

A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar

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**A TALE OF TWO (AND POSSIBLY THREE) *ATKINS*:
INTELLECTUAL DISABILITY AND CAPITAL PUNISHMENT
TWELVE YEARS AFTER THE SUPREME COURT'S
CREATION OF A CATEGORICAL BAR**

John H. Blume,* Sheri Lynn Johnson,** Paul Marcus*** and Emily Paavola****

INTRODUCTION

In 2002, following a consistent trend of state legislative action prohibiting the use of the death penalty for defendants with intellectual disability,¹ the United States Supreme Court overruled its thirteen-year-old decision of *Penry v. Lynaugh*.² A majority of Justices in *Atkins v. Virginia*³ declared a categorical exemption from capital punishment for death row inmates and capital defendants who are—in fact—persons with intellectual disability. In doing so, the Court recognized that defendants with intellectual disability are less culpable because they have diminished capacities to understand and process information, to communicate, to learn from mistakes and experiences, to engage in logical reasoning, to control impulses, and to understand the reactions of others.⁴ The Court was also moved by the fact that defendants with intellectual

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¹ *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (noting a “consistency of the direction of change”). See generally Denis W. Keyes & William J. Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 687, 687–96 (1997) (listing state exemptions from the death penalty for individuals with “mental retardation” that were enacted prior to 1997).

² 492 U.S. 302 (1989); see *Atkins*, 536 U.S. 304 (*abrogating Penry v. Lynaugh*, 492 U.S. 302 (1989)).

³ *Atkins*, 536 U.S. at 304, 318.

⁴ 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

disability are at a heightened risk of wrongful execution given higher incidences of false confessions, impairments in communicating with their attorneys about facts and details relevant to the case, difficulty testifying, and demeanors that a jury may erroneously interpret as lack of remorse.⁵

The Court defined the exemption by embracing two virtually identical and clinical definitions then in existence—one provided by the American Association on Mental Retardation (AAMR) (now the American Association on Intellectual and Developmental Disabilities (AAIDD))⁶ and the other by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).⁷ The three-part clinical definitions set forth by the AAIDD and DSM-IV-TR define intellectual disability as significantly subaverage intellectual functioning accompanied by significant limitations in adaptive functioning that originated before the age of eighteen.⁸ State measures for ascertaining intellectual disability, the Court suggested,

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.

Id. at 318 (citations omitted).

⁵ *Id.* at 305, 318, 320.

⁶ *Id.* at 308 n.3. The *Atkins* Court used the term “mental retardation” rather than intellectual disability. *See id.* at 317. However, the clinical field now uses the term “intellectual disability,” and the Supreme Court in its most recent decision addressing the issue also used the term “intellectual disability.” *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (“Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”).

⁷ *Atkins*, 536 U.S. at 308 n.3 (citing APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR]; AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter AAMR 9th ed.]). The AAMR 1992 definition has since been redrafted in a 2002 revision but is substantially the same. *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 13, 14, 17, 58 (10th ed. 2002) [hereinafter AAMR 10th ed.]; *see also* AAIDD, USER’S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 12 (10th ed. 2007) [hereinafter AAIDD 10th ed.].

⁸ The clinical definitions of intellectual disability approved in *Atkins* provide:

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.

AAMR 9th ed., *supra* note 7, at 1.

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,

would be appropriate—or constitutional—so long as they “generally conformed” to these clinical definitions.⁹ This suggestion led to a tremendous variation in how state courts resolved the intellectual disability matter.¹⁰ Just last term, in *Hall v. Florida*,¹¹ the Court stepped in and laid down a much clearer principle as it reaffirmed its commitment to *Atkins*. In *Hall*, the Court invalidated a gloss on the definition of intellectual disability adopted by the Florida Supreme Court, which had the possible effect of rendering the categorical exclusion a “nullity” and “risk[ed] executing a person who suffers from intellectual disability.”¹²

In this Article, which is in many respects a “follow-up” to the prior research in this area by two of the authors,¹³ we will examine capital cases decided by the lower courts since the Court created the categorical ban against the execution of persons with intellectual disability.¹⁴ Twelve years after the Supreme Court’s *Atkins* decision, we

use of community resources, self-direction, functional academic skills,
work, leisure, health, and safety. . . .

DSM-IV-TR, *supra* note 7, at 41.

⁹ *Atkins*, 536 U.S. at 308 n.3, 317 n.22 (“The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*.”). Unfortunately, the opinion offered little guidance to state courts on the manner of enforcement of its ruling. Rather, the Court stated that it would leave to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Id.* at 317 (alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). As two of the authors have written elsewhere, this led some states to attempt to circumvent *Atkins*’s mandate by embracing definitions of intellectual disability at odds with the clinical consensus. John H. Blume, Sheri Lynn & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 691 (2009) [hereinafter Blume et al., *Of Atkins and Men*].

¹⁰ Blume et al., *Of Atkins and Men*, *supra* note 9, at 693 (“This troubling array allows a defendant who would be ineligible for execution in one state to be eligible for execution in another.”).

¹¹ 134 S. Ct. 1986 (2014).

