

7 of 103 DOCUMENTS

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Symposium: An Empirical Look at Atkins v. Virginia and its Application in Capital Cases

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SUMMARY:

... Although the Court did endorse the prevailing clinical definitions of mental retardation, some advocates of a categorical mental retardation ban expressed concern that the language the Court used-communicating that states must "generally conform" to these definitions -was ambiguous enough to permit death eligibility to vary depending upon the jurisdiction in which the defendant was charged. ... More than "general conform would be needed to assure uniformity," because accurately assessing mental retardation requires adherence to the definition's operational principles, such as considering the standard error of measurement when assessing intelligence test scores, or community supports when determining adaptive functioning deficits. ... Our data set clearly does not include every Atkins claim raised to date: Undoubtedly, there are mental retardation claims that have not yet been adjudicated, claims that have been adjudicated but not reported (and not revealed by our queries), and some new challenges-even to older cases-that have yet to be filed. ... Second, the success rates for Atkins claims vary dramatically between states. ... Moreover, Alabama, unlike North Carolina, defines mental retardation more restrictively than do either of the professional organizations cited by the Supreme Court; it applies a strict IQ cutoff and assesses adaptive functioning deficits by focusing on what the claimant can do rather than focusing, as those clinical definitions require, on the individual's limitations. ... For example, in Florida, 50 percent of the losing Atkins claims lost on the first prong alone, and in half of those cases, the state's cut-off score determined the outcome.

TEXT:

[*625]

I. Introduction

In *Atkins v. Virginia*, the Supreme Court overruled *Penry v. Lynaugh*ⁿ¹ and declared that evolving standards of decency prohibit the execution of individuals with mental retardation.ⁿ² Both supporters and opponents of a categorical ban on executing persons with mental retardation were quick to criticize the majority opinion.ⁿ³ Dissenting, Justice Scalia argued that exempting people with mental retardation from the **death penalty** would promote sport litigation,

where defendants feigning mental retardation would, without penalty or risk, make spurious Atkins claims. ⁿ⁴ He urged:

[o]ne need only read the definitions of mental retardation . . . 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), the capital defendant who feigns mental retardation risks nothing at all. ⁿ⁵

As evidence of both the number and frivolity of Atkins claims about to swamp the courts, Justice Scalia pointed to the fact that since the docketing of Atkins, the Court had already received petitions from death-sentenced inmates who had never previously claimed they had mental retardation. ⁿ⁶

On the other side of Atkins, commentators found rampant malingering unlikely, if not impossible, but worried that the Court's opinion left too much [*626] room for reluctant states to evade Atkins. ⁿ⁷ Although the Court did endorse the prevailing clinical definitions of mental retardation, ⁿ⁸ some advocates of a categorical mental retardation ban expressed concern that the language the Court used-communicating that states must "generally conform" to these definitions ⁿ⁹ -was ambiguous enough to permit death eligibility to vary depending upon the jurisdiction in which the defendant was charged. ⁿ¹⁰ More than "general conform would be needed to assure uniformity," because accurately assessing mental retardation requires adherence to the definition's operational principles, such as considering the standard error of measurement when assessing intelligence test scores, or community supports when determining adaptive functioning deficits. ⁿ¹¹ Other supporters focused on the [*627] fact that Atkins left to the states a number of crucial procedural issues, such as the identity of the fact finder, the stage of the proceedings at which mental retardation should be determined, and the appropriate burden of proof. ⁿ¹²

These criticisms may in part reflect the ideology of the critics, and to that extent, are untestable. But the criticisms also contain empirical predictions that may be evaluated. Have the courts been inundated by a barrage of mental retardation claims, as Justice Scalia envisioned? Are most mental retardation claims brought by capital defendants patently frivolous? Do some states systematically treat mental retardation claims more harshly than others? Do differences in success rates correlate with either substantive or procedural variations?

This Article presents preliminary data relevant to these questions. Elsewhere, we have considered the rationales of selected lower court decisions in some detail. ⁿ¹³ Here, by contrast, we abjure that kind of analysis, and instead report overall patterns and, from them, draw some tentative inferences. We attempted to gather all of the mental retardation cases adjudicated in the six years since Atkins was decided. We searched for all reported decisions and augmented the reported cases by posting queries on e-lists seeking additional adjudicated cases. Our data set clearly does not include every Atkins claim raised to date: Undoubtedly, there are mental retardation claims that have not yet been adjudicated, claims that have been adjudicated but not reported (and not revealed by our queries), and some new challenges-even to older cases-that have yet to be filed. We believe the first group- mental retardation claims filed, but not yet adjudicated-to be the largest. Although in Texas, which has a very large death row, we believe almost all of the mental retardation claims have been initially adjudicated, anecdotal information suggests that in some states with smaller death rows, fewer than half of the filed cases have been ruled upon.

