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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBIN MYERS, Petitioner, vs. DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents.	)	Case No. 5:04-CV-618-LSC-TMP

REPORT AND RECOMMENDATION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the capital murder conviction he received in the Morgan County Circuit Court on January 18, 1994, for which he was sentenced to death. The petitioner, Robin Myers, with the assistance of an attorney, filed the instant petition for writ of *habeas corpus* on March 25, 2004. He is incarcerated on Death Row at Holman Correctional Facility in Atmore, Alabama. This matter was referred to the undersigned magistrate judge for a hearing on the limited issue of whether the instant *habeas* petition is barred by the applicable one-year statute of limitation found at 28 U.S.C. § 2244(d). Subsidiary to that question are further issues involving equitable tolling, actual innocence, and whether petitioner is entitled to relief under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

I. PROCEDURAL HISTORY

On January 18, 1994, the petitioner was convicted after a jury trial for the capital murder of Ludie Mae Tucker during the course of a robbery.[1] He was represented at trial by John Mays and Larry Madison. The prosecution demonstrated that, on October 5, 1991, a man unlawfully entered the home of Ludie Mae Tucker during the night and stabbed her. The evidence indicated that the man entered another bedroom of Ms. Tucker's home and stabbed Ms. Tucker's cousin, Marie Dutton. Ms. Dutton survived the attack; Ms. Tucker died as a result of her injuries. The intruder stole Ms. Tucker's videocassette recorder.

The evidence showed that the petitioner, Mr. Myers, lived across the street from Ms. Tucker and had been to her door on a couple of occasions to ask her if he could have some ice. Later that night of the attack at Ms. Tucker's, Mr. Myers traded the stolen VCR to a neighborhood drug dealer for a rock of crack cocaine. Mr. Myers testified at trial that he did not attack and stab Ms. Tucker or her cousin, but he admitted that he did trade the VCR for cocaine. He testified that he found the VCR in some bushes in an alley near his home the night of the murder. Another prosecution witness, Marzell Ewing, also testified to being at the crack house and observing Mr. Myers trade the VCR for a crack rock.[2]

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[1] Petitioner was indicted on two counts, one of murder committed in the course of a burglary and one of murder committed in the course of a robbery. Both counts involved a single death.

[2] Mr. Ewing has now given an affidavit in which he states this testimony was untrue. He now says that he did not witness petitioner trading the VCR, but testified so at trial only because Leon "Butch" Madden, the drug dealer who ran the crack house, told him that Mr. Myers had done so. Also, Mr. Ewing's affidavit states that, at the time he made the statement to Decatur police, he was facing a charge of auto theft, which was dropped after he made the statement. He says that a police detective told him that he would dispose of the stolen car in which Mr. Ewing was arrested.

The jury convicted petitioner of the murder and recommended that he be sentenced to life without the possibility of parole. The trial court rejected the jury's recommendation and, after a sentencing hearing on June 2, 1994, sentenced petitioner to death. Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed on May 24, 1996. Myers v. State, 699 So. 2d 1281 (Ala. Crim. App. 1996). He was represented on appeal by Brent King and Bernard Harcourt. Petitioner sought rehearing, which was overruled, and then sought review in the Alabama Supreme Court, which affirmed the decision of the appellate court on May 9, 1997. Ex parte Myers, 699 So. 2d 1285 (Ala. 1997). Petitioner sought review in the United States Supreme Court, which denied petitioner's application for writ of *certiorari* on January 12, 1998. Myers v. Alabama, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998).

On or about December 21, 1998, more than eleven months after the denial of *certiorari*, attorneys for petitioner filed a petition for post-conviction relief in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Petitioner was represented in the post-conviction motion by Earle Schwarz and William F. Burns. In an order dated July 21, 2001, the trial court denied all claims except ineffective assistance of counsel, and set a hearing on that remaining claim. After receiving additional evidence, the court denied the ineffective-assistance claim on November 27, 2001. Through counsel, petitioner timely filed a notice of appeal, but the Alabama Court of Criminal Appeals affirmed denial of any Rule 32 relief in an unpublished memorandum opinion dated February 21, 2003. Myers v. State, CR-01-0778 (Ala. Crim. App., Feb. 21, 2003). As is that court's practice, the Alabama Court of Criminal Appeals sent notice of the affirmance to petitioner's counsel, but not to petitioner personally. Mr. Schwarz now admits in an affidavit that

he did not notify petitioner of the result of the appeal and did not seek review in the Alabama Supreme Court, but, instead, "abandoned" petitioner.[3]

By letter dated February 13, 2004, almost a year after the affirmance by the Alabama Court of Criminal Appeals, the Attorney General of Alabama informed petitioner that because no avenue of appeal remained open to petitioner, an execution date would be set. The letter was addressed to Mr. Schwarz, and a copy was sent to petitioner. Enclosed with the letter was a copy of the Alabama Court of Criminal Appeals' February 21, 2003, opinion. Petitioner admits that he received the Attorney General's letter "in mid-February 2004," and immediately began a search for new counsel. (See Petitioner's Opposition to State's Motion to Dismiss Habeas Petition, Doc. 24, p. 13).

On March 25, 2004, the petitioner, represented by new counsel, filed the instant *habeas corpus* petition, and on May 13, 2004, filed an amended petition. After seeking and receiving multiple extensions of time in which to answer, the respondents filed an answer and a motion to dismiss, supported by exhibits, contending that the petition as amended is time-barred by operation of 28 U.S.C. § 2244(d)(1). In addition, respondents sought a stay on briefing in this matter, pending resolution of the time-bar issue, which was granted.

On October 18, 2004, almost seven months after the original petition was filed, petitioner moved to amend his petition a second time, asserting as a new claim that his execution is precluded by the Eighth Amendment and Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he is mentally retarded. On the same date, petitioner filed a response to the State's motion to dismiss, asserting that Attorney Schwarz's failure to notify him of the Alabama Court of

[3] The court now is aware that Mr. Schwarz has been disciplined in the form of public reprimand by the Tennessee State Bar Association for his actions in Myers' case.

Criminal Appeals' adjudication of his Rule 32 appeal constitutes "cause" to excuse the untimely filing of the current *habeas* petition, and that the lack of notice to him personally from the state appellate court is sufficient to warrant equitable tolling. Petitioner further asserts that he is entitled to equitable tolling because he is mentally retarded and because his petition is timely filed "pursuant to 28 U.S.C. § 2244(d)(1)(D) based upon newly discovered, material, exculpatory evidence."[4] Finally, petitioner asserts that the time limitation does not apply because he is actually innocent of the crime.[5] After seeking and receiving three extensions of time in which to answer the amended petition, respondents filed a response on January 11, 2005. On January 19, 2005, petitioner filed further traverses to the respondents' motions to dismiss.

On September 13, 2005, the matter was referred to the undersigned magistrate judge for an evidentiary hearing on the issues of whether the instant petition is time-barred, or whether there are circumstances that extend, excuse, or toll the time bar. At the core of these issues is the petitioner's mental capacity and his allegation that he is mentally retarded. It is in response to that order of reference that the instant Report and Recommendation is entered. Following discovery on the issue of mental retardation, the respondents filed a motion for summary judgment on September 8, 2006,

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[4] Petitioner identified this newly discovered evidence as the statements made by Marzell Ewing that (1) he was not truthful when he said he saw petitioner trade the VCR at the crack house, and (2) Decatur police dropped an auto theft charge against him after he made a statement implicating petitioner in the Tucker murder. Petitioner alleges that this evidence from Mr. Ewing was discovered only "in the spring of 2004."

[5] Petitioner further asserts that the petition was timely filed within one year of the date on which his Rule 32 proceedings were terminated upon the affirmance of denial of relief by the Alabama Court of Criminal Appeals. This argument, however, completely misapprehends the nature of § 2244(d)(2), which provides for the one-year limitation period to be *tolled* during the pendency of a post-conviction motion. Neither the statute nor the case law provides for the limitation period to begin anew when the motion finally is resolved.

asserting that no evidentiary hearing was necessary because expert testimony demonstrated that Mr. Myers is not mentally retarded. The petitioner filed an opposition to the motion for summary judgment on September 22, 2006. An evidentiary hearing was held October 10, 2006, which continued through October 12, 2006. The parties then filed post-hearing briefs, and the matter was taken under submission on March 19, 2007.[6]

II. TIMELINESS

The respondents raise the issue that the instant petition may not be considered by the court because it is time-barred pursuant to 28 U.S.C. § 2244(d)(1). Section 2244(d), enacted April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), established for the first time a one-year deadline for the filing of *habeas* actions under § 2254 challenging the validity of state criminal convictions. The one-year limitation runs from the latest of any of four dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

[6] Accordingly, this report and recommendation addresses only the question of whether petitioner's *habeas* petition was timely filed and does not address any of the substantive claims raised therein.

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The AEDPA further provides that the limitation period is subject to tolling under § 2244(d)(2), which states:

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

There is no dispute in this case that the petitioner's judgment of conviction became final when the United States Supreme Court denied his petition for writ of *certiorari* on January 12, 1998. Accordingly, petitioner had until January 12, 1999, to timely seek *habeas* relief in this court. Under § 2244(d)(2), however, the one-year limitation period was tolled for that portion of the period during which petitioner had pending in state court "a properly filed" post-conviction petition. In this case, petitioner's Rule 32 petition was filed on December 21, 1998, after 343 days of his 365-day limitation period had expired, leaving petitioner with only 22 days remaining once the tolling ended. The Rule 32 petition remained pending until February 21, 2003, when the Alabama Court of Criminal Appeals affirmed the trial court's denial of all his claims.[7] Accordingly, the time period began to run again on that date, and petitioner had 22 days remaining, or until March 15, 2003, in

[7] Arguably, the time limit remained tolled for another fourteen days after February 21, 2003, during which petitioner could have sought rehearing, but did not, in the Alabama Court of Criminal Appeals. This point is academic as it makes no difference in the calculation of the time bar in this case.

which to file a timely *habeas* petition. The instant petition was not filed until March 24, 2004, one year and nine days after the one-year period expired.

Petitioner does not dispute that strict application of § 2244(d) precludes relief because the petition clearly is untimely. He argues, however, that the time-bar should not be applied in this case. The first issue that must be addressed by this court, therefore, is whether there exist any exceptions to the strict application of the AEDPA's one-year time-bar. Petitioner seeks to be excepted from the statute of limitation on the following grounds:

(1) that his petition is timely filed pursuant to 28 U.S.C. § 2244(d)(1)(D) based upon newly discovered evidence arising from the affidavit statements now made by Marzell Ewing, which, he contends, establish a Brady claim;

(2) that he has demonstrated "cause and prejudice" to excuse his untimeliness based upon his Rule 32 attorney's "abandonment" of him following the affirmance of post-conviction relief;

(3) that the statute of limitation does not apply because petitioner is actually innocent; and

(4) that circumstances warrant application of the doctrine of equitable tolling due both to the conduct of his post-conviction counsel and to his limited mental capacity.

Each of these bases for avoiding the application of § 2244(d) are discussed below in turn.

A. Newly Discovered Evidence

Petitioner contends that Marzell Ewing's statements that he lied at petitioner's trial and that he received favorable treatment from the Decatur police constitute "newly discovered evidence" sufficient to trigger application of § 2244(d)(1)(D). Under that assertion, the one-year limitation

period would begin to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Here, petitioner points out that the factual predicate for this claim under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), was not discovered and could not have been discovered until the "spring of 2004" when Ewing recanted his trial testimony. Thus, he argues, the one-year limitation period for the entire *habeas* petition[8] did not begin to run until the "spring of 2004," making the March 25, 2004, filing of the instant petition timely.

At the evidentiary hearing, the petitioner presented no evidence or argument concerning his claim that his petition is timely because it is based upon "newly discovered evidence." He offered no evidence relating to his efforts in trying to secure this evidence from Ewing, or even the precise date on which it was secured. He offered no evidence about his or his counsel's efforts to locate Ewing after trial, or of Ewing's reticence in revealing the information until the spring of 2004. There simply is no evidentiary basis for determining whether, in fact, the factual predicate of his claim was not available earlier than the spring of 2004 if petitioner had exercised due diligence in pursuing it. Cf. Wood v. Spencer, 487 F.3d 1 (1st Cir. 2007) (§ 2244(d)(1)(D) does not save an otherwise time-barred Brady claim absent proof of "due diligence" in pursuing factual predicate of the claim).

