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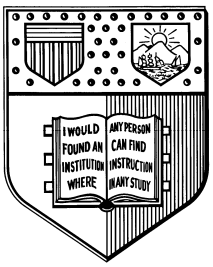

AN EMPIRICAL LOOK AT *ATKINS V. VIRGINIA* AND ITS APPLICATION IN CAPITAL CASES

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AN EMPIRICAL LOOK AT *ATKINS V. VIRGINIA* AND ITS APPLICATION IN CAPITAL CASES

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I. INTRODUCTION.

In *Atkins v. Virginia*, the Supreme Court overruled *Penry v. Lynaugh*[1] and declared that evolving standards of decency prohibit the execution of individuals with mental retardation.[2] Both supporters and opponents of a categorical ban on executing persons with mental retardation were quick to criticize the majority opinion.[3] Dissenting, Justice Scalia argued that exempting people with mental retardation from the death penalty would promote sport litigation, where defendants feigning mental retardation would, without penalty or risk, make spurious *Atkins* claims.[4] He urged:

> [o]ne need only read the definitions of mental retardation . . . to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all.[5]

As evidence of both the number and frivolity of *Atkins* claims about to swamp the courts, Justice Scalia pointed to the fact that since the docketing of *Atkins*, the Court had already received petitions from death-sentenced inmates who had never previously claimed they had mental retardation.[6]

On the other side of *Atkins*, commentators found rampant malingering unlikely, if not impossible, but worried that the Court's opinion left too much

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1. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).
2. Atkins v. Virginia, 536 U.S. 304, 318 (2002).
3. *See infra* notes 7-10, 13.
4. *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting) ("This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game.").
5. *Id.* (citations omitted).
6. *Id.* at 354 (citing Moore v. Texas, 535 U.S. 1044 (2002) (Scalia, J., dissenting from grant of application for stay of execution)).

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room for reluctant states to evade *Atkins*.[7] Although the Court did endorse the prevailing clinical definitions of mental retardation,[8] some advocates of a categorical mental retardation ban expressed concern that the language the Court used—communicating that states must "generally conform" to these definitions[9]—was ambiguous enough to permit death eligibility to vary depending upon the jurisdiction in which the defendant was charged.[10] More than "general conform[ity] would be needed to assure uniformity," because accurately assessing mental retardation requires adherence to the definition's operational principles, such as considering the standard error of measurement when assessing intelligence test scores, or community supports when determining adaptive functioning deficits.[11] Other supporters focused on the

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

8. *See Atkins*, 536 U.S. at 308 n.3, 317 n.22 (citing with approval AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (hereafter AAMR 9th ed.) ("Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) [hereafter DSM-IV-TR] ("The essential feature of Mental Retardation is significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.")). The AAMR is now the American Association on Intellectual and Developmental Disabilities. The clinical field increasingly employs the term "intellectual disability." *See* Robert L. Schalock, et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116 (2007) (explaining that change in terminology within AAIDD involves no change in definition). We use the term "mental retardation," because it was used by the Court in *Atkins*.

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

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

11. *See* AAMR, MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF

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fact that *Atkins* left to the states a number of crucial procedural issues, such as the identity of the fact finder, the stage of the proceedings at which mental retardation should be determined, and the appropriate burden of proof.[12]

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

This Article presents preliminary data relevant to these questions. Elsewhere, we have considered the rationales of selected lower court decisions in some detail.[13] Here, by contrast, we abjure that kind of analysis, and instead report overall patterns and, from them, draw some tentative inferences. We attempted to gather all of the mental retardation cases adjudicated in the six years since *Atkins* was decided. We searched for all reported decisions and augmented the reported cases by posting queries on e-lists seeking additional adjudicated cases. Our data set clearly does not include every *Atkins* claim raised to date: Undoubtedly, there are mental retardation claims that have not yet been adjudicated, claims that have been adjudicated but not reported (and not revealed by our queries), and some new challenges—even to older cases—that have yet to be filed. We believe the first group—mental retardation claims filed, but not yet adjudicated—to be the largest. Although in Texas, which has a very large death row, we believe almost all of the mental retardation claims have been initially adjudicated, anecdotal information suggests that in some states with smaller death rows, fewer than half of the filed cases have been ruled upon.