It is possible that the cases we have not captured are skewed in some ways but not possible for us to know in what ways. For example, it may be that the more meritorious cases are resolved quickly, or that the least meritorious cases are resolved first, or that the clearest cases-weakest and strongest-are [*628] decided most quickly. Moreover, some Atkins decisions we have included will be appealed, and, as a result, the status of some of the claims that we have designated as "winning" or "losing" will change. Despite these caveats, we think our data shed some light on the nature of post-Atkins litigation of mental retardation claims in capital cases and raise some questions that have not previously

been discussed in the literature.

We report three basic findings. First, Atkins has not opened floodgates of non-meritorious litigation. Second, the success rates for Atkins claims vary dramatically between states. Third, as compared to their representation on death row, African-American defendants both file and win a disproportionately high number of Atkins claims.

II. The Rate and Merit of Atkins Litigation

Justice Scalia's Atkins dissent predicted that "[t]ime will tell" if courts would experience an overwhelming number of frivolous Atkins claims.ⁿ¹⁴ Six years later, this fear has not been borne out.

There are more than three thousand death row inmates.ⁿ¹⁵ We found 234 cases adjudicating the substance of Atkins claims, which implies that about seven percent of all death row inmates have filed Atkins claims. Because there may be a small number of Atkins claims that have not yet been adjudicated by any court, or not yet resulted in a published opinion, this may slightly underestimate ultimate filings attributable to Atkins. Nonetheless, it is now obvious that the overwhelming majority of death row inmates have not alleged mental retardation and ineligibility for execution under Atkins.

The data also refute the Atkins dissent's prediction that Atkins filings would be largely frivolous. Nearly forty percent of all defendants who allege mental retardation have, in fact, proved it.ⁿ¹⁶ This is substantially higher than the frequency with which defendants succeed on allegations of incompetence to stand trial, allegations of ineffective assistance of counsel, or any other claim of which we are aware. Indeed, the overall rate of reversal of death sentences encompassing all claims raised at all stages of appellate litigation is approximately forty percent.ⁿ¹⁷ More broadly, we are aware of no civil claim for which plaintiffs recover in forty percent of the cases filed. Of course, this is not to say that none of the Atkins filings are frivolous, but only to say that by any [*629] reasonable standard, Atkins has not generated an unusual amount of frivolous litigation.

A caveat to this analysis of the national data is that the number of pleadings and the win-loss rates differ markedly between states. For example, North Carolina has adjudicated at least twenty-one Atkins claims and has determined that seventeen defendants have mental retardation. By contrast, Alabama courts have adjudicated at least twenty-six Atkins claims and have found only three of those claims meritorious. Thus, the success rate in North Carolina is about eighty percent, and that in Alabama is about twelve percent. The direction of this discrepancy corresponds with the availability of funding for post-conviction litigation: Alabama has minimal funding and low win rates; North Carolina has adequate funding and higher win rates.ⁿ¹⁸ Moreover, Alabama, unlike North Carolina, defines mental retardation more restrictively than do either of the professional organizations cited by the Supreme Court; it applies a strict IQ cutoffⁿ¹⁹ and assesses adaptive functioning deficits by focusing on what the claimant can do rather than focusing, as those clinical definitions require, on the individual's limitations.ⁿ²⁰ This suggests that success rate may be related to the jurisdiction's general sensitivity to capital cases, the state courts' interpretation of the Atkins requirement that it "generally conform" to clinical definitions of mental retardation, or both.

III. Wins and Losses, Prong By Prong

The Court in Atkins approved a three-pronged clinical definition of mental retardation.ⁿ²¹ The first prong of the definition is that an individual must exhibit significantly subaverage intellectual functioning.ⁿ²² The second prong requires that the individual experience significant limitations in adaptive functioning, which is measured by categories

that relate to everyday living experiences in a typical (i.e., non-institutional) community environment.ⁿ²³ The third prong requires that these limitations must have manifested before the person reached the age of eighteen.ⁿ²⁴ To satisfy the first requirement, a person must perform "at least two standard deviations below the mean of an appropriate assessment [*630] instrument, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."ⁿ²⁵ Put differently, performance on one of these standardized intelligence tests must place the person in the lowest two percent of the population.ⁿ²⁶

To meet the second prong, regarding significant limitations in adaptive functioning, a person's ability to deal with the demands of the everyday world must be impaired.ⁿ²⁷ The operational principles behind the second prong presume that "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture" and that "[w]ithin an individual, limitations often coexist with strengths."ⁿ²⁸ "None of the diagnostic criteria for mental retardation include an exclusion criterion,"ⁿ²⁹ which means that diagnosis of a mental illness does not preclude diagnosis of mental retardation.