This newly discovered Brady claim was discussed in the court's order granting the petitioner an evidentiary hearing, plainly putting petitioner on notice of the need to support this asserted triggering date with factual evidence relating to petitioner's diligence. The burden of proof was on petitioner to show under § 2244(d)(1)(D) that he could not have discovered the factual predicate of

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[8] See Walker v. Crosby, 341 F.3d 1240, 1244 (11th Cir. 2003) ("The statute of limitations in § 2244(d)(1) applies to the application as a whole; individual claims within an application cannot be reviewed separately for timeliness").

this claim sooner "with due diligence." In re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997); Lott v. Coyle, 261 F.3d 594, 605-06 (6th Cir. 2001). By not even attempting to offer evidence on this claim, which might be more accurately described as an avenue by which to avoid the time-bar, petitioner is deemed to have abandoned it.

Even if the newly discovered Brady claim was not abandoned, the court could accept that ground as an exception to the time-bar only if it were able to make a finding that the petitioner exercised the requisite diligence in discovering the factual predicate for the new claim. As already mentioned, he presented no evidence that gives the court any guidance as to when the "newly discovered" testimony of Marzell Ewing became available, or why the "new" testimony was unavailable during the approximate 10 years between the time of the trial and the time the instant petition was filed. He offered no evidence about his own diligence or that of his attorneys in seeking the information about Ewing. An explanation of this is particularly important given, as petitioner himself explained in his amended petition, that conflicts between Ewing's trial testimony and that of other witnesses, specifically Madden, raised genuine concerns about the truthfulness of his testimony. That suspicion being raised, petitioner and his attorneys were obligated to pursue the issue diligently. Without some evidence concerning diligence, the court cannot say that the claim could not have been discovered sooner than some 10 years after trial. Petitioner has failed to show any level of diligence[9] in obtaining the information, and, absent some evidence of "due diligence," the court cannot say that petitioner has carried his burden of proving that § 2244(d)(1)(D) applies.

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[9] The court recognizes that the petitioner's position is that his mental capacity is such that the level of diligence demanded of him is extremely low. This court finds not only that his mental capacity is not as limited as he asserts, but also that there is simply no evidence at all as to what diligence was exerted by petitioner or petitioner's counsel prior to the filing of the instant petition.

See In re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997); Lott v. Coyle, 261 F.3d 594, 605-06 (6th Cir. 2001).

B. "Cause and Prejudice"

Similarly, the lack of merit in petitioner's argument that he may avoid the time-bar by demonstrating "cause and prejudice" was discussed at length in the court's order regarding an evidentiary hearing. There it was noted that, unlike the "cause and prejudice" analysis in the context of the judicially created doctrine of procedural default, the § 2244(d) time-bar is statutory in origin, and nothing in the statute suggests the application of "cause and prejudice" as an avoidance of the statutory limitation. Indeed, the policy interests undergirding procedural default, on the one hand, and § 2244(d)(1), on the other, are different. The procedural-default doctrine is designed to respect federalism and comity by enforcing orderly state procedural rules through refusal to consider claims not presented in accordance with those rules. The time-bar in § 2244(d)(1) serves distinctly federal interests in finality of criminal judgments and avoiding the wasteful consideration of stale claims. There simply is no reason to believe that "cause and prejudice," a judicially created exception to a judicially created rule, has any application to a statutory time limitation. Rather, the more traditionally recognized exception to time limitations is equitable tolling, which is discussed below.

Even if the "cause and prejudice" test does apply to the time-bar at issue here, it too relies upon a finding that the petitioner is mentally retarded. As more fully discussed below, petitioner advances two separate, but intertwined, arguments: First, that he was abandoned by his attorney during the Rule 32, post-conviction appeal, and second, that his mental retardation made it impossible for him to understand the arcane procedures and timing for presenting his claims *pro se*.

Accordingly, whether the instant petition is due to be dismissed as time-barred or whether the claims asserted are due to be evaluated on the merits rests, at least in part, upon this court's determination of the petitioner's mental capacity. As explained more fully below, having evaluated all of the evidence and arguments submitted in extensive briefing and during the three-day evidentiary hearing, the undersigned magistrate judge finds that the petitioner has not met his burden of demonstrating by a preponderance of the evidence that he is mentally retarded or that he lacked the mental capacity at the time that his deadline for seeking *habeas* relief passed to exercise due diligence to protect his own rights.

Furthermore, the unforgivable and unethical "abandonment" of the petitioner by Mr. Schwarz after the Rule 32 denial was affirmed by the Alabama Court of Criminal Appeals, as badly as it reflects on Mr. Schwarz and attorneys generally, cannot amount to "cause" in the traditional "cause and prejudice" analysis because petitioner had no Sixth Amendment right to the assistance of counsel in the post-conviction challenges to his conviction and death sentence. The Supreme Court has been very clear that, to serve as "cause" under the "cause and prejudice" exception to procedural default, the ineffective assistance of counsel — and the court has no question that Mr. Schwarz's conduct would be ineffective assistance of counsel if it occurred during a direct appeal — must itself implicate the Sixth Amendment right to the assistance of counsel, and that right simply does not extend to post-conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991). As the Eleventh Circuit Court of Appeals observed in Henderson v Campbell, 353 F.3d 880 (11th Cir. 2003):

> While constitutionally ineffective assistance of counsel has been considered cause to excuse a procedural default that occurs at a stage in the proceedings in which the defendant enjoys a Sixth Amendment right to the effective assistance of counsel,

> there is no constitutional right to an attorney in state post-conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991). "Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Id. Therefore, any ineffectiveness of [counsel] could not be considered cause for the purposes of excusing the procedural default that occurred in this case at the state collateral post-conviction level. Id.; In re Magwood, 113 F.3d 1544, 1551 (11th Cir. 1997); Johnson v. Singletary, 938 F.2d 1166, 1174-75 (11th Cir. 1991). With AEDPA, Congress codified this rule by enacting § 2254(i), which provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

Id. at 892; Peoples v. Campbell, 377 F.3d 1208, 1231 n. 51 (11th Cir. 2004). That result occurs here. As inexcusable as Mr. Schwarz's conduct was — and it may well be conduct that will deprive petitioner of review of his constitutional claims in this matter[10] — it is not "cause" that can avoid a procedural default, much less the time-bar of § 2244(d)(1).

C. Mental Retardation and Petitioner's *Atkins* Claim

Petitioner argues that "actual innocence" provides an exception to the AEDPA one-year statute of limitation. See Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000) (in *dicta*); Arthur v. Allen, 452 F.3d 1234 (11th Cir. 2006). He asserts further that he is "actually innocent" of the death sentence imposed upon him because he is mentally retarded, and the mentally

[10] At the time the Alabama Court of Criminal Appeals affirmed denial of petitioner's Rule 32 petition, 22 days remained in his then-tolled, one-year limitation for seeking *habeas* relief. If Mr. Schwarz had complied with his ethical duties, by either pursuing further review in the Alabama courts, or by notifying petitioner of his need to do so, the time limitation may not have expired, and petitioner could have obtained review of his claims.

retarded are categorically excluded from the death penalty[11] in light of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).[12] In Atkins, the Supreme Court recognized a consensus of state legislatures had determined that the execution of an inmate who is mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment. Being, therefore, categorically exempt from the sentence of death, petitioner argues that he is "actually innocent" of the sentence, such that refusal to consider his constitutional claims due to the time-bar raises the very Suspension Clause issue side-stepped in Wyzykowski and other cases. As instructed by Wyzykowski, however, this court's first task is to assess whether petitioner has made an adequate showing of the factual basis for his "actual innocence" claim.

An "actual innocence" exception has been well established in the context of a procedural default since the Supreme Court held that a claim of actual innocence may "avoid a procedural bar" to consideration of the merits of a *habeas* petitioner's claims. Schlup v. Delo, 513 U.S. 298, 326-27, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Accordingly, the claim of actual innocence provides a "gateway" through which otherwise procedurally barred constitutional claims may be considered.

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[11] A person may be "actually innocent" of the sentence of the death penalty, although guilty of the underlying murder, if the person were never legally eligible for the death sentence, notwithstanding the crime. See, e.g., Smith v. Murray, 477 U.S. 527, 537, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986); Sawyer v. Whitley, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Here, petitioner argues that his alleged mental retardation now renders him legally ineligible for the death sentence under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[12] Petitioner also argues that he is "actually innocent" in that he did not commit the crime made the basis of the capital murder charge. This argument, however, is little more than a challenge to the sufficiency of the evidence and a proffer of the new testimony of Ewing. This evidence simply fails to raise an adequate question about his "actual innocence" to require the court to examine the next step, that is, whether the Suspension Clause requires an "actual innocence" exception to the time bar of § 2244(d)(1).

Id. at 315. An "actual innocence" exception to the bar on successive *habeas* petitions was codified through the AEDPA at 28 U.S.C. § 2244(b)(2)(B)(ii), but Congress did not include the same or any similar exception in the provisions governing time limitations at § 2244(d).

To date, the Supreme Court never has held that actual innocence may be used to overcome the one-year deadline.[13] As discussed at length in this court's Order Regarding Evidentiary Hearing, however, United States v. Montano, 398 F.3d 1276, 1284 (11th Cir. 2005), seems to provide binding precedent that an "actual innocence" exception applies to time-barred claims as well as to those that have been procedurally defaulted or are successive. Accordingly, the parties were given the opportunity to present evidence at the evidentiary hearing tending to prove or disprove Myers' claim that he is mentally retarded. If this court were to determine that Myers is mentally retarded, he would be ineligible for the death penalty under Atkins, and all of his *habeas* claims likely would be due to be reviewed on the merits because petitioner would enter through the "actual innocence" gateway. If petitioner fails to demonstrate that he meets the definition of mental retardation, he is not entitled to any relief on the basis of the Supreme Court's decision in Atkins, and his claims are time-barred, unless the petitioner is entitled to equitable tolling of the filing deadline.

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[13] While the question was broached in Herrera v. Collins, 506 U. S. 390, 400, 113 S. Ct. 853, 860, 122 L. Ed. 2d 203 (1993), it was not answered, and the Court noted that innocence, absent some underlying constitutional violation, is no independent ground for *habeas* relief, because *habeas* relief is available to ensure a defendant's constitutional rights, and "not to correct errors of fact." Id. While it is troubling to imagine that a *habeas* court is without power to vindicate the rights of a prisoner who makes a clear and convincing showing that he is innocent, it appears to this court that that possibility exists under the law.

1. Defining Mental Retardation

In order to evaluate petitioner's claim that he is mentally retarded, the court must first examine the principles at work behind the Atkins decision:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

Atkins, 536 U.S. at 306-07. Of course, to carry out the purposes of Atkins, the courts must be able to differentiate among inmates who are learning disabled or poorly educated, those who are feigning retardation, and those who are truly "mentally retarded." Atkins also calls for the courts to recognize distinctions between mental retardation and other limitations in mental capacity, such as those caused by mental illness. There is no clear test by which a court can determine which inmates are mentally retarded and which suffer from other conditions. Mental retardation apparently cannot be identified by a gene, a blood test, or even solely by the standardized tests that measure intelligence. As the Supreme Court recognized, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." 536 U.S. at 317.

In Atkins, the Supreme Court sought to define mental retardation, and referred to the definition promulgated by the American Association on Mental Retardation ("AAMR"):[14]

> "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." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).

536 U.S. at 308 n.3. The court also looked to the definition provided by the American Psychiatric Association ("APA"):

> "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) 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 (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id., at 42-43.