It is possible that the cases we have not captured are skewed in some ways but not possible for us to know in what ways. For example, it may be that the more meritorious cases are resolved quickly, or that the least meritorious cases are resolved first, or that the clearest cases—weakest and strongest—are

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SUPPORTS 13, 14, 17, 58 (10th ed. 2002); AAIDD, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 12 (10th ed. 2007); ROBERT L. SCHALOCK & RUTH LUCKASSON, CLINICAL JUDGMENT (AAMR, 2005); Tobolowsky, *supra* note 10, at 96.

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

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

decided most quickly. Moreover, some *Atkins* decisions we have included will be appealed, and, as a result, the status of some of the claims that we have designated as "winning" or "losing" will change. Despite these caveats, we think our data shed some light on the nature of post-*Atkins* litigation of mental retardation claims in capital cases and raise some questions that have not previously been discussed in the literature.

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

II. THE RATE AND MERIT OF *ATKINS* LITIGATION

Justice Scalia's *Atkins* dissent predicted that "[t]ime will tell" if courts would experience an overwhelming number of frivolous *Atkins* claims.[14] Six years later, this fear has not been borne out.

There are more than three thousand death row inmates.[15] We found 234 cases adjudicating the substance of *Atkins* claims, which implies that about seven percent of all death row inmates have filed *Atkins* claims. Because there may be a small number of *Atkins* claims that have not yet been adjudicated by any court, or not yet resulted in a published opinion, this may slightly underestimate ultimate filings attributable to *Atkins*. Nonetheless, it is now obvious that the overwhelming majority of death row inmates have not alleged mental retardation and ineligibility for execution under *Atkins*.

The data also refute the *Atkins* dissent's prediction that *Atkins* filings would be largely frivolous. Nearly forty percent of all defendants who allege mental retardation have, in fact, proved it.[16] This is substantially higher than the frequency with which defendants succeed on allegations of incompetence to stand trial, allegations of ineffective assistance of counsel, or any other claim of which we are aware. Indeed, the overall rate of reversal of death sentences encompassing all claims raised at all stages of appellate litigation is approximately forty percent.[17] More broadly, we are aware of no civil claim for which plaintiffs recover in forty percent of the cases filed. Of course, this is not to say that none of the *Atkins* filings are frivolous, but only to say that by

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14. *Atkins*, 536 U.S. at 353–54.

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

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

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

any reasonable standard, *Atkins* has not generated an unusual amount of frivolous litigation.

A caveat to this analysis of the national data is that the number of pleadings and the win-loss rates differ markedly between states. For example, North Carolina has adjudicated at least twenty-one *Atkins* claims and has determined that seventeen defendants have mental retardation. By contrast, Alabama courts have adjudicated at least twenty-six *Atkins* claims and have found only three of those claims meritorious. Thus, the success rate in North Carolina is about eighty percent, and that in Alabama is about twelve percent. The direction of this discrepancy corresponds with the availability of funding for post-conviction litigation: Alabama has minimal funding and low win rates; North Carolina has adequate funding and higher win rates.[18] Moreover, Alabama, unlike North Carolina, defines mental retardation more restrictively than do either of the professional organizations cited by the Supreme Court; it applies a strict IQ cutoff[19] and assesses adaptive functioning deficits by focusing on what the claimant can do rather than focusing, as those clinical definitions require, on the individual's limitations.[20] This suggests that success rate may be related to the jurisdiction's general sensitivity to capital cases, the state courts' interpretation of the *Atkins* requirement that it "generally conform" to clinical definitions of mental retardation, or both.

III. WINS AND LOSSES, PRONG BY PRONG

The Court in *Atkins* approved a three-pronged clinical definition of mental retardation.[21] The first prong of the definition is that an individual must exhibit significantly subaverage intellectual functioning.[22] The second prong requires that the individual experience significant limitations in adaptive functioning, which is measured by categories that relate to everyday living experiences in a typical (i.e., non-institutional) community environment.[23] The third prong requires that these limitations must have manifested before the person reached the age of eighteen.[24] To satisfy the first requirement, a person must perform "at least two standard deviations below the mean of an appropriate assessment

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

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

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

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

22. *Id.*

23. *Id.*

24. *Id.*

instrument, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."[25] Put differently, performance on one of these standardized intelligence tests must place the person in the lowest two percent of the population.[26]

To meet the second prong, regarding significant limitations in adaptive functioning, a person's ability to deal with the demands of the everyday world must be impaired.[27] The operational principles behind the second prong presume that "[l]imitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture" and that "[w]ithin an individual, limitations often coexist with strengths."[28] "None of the diagnostic criteria for mental retardation include an exclusion criterion,"[29] which means that diagnosis of a mental illness does not preclude diagnosis of mental retardation.