The third criterion, onset before eighteen, is the most straightforward of the three, although it is important to note that the definitions do not require a qualifying standardized test score before the age of eighteen, which might depend upon the school system the defendant attended, but only that the disability has manifested before that age.ⁿ³⁰

Courts have found that the majority of losing claims, approximately fifty-six percent, failed both the first and second prongs.ⁿ³¹ The remaining losing cases are almost evenly split between prong one and prong two losses, with the rare case (less than two percent) losing for failure to prove juvenile onset.ⁿ³²

[*631] Table 1ⁿ³³

LOSING CASES: LOSSES BY PRONG

[SEE TABLE 1 ORIGINAL]

A. Prong 1 - Intellectual Functioning: Win Rates and Averages

The clinical definitions of mental retardation take account of the risk of error in any intelligence test measurement. Accordingly, they incorporate the standard error of measurement (SEM) and other psychometric principles that identify the uncertainty inherent in statistical measures.ⁿ³⁴ The AAIDD defines significantly subaverage intellectual functioning as "[p]erformance that is at least two standard deviations below the mean of an appropriate assessment instrument, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."ⁿ³⁵ Similarly, the DSM-IV-TR states that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."ⁿ³⁶ With results in that range, the clinical literature advises thinking of the first prong of the Atkins assessment as a gateway to a rigorous assessment of adaptive functioning.ⁿ³⁷ Employing a strict IQ score [*632] cutoff of 70, by contrast, may wrongly exclude some individuals with mental retardation from Atkins's protection.ⁿ³⁸

An examination of the IQ scores reported for winning Atkins cases reflects jurisdictional variations. Over 60 percent of the claims that win on the first prong involve claimants who did not have any reported IQ scores over 70.ⁿ³⁹ Thus, a majority of winning claimants indisputably satisfy prong one. On the other hand, in about 15 percent of the successful cases the claimant's average IQ scoreⁿ⁴⁰ did exceed 70.ⁿ⁴¹ Thus, approximately 15 percent of the Atkins victories involve defendants whose average intelligence scores only qualify if a court takes into account measurement error or practice effects. A number of jurisdictions, including those employing cutoffs, consistently and explicitly refuse

to take into account such errors.ⁿ⁴² Finally, a handful of winning claims involve defendants who had no IQ score under 70,ⁿ⁴³ a result obviously precluded in the jurisdictions that impose a cutoff of 70.

[*633]

Not surprisingly, examination of the IQ scores in losing cases also reflects a variety of approaches. Of the claims that lose on the first prong, approximately 35 percent presented an average IQ below 70.ⁿ⁴⁴ In 21 percent of the losing cases, there was no reported IQ score of 70 or greater.ⁿ⁴⁵ This statistic corresponds to the 17 percent of cases that were successful on the first prong (establishing IQ scores under 70) but lost nevertheless because the claimant was unable to establish significant limitations in adaptive functioning. That leaves 18 percent of the losing cases in which courts faced with scores both above and below 70 determined that the over-70 IQ score was the most reliable and precluded a finding of significantly subaverage intellectual functioning.ⁿ⁴⁶ Some of this number reflects determinations that failed to take into account measurement error and practice effect or applied strict cutoffs on IQ scores.ⁿ⁴⁷ For example, in Florida, 50 percent of the losing Atkins claims lost on the first prong alone, and in half of those cases, the state's cut-off score determined the outcome.ⁿ⁴⁸

[*634]

B. Prong 2 - Adaptive Functioning: Win Rates and Averages

The clinical definitions classify adaptive functioning according to skill sets. The AAIDD and DSM-IV-TR definitions use different numbers of skill sets. Accordingly, an individual must establish a deficiency in a different number of skill sets to meet each definition, even though the definitions are substantively very similar. For example, when the Court decided Atkins, the AAIDD required significant deficits, or limitations, in adaptive behavior in two of ten skill areas.ⁿ⁴⁹ Similarly, the APA, in the DSM-IV-TR, required a showing of adaptive limitations in two of eleven skill areas.ⁿ⁵⁰ The AAIDD has since revised its definition and now measures adaptive deficits in three skill areas rather than ten, as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives," and requires a showing of significant limitations in only one of these areas.ⁿ⁵¹