536 U.S. at 308 n.3. The Court noted that these "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction," and that the hallmarks of mental retardation become

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[14] The AAMR changed its name to the Association on Intellectual and Developmental Disabilities in 2007, but is referred to herein as the AAMR, as it was known in Atkins and cases cited *infra*.

apparent before age 18. 536 U.S. at 318. In spite of the limitations that mental retardation may impose on individuals, the mentally retarded may generally be deemed more culpable for criminal offenses than the insane or incompetent. The Court explained:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

536 U.S. at 318 (footnotes omitted).

As a result of the Supreme Court's mandate in Atkins, it is clear that individuals who are deemed to be mentally retarded may not be subjected to the death penalty. The Court explained its rationale for excluding the mentally retarded from execution, asserting that the purposes served by the death penalty, retribution and deterrence, are not served in the case of the mentally retarded:

> With respect to retribution — the interest in seeing that the offender gets his "just deserts" — the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.*, at 433, 100 S. Ct. 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

> With respect to deterrence — the interest in preventing capital crimes by prospective offenders — "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" *Enmund,* 458 U.S. at 799, 102 S. Ct. 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U.S., at 186, 96 S. Ct. 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable — for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses — that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Atkins, 536 U.S. at 319-20. In addition, mentally retarded defendants "face a special risk of wrongful execution," the Court noted, because they may be less capable of assisting counsel and providing helpful testimony, and more apt to give a false confession or convey a demeanor that enhances a suggestion of future dangerousness or that lacks an expression of remorse. 536 U.S. at 320-21.

The difficulty in carrying out the Atkins rule lies in determining which defendants fall within the ambit of the term "mentally retarded." In reaching a conclusion as to Mr. Myers' status, the court first examines, for comparison, the evidence that was presented in Atkins, which involved a defendant convicted of capital murder in the Commonwealth of Virginia.

A forensic psychologist testified in the penalty phase of Mr. Atkins' trial that the defendant was "mildly mentally retarded." His opinion was based upon interviews with people who knew him,

school and court records, and a standardized intelligence test[15] showing a full-scale IQ of 59. 536 U.S. at 308-09. He further testified that Mr. Atkins fell within the bottom one percentile of the population in intelligence, and that his limited intellect had been consistent over his lifetime. 536 U.S. at 309 n.5. An expert[16] for the prosecution testified that Mr. Atkins was not mentally retarded, but had "average intelligence, at least" and an antisocial personality disorder. The prosecution's expert did not administer any intelligence tests. Both experts agreed that Mr. Atkins' academic performance in school had been "terrible." 536 U.S. 309 n.6.

Atkins provides no bright line for testing mental capacity, and further "'leave[s] to the State[s]' the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." By not giving the concept of "mental retardation" a constitutional definition under the Eighth Amendment, the Supreme Court left open the possibility that a defendant with a given IQ and ability could be eligible for the death penalty in one state, and ineligible in another state where the standard is different or more amorphous. The Court in Atkins did note that statutory definitions of mental retardation "generally conform" to the clinical definitions used by the AAMR and the APA. 536 U.S. at 317 n.22. Pursuant to this mandate in Atkins, the court looks to the definitions of mental retardation that have been employed by the State of Alabama.

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[15] The psychologist administered the Wechsler Adult Intelligence Scales Test (WAIS-III). 536 U.S. at 309 n.6. It has been described as the "gold standard" for measuring IQ in English-speaking adults. See, *e.g.*, Rivera v. Dretke, No. Civ. B-03-139, 2006 WL 870927, at *13 (S.D. Tex. March 31, 2006).

[16] The witness is identified as a doctor, but it is not clear whether the witness was a psychologist, counselor, or social worker with a doctoral degree, or was a psychiatrist or other type of medical doctor.

a. Mental Retardation Under Alabama Law

The Alabama Legislature in 1985 enacted the Retarded Defendant Act, designed to address the treatment of persons accused of a crime in Alabama who are mentally retarded. Alabama Code § 15-24-2(3) defines a mentally retarded defendant as a "person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior manifested during the developmental period, as measured by appropriate standardized testing instruments." This definition comports with the AAMR[17] and the APA, although it lacks some of the specificity employed by the AAMR and APA in describing adaptive functioning. Alabama's statute does not set any threshold number at which an IQ may be deemed "significant[ly] subaverage," nor does it address the types or number of deficits that must be observed in a defendant's adaptive functioning. None of the definitions employed by the AAMR, the APA, or Alabama statute names or describes what standardized tests are the most appropriate vehicles for assessing intellectual functioning or adaptive behavior.[18]

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[17] Since Atkins, the AAMR has set forth a revised definition of mental retardation, although it is substantially similar to the 1992 definition used in Atkins. The 2002 manual, and the organization's website in July 2007, define the condition as follows:

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

[18] It generally has been accepted that children under the age of 17 may be evaluated with the Weschler Intelligence Scale for Children, the WISC-III, and that an intelligence quotient in an adult may be validly measured by the Weschsler Adult Intelligence Scale, the WAIS-III. In addition, the Slosson Intelligence Test and the Stanford-Binet Intelligence Scale are considered to "correlate well" with other tests, except that the Standford-Binet is of limited use with persons who have an IQ of under 40. (See American Association on Mental Retardation, Mental Retardation, Definition, Classification, and Systems of Supports 51-72 (10th ed. 2002).

In Alabama, since the landmark decision in Atkins, state courts have been required to determine which criminal defendants should be deemed mentally retarded for purposes of applying the Atkins prohibition. The Alabama Supreme Court first defined mental retardation in light of Atkins by stating:

> [A] defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830, 124 S. Ct. 69, 157 L. Ed. 2d 55 (2003). Since Perkins, the state courts have strongly suggested that the Alabama legislature enact a statute that would "develop procedures for determining whether a capital defendant is mentally retarded and thus ineligible for execution." Smith v. State, ___ So. 2d ___, 2007 WL 1519869 at *7 (Ala. May 25, 2007). No such legislation has been forthcoming, and the state courts have relied upon the Retarded Defendants Act for guidance and have continued to adhere to the factors set forth in Perkins.

The adoption of a general mental retardation "cutoff" IQ of 70 was reached by the Alabama courts even before Atkins was decided by the Supreme Court, but after 18 other states had passed statutory prohibitions on the execution of mentally retarded defendants. In Stallworth v. State, 868 So. 2d 1128, 1180 n.2 (Ala. Crim. App. 2001), the appellate court noted that 18 states prohibited the execution of the mentally retarded, and that ten of those states set a definitive IQ level below which

a defendant would be exempt from the death penalty. Eight of the ten states defined mental retardation as being marked by an IQ of 70 or below.[19]

A chronological review of the most illustrative cases in which Alabama courts have made decisions regarding mental retardation for purposes of Atkins shows how the courts attempt to evaluate defendants' actual test scores in light of their life experiences and ability to function in society. While the courts' evaluations are multi-faceted and sometimes rely primarily on evidence of adaptive skills, the fact remains that, to date, no Alabama defendant who has scored above 72 on an IQ test administered after the crime has been deemed ineligible for the death penalty. Most of the defendants who filed actions raising Atkins claims have been denied any relief.

In Perkins, the court found that the defendant, tested as an adult, had a full-scale IQ score of 76, and "did not exhibit 'significant' or 'substantial' deficits in adaptive behavior before or after age 18." 851 So. 2d at 456. The court noted that the defendant had been married, and had maintained a job as an electrician for a "short period." 851 So. 2d at 456.[20]

In Lewis v. State, the Alabama Court of Criminal Appeals rejected a defendant's assertion that he was mentally retarded even though he had a full-scale IQ score of 58 at age 33 on the WAIS-R,[21] because there was evidence that the defendant showed "quite limited effort" on the test, had

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[19] One state, Arkansas, set the standard at 65 or below, and Arizona set the standard higher, at 75. The remaining eight states set no numerical IQ standard, relying more generally on the term "significantly subaverage." Stallworth, 868 So. 2d at 1180 n.2.

[20] The state Supreme Court conducted a plain-error review of the trial court's findings based on evidence that apparently had been introduced during the penalty phase of the trial, pre-Atkins, as mitigating circumstances. The court found that there was no need to remand the issue to the trial court for an evidentiary hearing on the issue of mental retardation in light of Atkins, presumably because the matter was sufficiently addressed at trial.

[21] The WAIS-R is an earlier version of the WAIS-III.

scored a 109 on a WRAT-R[22] a few years earlier, and showed "no deficits" in adaptive behavior. 889 So. 2d 623, 697-98 (Ala. Crim. App. 2003). The court further found that, where a defendant fails to demonstrate that he *currently* meets the state's definition of mentally retarded, there is no need to address whether the alleged mental retardation was manifested before the defendant was 18 years of age. 889 So. 2d at 698 (emphasis added). Similarly, the Alabama Court of Criminal Appeals held that a defendant was not mentally retarded, in spite of having been given an IQ score of only 67 as an adult, where his "deficits may be due to his voluntary use of drugs and/or alcohol and/or to malingering." Lee v. State, 898 So. 2d 790, 859-60 (Ala. Crim. App. 2003), cert. denied, 898 So. 2d 874 (Ala. 2004).

The Alabama Court of Criminal Appeals again rejected a defendant's assertion that his death sentence was violative of Atkins in McGowan v. State, ___ So. 2d ___, 2003 WL 22928607 (Ala. Crim. App. Dec. 12, 2003). The court found "no evidence in the record" that Mr. McGowan had "significant or substantial deficits in adaptive behavior or that his IQ is significantly subaverage" where a full-scale IQ score of 76 was reported by the defendant's own expert, and the defendant had been married and had maintained various jobs in construction. 2003 WL 22928607 at *57. The court made this finding even in light of evidence presented at sentencing that the defendant could barely read and was academically very "slow." Evidence that the defendant was the son of an alcoholic, abusive father, had been abandoned by his mother at age 9, and had been abused and neglected by other family members throughout his childhood also failed to sway the court toward a finding that the defendant was mentally retarded. 2003 WL 22928607 at *6-7.

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[22] The WRAT-R is a version of the Wide Range Achievement Test, which measures academic achievement by assessing the grade-level on which a student is performing. It does not appear to be generally accepted as a measure of IQ.

Alabama courts for the first time granted Atkins relief for a capital defendant in Borden v. State, ___ So. 2d ___, 2004 WL 362256 (Ala. Crim. App. Feb. 27, 2004). In Borden, the State stipulated that Mr. Borden was mentally retarded, based on a full-scale IQ score of 53 generated from a WAIS-III test given by the State's expert and testimony that Mr. Borden had "always functioned in the retarded range of intellectual ability." In addition to the tests given by the State's expert, the defense presented a litany of test results and expert examinations given over the past 30 years, all of which comported with a finding that Mr. Borden is mentally retarded.[23] 2004 WL 362256 at *4. His adaptive skills also had been tested, and the results had consistently demonstrated extreme impairment, with Mr. Borden scoring at the lowest possible level. Moreover, diagnoses of mental retardation consistently had been noted since at least the age of 16, and Mr. Borden never had scored more than a 66 on an IQ test.

In Tarver v. State, 940 So. 2d 312 (Ala. Crim. App. 2004), the state appellate court reviewed a defendant whose IQ had *increased* as he aged. Mr. Tarver had scored a 61 on an IQ test when he was 14 years old, and had shown deficits in adaptive behavior before he was 18. An IQ test given at age 17 resulted in a full-scale score of 72. 940 So. 2d at 318. Experts classified Mr. Tarver as mentally retarded earlier in his life, and the trial court, pre-Atkins, found as a mitigating circumstance that Mr. Tarver was mentally retarded. 940 So. 2d at 320. When he was tested again years after his conviction, Mr. Tarver scored a 76. 940 So. 2d at 318. The court remanded for an evidentiary hearing in the trial court on the issue of the defendant's intellectual functioning and

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[23] The highest score ever generated by Mr. Borden apparently was a 66, and none of the experts who tested Mr. Borden ever reported any evidence of malingering. It further was noted that Mr. Borden had poor adaptive skills, difficulty in talking, and possibly had suffered brain injury as a result of a high fever and coma. 2004 WL 362256 at *4.

adaptive behavior, instructing the trial court to "consider the definition of mental retardation in § 15-24-2(3), Ala. Code 1975, as well as the guidelines set forth in Atkins and Ex parte Perkins." 940 So. 2d at 321. On remand, the trial court conducted an evidentiary hearing and found that Mr. Tarver had been assessed with a full-scale IQ score of 61, based on the WISC given at age 14. (Final Order On Remand, p. 9).[24] At age 16, his score had improved to a 72, based on the WAIS. Id. After his arrest for capital murder, three doctors evaluated Mr. Tarver at the Taylor Hardin Secure Medical Facility to determine his competency for trial, and none found that he was mentally retarded. Id. In preparation for a Rule 32 hearing after his conviction, Mr. Tarver twice was administered the WAIS-R, and received full-scale IQ scores of 76 and 74. Id. at p. 10. When evaluated seven years later by a state expert, Mr. Tarver scored a 59 on the WAIS-III, was re-tested a few weeks later, and scored a 61. Id. The court ultimately found that the scores in the 70s could not be reconciled with the scores near 60 absent malingering, and held that the defendant had failed to prove that he had "significantly subaverage intellectual functioning." Id. at 15. Accordingly, to date, the defendant in Tarver has not been granted any relief pursuant to Atkins.