The third criterion, onset before eighteen, is the most straightforward of the three, although it is important to note that the definitions do not require a qualifying standardized test score before the age of eighteen, which might depend upon the school system the defendant attended, but only that the disability has manifested before that age.[30]

Courts have found that the majority of losing claims, approximately fifty-six percent, failed both the first and second prongs.[31] The remaining losing cases are almost evenly split between prong one and prong two losses, with the rare case (less than two percent) losing for failure to prove juvenile onset.[32]

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

26. *Id*.

27. *Id*.

28. *Id.* at 8-9.

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

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

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

32. *See* Table 1.

TABLE 1[33]
LOSING CASES: LOSSES BY PRONG

	Number of Losing *Atkins* Claims	Percent of Total Losing *Atkins* Claims (144)
Multiple prongs	80	56%
Intellectual functioning (Prong 1) only	24	17%
Adaptive functioning (Prong 2) only	24	17%
Onset (Prong 3) only	2	1.4%

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

The clinical definitions of mental retardation take account of the risk of error in any intelligence test measurement. Accordingly, they incorporate the standard error of measurement (SEM) and other psychometric principles that identify the uncertainty inherent in statistical measures.[34] The AAIDD defines significantly subaverage intellectual functioning as "[p]erformance that is at least two standard deviations below the mean of an appropriate assessment instrument, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."[35] Similarly, the DSM-IV-TR states that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."[36] With results in that range, the clinical literature advises thinking of the first prong of the *Atkins* assessment as a

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

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

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

36. DSM-IV-TR, *supra* note 8, at 41-42 ("It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75).").

gateway to a rigorous assessment of adaptive functioning.[37] Employing a strict IQ score cutoff of 70, by contrast, may wrongly exclude some individuals with mental retardation from *Atkins*'s protection.[38]

An examination of the IQ scores reported for winning *Atkins* cases reflects jurisdictional variations. Over 60 percent of the claims that win on the first prong involve claimants who did not have *any* reported IQ scores over 70.[39] Thus, a majority of winning claimants indisputably satisfy prong one. On the other hand, in about 15 percent of the successful cases the claimant's average IQ score[40] did exceed 70.[41] Thus, approximately 15 percent of the *Atkins* victories involve defendants whose average intelligence scores only qualify if a court takes into account measurement error or practice effects. A number of jurisdictions, including those employing cutoffs, consistently and explicitly refuse to take into account such errors.[42] Finally, a handful of winning claims

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37. AAIDD, *supra* note 11, at 24 (stating that "IQ scores alone cannot precisely identify an individual's functioning in the upper boundary of mental retardation" and suggesting an upper range of 75); *accord* Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. FORENSIC PSYCHOL. PRAC. 1, 21 (2006) ("Limiting the determination of mental retardation to a specific IQ score is unacceptable due to multiple factors such as measurement error and cultural bias.").

38. *See* Bonnie & Gustafson, *supra* note 29, at 836 ("[T]he SEM must always be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests.").

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

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

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

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

involve defendants who had *no* IQ score under 70,[43] a result obviously precluded in the jurisdictions that impose a cutoff of 70.

Not surprisingly, examination of the IQ scores in losing cases also reflects a variety of approaches. Of the claims that lose on the first prong, approximately 35 percent presented an *average* IQ below 70.[44] In 21 percent of the losing cases, there was *no* reported IQ score of 70 or greater.[45] This statistic corresponds to the 17 percent of cases that were successful on the first prong (establishing IQ scores under 70) but lost nevertheless because the claimant was unable to establish significant limitations in adaptive functioning. That leaves 18 percent of the losing cases in which courts faced with scores both above and below 70 determined that the over-70 IQ score was the most reliable *and* precluded a finding of significantly subaverage intellectual functioning.[46] Some of this number reflects determinations that failed to take into account measurement error and practice effect or applied strict cutoffs on IQ scores.[47] For example, in Florida, 50 percent of the losing *Atkins* claims lost on the first prong alone, and in half of those cases, the state's cut-off score determined the outcome.[48]

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

44. Among the lowest IQ scores in losing claims are Eugene Clemons and Clifton Williams. Clemons v. State, CR-01-1355, 2003 WL 22047260, at *12 (Ala. Crim. App. Aug. 29, 2003) (claimant had a low IQ score of 58 on the Stanford-Binet test and an average IQ score of approximately 66, and lost on both the first and second prongs); Williams v. State, 270 S.W.3d 112, 118 (Tex. Crim. App. 2008) (claimant had a low IQ score of 63 (WAIS-III) and an average IQ score of approximately 66, and lost on both the first and second prongs). *See also* Scott v. State, 878 So.2d 933 (Miss. 2004) (claimant had a low IQ score of 60 on WAIS and an average IQ score of approximately 67, and lost on the second prong); *Ex Parte* Rodriguez, 164 S.W.3d 400, 402 (Tex. Crim. App. 2005) (claimant had a low IQ score of 60 on WAIS and an average IQ score of approximately 66, and lost on the second prong).

