel to conduct an evaluation for Atkins purposes or for capital sentencing more broadly). However, this is not substantially different from the payment source for other kinds of forensic assessment and is handled by ensuring that the evaluator is paid for his/her time rather than conclusions. More problematic are personal feelings or a professional position that is very strongly pro or con regarding capital punishment. A forensic clinician with such reactions, or position, is well advised to avoid participating in either an Atkins evaluation or a broader capital sentencing assessment. The perceptions of judges and attorneys are likely to be that such an individual could not be impartial—and such perceptions are likely to be accurate.

Principle 4: Clarify the evaluator's role with the attorney. Under Ake v. Oklahoma, the defendant in a capital case is entitled to an expert (at state expense) to assist the defense on the issue of sanity at the time of the offense, and at capital

sentencing.\textsuperscript{53} The role of the \textit{Ake} expert is described broadly, as encompassing both evaluative and consultative roles (the latter might involve, for example, helping the defense attorney prepare the cross-examination of the opposing experts).\textsuperscript{54} However, there are compelling ethical and professional reasons for the forensic clinician to avoid playing the roles of both impartial expert and consultant in the same case (Heilbrun, 2001). In both \textit{Atkins} evaluations and broader assessments for capital sentencing, this principle suggests that the forensic clinician should select the role of \textit{either} impartial evaluator \textit{or} consultant, and retain that role for the duration of the case.

Principle 5: \textit{Clarify financial arrangements}. When payment for an \textit{Atkins} evaluation or capital sentencing FMHA is provided by the defense (either through the defendant or the attorney’s office), then the amount, timing, and other details of such payment should be clarified when the forensic clinician is retained. Many evaluations in capital contexts, however, are publicly funded, with the mechanism for and amount of remuneration prescribed by relevant statute or administrative code. In such instances, it may be unnecessary to clarify the terms of payment if retained by one of the attorneys or ordered by the court to conduct either kind of evaluation. Both kinds of evaluation are very important and demand thorough and detailed collection of data across multiple sources. Significant time is needed, and the forensic clinician may be unwilling to conduct such evaluations without assurance that this time will be compensated. A court order authorizing payment up to an agreed-upon limit is an alternative to the evaluator’s depending on the court to approve a post-evaluation payment request that exceeds the statutorily imposed limit.

Principle 6: \textit{Obtain appropriate authorization}. All individuals undergoing FMHA should receive a notification of purpose concerning the evaluation before it is begun. Such notice typically includes details such as the evaluator’s name and profession, who requested the evaluation and why, the purpose(s) for which it may or will be used, the distinction between this FMHA and therapeutic evaluation, and the limits on confidentiality. When a defendant has a legal right to refuse to participate (as in cases in which the evaluation has been requested by the defense rather than ordered by the court), the defendant’s consent to participate should also be obtained.

There are important distinctions regarding notification and consent between \textit{Atkins} evaluations and broader capital sentencing evaluations. These distinctions flow from the kind of information sought in each respective evaluation. The \textit{Atkins} assessment seeks to determine whether the defendant is mentally retarded, and thus requires data on intellectual functioning, adaptive functioning, and history of any previous diagnosis of mental retardation. By contrast, the broader capital sentencing evaluation typically must address several factors associated with

\textsuperscript{53} \textit{Ake}, 470 U.S. at 78-82.

\textsuperscript{54} \textit{Id.} at 82.
mental state at the time of the offense. The evaluator must seek information about the defendant’s thoughts, emotions, perceptions, and behavior at the time of the offense to evaluate these factors properly. Obtaining such information on a pre-trial basis (when evaluations must be conducted to allow sufficient time to gather appropriate information and write the report), however, is often difficult. Many defendants deny or minimize their culpability, so information regarding their mental state at the time of the offense cannot be obtained through self-report. The notification in capital sentencing cases must draw the complex distinction between the defendant’s legal right to assert innocence until proven guilty, exercised pre-adjudication, versus the defendant’s interest in providing information regarding mental state at the time of the offense, potentially useful in mitigation, which would nevertheless only be used at sentencing if the defendant has been convicted. Not surprisingly, many defendants do not provide such information following this notification, even defendants for whom the evidence strongly suggests factual guilt, leaving the evaluator to draw more limited conclusions regarding applicable mitigating factors (see discussion of Principle 14, later in this section).