The Alabama Court of Criminal Appeals found another defendant was not mentally retarded because he functioned "normally" in society. In Yeomans v. State, 898 So. 2d 878 (Ala. Crim. App. 2004), cert. denied, 126 S. Ct. 175, 163 L. Ed. 2d 180 (2005), the court reviewed evidence of the defendant's IQ, which had resulted in scores as low as 67 at age 7, and as high as 83 at age 9. At 11 years of age, he achieved a score of 78, and at 17, Mr. Yeomans was given a full-scale IQ score of

[24] A copy of the trial court's order was provided to this court by the Alabama Court of Criminal Appeals. The order from the Circuit Court of Mobile County in Case No. CC-82-231.60, was entered by Judge Ferrill McRae on May 2, 2005.

72.[25] 898 So. 2d at 901-02. Neither the trial court nor the appellate court apparently had available any evidence of Mr. Yeomans' intelligence level at the time of the crime or at the time he sought Atkins relief.[26] Both the trial and appellate courts, however, based the denial of relief primarily on a determination that the defendant did not suffer "significant deficits" in adaptive behavior based on findings that he was "steadily employed, he married more than once, fathered and raised several children and ... tried to teach his children right from wrong." 898 So. 2d at 902. The Alabama Court of Criminal Appeals determined in Morrow v. State, 928 So. 2d 315 (Ala. Crim. App. 2004), that a defendant who had been given a full-scale IQ score of 64 at age 10, 67 at age 13, and 51-63 as an adult, was entitled to an evidentiary hearing in the trial court on the Atkins issue. On the other hand, evidence that a defendant had been placed in classes for learning disabilities and had an IQ of 75 at age 19 was deemed insufficient to meet even the "broadest" definition of mental retardation. Peraita v. State, 897 So. 2d 1161, 1206-07 (Ala. Crim. App. 2004), aff'd, 897 So. 2d 1227 (2004).

In Beckworth v. State, 946 So. 2d 490 (Ala. Crim. App. 2005), cert. denied, 127 S. Ct. 936, 166 L. Ed. 2d 717 (2007), the court considered a defendant who had scored a 71 on the Wechsler Adult Intelligence Scale when it was administered by a defense expert in order to determine his competency to stand trial, and a 67 on the Stanford-Binet test given about the same time.[27] An

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[25] The 67 and 78 were based upon Stanford-Binet Intelligence Tests. The 83 was based on a Wechsler Intelligence Scale for Children Revised, and the 72 was the result of a Wechsler Adult Intelligence Scale.

[26] The defense apparently retained an expert to evaluate the defendant, but his report was not used as evidence in the case.

[27] Both the testing expert and an opposing expert testified that an error was made in scoring the Weschler test, and that Mr. Beckworth's scale should have been elevated by 1 or 2 points, meaning that a valid IQ score at that time would have been 72 or 73.

Adaptive Behavior Scale given by the same defense expert at the same time produced a score "comparab[le] to individuals who were mentally retarded." 946 So. 2d at 499. The trial court was not presented with any evidence of defendant's academic performance before age 18, but did note that he had remained employed at jobs that required some level of skill, including obtaining a commercial driver's license, had made As and Bs while taking classes at a technical college, could read and write, and maintained a loving relationship with his daughter. 946 So. 2d at 500. The lack of evidence that the alleged mental retardation was manifested before age 18 and an absence of evidence of significant deficits in adaptive behavior led the appellate court to conclude that the trial court did not err in finding Mr. Beckworth was not mentally retarded. 946 So. 2d 490.

In Stephens v. State, 2005 WL 1925720 (Ala. Crim. App. Aug. 5, 2005), rev'd on other grounds, In re Stephens, No. 1041861, 2006 WL 2089894 (Ala. 2006) , the court similarly rejected the retardation exemption for a defendant with an IQ of more than 70:

> Here, the record indicated that Stephens had a verbal IQ of 73 and a performance IQ of 86, for a full-scale IQ of 77. During the trial and sentencing hearing, it was noted that Stephens had completed high school and that he subsequently obtained a commercial driver's license and had successfully performed as a qualified truck driver. The Court noted that based on Stephens's school history and subsequent work performance, Stephens was able to function satisfactorily in society. The record indicates that Stephens did not suffer significant deficits in his adaptive behavior. To the contrary, he was employed, he was married, and he fathered three children, and according to defense witnesses, he was a caring father.

Stephens, 2005 WL 1925720 at *30; see also Burgess v. State, ___ So. 2d ___, 2005 WL 2402672 at *23-24 (Ala. Crim. App. Sept. 30, 2005) (finding the defendant not mentally retarded when IQ was "between 70 and 80" and defendant had been a "normal child," an industrious worker, and had maintained a relationship with a girlfriend).

Even when a defendant has had a history of disruptive behavior and evidence of mental illness, the Alabama Court of Criminal Appeals has declined to find mental retardation in a defendant whose sole available IQ test, apparently taken before age 18, resulted in a full-scale score of 76. Brown v. State, ___ So. 2d ___, 2006 WL 1125007 at * 35-36 (Ala. Crim. App. April 28, 2006). A single IQ test that measures a defendant's intelligence quotient at more than 70, however, does not necessarily require that a court find the defendant is ineligible for relief under Atkins. In Jackson v. State, ___ So. 2d ___, 2006 WL 2788980 (Ala. Crim. App. Sept. 28, 2006), the state appellate court held that the trial court committed clear error in rejecting the mental retardation claim of a defendant who had scored a 72 on an IQ test given around the time of his capital-murder trial, but had scored 69 on tests taken in fourth and seventh grades, and had scored 65 on another evaluation as an adult. In Jackson, the state stipulated that the defendant was mentally retarded, but the trial court rejected the stipulation, finding that the evidence was conflicting. 2006 WL 2788980 at *4. The appellate court reversed, holding that the trial court had abused its discretion by rejecting the parties' stipulation that Mr. Jackson was mentally retarded. The court further concluded that "Jackson's full-scale IQ scores supported a diagnosis of mildly mentally retarded," and that he also had demonstrated significant deficits in adaptive skills. 2006 WL 2788980 a t *6-7. The court relied upon testimony of three experts who diagnosed Mr. Jackson as mentally retarded, teachers who described him as mentally retarded, and a relative and an employer who described the defendant as requiring constant supervision and capable only of menial tasks.[28] 2006 WL 2788980 at *6-7. The

[28] Unlike the defendants in Yeomans, Beckworth, and Stephens, Mr. Jackson was unable to hold a job for longer than three months, and had a "very sparse" employment history. 2006 WL 2788980 at *6.

result in Jackson, of course, is less instructive than one that followed it, because the state had not contested the defendant's claim of mental retardation.

Atkins relief was granted for the second time by the Alabama courts in 2006. The Alabama Court of Criminal Appeals found that an Alabama death-row inmate was ineligible for the death penalty because of his mental disability in Smith v. State, ___ So. 2d ___, 2003 WL 22026579 (Ala. Crim. App. Sept. 29, 2006).[29] Mr. Smith had been classified as "educably mentally retarded" as a child and had received an IQ score of 61 at age 8; he had consistent IQ scores that showed an IQ "in the range of 60 to 70" during school years. 2003 WL 22026579 at *6. Evidence relating to Mr. Smith's early life indicated that he could not read or write and that several of his siblings were mentally retarded and/or mentally ill. He had started using drugs at an early age, and had lived in extreme poverty in a dysfunctional family. 2003 WL 22026579 at *6. In exploring mitigating circumstances, the trial court heard expert testimony that Mr. Smith was "borderline" or "mildly" mentally retarded. Based on the trial court's findings, the appellate court held that Smith could not be executed.[30] The Alabama Supreme Court, however, reversed and remanded to the Alabama Court

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[29] Westlaw now lists this case as "no longer available," and states that it has been replaced. However, no subsequent opinion from the Alabama Court of Criminal Appeals of this defendant's case is available on Westlaw. The Alabama Supreme Court opinion that reversed and remanded the opinion that is "no longer available" is discussed *infra*. The discussion of this case is included herein because it provides some illumination as to whether evidence of mental retardation in childhood, absent evidence of current mental retardation, is sufficient to support an Atkins claim under Alabama law.

[30] The trial court reviewed new evidence in its hearing that followed remand from the state supreme court that called for a hearing on the issue of mental retardation. The trial court, however, did not specifically address Atkins, but the Alabama Court of Criminal Appeals used the trial court's findings regarding mitigating circumstances as evidence relevant to an Atkins inquiry.

of Criminal Appeals, requiring that court to remand to the trial court to conduct an Atkins hearing. Smith v. State, ___ So. 2d ___, 2007 WL 1519869 (Ala. May 25, 2007).

In reversing the Smith decision, the Alabama Supreme Court put a gloss on the appellate court's operative definition of mental retardation, saying:

> In *Ex parte Perkins*, we concluded that the "broadest" definition of mental retardation consists of the following three factors: (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18). 851 So.2d at 456. All three factors must be met in order for a person to be classified as mentally retarded for purposes of an *Atkins* claim. Implicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18. This conclusion finds support in examining the facts we found relevant in *Ex parte Perkins* and *Ex parte Smith* and finds further support in the *Atkins* decision itself, in which the United States Supreme Court noted: "The American Association on Mental Retardation (AAMR) defines mental retardation as follows: '*Mental retardation* refers to substantial limitations in *present* functioning.'" 536 U.S. at 308 n.3, 122 S. Ct. 2242 (second emphasis added). Therefore, in order for an offender to be considered mentally retarded in the *Atkins* context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18.

Smith, 2007 WL 1519869 at *8. The court went on to recognize that the APA recognizes four levels of mental retardation: mild, moderate, severe, and profound, and that any of these four diagnoses renders a defendant ineligible for the death penalty. 2007 WL 1519869 at *8. The Alabama Supreme Court noted that Mr. Smith had achieved an "overall IQ score of 72 a year after the murders." 2007 WL 1519869 at *10. A diagnosis of "borderline intellectual functioning," however, as was assessed in Mr. Smith's case, "describes an intelligence level that is higher than mental retardation" and does not provide a basis for relief under Atkins. 2007 WL 1519869 at *8.

Based on Smith, it is clear that Alabama courts would find that evidence of an IQ below 70 as a child, absent additional evidence of similar *current* scores and current deficits in adaptive skills, is not sufficient to render a defendant exempt from the death penalty. The Alabama Supreme Court specifically noted that "focus on [the defendant's] functioning before the age of 18 is misplaced" when that defendant's "intellectual functioning and behavior as an adult places him above the mentally [retarded] range." 2007 WL 1519869 at *10. The court remanded the case for an evidentiary hearing in the trial court.[31]

Error under Atkins was again alleged by an Alabama death-row inmate in Morris v. State, 956 So. 2d 431 (Ala. Crim. App. 2005). In Morris, however, the mental retardation issue was enmeshed with a claim arising under Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), because the defendant's motion for funds to hire an expert devoted to the defense had been denied. 956 So. 2d at 435-36. Mr. Morris's mental state was first examined soon after his arrest, based upon his assertion of a defense arising from a mental disease or defect. A state-appointed expert reviewed the defendant's school records and medical records, interviewed his sister and defense counsel, conducted an interview with Mr. Morris, and administered a WAIS-III, which resulted in a full-scale IQ score of 53. 956 So. 2d at 437. The expert determined that Morris was mentally retarded.[32] The Alabama Department of Mental Health and Mental Retardation further evaluated the defendant, administering the AAMD Adaptive Behavior Scale, which indicated that

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[31] While there are no further published opinions relating to Mr. Smith's case, he is no longer listed as a death row inmate on the Alabama Department of Corrections' website.

[32] While the expert later changed her opinion and stated that his intellect was superior to the level indicated by her tests, the change was based on the prosecution's apparently unfounded representation that certain relatively articulate letters had been written by the defendant. Morris, 956 So. 2d at 452.