1. Deficits commonly demonstrated

According to our data, the adaptive deficits most often successfully proven by claimants are deficits in functional academics, which were proven in over 55 percent of the successful Atkins cases, followed by deficits in social skills, which were proven in just under 40 percent of the winning cases.ⁿ⁵² Claimants established significant adaptive deficits in work skills in slightly less than 20 percent of the cases.ⁿ⁵³

[*635] TABLE 2

WINNING CASES: ADAPTIVE DEFICITS FOUNDⁿ⁵⁴

[SEE TABLE 2 IN ORIGINAL]

2. Reliance on Criminal Competence and Prison Behavior to Negate Prong 2 Showings

One key operating principle of the clinical definition of mental retardation is that strengths often coexist with weaknesses. The presence of weaknesses-not the absence of strengths-determines mental retardation.ⁿ⁵⁵ Consequently, relying on the "sophistication" of a defendant's crime to disprove adaptive functioning deficits, except in extraordinary circumstances, would not be consistent with accepted clinical practice because the "sophistication" of the crime is

irrelevant to the existence of weaknesses.ⁿ⁵⁶ Another important precept is that strengths and weaknesses must be assessed in the context of the individual's community environment.ⁿ⁵⁷ Thus, evidence of an inmate's activities in prison is of little value, because the clinical definition of mental retardation commands that adaptive behavior must be assessed in "typical community environments," not in circumstances of "legal restraint," such as prison.ⁿ⁵⁸

[*636]

Misapplication of the clinical definitions is fairly common. In our data set, nearly 30 percent of the losing cases rely at least in part on the applicant's prison behavior. In 16 percent of the losing cases, the court expressly found that the applicant had adapted well to prison, received education while in prison, or both. In at least 15 percent of the losing cases, the court explicitly relied on testimony from a corrections officer or an arresting or interrogating law enforcement officer. And in approximately 5 percent of the losing cases, the court determined that the applicant did not have mental retardation based, in some part, on observations of the defendant with legal books or documents. Most remarkably, in 75 percent of the Florida cases that passed the first prong but lost on the second, the court's finding of no adaptive functioning limitations was based in part on the claimant's behavior in prison, orchestration of the crime, or in-court conduct.

C. Prong 3 - Age of Onset

We found only two cases that lost solely on the age-of-onset prong of Atkins.ⁿ⁵⁹ This low number seems consistent with clinical definitions, which demand no specific form of proof of juvenile onset, but only require some evidence, which may include medical records or interviews with friends, family, teachers and others who knew the individual before the age of eighteen. In both cases that denied Atkins claims for failure to meet the third prong, the court insisted, however, that proof of onset in the form of a standardized test score predating the individual's eighteenth birthday was necessary, and that the absence of such scores defeated the claim.ⁿ⁶⁰ These decisions seem patently wrong, but they are, at least thus far, isolated.

IV. Racial Effects

Across the nation, 45 percent of death row inmates are Caucasian, 42 percent are African American, 11 percent are Hispanic, and approximately 2 percent are Asian or Native American.ⁿ⁶¹ However, of the Atkins claims raised, [*637] 57 percent have been raised by African-American defendants,ⁿ⁶² 22 percent have been raised by Caucasian defendants, and 12 percent by Hispanic defendants. Thus, African Americans are markedly overrepresented and Caucasian markedly underrepresented in Atkins filings.

We can look at race and outcome of Atkins claims from two different perspectives. Comparing successful petitioners to those on death row, African Americans are again overrepresented and Caucasians underrepresented. Fifty-seven percent and 18 percent of the successful Atkins claims are filed by African Americans and Caucasians, respectively, with Hispanic defendants filing a proportionate 14 percent of the winning claims. Alternatively, we can compare Atkins winners with Atkins claimants, and see that the rate of wins and losses within claimants does not seem to vary by race: African Americans file 57 percent of Atkins claims and comprise 57 percent of successful Atkins cases; Caucasians file 22 percent of the claims and comprise 18 percent of the winning cases; and Hispanics file 12 percent of the claims and comprise 14 percent of the winning cases.

We also looked at racial patterns by state. Here, we report only those states in which more than ten Atkins claims have been adjudicated. In most of these states, the percentage of Atkins claims raised by African-American defendants substantially exceeds the percentage of African Americans on death row, but Oklahoma and Pennsylvania do not follow

this pattern.ⁿ⁶³ In Pennsylvania, African Americans are slightly underrepresented in filed Atkins claims, and in Oklahoma, they are sharply underrepresented.