Principle 7: Avoid playing the dual role of therapist and forensic evaluator. This principle would rarely apply to either Atkins assessments or capital mitigation evaluations. The exception might involve a treating mental health professional (a former provider or therapist delivering services to the defendant in jail) being asked to render a forensic opinion regarding mental retardation, or broader questions of mitigation and aggravation. This is invariably a poor idea, for a variety of ethical and professional reasons (Heilbrun, 2001, pp. 65-73; Melton et al., 1997, pp. 86-87). The occasional instance in which it would be helpful to have a treating clinician provide information can be handled by having that clinician testify in the role of fact witness rather than forensic expert, assuming that any privilege associated with treatment information had been waived.

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55. The most common factors relevant to a defendant’s mental state at the time of the offense are extreme mental and emotional disturbance (Alabama, Arkansas, California, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, Washington, Wyoming, and the federal U.S. jurisdiction), extreme duress or substantial domination by another (Alabama, Arizona, Arkansas, California, Colorado, Florida, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Washington, Wyoming, and the federal U.S. jurisdiction), and substantial impairment in the defendant’s capacity to appreciate criminality or conform conduct to the requirements of the law (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Washington, Wyoming, and the federal U.S. jurisdiction) (Citations omitted). There are minor differences in the wording of these factors in some jurisdictions.
Principle 8: Determine the particular role to be played within the forensic assessment if the referral is accepted. The role of impartial expert (whether retained by either side or court ordered) and consultant, discussed earlier under Principle 4, should be identified and treated as distinct from the time the forensic clinician is retained, with only one role assumed in a given case. This is comparably applicable to an Atkins evaluation and a broader capital sentencing FMHA. The relative absence of bias or advocacy associated with the impartial expert role should be reflected in both the tone of the report and the tenor of the testimony. Specific reflections of this impartiality should include a description of all findings (e.g., if a test is administered, it should be scored, interpreted, and discussed as part of the overall pattern of findings), a thorough approach using multiple sources, an even-handed consideration of all reasonable possibilities, and communication in language that is clear but not hyperbolic or overly technical.

Principle 9: Select the most appropriate model to guide data gathering, interpretation, and communication. There are two particular models of FMHA that are useful in helping to structure the data gathering, interpretation and reasoning, and communication of results. These respective models were originally proposed by Morse (1978, pp. 14-30) and Grisso (1986, pp. 14-30; 2003, pp. 21-67). Two of the components shared across models are: (a) the functional legal capacities underlying the legal question, and (b) the causal connection between deficits in such functional legal capacities and the potential sources of these deficits.

These models would apply quite differently to Atkins assessments and capital sentencing FMHA. The sole question in an Atkins evaluation involves whether the defendant meets diagnostic criteria for mental retardation. Although this question requires intellectual, behavioral, and historical data to yield a proper answer, there is no demand for a description of functional legal capacities underlying the larger legal question. Considered differently, the diagnostic/symptomatic and the functional legal criteria are synonymous in Atkins.

By contrast, diagnostic/symptomatic criteria are distinct from functional legal criteria in a capital sentencing evaluation, as they are in all other kinds of FMHA. The Morse or Grisso model can help to identify these two domains distinctly. Because there are a number of mitigating factors, and occasionally aggravating factors (e.g., the defendant’s future dangerousness) that are appropriate for expert mental health evaluation, these models suggest that the data and reasoning applicable to each be described in a separate section of the report, with a number of sub-sections to delineate each factor separately.

Principle 10: Use multiple sources of information for each area being assessed. Using multiple sources of information (self-report, records, third-party interviews, psychological testing, and specialized testing) and gauging the consistency of results across sources can help reduce the degree of error associated with any

56. For a fuller discussion of these models in FMHA, see Heilbrun (2001) pp. 83-96.
single source. This applies to both Atkins assessments and capital sentencing evaluations. However, the scope of the Atkins assessment is relatively narrow, while the capital sentencing evaluation is quite broad. Given the breadth of capital sentencing FMHAs, it is important to expand the scope of sources to an extent commensurate with this breadth.