Mr. Morris's adaptive functioning also indicated that he was mentally retarded. 956 So. 2d at 438. The Alabama Court of Criminal Appeals found that in light of Mr. Morris's compelling evidence of mental deficits, his trial was constitutionally infirm under both Ake and Atkins. 956 So. 2d at 452.

In general, the Alabama cases indicate that a defendant in Alabama may succeed on an Atkins claim only when his IQ scores have generally, if not consistently, fallen below 70. See, *e.g.*, Davis v. State, ___ So. 2d ___, 2006 WL 510508, (Ala. Crim. App. March 3, 2006) (finding that a score of 74 in the eighth grade, with later tests in the high 70s, was insufficient to support a claim of mental retardation), abrogated on other grounds by Ex parte Clemons, 2007 WL 1300722 (Ala. May 4, 2007) (finding that a sole IQ score of 77 acquired before age 18 was insufficient to support a claim of mental retardation). The holdings in the Alabama cases further suggest that an evaluation of the defendant's adaptive behavior, or of the defendant's age at the onset of the problems, becomes critical only once the initial threshold of *presently* subaverage intellectual functioning has been passed.

b. Definitions Of Mental Retardation Employed By Federal Courts

Although cases interpreting Alabama law must be consulted under the Atkins mandate that definitions of mental retardation be left to the states, it is worth noting that Alabama cases comport with conclusions reached by federal courts that have been forced to sort through the complex questions regarding mental retardation and the death penalty. Those cases are examined here primarily in relation to determinations of whether a defendant's intellectual functioning was sufficiently low to meet the "significantly subaverage" requirement suggested in Atkins. The court's focus on the intellectual functioning element of mental retardation is twofold: first, Mr. Myers'

arguments are most vehemently disputed on this issue; and, second, the intellectual functioning deficiency is the cornerstone of any finding of mental retardation. This is true because deficiencies in adaptive behavior, even coupled with a manifestation before age 18, can be attributed to environmental factors, substance abuse, or mental illness, rather than true mental retardation. See, *e.g.*, U.S. v. Webster, 421 F.3d 308, 313 (5th Cir. 2005) (finding that "while it is undisputed that [petitioner] has had low I.Q. scores on almost every I.Q. test that has been administered to him" the low scores are attributable to a lack of quality education and an inadequate home life), cert. denied, 127 S. Ct. 45, 166 L. Ed. 2d 47 (2006). Furthermore, in the absence of a significantly subaverage intellect, proof of the other characteristics of mental retardation do not warrant relief under Atkins.

The Fourth Circuit Court of Appeals has examined Atkins claims and has denied relief based primarily on findings that the petitioners' IQ scores were not so low as to meet the first prong of the test — that the petitioner had "significant limitations in intellectual functioning." In Walton v. Johnson, 440 F.3d 160 (4th Cir. 2006), cert. denied, 126 S. Ct. 2377, 165 L. Ed. 2d 298 (2006), the court determined that two IQ scores of 90 and 77, received shortly before and shortly after the defendant turned 18, demonstrated that petitioner was not mentally retarded based on a Virginia statute that required a showing that the defendant's IQ was 70 or less before age 18.[33] 440 F.3d at 177-78. Similarly, applying Virginia law in Hedrick v. True, the court rejected a petitioner's argument that his IQ score of 76 could be as low as 71 when the standard of error is taken into

[33] The definition of mental retardation provided in Virginia Stat. § 19.2-264.3:1.1, states: "Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

account, and that he should therefore be considered to have met his burden of proving that his IQ was 70 or below.[34] 443 F. 3d 342 , 347 (4th Cir. 2006), cert. denied, 127 S. Ct. 10, 165 L. Ed. 2d 992 (2006). In Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006), the court applied North Carolina's definition of mental retardation[35] and denied Atkins relief in spite of a petitioner's showing that his current IQ score was 68, where earlier tests, administered before the age of 18, were consistently in the range of 79 to 80. 453 F.3d at 592.

In the Fifth Circuit Court of Appeals, even an IQ score of 64 assessed for a defendant tested as an adult was insufficient to prove mental retardation. In Moreno v. Dretke, 450 F. 3d 158 (11th Cir. 2006), cert. denied, 127 S. Ct. 935, 166 L. Ed. 2d 717 (2007), a defendant was given an intelligence test at age 35, after his arrest. He alleged, however, that he was mentally retarded, and asserted that he had been in special education classes as a child. Applying Texas law,[36] the court rejected his Atkins claim, stating:

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[34] It is not clear whether the petitioner in Hedrick asserted that 71 is "close enough" to 70, or whether the 76 scored as an adult creates an inference that the score would have been less than 70 before age 18. In any event, the defendant in Hedrick apparently offered only one IQ score for the court's consideration. It is not clear what age defendant was at the time the IQ test was taken, but it was after his arrest and in anticipation of trial, and so apparently was after the defendant was 18.

[35] North Carolina has enacted a statutory prohibition on the execution of persons who are mentally retarded, and requires a defendant to prove that he is mentally retarded by demonstrating: (1) "significantly subaverage general intellectual functioning," and (2) "significant limitations in adaptive functioning," both of which had "manifested before the age of 18." N.C. Gen.Stat. § 15A-2005(a)(1)(a) & (a)(2). The statute defines "significantly subaverage general intellectual functioning" as "[a]n intelligence quotient of 70 or below." Id. § 15A-2005(a)(1)(c).

[36] Texas courts have followed the AAMR definition of mental retardation, and the definition set forth in Texas Health & Safety Code § 591.003, which requires: "1) a 'significantly sub-average' general intellectual functioning, usually defined as an IQ of about 70 or below; 2) accompanied by 'related' limitations in adaptive functioning; 3) the onset of which occurs prior to the age of 18." See, *e.g.*, In re Salazar, 443 F.3d 430, 434 n.2 (5th Cir. 2006).

> In support of his Atkins claim in state court, Moreno presented evidence that he scored a 64 on an IQ test that was administered in 2003, after Atkins was decided and when he was 35 years of age. The psychologist who administered this test qualified the score with the following observations:
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> > The results probably reflect the lowest level of his abilities. The results may not be valid, because he may not have been motivated to give his best effort on some of the tasks, and may have exaggerated any possible deficits. He often gave up easily on questions but would guess at the answers when encouraged to do so by the examiner. ... This score may somewhat underestimate his true level of intellectual functioning.
>
> The psychologist also observed that Moreno's speech was "free of articulation errors," he expressed himself appropriately and coherently, and his "cognitive processing speed was unremarkable." He was oriented to time and place, his memory was intact, and he was able to perform tasks that took several minutes of concentration.
>
> Moreno argued that he suffered adaptive limitations by alleging his attendance at special education classes as a child. His only evidentiary support for that claim was the psychologist's report reciting Moreno's self-reported educational background. He could not identify any specific special education classes or provide documentation of those classes. Moreno also argued that his history of substance abuse indicated adaptive limitations.

450 F.3d at 164. In Moreno, it appears that the Fifth Circuit Court of Appeals both doubted the reliability of the score and noted that there was no evidence of an IQ below 70 before the defendant

was 18. The Fifth Circuit Court of Appeals also held that a petitioner failed to make a *prima facie*[37] showing of mental retardation where the intelligence test relied upon "indicates that his IQ is significantly above the range of retardation." In re Brown, 457 F.3d 392, 396 (5th Cir. 2006) .[38]

In the Sixth Circuit Court of Appeals, petitioners seeking to be excluded from the death penalty pursuant to Atkins also have been required to show subaverage intellectual functioning through IQ scores that fall below 70. See, *e.g.*, In re Bowling, 422 F.3d 434 (6th Cir. 2006), cert. denied, 126 S. Ct. 1353, 164 L. Ed. 2d 65 (2006). The defendant in Bowling was denied relief in part because he had achieved IQ scores of 86 and 87 on tests given before trial, and had never scored less than 70. Looking to state law, that court found that "significant subaverage" intellect was defined as an IQ of 70 or below, and even scores of 74 and 78, received while in school, did not meet the "cutoff of 70 established by the Kentucky statute."[39] 422 F.3d at 439. Even though the petitioner asserted that his score of 74, given a margin of error of 5 points, could be deemed to be a score of 70 or less, the court rejected that argument, essentially accepting scores at their face value on the basis that the trained professionals who assigned the scores took the "adequacy and accuracy" of the tests into account at the time they chose the tests and calculated the scores. 422 F.3d at 437.

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[37] The appellate court required a *prima facie* showing because the petitioner was seeking authorization to file a successive *habeas* petition. See 28 U.S.C. § 2244(b).

[38] The opinion does not indicate what IQ score Mr. Brown had received, but the application of Texas law, which requires an IQ of "about 70 or below," compels the conclusion that his score was above 70.

[39] The appellate court applied Ky. Rev. Stat. § 532.140, which was enacted 12 years before Atkins, and which prohibited the execution of "seriously mentally retarded" defendants. The statute defines "significant subaverage intellectual functioning" as an IQ of 70 or below, and the Sixth Circuit Court of Appeals noted that the state law is "remarkably similar" to the standard set forth in Atkins. 422 F.3d at 439.

In the Eleventh Circuit Court of Appeals, the issue of whether an inmate meets the Atkins standard to be deemed mentally retarded and therefore exempt from the death penalty has only twice been addressed.[40] Both of these cases involved petitioners who sought to file second or successive *habeas* petitions in order to raise claims arising from the newly announced Supreme Court decision in Atkins. In both instances, the court held that the Atkins prohibition on the execution of a mentally retarded person was a new rule of constitutional law that is retroactive to cases on collateral review, which meets the first part of the statutory requirement of 28 U.S.C. § 2244(b). See In re Hicks, 375 F.3d 1237, 1239 (11th Cir. 2004); In re Holladay, 331 F.3d 1169 (11th Cir. 2003). In order to obtain review under 28 U.S.C. § 2244(b), the petitioners were further required to demonstrate "a reasonable likelihood that [they are] in fact mentally retarded." Hicks, 375 F.3d at 1239, quoting Holladay, 331 F.3d at 1173.[41]

The court first examined the planned execution of a mentally retarded inmate in In re Holladay, 331 F.3d 1169 (11th Cir. 2003). Mr. Holladay was sentenced to death in 1987. The trial court specifically noted his "slight mental retardation" as a non-statutory mitigating circumstance at the time of the sentencing hearing. 331 F.3d at 1171. His direct appeal, his post-conviction petition, and a federal *habeas* petition all were resolved prior to the decision in Atkins, and petitioner was not given any relief on any of his claims. 331 F.3d at 1171-72. In 2003, after an execution date

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[40] The issue was first presented to the appellate court in In re Turner, 339 F.3d 1247 (11th Cir. 2003), but the court declined to address that question because the petitioner had a pending state-court action in which he asserted an Atkins claim in a motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.

[41] In the instant case, Mr. Myers has demonstrated the "reasonable likelihood" that he is mentally retarded, which entitled him to an evidentiary hearing on the issue. Mr. Myers is now required to show by a preponderance of the evidence that he is in fact mentally retarded.

was set, Mr. Holladay sought to file a second or successive *habeas* petition in federal court to present a claim under the recently announced decision in Atkins. In granting the motion, the court adopted the standard set forth by the Seventh Circuit in Bennett v. United States, 119 F.3d 468, 469 (7th Cir.1997), which held that "if petitioner's proofs, when measured against the entire record in this case, establish a reasonable likelihood that he is in fact mentally retarded, then we are required to grant him leave to file a second or successive habeas petition on the basis of *Atkins*." Holladay, 331 F.3d at 1173. The court looked to evidence of Mr. Holladay's IQ, noting that he had taken ten IQ tests since childhood, and had scored as low as 49 in 1958 and as high as 72 in 1979, with a mean score of 64. 331 F.3d at 1174-76. While in school as a child, he had been classified by the Alabama Department of Human Resources as "barely educable with a Wechsler IQ of 54." 331 F.3d at 1175.

The court permitted Mr. Holladay to file a second *habeas* petition, noting:

> When we couple these contrary findings with the facts that 1) petitioner scored a 65 on his most recent IQ test (taken in 1991); 2) the trial court instructed the jury to consider his mental retardation as mitigating evidence at the penalty phase of his trial; and 3) the prosecution noted petitioner's mental retardation during its closing argument, we simply cannot say, for purposes of granting leave to file a second habeas petition, that there is no reasonable likelihood that Holladay is mentally retarded, and that his execution consequently would not run afoul of the Eighth Amendment. Overarching this square factual conflict, we cannot avoid the observation that petitioner's Eighth Amendment claim never has been adjudicated by any court. Importantly, we do not say that Holladay *is* mentally retarded. Rather, we simply hold today that based on the facts presented and the procedural posture of this case petitioner should be permitted to file a second petition for a writ of habeas corpus on the basis of his *Atkin*s claim.