TABLE 3

[SEE TABLE 3 IN ORIGINAL]ⁿ⁶⁴ [*638]

We also examined the winning rates by state and race. We found variation here as well. In some states, including Florida, Georgia, Indiana, and Tennessee, African-American defendants have presented most successful Atkins claims. In other states, African-American defendants' Atkins claims have not fared nearly as well as those of Caucasian claimants. In Alabama, twelve African-American defendants filed Atkins claims and only one won, whereas two of the seven Caucasian defendants who raised Atkins claims won. Similarly, in Missouri, of seven claims, African-American defendants raised four but only one of these defendants won, while two of three Caucasian defendants who raised Atkins claims prevailed. At this time, we have no explanation for the variation between states.

More fundamentally, we do not know what explains the disproportionately high percentage of African-American defendants represented in Atkins claims (or conversely, the relatively low percentage of Caucasian defendants).ⁿ⁶⁵ Perhaps attorneys, following cultural stereotypes, are quicker to see mental retardation in African-American clients. Perhaps they are not themselves influenced by those stereotypes, but believe judges and juries will be. Perhaps there are more African Americans who have mental retardation on death row because jurors have been less sympathetic to their evidence of mental retardation when presented in mitigation. Alternatively, perhaps persons with mental retardation are more likely to engage in criminal activity when they receive less support and training as children, and because African Americans as a group are poorer, larger numbers of them have faced the combination of mental retardation and disadvantage.

Our data do not permit us to eliminate or endorse any of these explanations. Hoping for some illumination, we examined the average IQ scores of all Atkins claimants by race. The national average IQ score for African-American Atkins claimants is 71; the average IQ score for Caucasian claimants is 73; and the average IQ score for Hispanic claimants is 69.ⁿ⁶⁶ The issue is how to interpret these averages. Perhaps they raise the question of whether too few claims are being brought on behalf of Hispanic defendants. This hypothesis also gains some support from the fact that win rates among Hispanic claimants are somewhat higher than among other racial groups.ⁿ⁶⁷

We also report below the breakdown of IQ scores by race and state, though all we discern here is variation.

[*639] TABLE 4

ATKINS CLAIMS: AVERAGE IQ BY RACEⁿ⁶⁸

[SEE TABLE 4 ORIGINAL]ⁿ⁶⁹

V. Conclusion

From this analysis, we infer some good news, some bad news, and some old news. The floodgates of Atkins litigation have not opened on the courts, nor have an overwhelming number of frivolous claims been presented. Atkins, however, has not been applied uniformly among the states. Finally, race matters, although perhaps in a more complicated way than expected. Our data show us that Justice Scalia's concerns have gone unfounded, but that Atkins is not evenhandedly protecting those it was designed to protect.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Defenses Insanity Insanity Defense Criminal Law & Procedure Sentencing Capital Punishment Mental Retardation Criminal Law & Procedure Sentencing Mental Incapacity

FOOTNOTES:

n1 Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

n2 Atkins v. Virginia, 536 U.S. 304, 318 (2002).

n3 See infra notes 7-10, 13.

n4 Atkins, 536 U.S. at 353 (Scalia, J., dissenting) ("This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game.").

n5 Id. (citations omitted).

n6 Id. at 354 (citing Moore v. Texas, 535 U.S. 1044 (2002) (Scalia, J., dissenting from grant of application for stay of execution)).

n7 See, e.g., Douglas Mossman, Atkins v. Virginia: A Psychiatric Can of Worms, 33 N.M. L. Rev. 255, 276-77 (2003) ("[E]xamination of diagnostic criteria suggests that mental retardation is hard to fake successfully, because the criteria require evidence that retardation began during childhood- evidence, that is, that the condition existed years before the defendant committed a capital crime. . . . Moreover, in considering Justice Scalia's concern, it is important to recognize that assessing malingering is a core skill for mental health clinicians . . .").

n8 See Atkins, 536 U.S. at 308 n.3, 317 n.22 (citing with approval American Association of Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) (hereafter AAMR 9th ed.) ("Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) [hereafter DSM-IV- TR] ("The essential feature of Mental Retardation is significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of

community resources, self-direction, functional academic skills, work, leisure, health, and safety.")). The AAMR is now the American Association on Intellectual and Developmental Disabilities. The clinical field increasingly employs the term "intellectual disability." See Robert L. Schalock, et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 *Intell. & Developmental Disabilities* 116, 116 (2007) (explaining that change in terminology within AAIDD involves no change in definition). We use the term "mental retardation," because it was used by the Court in *Atkins*.

n9 See *Atkins*, 536 U.S. at 317 n.22 (noting that "[t]he [State] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions . . .").