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

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

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

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

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

The clinical definitions classify adaptive functioning according to skill sets. The AAIDD and DSM-IV-TR definitions use different numbers of skill sets. Accordingly, an individual must establish a deficiency in a different number of skill sets to meet each definition, even though the definitions are substantively very similar. For example, when the Court decided *Atkins*, the AAIDD required significant deficits, or limitations, in adaptive behavior in two of ten skill areas.[49] Similarly, the APA, in the DSM-IV-TR, required a showing of adaptive limitations in two of eleven skill areas.[50] The AAIDD has since revised its definition and now measures adaptive deficits in three skill areas rather than ten, as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives," and requires a showing of significant limitations in only one of these areas.[51]

1. Deficits commonly demonstrated

According to our data, the adaptive deficits most often successfully proven by claimants are deficits in functional academics, which were proven in over 55 percent of the successful *Atkins* cases, followed by deficits in social skills, which were proven in just under 40 percent of the winning cases.[52] Claimants established significant adaptive deficits in work skills in slightly less than 20 percent of the cases.[53]

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49. *See* AAMR (9th ed).

50. *See* DSM-IV-TR.

51. AAMR, *supra* note 11, at 73. *See also id.* at 20-23 (table) (chronicling historical development of the current definition). The definitions of adaptive behavior have retained a consistent core meaning. *See id.* at 21–23.

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

53. *Id.*

TABLE 2
WINNING CASES: ADAPTIVE DEFICITS FOUND[54]

	Number of Winning *Atkins* Claims	Percent of Winning *Atkins* Claims (88)
Functional Academic Skills	50	57%
Social Skills	33	33%
Communication Skills	29	36%
Work Skills	17	19%

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

One key operating principle of the clinical definition of mental retardation is that strengths often coexist with weaknesses. The presence of weaknesses—not the absence of strengths—determines mental retardation.[55] Consequently, relying on the "sophistication" of a defendant's crime to disprove adaptive functioning deficits, except in extraordinary circumstances, would not be consistent with accepted clinical practice because the "sophistication" of the crime is irrelevant to the existence of weaknesses.[56] Another important precept is that strengths and weaknesses must be assessed in the context of the individual's community environment.[57] Thus, evidence of an inmate's activities in prison is of little value, because the clinical definition of mental retardation commands that adaptive behavior must be assessed in "typical community environments," not in circumstances of "legal restraint," such as prison.[58] Misapplication of the clinical definitions is fairly common. In our

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

55. AAMR, *supra* note 11, at 48.

56. *Id.*

57. *See id.*

58. AAIDD, *supra* note 11, at 14–15. A variety of other problems exist with this evidence. Often, these assertions, presented via the testimony of corrections officers, prison wardens, or arresting officers, point to events such as having a magazine subscription or filing a grievance form—evidence that provides little insight into an inmate's actual ability. In some cases, courts are persuaded by this evidence, without asking the more important questions: whether the prisoner actually read the magazines or books checked out from the library, whether the grievance form was copied, and so on. It has also been suggested that this testimony poses a problem because witnesses in corrections or law enforcement may, by virtue of their professional roles, possess biases against the prisoner. *See, e.g.*, John M. Fabian, *Life, Death, and IQ; It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5 J. FORENSIC PSYCHOL. PRAC. 1, 13-14 (2005) (identifying that correctional staff "may be plagued by certain biases for or against the defendant," "there may be a consensus among staff

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

C. Prong 3 – Age of Onset

We found only two cases that lost solely on the age-of-onset prong of *Atkins*.[59] This low number seems consistent with clinical definitions, which demand no specific form of proof of juvenile onset, but only require some evidence, which may include medical records or interviews with friends, family, teachers and others who knew the individual before the age of eighteen. In both cases that denied *Atkins* claims for failure to meet the third prong, the court insisted, however, that proof of onset in the form of a standardized test score predating the individual's eighteenth birthday was necessary, and that the absence of such scores defeated the claim.[60] These decisions seem patently wrong, but they are, at least thus far, isolated.