331 F.3d 1176.

When Mr. Holladay filed his second petition in the district court, the matter was referred to a magistrate judge, who conducted an evidentiary hearing. After examining the evidence presented

at a two-day hearing, the magistrate judge recommended that the petition be denied, based on a finding that Mr. Holladay had failed to demonstrate by a preponderance of the evidence that he is mentally retarded. Objections were filed by petitioner, and the district judge ordered that the matter be briefed again, and himself held another evidentiary hearing. The judge then entered an order granting the petition, explicitly finding that the petitioner is mentally retarded. Holladay v. Campbell, 463 F. Supp. 2d 1324 (N.D. Ala. 2006). The respondents appealed, and that matter remains pending before the Eleventh Circuit Court of Appeals.

Another petitioner who, like Mr. Holladay, sought to file a second *habeas* petition in order to assert an Atkins claim, was denied permission to do so. In In re Hicks, a capital murder defendant sought authorization to file a successive § 2254 petition and moved for a stay of execution, asserting that he was mentally retarded. 375 F.3d 1237 (11th Cir. 2004). The court denied the application, noting that the defendant had adjudicated his Atkins claim in the state and federal courts, and finding that the petitioner could not "demonstrate that a reasonable likelihood that he is in fact mentally retarded exists." 375 F.3d at 1240. In Hicks, the court relied primarily upon the fact that Hicks scored a 94 on the sole IQ test available, "well above" the Atkins standard.[42] It is not clear at what age the petitioner scored the 94, although it was obtained "pre-trial."[43] However, it is clear that the

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[42] The court specifically referenced Atkins, 536 U.S. at 308, n. 3, which quotes the American Psychiatric Association, and states: "'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." The court also looked to the Georgia statute which prohibits the execution of the mentally retarded, O.C.G.A. § 17-7-131, and which defines the term as: "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." O.C.G.A. § 17-7-131(a)(3).

[43] In a dissenting opinion, the evidence relied upon was deemed "faulty" in that it was based on an "incomplete and outdated test" – the abbreviated WAIS – and was inaccurately high because of the "Flynn Effect." 375 F.3d at 1242-43 (J. Birch, dissenting).

petitioner had presented evidence to support his claim of mental retardation in both state and federal courts, and that his claim of mental retardation had been rejected.

Although the Eleventh Circuit Court of Appeals has only twice reached the substantive question of whether a petitioner meets the threshold showing of mental retardation for purposes of filing a second or successive petition, the court has determined that a *habeas* petition asserting an Atkins claim is subject to the same time limitations as any other claim based on new, retroactive Supreme Court law. See In re Hill, 437 F.3d 1080, 1084 (11th Cir. 2006). It is important to note that, despite the apparent categorical nature of Atkins' conclusion that the Eighth Amendment simply does not permit the execution of the mentally retarded, the court of appeals' application of the § 2244(d)(1) time bar to an Atkins claim seems to mean that such a claim can be forfeited by delay, even if that results in the execution of an indisputably retarded petitioner. The answer to that conundrum may be the argument advanced here, that is, that a prisoner who is truly mentally retarded is, under Atkins, "actually innocent" of the death penalty, and that barring consideration of that claim by application of § 2244(d)(1) might be an unconstitutional suspension of the writ. Cf. Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000) (in *dicta*); Arthur v. Allen, 452 F.3d 1234 (11th Cir. 2006). This bolsters the court's conclusion that it is required to examine petitioner's claim of mental retardation carefully and thoroughly.

The Eleventh Circuit also has suggested that it would recognize a "cutoff" of "approximately 70 or below on an individually administered IQ test" in determining whether a defendant has a mental capacity that renders him less culpable. See Henyard v. McDonough, 459 F.3d 1217, 1747, n.1, 1248 n. 4 (11th Cir. 2006)(J. Barkett, concurring), cert. denied, 127 S. Ct. 1818, 167 L. Ed. 2d 328 (2007). In Henyard, the petitioner had not raised an Atkins claim, but mitigating evidence

presented at trial indicated that the defendant, who was 18 at the time of the crime, had a "mental age" of 13, although his IQ of 85 indicated that he fell within the "low average" range of intellectual functioning.

It is clear from an examination of both Alabama and federal cases that the petitioner in the instant case has the burden of proving by a preponderance of the evidence that he currently is mentally retarded. In order to do so, he must demonstrate that his present intellectual functioning is "significantly subaverage." Under Alabama law, which comports with almost every state or federal circuit court that has addressed that question, a defendant is not currently mentally retarded unless his IQ is "about 70 or below."

2. Petitioner's Evidence Of Mental Capacity

In the instant case, petitioner argues that he is mentally retarded, although he does not dispute that the most recent IQ test given to him generated an IQ score of 84, and that the test is a valid measure of his current intellectual functioning.[44] The petitioner presented eight witnesses at the Atkins hearing, most of whom were friends and relatives who knew him well when he was growing up in New Jersey. The only witnesses who testified about his abilities as an adult were his wife, Debbie Anthony, and a neuropsychologist, Dr. Charles Golden, a defense expert who examined him in preparation for the Atkins hearing.[45]

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[44] Petitioner was last tested in 2006, near his 45th birthday. Prior to 2006, the most recent IQ test administered to petitioner was at age 16. The crime for which he was convicted occurred in 1991, the year petitioner turned 30.

[45] Even Dr. Golden testified, however, that he was asked only to form and express an opinion about petitioner's mental capacity before the age of 18, not his current capacity or his capacity at the time of the murder.

The petitioner provided substantial evidence of a very deprived childhood. He was one of ten children, he was born to a teen-aged mother, had an alcoholic father, and lived in chaotic poverty. His academic performance was very poor, and he dropped out of or was expelled from school during the eighth grade. Inexplicably, it seems that the petitioner repeated the third grade, but then was moved to the sixth grade without ever attending the fourth and fifth grades. (Petitioner's Ex. 22). Even when enrolled in school, Mr. Myers attended only sporadically. As discussed above, however, these factors become relevant to an Atkins claim of mental retardation only if the petitioner also demonstrates that his intellectual functioning at the present time is "significantly subaverage."[46]

In support of the claim that petitioner is entitled to relief under Atkins, petitioner relies exclusively on evidence of intellectual functioning prior to age 18. The petitioner cites many tests and evaluations conducted during his elementary-school education in New Jersey. Petitioner's counsel asserts that "only three of the tests administered were appropriate for use in diagnosing mental retardation." (Petitioner's Opposition to Motion for Summary Judgment, Court Doc. #68, p. 22). Specifically, petitioner points to the WISC administered in April 1973, when he was 11 years old, and on which he received a full-scale IQ score of 75; the WISC, taken seven months later at age 12, on which he received a full-scale IQ score of 64; and, the WISC-R, taken when he was 16, which rendered a full-scale IQ score of 71.

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[46] It is generally accepted as true that maternal age and alcohol use, and petitioner's own use of drugs or alcohol, can cause mental retardation. However, the cause of the condition is not relevant to an Atkins inquiry, and certainly is not relevant to an examination of a petitioner who does not exhibit "substantially subaverage" intellect. See, *e.g.*, Rivera v. Dretke, 2006 WL 870927 * 22-23 (S.D. Tex. March 31, 2006) (noting that the concept that mental retardation may be caused by "self-induced" means such as drug use conflicts with the well-established legal principle that voluntary intoxication generally is not a defense).

Petitioner argues that his intellectual functioning must be measured not only by IQ tests, but also by other means. The petitioner points to assessments of his academic performance, which was consistently well below grade level, and notes that he failed to master basic skills in reading, writing, or arithmetic. He was unable to count change, and never obtained a drivers license.[47] Although he was never labeled "mentally retarded" while in school,[48] Mr. Myers did attend special education classes, and was assigned to a different school than his siblings and neighbors in order to attend the special education classes. He was classified as emotionally disturbed, perceptually impaired, and multiply handicapped. (Evidentiary Hearing, Petitioner's Ex. 28). His school records frequently note that he showed frustration and hostility, and suggest the possibility of "higher potential" than his testing or academic performance demonstrate. (See, *e.g.*, Evidentiary Hearing, Petitioner's Exs. 28, 29, 31). Relatives and friends who knew him well as a child[49] testified that Mr. Myers could

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[47] There was testimony that Mr. Myers could drive, and sometimes did drive, but that he didn't drive competently, and never took the test for a license.

[48] Much of petitioner's evidence presented at the three-day evidentiary hearing centered on the assessments of Mr. Myers made by the New Jersey school system when he was an adolescent. Petitioner relies upon testimony from Ella Barco, who then worked as a learning disability teacher consultant in the Newark, New Jersey, schools. Ms. Barco testified that she was one member of a three-member team, along with a social worker and a psychologist, who evaluated Mr. Myers in 1973 when he was 11 years and 10 months old, and in the sixth grade. She administered a Peabody Individual Achievement Test, which indicated that he functioned at about three years below grade level. She also gave him a Slosson Intelligence Test, which is the equivalent of a verbal portion of an IQ test, and a Peabody Picture Vocabulary Test, which measures a separate aspect of IQ, and a Monroe Auditory Memory Test. (Transcript, Vol. 1, pp. 76-87). At the time, Ms. Barco gave him IQ scores of 74 and 78 based on verbal ability, noted that he generally functioned at a 2.8 grade level, and described his intellectual functioning as "borderline." At the hearing, however, she stated that Mr. Myers was then mentally retarded, but that he was instead classified as emotionally disturbed. The IQ scores reached by Ms. Barco are not "full-scale" IQ scores, but she testified that they do correlate to intelligence. (Transcript. Vol. 1., pp. 83-103).

[49] Most of the friends and relatives had no contact with Mr. Myers after he left New Jersey to move to Alabama at about age 20.

barely read or write. Mr. Myers' wife, who married him as a teen and moved with him to Alabama, testified that he could not read or write, and could not help his children with their homework once they reached about a third-grade level.

The petitioner offered testimony from a neuropsychologist, Dr. Charles Golden, who examined Mr. Myers while in prison. He defined mental retardation as "an IQ in the range of around 70 and below and adaptive problems in at least two significant areas of life functioning. ... Onset has to be before age 18." (Transcript, Vol. 2, p. 60). Dr. Golden further testified that there is no practical difference between a person whose IQ is in the high end of "mildly mentally retarded," and someone with an IQ in what used to be known as the low end of "borderline."[50] He acknowledged, however, that "you have to have an arbitrary cutoff point," and that the cutoff is "around 70," but can be "as high as an IQ of 75." (Transcript, Vol. 2, pp. 62-63.) Even Dr. Golden, petitioner's own expert, does not assert that mental retardation is ever a proper diagnosis for a person who is found to have an IQ above 75.

Dr. Golden dismisses Mr. Myers' scores of 74 and 75 as unreliable because the underlying test data is not provided in the school records, and states that the score of 71 may be inflated by "practice effect," the accepted notion that a test may result in an artificially inflated score when a test-taker repeats the same IQ test within a year or two because he may remember the questions, answers, or methods.[51] Dr. Golden finds the score of 64, reported at age 12, to be the most accurate

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[50] In spite of testimony that "borderline" is no longer used as a term to describe intellectual functioning, it appears frequently in both records and testimony, and generally refers to an IQ range of 71 to 84 or 85.

[51] A thorough discussion of "practice effect," "Flynn effect," and the margin of error or range of confidence of IQ scores is set forth in Rivera v. Dretke, 2006 WL 870927 at * 12-15. The subjects also are extensively reviewed in Green v. Johnson, 2006 WL 3746138 at * 43-47

and complete, but also states that the tests all are "pretty consistent of an individual functioning in the 64 to 75 range."[52] Dr. Golden's conclusion, based on both the IQ data available to him and his own analysis of Myers' adaptive skills, was that "Mr. Myers when he reached the age of 18 met the criteria for being classified as mentally retarded." (Transcript, Vol. 2, p. 124).