n10 See Peggy Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 *J. Legis.* 77, 78 (2003); Alexis Krulish Dowling, *Comment, Post- Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 *Seton Hall L. Rev.* 773, 810 (2003); see also Mossman, *supra* note 7, at 275 ("The result could well be that, when states implement the *Atkins* ban, some will do so in ways that will permit execution of persons whom many mental health professionals would deem mentally retarded.").

n11 See AAMR, *Mental Retardation Definition, Classification, and Systems of Supports* 13, 14, 17, 58 (10th ed. 2002); AAIDD, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 12 (10th ed. 2007); Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* (AAMR, 2005); Tobolowsky, *supra* note 10, at 96.

n12 See *Atkins*, 536 U.S. at 317 (leaving "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences") (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)); see also Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 *DePaul L. Rev.* 721, 724-30 (2008).

n13 See John H. Blume, Sheri Lynn Johnson, & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases* (Cornell J. of Law & Pub. Policy, Paper No. 09-001, 2009), available at <http://ssrn.com/abstract=1327303>.

n14 *Atkins*, 536 U.S. at 353-54.

n15 See **Death Penalty** Information Center, <http://www.dpic.com> (last viewed May 12, 2009).

n16 Our data show that thirty-eight percent of *Atkins* claims have won, while sixty-two percent have not.

n17 James S. Liebman, et al., A Broken System: Error Rates in Capital Cases, 1973-1995 13 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 15, 2000), available at <http://ssrn.com/abstract=232712>, at 7 (taking into account cases adjudicated on direct appeal, in state post-conviction proceedings, and in federal habeas corpus).

n18 North Carolina also has, in our opinion, a reasonably sensitive post-conviction system overall.

n19 See *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (demanding that "a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below) . . .").

n20 See *Tarver v. State*, 940 So. 2d 312, 330-31 (Ala. Crim. App. 2004) (Cobb, J., concurring in part and dissenting in part from unpublished memorandum on return to remand). After remand, the trial court revoked its finding that the defendant had mental retardation.

n21 *Atkins v. Virginia*, 536 U.S. 304, 308-09 n.3 (2002) (quoting AAMR and DSM-IV-TR definitions).

n22 *Id.*

n23 *Id.*

n24 *Id.*

n25 AAMR, *supra* note 11, at 12.

n26 *Id.*

n27 *Id.*

n28 *Id.* at 8-9.

n29 DSM-IV-TR, *supra* note 8, at 47. See generally Blume, Johnson, & Seeds, *supra* note 13; Richard J. Bonnie & Katherine Gustafson, The Challenge of Implementing *Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in **Death Penalty** Cases, 41 U. Rich. L. Rev. 811 (2007) (discussing the significance of the standard error of measurement and other practice effects in assessing IQ scores).

n30 See generally Penny White, Treated Differently in Life, But Not in Death, 76 Tenn. L. Rev. 685 (2009) (examining how state definitions often deviate from these principles).

n31 See *infra* Table 1; see, e.g., *Woods v. Quarterman*, 493 F.3d 580, 587 (5th Cir. 2007) (affirming denial of habeas relief on *Atkins* claim after finding petitioner failed all three prongs).

n32 See Table 1.

n33 The cases do not always state explicitly the prong on which an *Atkins* claim loses. Many appeals summarily affirm trial court determinations that a claimant does not have mental retardation or summarily deny a federal habeas petitioner's motion to file a successive petition based on an *Atkins* claim. In these situations, barring a more illustrative concurring opinion or dissent, see, e.g., *Ex parte Taylor*, No. WR-48498-02, 2006 WL 234854, at *1-6 (Tex. Crim. App. Feb. 1, 2006) (summarily affirming trial court determination of no mental retardation, but concurring opinion explains that claimant possessed qualifying IQ scores and lost on prongs 2 and 3), *aff'd sub nom. Taylor v. Quarterman*, 498 F.3d 306 (5th Cir. 2007), no reported history of the specific strengths and weaknesses of the *Atkins* claim generally exist. The remaining percent of the cases we reviewed fell in this category.

n34 The most prominent in addition to the SEM are the practice effect and Flynn effect. See Blume, Johnson, & Seeds, *supra* note 13, at 9.

n35 AAIDD, *supra* note 11, at 12; AAMR, *supra* note 11, at 13, 14, 15, 17, 58. The Supreme Court acknowledged this as well in *Atkins*, noting that "[m]ild mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002) (emphasis added).

n36 DSM-IV-TR, *supra* note Ref226467302 h *MERGEFORMAT8, at 41-42 ("It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75).").