Principle 11: Use relevance and reliability (validity) as guides for seeking information and selecting data sources. Some sources of information are particularly helpful. This principle prompts the evaluator to use relevance and reliability to select the best sources. However, there is a relationship between the scope of the evaluation and the sources selected. The Atkins evaluation is not only narrower in scope, but largely employs conventional diagnostic measures (e.g., IQ tests, adaptive behavior scales) that have been developed and validated for assessing mental retardation. Capital sentencing evaluations, by contrast, call for the assessment of data relevant to mental state at the time of the offense, and other domains that also encompass thinking, perception, and judgment, for which there are fewer and less well-validated tools available. The forensic clinician must compensate for this obstacle by employing more sources of information, judging the credibility of sources that have no formal validation (e.g., third-party interviews), and gauging the consistency of findings across sources rather than relying more heavily on fewer but well-validated sources.

Principle 12: Obtain relevant historical information. This principle is very important for both Atkins evaluations and capital sentencing FMHA, although for somewhat different reasons. When assessing whether a criminal defendant is mentally retarded, the forensic clinician must consider the possibility of exaggeration of cognitive deficits. However, a good history obtained from multiple sources can establish whether the defendant has been diagnosed as mentally retarded prior to age eighteen. This simultaneously helps to establish the diagnosis, which requires an initial diagnosis, and allows the evaluator to weigh the possibility that the defendant's deficits are exaggerated by comparing them with descriptions of such deficits from earlier in the defendant's life.

In capital sentencing evaluations, historical information is an essential component of a broad, longitudinal description of the defendant's functioning in particular areas. Self-reported information suggesting that a defendant suffered from symptoms of severe mental illness around the time of the offense, for example, can be weighed in the context of historical information regarding the presence of severe mental illness. Other broad developmental influences, such as problems with childhood abuse or neglect, family, school, peers, neighborhood, and substance abuse, cannot be assessed without relevant historical information from multiple sources.

Principle 13: Assess clinical characteristics in relevant, reliable, and valid ways. This principle refers to the importance of using measures that are reliable (having limited measurement error), valid (established to measure what is intended), and relevant to the clinical and personal characteristics important in the case. In Atkins assessment, this principle applies strongly; it is important to use
standardized, validated, and reliable measures of intellectual functioning and adaptive behavior that are used to assess mental retardation. In capital FMHA, the domain of clinical symptoms and personal characteristics is much broader, but it remains important to select psychological tests or specialized inventories that have been developed and validated for the purposes for which they are used. For instance, when using the MMPI-2, it is appropriate to use the specialized norms applicable to correctional populations. Given the expanded scope of relevance in the defendant's life, credible records are also particularly important, as are third-party interviews with individuals familiar with the defendant's life as a child and adolescent.

Principle 14: Assess legally relevant behavior. As noted earlier, the assessment of legally relevant behavior under Atkins is synonymous with establishing (or disconfirming) the diagnosis of mental retardation. For capital FMHA, however, the evaluator must consider factors that occur in a number of jurisdictions, such as whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; whether the defendant acted under extreme duress or under the substantial domination of another person; and whether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect. There are few specialized tools that could combine the retrospective aspect of these factors with their functional legal focus, so the forensic clinician in the capital context must generally approach this aspect of the evaluation by combining multiple sources across multiple modalities (self-report, testing, and collateral information) to yield conclusions that are driven by comparable findings across sources.

When the defendant declines to report on mental state at the time of the offense by indicating the absence of any involvement in the offense, it becomes more difficult to establish the presence of mental or emotional disturbance, appreciating criminality or conforming conduct, or being influenced by extreme duress. There are two ways, however, in which the existence of such factors may be established (albeit less firmly): through collateral information, and the fact that the deficits or symptoms involved are relatively unchanging over time. In this respect, mental retardation (considered prior to Atkins as a mitigating factor rather than a basis for excluding the defendant entirely from a death sentence) is a factor which, when established through a verified history of diagnosis from an early age, would certainly have been present at the time of the offense. In a similar vein, if there is strong and consistent third-party evidence that an individual was behaving in a way that indicated the experience of symptoms of severe mental illness at the time of the offense, the evaluator may conclude that such symptoms were present, even when the defendant denies involvement in the offense.