IV. RACIAL EFFECTS

Across the nation, 45 percent of death row inmates are Caucasian, 42 percent are African American, 11 percent are Hispanic, and approximately 2 percent are Asian or Native American.[61] However, of the *Atkins* claims raised, 57 percent have been raised by African-American defendants,[62] 22 percent

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that experts are coming to death row to 'get the prisoner off the hook,'" "officers may have their own lay opinions on what retardation is and may also not believe these defendants are retarded because they are criminals and function fairly well in some areas," and some officers are likely "to have experienced conflicts with the defendants which may cause bias against the defendant in an evaluative setting").

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

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

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

62. Table 3.

have been raised by Caucasian defendants, and 12 percent by Hispanic defendants. Thus, African Americans are markedly overrepresented and Caucasian markedly underrepresented in *Atkins* filings.

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

We also looked at racial patterns by state. Here, we report only those states in which more than ten *Atkins* claims have been adjudicated. In most of these states, the percentage of *Atkins* claims raised by African-American defendants substantially exceeds the percentage of African Americans on death row, but Oklahoma and Pennsylvania do not follow this pattern.[63] In Pennsylvania, African Americans are slightly underrepresented in filed *Atkins* claims, and in Oklahoma, they are sharply underrepresented.

TABLE 3

AFRICAN AMERICAN LITIGANTS: *ATKINS* CLAIMS BY STATE[64]	Percent of *Atkins* Claims	Percent of Death Row Inmates
National	57% (232)	42%
Alabama	62% (26)	47%
Florida	59% (17)	35%
Louisiana	91% (11)	63%
Mississippi	71% (14)	52%
North Carolina	76% (21)	53%
Ohio	80% (15)	51%
Oklahoma	15% (13)	41%
Pennsylvania	50% (12)	60%
Texas	63% (46)	41%

We also examined the winning rates by state and race. We found variation here as well. In some states, including Florida, Georgia, Indiana, and Tennessee, African-American defendants have presented most successful

63. *See* Table 3.

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

Atkins claims. In other states, African-American defendants' *Atkins* claims have not fared nearly as well as those of Caucasian claimants. In Alabama, twelve African-American defendants filed *Atkins* claims and only one won, whereas two of the seven Caucasian defendants who raised *Atkins* claims won. Similarly, in Missouri, of seven claims, African-American defendants raised four but only one of these defendants won, while two of three Caucasian defendants who raised *Atkins* claims prevailed. At this time, we have no explanation for the variation between states.

More fundamentally, we do not know what explains the disproportionately high percentage of African-American defendants represented in *Atkins* claims (or conversely, the relatively low percentage of Caucasian defendants).[65] Perhaps attorneys, following cultural stereotypes, are quicker to see mental retardation in African-American clients. Perhaps they are not themselves influenced by those stereotypes, but believe judges and juries will be. Perhaps there are more African Americans who have mental retardation on death row because jurors have been less sympathetic to their evidence of mental retardation when presented in mitigation. Alternatively, perhaps persons with mental retardation are more likely to engage in criminal activity when they receive less support and training as children, and because African Americans as a group are poorer, larger numbers of them have faced the combination of mental retardation and disadvantage.

Our data do not permit us to eliminate or endorse any of these explanations. Hoping for some illumination, we examined the average IQ scores of all *Atkins* claimants by race. The national average IQ score for African-American *Atkins* claimants is 71; the average IQ score for Caucasian claimants is 73; and the average IQ score for Hispanic claimants is 69.[66] The issue is how to interpret these averages. Perhaps they raise the question of whether too few claims are being brought on behalf of Hispanic defendants. This hypothesis also gains some support from the fact that win rates among Hispanic claimants are somewhat higher than among other racial groups.[67]

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

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

66. Table 4.

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

TABLE 4
ATKINS CLAIMS: AVERAGE IQ BY RACE[68]

	African American	Caucasian	Hispanic
National	71	73	69
Alabama	75	71	76
Florida	74	76	66
Louisiana	67	n/a	n/a
Mississippi	72	66	n/a
North Carolina	67	68	n/a
Ohio	70	75	n/a
Oklahoma[69]	70	72	74
Pennsylvania	73	67	59
Texas	69	72	71

V. CONCLUSION

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

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

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