n37 AAIDD, supra note Ref226467134 h *MERGEFORMAT11, at 24 (stating that "IQ scores alone cannot precisely identify an individual's functioning in the upper boundary of mental retardation" and suggesting an upper range of 75); accord Kay B. Stevens & J. Randall Price, Adaptive Behavior, Mental Retardation, and the **Death Penalty**, 6 J. Forensic Psychol. Prac. 1, 21 (2006) ("Limiting the determination of mental retardation to a specific IQ score is unacceptable due to multiple factors such as measurement error and cultural bias.").

n38 See Bonnie & Gustafson, supra note Ref226469891 h *MERGEFORMAT29, at 836 ("[T]he SEM must always be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests.").

n39 This figure includes cases in which the IQ score was not specified in the court's decision. Among the winning cases with IQ scores available, approximately 44 percent did not have reported scores over 70.

n40 We assessed the claimants' average IQ scores by taking the average of all WISC, Stanford-Binet, WAIS, WAIS-III, WISC-R, WAIS-R, Wechsler Scale, WAIT and WAIS-IV scores because these tests are recognized in the field to be valid measures of an individual's IQ. Scores conducted in a group setting, produced by an abbreviated or incomplete test, derived from an estimate by an expert (rather than a specific test), or some combination thereof were omitted. We also excluded all scores where the expert who administered the test expressly stated that he or she believed the subject was malingering.

n41 A number of reported rulings, winning and losing, on the first prong did not state the claimant's IQ scores. We have included those cases in calculating the percentage of successful cases in which the claimant's IQ is 70 or greater.

n42 See, e.g., Jones v. State, 966 So.2d 319, 329 (Fla. 2007) ("Under the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."); Bowling v. Commonwealth, 163 S.W.3d 361, 374-75 (Ky. 2005) (stating that "Atkins did not discuss margins of error" and interpreting statute defining "significantly subaverage general intellectual functioning" as "an intelligence quotient (I.Q.) of seventy (70) or below" to impose a "bright line cutoff" at 70); Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004) (interpreting statute demanding "significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy or below" to impose a "bright line" cutoff at 70). See also note 52.

n43 See, e.g., Commonwealth v. Gibson, 925 A.2d 167, 170 (Pa. 2007) (stating that the claimant's IQ score ranged from 70 to 75). Jorge Vidal won on Atkins in California with an average IQ score of approximately 84 and a score as high as 92 on the WAIS-R. People v. Superior Court, 21 Cal. Rptr. 3d 542, 549- 50 (Cal. Ct. App. 2004). In Vidal's case, however, there was significant disparity between the verbal IQ score, which was very low, and the performance IQ score, resulting in a full scale IQ score that exceeded the mild mental retardation range. Id.

n44 Among the lowest IQ scores in losing claims are Eugene Clemons and Clifton Williams. Clemons v. State, CR-01- 1355, 2003 WL 22047260, at *12 (Ala. Crim. App. Aug. 29, 2003) (claimant had a low IQ score of 58 on the Stanford-Binet test and an average IQ score of approximately 66, and lost on both the first and second prongs); Williams v. State, 270 S.W.3d 112, 118 (Tex. Crim. App. 2008) (claimant had a low IQ score of 63 (WAIS- III) and an average IQ score of approximately 66, and lost on both the first and second prongs). See also

Scott v. State, 878 So.2d 933 (Miss. 2004) (claimant had a low IQ score of 60 on WAIS and an average IQ score of approximately 67, and lost on the second prong); Ex Parte Rodriguez, 164 S.W.3d 400, 402 (Tex. Crim. App. 2005) (claimant had a low IQ score of 60 on WAIS and an average IQ score of approximately 66, and lost on the second prong).

n45 This figure includes cases where no score was available. See supra notes 27 & 36. The percentage was 90% among only the losing cases with scores available.

n46 See, e.g., Trotter v. State, 932 So.2d 1045, 1050 (Fla. 2006) (relying in part on defense expert's testimony that IQ score of 88, after proper adjustment for practice and measurement effects, should be 80); accord Carroll v. Crosby, No. 6:05-cv-857-Orl-31KRS, 2008 WL 2557555, at *13 (M.D. Fla. Jun. 20, 2008) (relying on defense expert testimony that the claimant's IQ was 81).

n47 See, e.g., Cherry v. State, 959 So.2d 702, 713-14 (Fla. 2007) (applying strict IQ cutoff at score of 70, and rejecting Cherry's claim based on IQ score of 72 without considering the second prong); see also Nixon v. State, 2 So.3d 137, 142-46 (Fla. 2009) (discussing strict cutoff imposed in Cherry with approval and denying the petitioner's Atkins claim).