Principle 15: Ensure that conditions for evaluation are quiet, private, and distraction-free. There is one respect in which this principle is particularly important. When
assessing an individual's level of intellectual functioning, performance may be adversely affected by conditions that include distractions or other influences that might impair attention/concentration. In the Atkins context, a small deviation in performance can yield a very important difference in the conclusion regarding mental retardation. Consequently, this principle should be respected carefully when conducting an Atkins assessment.

In capital FMHA, this principle is also important because there can be sensitive information being discussed when the interview focuses on mental state at the time of the offense while the defendant is still pre-adjudication. It could be very damaging for such information to be overheard by another inmate, and such matters should never be discussed with jail staff. It is essential, therefore, that the conditions under which capital FMHA is conducted are fully private, and do not permit sensitive information to be overheard.

Principle 16: Provide appropriate notification of purpose and/or obtain appropriate authorization before beginning. Both Atkins evaluations and capital FMHA have significant implications for subsequent legal proceedings. It is important, therefore, that the defendant have a basic understanding of the elements of the notification (see discussion under Principle 6, earlier in this section). Individuals with significant intellectual limitations may have trouble understanding aspects of even a simple notification, so language should be basic and the evaluator should ensure that there is a specific gauge of how well the notification is understood (see Principle 17, next).

In capital FMHA, the defendant's discussion of thinking and feeling around the time of the offense may depend partly on the extent to which the complex notification regarding the value of information concerning mental state at the time of the offense is understood. The evaluator should make a concerted effort to explain why such questions are asked, and the limited circumstances under which the information obtained would be used. The essence of this aspect of the notification for a defense-requested capital FMHA should cover the following contingency: the material could be used as evidence at sentencing if the defendant is convicted of first degree murder and if the results are favorable to defendant so the attorney decides to use them. Under other circumstances, however (if there is no first degree conviction or there is a first degree conviction but results of the evaluation are not favorable to the defendant), the material will not be used.

Principle 17: Determine whether the individual understands the purpose of the evaluation and the associated limits on confidentiality. When the notification is delivered, the evaluator should make an immediate effort to determine how well its elements have been understood. The notification can be given in either written or oral form, although many defendants have sufficient reading problems to make written material useless. How well the defendant can recall and describe the elements of the notification should reflect their basic awareness of the nature of the evaluation and why it is being conducted.
The *Atkins* evaluation is much simpler than the capital FMHA. It is possible for the defendant to grasp the purpose of the former even when he/she has significant cognitive limits. Given the complexity and the sensitive nature of some of the material addressed in the latter evaluation, however, it is very important for the evaluator to explain it carefully and to document the extent to which this explanation has been understood.

If the defendant does not understand the notification, then deficits that interfere with such understanding should be identified and described in full in the evaluation. However, absence of fully informed consent is not sufficient to stop the evaluation if the attorney (as defendant’s legal representative) wants it to proceed and the defendant is willing and provides what is basically assent rather than fully informed consent. Attorneys should be aware of the evaluator's reasons for asking detailed questions regarding mental state at the time of offense, and for encouraging the defendant to describe some aspects of behavior that would be incriminating if conveyed to others (e.g., police, other inmates).

**Principle 18: Use third-party information in assessing response style.** The question of whether self-reported information provided in FMHA is accurate must be considered in any evaluation in which the evaluatee has substantial incentive to provide distorted information. When conducting an *Atkins* evaluation, the use of third-party information (in the form of records and interviews with knowledgeable observers) provides a useful counterpoint to the possibility that a defendant might exaggerate intellectual deficits. When such information is used to construct a cross-checked, relevant history, there is little chance that an inaccurate self-report might lead to a mistaken conclusion that the defendant is mentally retarded.

The forensic clinician should describe the consistency of third-party information with self-reported information. The clinician should be particularly cautious about self-report when it is significantly different from third-party accounts. Third-party information can be used to cross-check potential exaggeration and potential defensiveness.

It should be noted that third-party informnants may have their own biases, affecting factual aspects of their descriptions of the defendant. Such biases can be handled in a variety of ways including focusing on observations rather than conclusions, providing memory prompts in non-sensitive areas, and asking about how the third-party would like to see the case resolved (Heilbrun, Warren, & Picarello, 2003, pp. 81-83).