When viewing the results of the most recent IQ test given to Mr. Myers, the WAIS-III in 2006, Dr. Golden assesses Mr. Myers' IQ in the "74 to 86, 87 range of IQ." (Transcript, Vol. 2, p. 135.). He further explained the improvement in Mr. Myers' IQ scores as a result of brain injury that caused his brain to develop more slowly than the average person's brain. Dr. Golden asserts that because Mr. Myers lived in an improved environment later in life, his brain developed later than would be expected. Dr. Golden asserts that, after Mr. Myers left his childhood home for life with

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(E.D. Va., Dec. 15, 2006). While these terms of art employed by experts in interpreting IQ scores support the conclusion that, for example, a score of 70 reflects a range of scores, probably from about 65 to about 75, likely to reflect the subject's true IQ, it also is true that the score assessed by the expert is the "best guess" available to assess a subject's intellectual functioning. Neither petitioner's evidence in this case nor discussions of the issue in other cases give the court any reason to assume that the true score lies in the lower, rather than upper, regions of the range. Moreover, in Mr. Myers' situation, the "practice effect" makes it even less likely that 64 is an accurate IQ score because it is his lowest, even though it came on the heels of another administration of the same test. And while the court recognizes that without all the underlying data it may be difficult to challenge a score, the absence of all the data does not, in itself, undermine the reliability of the score. Finally, given the relatively large number of test scores available for Mr. Myers, the consensus as to the validity of the most recent score, and given that 84 is so far above the cutoff of 70, there is no need to "reduce" his scores for the Flynn Effect or on the basis of the standard error of measurement. See, *e.g.*, Green, 2006 WL 3746138 at *43-44. The magistrate judge's Report and Recommendation referenced *supra* was adopted by the district judge. 2007 WL 951686 (E. D. Va., March 26, 2007).

[52] Dr. Golden further testified that an interview with Mr. Myers' mother indicated that, at age 17 or 18, Mr. Myers showed deficits in at least five of the areas tested in an adaptive behavior test, which is more than the two deficits required for a diagnosis of mental retardation. Again, however, the court finds that adaptive behavior need not be closely examined until it can be determined whether Mr. Myers has a present IQ of about 70 or below.

his wife, he went to a "better environment." Dr. Golden even stated that prison life is beneficial to Mr. Myers' intellectual functioning because it is predictable and stable. Dr. Golden conceded that the only question he was asked was whether Robin Myers was mentally retarded as an adolescent. He does not consider him to be mentally retarded at the present time. (Transcript, Vol. 2, p. 236). Accordingly, while petitioner did present evidence from which the court *might* conclude that he had an IQ of "about 70 or below" when he was age 12, he has not provided any evidence that his IQ was "about 70 or below" at the time he committed the crime, or at the present time.

3. Respondents' Evidence Of Mental Capacity

The respondents offered two witnesses in support of their motion for summary judgment on the Atkins issue. A psychologist with a doctoral degree in clinical psychology, Dr. Glen King, examined Mr. Myers in April of 2006. He administered a WAIS-III test, a WRAT, and an adaptive functioning test.[53] On the WAIS-III, Mr. Myers generated a full-scale IQ score of 84, which places his intellectual functioning "just below that demarcation between average and borderline." (Transcript, Vol. III, p. 35). Dr. King reviewed all of the test scores available from Mr. Myers' school records, including the 64 relied upon most heavily by the petitioner. He concluded, however: "It's harder to increase your scores on the IQ tests than it is to decrease them. In other words,

[53] The petitioner's expert pointed out, however, that the test to measure one's adaptive functioning is designed for persons living in a residential setting, and is not appropriate for measuring those skills in a prison setting, because a prisoner has no need to prepare meals, pay rent, or perform other functions about which the test is designed to detect deficits. Dr. King concluded that the test is a valid measure of adaptive skills, and further opined that Mr. Myers' score would not be consistent with a diagnosis of mental retardation. Again, however, the court need not reach the question of Mr. Myers adaptive skills because Mr. Myers has failed to establish that he currently exhibits "significantly subaverage" intellectual functioning.

whatever the test reflects [as] your upward level is what you've actually been able to perform." (Transcript, Vol. III, pp. 44-45). Accordingly, Dr. King found that the score of 64 "would not be representative of his true abilities" given his other scores and given that he scored the 64 only six months after scoring a 75 on the same test. (Transcript, Vol. III, p. 45). In sum, Dr. King testified that Mr. Myers is not currently mentally retarded, and was not mentally retarded before the age of 18.

The respondents also offered the testimony of Dr. Susan Gierok, a neuropyschologist who evaluated Mr. Myers in preparation for the Atkins hearing. She testified that she administered a Wechsler Abbreviated Scale of Intelligence ("WASI") test on Mr. Myers, on which he received a full-scale IQ score of 85, (Transcript, Vol. III, p. 146),[54] and that she did not consider Mr. Myers to be mentally retarded. She reviewed all of Mr. Myers' school records, and administered additional tests. She reported that Mr. Myers was easily frustrated and that his school records indicated that he had a history of exerting less than optimal effort on tests. In examining his IQ scores of 75, 64, and 71, achieved in that order in fairly rapid succession, she noted: "Barring some sort of head injury, I just don't understand why that drop in IQ. Again, effort would be a very reasonable explanation for that, as would a behavioral problem." (Transcript, Vol. III, p. 169). She further stated: "[A] person is only — they can only do as well as what they're biologically capable of doing. In other words, you can't fake a good performance. ... There's lots of factors that can make a score lower, but an individual's true abilities cannot be higher than they're biologically able to do."

[54] It is undisputed that the abbreviated test is a less reliable indicator of IQ, but that Dr. Gierok selected it for administration in this setting because Mr. Myers had so recently taken the WAIS-III. She gave the WASI to avoid generating a score elevated by the "practice effect," a well-documented principle that an IQ test score is likely to increase when taken more than once over a relatively short period of time because the examinee may remember the questions.

(Transcript, Vol. III, p. 169). Dr. Gierok determined both that Mr. Myers now functions in the low average range of intellectual ability, and that he was functioning in that same range before age 18. Her conclusion is that he is not mentally retarded now, and should not have been diagnosed with mental retardation before age 18. (Transcript, Vol. III, p. 174-75). Finally, Dr. Gierok testified that she does not believe it is possible for both the 64 and the 85 to be valid scores, and that it is not conceivable that intelligence would increase by 21 points in a person's lifetime.[55]

4. Analysis Of the Evidence Of Mental Retardation

Having reviewed all of the relevant court decisions in Alabama and the Eleventh Circuit Court of Appeals, and having further examined the reasoning of other federal courts, this court is persuaded that any petitioner who fails to demonstrate that his IQ is currently about 70 or below cannot be deemed mentally retarded for purposes of seeking relief from a death sentence. The court is cognizant of the inherent dangers in such "bright-line" rules, and is mindful of the negligible differences between the intellectual capacities of a person who scores a 69 on an IQ test and a person who scores a 71. It is clear that Robin Myers was poorly educated: He never learned to read or write at more than a third-grade level, and he was reared in an environment that hampered his ability to acquire those skills, or even to pick up general knowledge. If this were a closer case, the court would have some difficulties in applying an absolute "cutoff" of 70 to determine the issue of mental

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[55] She did note that a decrease of that magnitude may occur with a severe head injury, but that she did not "understand how they would go up," even though the DSM-IV indicates that mental retardation may not be "for life." She interprets that statement to indicate that an increase in adaptive skills through training and structured environments might raise a person's adaptive functioning above the level of mental retardation, but that the IQ score would not likely change to such a degree. Further, she reiterated that "our best scores are going to be our more valid scores, because, again, we can't fake that." (Transcript, Vol. III, p. 230-31).

retardation. But this is not a close case. Two separate intelligence tests in the last year, conceded by petitioner to be valid, set his IQ at 84 or 85, well above the mental retardation "cut-off" of about 70.

The evidence in this case does not present a close question as to whether Mr. Myers is currently mentally retarded. The petitioner has not presented any evidence to contradict Dr. King's finding that Mr. Myers, in 2006, scored an 84 on a valid IQ test. Dr. Gierok's test results and testimony support the finding that Mr. Myers' IQ is approximately 84. The petitioner's own expert, Dr. Golden, does not believe that Mr. Myers is *currently* mentally retarded, and does not dispute the validity of the 84 score received in 2006. For all practical purposes, the court's inquiry might end there. As the Alabama Court of Criminal Appeals made clear in Lewis v. State, when a defendant fails to demonstrate that he *currently* meets the state's definition of mentally retarded, there is no need to address whether the alleged mental retardation was manifested before the defendant was 18 years of age. 889 So. 2d at 698 (emphasis added).

Even if this court were willing to ignore the clear mandate of Lewis, there still would be insufficient evidence to support a finding that Mr. Myers has met his burden of proving that he was mentally retarded before he reached the age of 18. The petitioner urges that only two of Mr. Myers' pre-age 18 IQ scores "provide a sufficient basis" upon which to diagnose or rule out mental retardation, those being the 64 and the 71. Because mental retardation "can" be diagnosed in persons with an IQ as high as 75, petitioner argues, these scores satisfy a showing of mental retardation manifested before age 18.

It should be noted first that the petitioner's reliance on only two scores, 64 and 71, is untenable. The petitioner's argument ignores the 75 scored on the WISC at age 11, and the 78 and

74 scored on the Slosson and Peabody just a month later. While the Slosson and Peabody, viewed alone, are not the reliable indicators of IQ that the WISC is considered to be, looking at the three together makes it much more likely that Mr. Myers' IQ at age 11 was in the mid- to upper-70s than that it was 64. Moreover, there is no valid explanation for Mr. Myers' loss of at least ten IQ points in the six months between the 75 score he achieved at age 11 and the 64 scored on the WISC at age 12. The more credible testimony regarding this discrepancy came from Dr. Gierok, who explained that you "can't fake" a high score, but that an unreliably low score can be the result of a "bad day," or malingering, or emotional or behavioral problems. The evidence is replete with references to Mr. Myers' propensity to become frustrated and give up, or to refuse to put forth effort. The trained clinicians who tested Mr. Myers as a child frequently noted that his intellectual potential may be higher than the test results indicated. None of the psychologists, psychiatrists, or educators who evaluated Mr. Myers ever diagnosed him with mental retardation, or suggested that the test scores appear to over-estimate his intellectual capability.[56]

As the respondents have shown, there are other compelling explanations for Mr. Myers' poor academic showing. He was absent with alarming frequency, he had learning disabilities that made him unable to keep pace with other children his age, and he began abusing alcohol while still in grade school. He apparently never attended the fourth or fifth grades, but was inexplicably

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[56] Although the petitioner presented evidence that the school system Mr. Myers attended in the 1970s demonstrated reluctance to label minority students as mentally retarded, both out of a fear of accusation of racism and in an effort to place them in smaller classes, that explanation is not persuasive in light of the fact that Mr. Myers was consistently placed in special education classes, and was "labeled" as emotionally disturbed, multiply handicapped, and socially maladjusted. It seems unlikely that, if he truly was mentally retarded, the school system would have been reluctant to use that designation, given the "labels" they otherwise attached to him.

"promoted" from third grade to sixth grade. All the while, Mr. Myers was struggling with bed-wetting and living in a home environment that was, at best, poverty-ridden and chaotic.

Given all of the evidence, and having weighed the credibility of the witnesses presented, the court finds that Mr. Myers has failed to demonstrate that he currently exhibits "significantly subaverage" intellectual functioning.[57] It is not seriously disputed that Mr. Myers is currently functioning in the borderline to average range of intellectual functioning, with an IQ of about 84. It further is clear that IQ is a relatively static concept, and that IQ does not change dramatically over time in the absence of issues such as traumatic brain injury or drug abuse, and even then these result only in *decreases*, not increases in intellectual functioning. Given all of these facts, and even taking into account the margin of error on such tests, the evidence does not support a conclusion that Mr. Myers meets the first prong of the test for mental retardation. Accordingly, because he is not mentally retarded currently, he is not "actually innocent" of the death penalty and does not qualify for relief under Atkins.