n48 See, e.g., Nixon, 2 So.3d at 142-46, and Cherry, 959 So.2d at 713-14.

n49 See AAMR (9th ed).

n50 See DSM-IV-TR.

n51 AAMR, supra note Ref226467134 h *MERGEFORMAT11, at 73. See also id. at 20-23 (table) (chronicling historical development of the current definition). The definitions of adaptive behavior have retained a consistent core meaning. See id. at 21-23.

n52 Table 2. Decisions do not always list specifically what adaptive deficits the court finds. In that circumstance, we inferred from the court's decision which deficits the defendant possessed. For example, if, in a case with a winning claim, the defendant was in special education or the opinion discussed his inability to read or write, we classified that as a finding of a defect in functional academic skills. Similarly, if the court's decision was not explicit about the adaptive deficits found, but discussed that the claimant had difficulty speaking or understanding conversation, we classified this as a finding of a defect in communication skills. If the State provided what the court considered strong evidence that an adaptive deficit was not present, and the opinion did not specifically state that the court found the defendant had proven the deficit, we did not include it. Generally, we included an adaptive deficit in cases where no specific finding was stated if the evidence for its existence substantially outweighed the State's counterclaim. When in doubt, we did not classify a deficit as found by a court in the absence of an express finding.

n53 *Id.*

n54 Most courts assess adaptive functioning according to the skill areas set forth in the DSM-IV-TR or AAMR. We have used those classifications here. In some cases, the court found that the defendant established significant adaptive functioning limitations in more than one skill area.

n55 AAMR, *supra* note Ref226467134 h *MERGEFORMAT11, at 48.

n56 *Id.*

n57 *See id.*

n58 AAIDD, *supra* note Ref226467134 h *MERGEFORMAT11, at 14-15. A variety of other problems exist with this evidence. Often, these assertions, presented via the testimony of corrections officers, prison wardens, or arresting officers, point to events such as having a magazine subscription or filing a grievance form-evidence that provides little insight into an inmate's actual ability. In some cases, courts are persuaded by this evidence, without asking the more important questions: whether the prisoner actually read the magazines or books checked out from the library, whether the grievance form was copied, and so on. It has also been suggested that this testimony poses a problem because witnesses in corrections or law enforcement may, by virtue of their professional roles, possess biases against the prisoner. *See, e.g., John M. Fabian, Life, Death, and IQ; It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5 J. Forensic Psychol. Prac. 1, 13-14 (2005) (identifying that correctional staff "may be plagued by certain biases for or against the defendant," "there may be a consensus among staff that experts are coming to death row to 'get the prisoner off the hook,'" "officers may have their own lay opinions on what retardation is and may also not believe these defendants are retarded because they are criminals and function fairly well in some areas," and some officers are likely "to have experienced conflicts with the defendants which may cause bias against the defendant in an evaluative setting").

n59 *Stallings v. Bagley*, 561 F. Supp. 2d 821, 881-86 (N.D. Ohio 2008); *State v. Strode*, 232 S.W.3d 1, 16-17 (Tenn. 2007).

n60 *See Stallings*, 561 F. Supp. 2d at 881-86; *Strode*, 232 S.W.3d at 17-18. Some Atkins claims that lose on multiple prongs suffer the same error. *See, e.g., Rosales v. Quarterman*, 291 Fed. App'x 558, 563 (5th Cir. 2008) (unpublished opinion); *Pizzuto v. State*, 202 P.3d 642, 651-55 (Idaho 2008); *State v. White*, 885 N.E.2d 905, 917 (Ohio 2008).

n61 *See Death Penalty* Information Center, <http://www.dpic.org> (last viewed May 10, 2009).

n62 Table 3.

n63 See Table 3.

n64 Table 3 lists only states in which more than ten Atkins claims have been litigated. The number of claims is in parentheses.

n65 Cf. Taiping Ho, Examination of Racial Disparity in Competency to Stand Trial Between White and African American Retarded Defendants, 29 *J. Black Studies* 771, 774-75 (1999) (stating that mentally retarded African Americans are more likely to be judged as competent to stand trial, despite their overrepresentation in the criminal justice system).

n66 Table 4.

n67 Conversely, an observer with more of an anti-Atkins bent might infer that too many claims are being brought on behalf of Caucasian inmates, observing both higher average IQs and higher loss rates among that group.

n68 Table 4 lists only states in which more than 10 Atkins claims have been litigated. For the number of Atkins claims for these States, see Table 3, *supra*.

n69 Thirty-one percent of the Atkins claims in Oklahoma have been raised by Native American defendants. The average IQ of those defendants is 74.