**Principle 19: Use testing when indicated in assessing response style.** There are also specialized tests that are sensitive to response style. Some have been developed specifically to measure exaggerated or fabricated symptoms of different kinds (e.g., the SIRS, Rogers, 1992; the VIP, Frederick, 1997; the TOMM, Tombaugh, 1997), or have “validity indicators” as part of the broader test (e.g., MMPI-2, Butcher et al., 1989). Such tests would probably not be needed in *Atkins* evaluations, assuming that adequate historical information could be obtained. However, there are a number of measures that might be appropriate to detect
exaggeration in self-reported symptoms or deficits (see generally Rogers, 1997). These measures may provide a useful complement to the evaluation of response style in other ways.

Principle 20: Use case-specific (idiographic) evidence in assessing clinical condition, functional abilities, and causal connection. Science can be applied to FMHA in three ways as described in Principles 20, 21, and 22. In the first of these three principles, science can be helpful through obtaining information specific to the case circumstances and present functioning of the individual and comparing it to that individual’s capacities and functioning at other times. This applies to the Atkins assessment through an evaluation of present intellectual functioning and a comparison with the individual’s history of previously diagnosed mental retardation (if present).

In capital FMHA, this principle applies more broadly. Consistent with the legal goal of individualized justice, the evaluator attempts to describe the defendant’s clinical condition (broadly conceived to include personality and behavioral attributes) and functional legal abilities in the context of his or her history of symptoms and demonstrated capacities.

Principle 21: Use nomothetic evidence in assessing causal connection between clinical condition, functional abilities, and causal connection. Science also provides empirical data from groups similar to that of the defendant in a capital case and offers tests that have been validated on comparable populations. Using such tests allows the evaluator to compare measured capacities to those in “known groups.” This principle is particularly valuable for promoting scientifically informed legal decisions. Atkins evaluations are straightforward in this respect, using tests and measures that have been developed and validated for assessing individuals with different degrees of mental retardation. It is important to note that the scientific aspects of such measures (reliability and validity) should be scrutinized carefully, and only the strongest should be admissible as part of such assessments.

Capital FMHA includes the assessment of two broad domains: clinical condition and functional-legal capacities. This principle suggests that evaluators should carefully consider what tests and measures have been developed and validated for various aspects of each of these domains. The critical consideration of which tests are supported through nomothetic data, and how strongly they are supported, is a valuable part of FMHA that is underscored by this principle in particular.

Principle 22: Use scientific reasoning in assessing causal connection between clinical condition and functional abilities. In some respects, science is similar to the FMHA process. Multiple sources of information are used; one source can create “hypotheses to be verified” (Heilbrun, Marczyk, DeMatteo, et al., 2003, p. 340) through further information obtained from other sources. Accepting or rejecting hypotheses that account for the most information using the simplest explanation is consistent with the scientific principle of parsimony. At times, evidence appears mixed, or competing explanations seem to account comparably well for this available information—this can be communicated in these terms. Principle
22 can be applied to the reasoning process in both *Atkins* assessments and capital FMHA.

Principle 23: *Do not answer the ultimate legal question.* There is disagreement within the fields of forensic psychology and forensic psychiatry concerning whether forensic evaluators should answer the “ultimate legal question” to be decided by the court. Some judges and attorneys anticipate that the forensic clinician will answer the ultimate legal question in the course of the evaluation. Others emphasize the more appropriate focus on the relevant included forensic capacities, because the ultimate legal decision includes moral, political, and community-value components and must apply these values to determining “how much is enough” when translating deficits into a dichotomous legal outcome.

The ultimate legal issue in *Atkins* is whether the defendant should be excluded from a death sentence due to mental retardation, but there is little reasoning needed between this conclusion and the finding of mental retardation. Hence, an *Atkins* evaluator can draw a conclusion that is well supported by science and come close to the ultimate issue without injecting political or moral values. By contrast, the ultimate legal question in a capital sentencing FMHA—whether the defendant should receive a death sentence—contains a broad mix of aggravating and mitigating factors that are not appropriate for expert evaluation because they are primarily fact-based (e.g., number of prior convictions) and other aggravating and mitigating factors that are appropriate for expert evaluation. It would seem best, therefore, to address the applicability of each factor that is part of the FMHA without coming close to combining them in the form of the ultimate legal decision.