D. Equitable Tolling

Lastly, Petitioner argues that he can avoid the time-bar of § 2244(d)(1) because he is entitled to an equitable tolling of the statute of limitation based upon (1) the fact that the state appellate court

[57] Petitioner further relies upon the adaptive functioning assessment — based solely upon Mr. Myers' mother's responses to questions posed to her in anticipation of this hearing — that he also demonstrated sufficient deficits in adaptive functioning to satisfy the requirement that he suffered adaptive functioning deficits prior to age 18. Other evidence presented by witnesses at the hearing do support the contention that Mr. Myers did have significant difficulties in handling money, taking care of his own hygiene, and functioning in social situations. In the absence of sufficient evidence that his IQ is significantly subaverage, however, deficits in adaptive functioning alone do not demonstrate mental retardation.

did not send him notice of the resolution of his appeal, but instead sent notice only to an attorney who by then had "abandoned him," and (2) evidence that petitioner has "significant cognitive impairments" consistent with mental retardation that made it reasonable and duly diligent for him to rely upon his attorney for notification regarding the appeal. The court finds both of these arguments unpersuasive.

The Eleventh Circuit Court of Appeals has recognized that the limitations period under § 2244(d)(1) may be equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Sandvik v. United States, 177 F. 3d 1269, 1271 (11th Cir. 1999); Helton v. Secretary for Department of Corrections, 259 F.3d 1310, (11th Cir. 2001); Sibley v. Culliver, 377 F.3d 1196 (11th Cir. 2004). The court went on to note that equitable tolling is an "extraordinary remedy" and cautioned that it is to be "applied sparingly." Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000)(citing Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990)). Other circuits likewise have restricted the use of equitable tolling to instances that are "extraordinary," "rare," and "beyond the control" of the petitioner. See Wyzykowski v. Department of Corrections, 226 F. 3d 1213, 1216 n.1 (11th Cir. 2000), and cases cited therein.

It is clear that equitable tolling is available only where "extraordinary circumstances" have prevented timely filing and the movant has been "otherwise diligent." Helton v. Secretary for the Department of Corrections, 259 F.3d 1310, 1312-13 (11th Cir. 2001), cert. denied, 535 U.S. 1080, 122 S. Ct. 1965, 152 L. Ed. 2d 1025 (2002). The burden of showing "entitlement to this extraordinary remedy plainly rests with the petitioner." Spottsville v. Terry, 476 F.3d 1241 (11th Cir. 2007), quoting Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004). In Helton, the petitioner

asserted that his attorney misinformed him about the deadline for filing his federal *habeas* action, and that he filed his petition before what he believed was the deadline. The court held that the attorney's mistake was not an "extraordinary circumstance" that would trigger equitable tolling. Id. at 1313. As discussed above, the fact that Myers' attorney failed to notify him of the resolution of his appeal from the Rule 32 denial is, while clearly neglectful, not a denial of a constitutional right. Furthermore, Helton teaches that the incompetence of an attorney in the context of a post-conviction action generally will not constitute the type of "extraordinary circumstance" that justifies the application of the doctrine of equitable tolling. Helton, 259 F.3d at 1313. The attorney's negligence is not a basis for equitable tolling "especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005), aff'd, 127 S. Ct. 1079 (2007), quoting Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005). Even being misled by an attorney does not warrant equitable tolling. Howell v. Crosby, 415 F.3d 1250, 1252 (11th Cir. 2005), cert. denied, 126 S. Ct. 1059, 163 L. Ed. 2d 885 (2006).[58]

In spite of the boundaries set by Helton, however, the petitioner urges that he should be entitled to an equitable tolling of the AEDPA deadline because of his mental limitations. As discussed at length, the court does not find that Mr. Myers meets the legal definition of mental retardation. While that finding makes him ineligible for relief under Atkins, it is at least conceivable that he still could be entitled to equitable tolling. This is true because the term "extraordinary circumstance" is more flexible than the standards for mental retardation, and it is at least possible

[58] Where a petitioner has been misled by the court or the State, however, application of the doctrine of equitable tolling may be applied. See Spottsville, 476 F.3d at 1245-46.

that a mental incapacity less severe than mental retardation still could be sufficient to trigger the application of the doctrine of equitable tolling.

However, petitioner must show not only that such "extraordinary circumstance" existed, but also that the untimely filing was "unavoidable even with diligence," as required by Sandvik. To establish diligence a petitioner must "present evidence showing reasonable efforts to timely file his action." Dodd v. United States, 365 F.3d 1273, 1282 (11th Cir. 2004), aff'd, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005). In most circumstances, these reasonable efforts must include some active participation on the part of the petitioner in contacting the court, counsel, or prison officials, and staying actively involved in his own proceedings. See, e.g., Dodd, 365 F.3d at 1283 (noting that petitioner's lack of any request to prison officials for his legal papers and absence of any attempt to contact counsel failed to suggest the presence of diligence). The measurement of diligence, however, requires an examination of what effort is "appropriate ... for someone in [petitioner's] situation." Id. Dodd instructs that an evaluation of a petitioner's diligence is subjective, taking into account each individual petitioner's abilities and limitations.

A petitioner who shows that he suffers from mental impairments, without more, is insufficient to justify equitable tolling. Putnam v. Holt, 2006 WL 1669676 at *11 (M.D. Ala. June 13, 2006. In Putnam, the district court determined that petitioner failed to present any evidence showing that he was "incompetent or incapable of preparing a habeas petition at any time during the running of the limitation period." 2006WL 1669676 at *11. Although the petitioner demonstrated that he had received some outpatient treatment, he failed to establish a causal connection between the mental incompetence and his failure to timely file a *habeas* petition, and was therefore not entitled to equitable tolling of the limitation period. 2006 WL 1669676 at *12. Furthermore,

evidence that a petitioner has a low IQ or is illiterate is not, in itself, sufficient to justify equitable tolling. In Lawrence, the petitioner had a full-scale IQ of 81, and the court rejected his claim that he was unable to timely file due to mental incapacity. 421 F.3d at 1226-27.

Counsel for Myers argues that it was reasonable and diligent for Myers to rely upon notification from his attorney regarding the disposition of his Rule 32 petition. In other cases involving an evaluation of diligence, this court generally has required that a petitioner take some active role in contacting the court or counsel about the status of his case. In those cases, however, petitioner sought post-conviction relief by filing the Rule 32 petitions *pro se.* Where a petitioner is able to navigate his way through the state's post-conviction proceedings by timely and properly filing, the court might reasonably conclude that he also is able, through diligence, to comply with the AEDPA time limitation. In the instant case, however, petitioner has been represented by counsel at every stage of his prosecution, appeal, and post-conviction motion. Accordingly, the court held the evidentiary hearing, specifically noting that the court would determine whether "he exercised the requisite diligence, considering his mental capacity." (Order, Court Doc. 39).

At the hearing, petitioner presented much evidence relating to mental capacity, and demonstrated that he is unable to read, write, or spell beyond a third- or fourth-grade level. His counsel argue that his virtual illiteracy made Mr. Myers incapable of reading and understanding the complex court rules and statutes that govern the filing of a *habeas* petition. While the evidence supports a contention that the threshold of participation required by Mr. Myers might be low, the petitioner has failed to present any evidence that he exerted *any* diligence of *any* type at *any* time. The petitioner argues that Mr. Myers simply trusted his attorney, who clearly and inexcusably abandoned him, and that he did nothing at all for about a year. While the evidence does suggest that

Mr. Myers was essentially illiterate, the evidence also demonstrates that his IQ is about 84, and that his intellectual functioning falls within the borderline to low average ranges. The evidence further shows that Mr. Myers could have called, written, or otherwise stayed in communication with his attorney about the status of his case, or at least could have communicated to someone that he needed help with understanding or pursuing legal recourse. There is no evidence of what, if anything, Mr. Myers ever attempted to do.

It certainly cannot be the case that *no* diligence at all is good enough to be reasonable diligence. In order to grant the equitable tolling that petitioner seeks, this court would have to find that a person operating in the low average to borderline range of mental functioning lacks the ability even to make a telephone call, ask for information, or seek help. Mr. Myers' position is that a person with an IQ of 84 is not required to demonstrate any diligence at all. The court is unpersuaded. A long history of examining *pro* se prisoner litigation compels the conclusion that even prisoners who lack basic verbal skills and who are not educated or lack average intelligence are capable of taking some actions to protect their own legal rights. Mr. Myers has failed to demonstrate that he exercised any diligence at all in seeking to timely file a *habeas* petition.

Petitioner's counsel argue in his reply brief filed March 19, 2007, that "within weeks" of learning that his execution date had been set, Mr. Myers "obtained new counsel and sought federal habeas relief almost immediately." Counsel has failed to provide any details or explanation of what Mr. Myers did upon learning that his execution date was set, but alleges that Mr. Myers' cognitive impairments "rendered him utterly unable" to protect his rights.[59] As Dodd teaches, the petitioner

[59] The court is not unsympathetic to difficulties presented to *pro se* litigants who must attempt to make their way through statutes, rules of courts, and case law. Congress, however, has declined to make attorneys available to all prisoners seeking *habeas* relief, and has drawn strict

is required to demonstrate with some "degree of particularity what efforts he made that would even arguably constitute an appropriate degree of diligence for someone in his situation." 365 F.3d at 1283.

In any event, the facts demonstrate that, even if the court were to find that petitioner is entitled to equitable tolling from the time the Rule 32 appeal was completed until the time he received the Attorney General's letter, when he first *actually* learned that the appeal was over, he still allowed the 22 remaining days of his § 2244(d)(1) limitation to expire. Petitioner admits that he received the letter in "mid-February 2004," yet he did not file the instant *habeas* petition until March 25. Once he received the Attorney General's letter, there no longer existed any "extraordinary circumstances" that prevented him from preserving his claims. He actually knew at that point that proceedings in the state courts were no longer "pending," and he knew then that he had to act to preserve his rights. Even if the court discounts all of the month of February — the month during which petitioner admits that he received actual notice that the appeal was finished — he allowed 25 days in March to expire before the petition was filed. Because he only had 22 days remaining when the tolling was lifted, the limitation period expired, even if he is given the benefit of equitable tolling up to the point in time he himself received actual notice of the completion of his state Rule 32 proceedings.

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deadlines for filing of *habeas* petitions, to which there are very few and very narrow exceptions. The petitioner acknowledges that the Eleventh Circuit Court of Appeals has applied equitable tolling only where the petitioner exerted some effort to protect his rights. (Petitioner's Brief, Court Doc. #101, p. 16-17, citing Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2002). The facts in this case simply do not allow this court to find that Mr. Myers is entitled to the rare and exceptional remedy of equitable tolling where he has failed to demonstrate any form of diligence, even in light of the cognitive impairments asserted by Dr. Golden. The court accepts Dr. Golden's findings that Mr. Myers did suffer impairments, but finds Dr. Gierok's overall assessment of Mr. Myers's functioning to be more illuminating and more credible.

In light of all the evidence, the doctrine of equitable tolling does not apply to the petitioner, but, even if it does, the petition in this case will was not timely filed. His petition for federal *habeas* relief is barred by the AEDPA statute of limitation.

RECOMMENDATION

In conclusion, the court finds that the petition for writ of *habeas corpus* in this action was not timely filed, and it is barred from consideration by the time-bar in § 2244(d)(1). None of the grounds advanced by petitioner overcomes the time-bar. After a hearing, petitioner failed to prove that he exercised "due diligence" with respect to the factual predicate of his alleged newly discovered Brady claim, in order to benefit from the triggering date in § 2244(d)(2)(D). "Cause and prejudice" does not apply as exception to the § 2244(d)(1) time-bar, but, even if it did, he can identify only the defalcation of his post-conviction attorney as a possible "cause," and this is insufficient as a matter of Sixth Amendment law. He has not proven that he is mentally retarded within the meaning of Atkins v. Virginia, and, therefore, he is not "actually innocent" of the death penalty. Finally, he is not entitled to equitable tolling because the failures of his lawyer are not "extraordinary circumstances," and even if they were, he still allowed the remaining 22 days of untolled time to expire after receiving *actual* notice of the completion of his Rule 32 appeal.

Accordingly, for the reasons stated above, the magistrate judge hereby RECOMMENDS that the petition for writ of *habeas corpus* under 28 U.S.C. § 2254 be DISMISSED WITH PREJUDICE as barred by 28 U.S.C. § 2244(d).

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections

to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon the petitioner and upon counsel for the respondents.

DATED this 24th day of August, 2007.

T. MICHAEL PUTNAM
U.S. MAGISTRATE JUDGE