Principle 24: *Describe findings and limits so that they need change little under cross examination.* The data and reasoning from FMHA should be described impartially, thoroughly, and with acknowledgment of appropriate limitations. This should apply comparably to both an *Atkins* assessment and capital FMHA. When this approach is taken—when challenges that would be presented on cross examination are considered and incorporated into the results of the evaluation—then it is not likely that the description of these results will change substantially during the cross examination.

Principle 25: *Attribute information to sources.* FMHA is done in the context of an adversarial legal proceeding. A challenge to findings should be expected; therefore, all such findings should be attributed by source. Source attribution is necessary because findings across multiple sources may need to be deconstructed during testimony, and to allow the opposing attorney to prepare to challenge these results. This principle should apply comparably to *Atkins* assessments and capital FMHA.

Principle 26: *Use plain language; avoid technical jargon.* Those who present, challenge, and use FMHA to make decisions are typically trained in the law but not in the medical or behavioral sciences; jurors may not be trained in any of

these areas. Thus, it is important to use technical language only occasionally, and
to define technical terms parenthetically when they must be used. This principle
as well would seem to apply to both Atkins evaluations and capital FMHA.

Principle 27: Write the report in sections, according to model and procedures. Almost
all FMHA reports can be written in sections that make it easy to apply many of the
principles described earlier. The following sections have been suggested by
Heilbrun (2001): (1) Referral (with identifying information concerning the
individual, his/her characteristics, the nature of the evaluation, and by whom it
was requested or ordered), (2) Procedures (times and dates of the evaluation, tests
or procedures used, different records reviewed, and third-party interviews
conducted, as well as documentation of the notification of purpose or informed
consent and the degree to which the information was apparently understood), (3)
Relevant History (containing information from multiple sources describing areas
important to the evaluation), (4) Current Clinical Condition (broadly considered to
include appearance, mood, behavior, sensorium, intellectual functioning, thought,
and personality), (5) Forensic Capacities (varying according to the nature of the legal
questions), and (6) Conclusions and Recommendations (addressed toward the relevant
capacities rather than the ultimate legal questions). These sections could guide
the construction, conduction, and communication of capital FMHA. An Atkins
evaluation could use all sections except Forensic Capacities, as the focus of
Atkins is primarily on section four rather than the relationship between sections
four and five.

Principle 28: Base testimony on the results of the properly performed FMHA. The
foundation for expert testimony is the evaluation, which should be documented
in the report. Principles 28 and 29 refer to the substantive aspects of report-
writing, and the substantive and stylistic aspects, respectively, of expert
testimony. When the substantive aspects of FMHA, whether an Atkins
evaluation or capital sentencing evaluation, are carefully documented in the report
(and performed consistent with the first twenty-seven principles), this creates a
basis for testimony that allows the presenting attorney to use these findings more
effectively, the opposing attorney to prepare to challenge them, the judge and jury
to understand them, and the evaluator to communicate them.

Principle 29: Testify effectively. The final principle describes the integration of
substantive and stylistic aspects of expert testimony. The substantive component
may be summarized by many of the principles discussed in this section; the
stylistic component of expert testimony concerns how the forensic clinician
presents himself or herself as credible, interesting, understandable, and likeable
through speech, dress, and other aspects of behavior. When substance and style
are both strong, expert testimony should be most effective. This principle would
seem to apply comparably to Atkins assessments and capital FMHA.
IV. CONCLUSION

Forensic mental health assessments conducted in the context of capital sentencing are among the most important evaluations provided by psychologists and psychiatrists to the legal system. The recent U.S. Supreme Court decision in Atkins created a somewhat different kind of FMHA in the capital context, but the broad core of FMHA principles described in this article can be applied to both Atkins assessments and more traditional capital sentencing evaluations. These principles provide a lens through which both kinds of evaluations can be viewed to make them more consistent, impartial, and attentive to the demands of the law, science, professional ethics, and standards for professional practice.
REFERENCES