¹² *Id.* at 1999, 2002. After *Atkins*, the Florida Supreme Court adopted a strict IQ cutoff for Prong 1 that required a person claiming intellectual disability to have an IQ score of 70 or below. See *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007). Because Hall had an IQ score of 71, the Florida Supreme Court ruled that as a matter of law his claim failed. *Hall v. State*, 109 So. 3d 704, 707, 709 (Fla. 2012). The Supreme Court of the United States concluded that Florida’s bright-line test was in conflict with the unanimous clinical consensus that the standard error of measurement (+/- 5 points) in any IQ test must be taken into account, reversed the judgment of the Florida Supreme Court, and remanded the case for additional proceedings where Hall’s (quite strong) evidence of intellectual disability must be considered. *Hall*, 134 S. Ct. at 1997, 2000.

¹³ See John H. Blume, Sheri L. Johnson & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009) [hereinafter Blume et al., *An Empirical Look at Atkins*].

¹⁴ For a look at the non-capital cases of the last twelve years considering the application of *Atkins*, see Paul Marcus, *Does Atkins Make a Difference In Non-capital Cases? Should It?*, 23 WM. & MARY BILL RTS. J. 431 (2014).

analyzed a number of issues including filing rates, success rates, the reasons cases that often appear meritorious lose, differences in decisionmakers (i.e., judge versus jury), and recent trends in intellectual disability litigation. As we will discuss in more detail below, there are several positive trends in the lower courts. There are, however, some negative trends—some of which could, if not corrected by the Supreme Court, bring to bear the fear articulated in *Hall* of effectively nullifying the High Court's mandate.¹⁵

I. OVERALL FILING AND SUCCESS RATES

Dissenting in *Atkins*, Justice Scalia maintained that exempting people with intellectual disability from the death penalty would promote frivolous litigation.¹⁶ He envisioned a world in which defendants feigning intellectual disability would, without penalty or risk, make spurious intellectual disability claims.¹⁷ He stated:

One 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.¹⁸

Justice Scalia was wrong. From the time of *Atkins* through the end of 2013, we identified only 371 death row inmates or capital defendants who claimed that they could not be executed (or, in the case of pre-trial capital defendants, sentenced to death) due to intellectual disability.¹⁹ Thus, calculating the filing rate in the manner most generous to Justice Scalia's floodgates concern, only approximately 7.7% of persons whose lives could potentially be spared by a determination of intellectual disability have raised such claims.²⁰ This rate has also been relatively constant over

¹⁵ *Hall*, 134 S. Ct. at 1999–2001.

¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 337, 353–54 (Scalia, J., dissenting).

¹⁷ *Id.* He was joined by the Chief Justice and Justice Thomas. *Id.*

¹⁸ *Id.* at 353 (citation omitted).

¹⁹ We gathered the data we rely upon in this Article through a variety of sources. First, we used Westlaw searches to identify, obtain, and analyze every reported decision (whether published or unpublished) in which a post-*Atkins* assertion of intellectual disability was made in a capital case. We also posted queries on several national listservs requesting any unpublished decisions and information about cases that may have been resolved without a trial or hearing. Finally, we contacted attorneys involved in capital litigation to identify cases that had not been discovered through the first two means.

²⁰ There were 3,557 persons on death row at the time *Atkins* was decided in 2002. From 2002 through the end of 2013, another 1,262 persons were sentenced to death, providing a total death row population of 4,819 inmates during the relevant time period. We calculated the filing rate using 4,819 as the relevant denominator. The actual number, however, is larger

time. The filing rate from 2002 through 2009 was also approximately 7%.²¹ Whether the 7% rate is a fixed steady state is, of course, unknowable. Nevertheless, more than a decade after the Court's creation of the Eighth Amendment categorical bar, the objective, empirical evidence certainly refutes Justice Scalia's prediction. He wildly misspoke in writing that every death row inmate and his brother would assert an intellectual disability in an effort to cheat the executioner.²² The empirical evidence also refutes any concern that significant numbers of frivolous claims would be filed. As noted above, not only did a relatively small number of death-sentenced inmates and capital defendants claim to be persons with intellectual disability, those who did prevailed in a significant number of cases. The overall "success" rate, i.e., from 2002 through the end of 2013, was 55%.²³ Thus, in more than half of the cases, the

(and likely substantially so) than that. Our number does not include cases in which the prosecution sought the death penalty but instead were resolved by plea bargain, acquittal, conviction of a non-capital lesser included offense, or a life sentence imposed by jury or judge.

²¹ Blume et al., *An Empirical Look at Atkins*, *supra* note 13, at 628.

²² See *Atkins*, 536 U.S. at 353. We were surprised by this finding. Not for the reasons stated by Justice Scalia, i.e., death row inmates and their lawyers conspiring to throw sand in what Justice Blackmun described as the "machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1141, 1145 (1994) (Blackmun, J., dissenting denial of certiorari). Rather, we expected higher numbers because of the higher incidence of persons with intellectual disability in jails and prisons. While only 2–3% of persons in the general population have intellectual disability, it is generally estimated that between 4–10% of persons in jail and prison have intellectual disability. See Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice System: Victims and Suspects*, THE ARC, <http://www.thearc.org/document.doc?id=3664> (last updated Aug. 2009). Thus, taking into account clear cases, close cases, and even some hopeful cases, we anticipated that more than 7% of death row inmates and persons facing the death penalty would seek safe harbor under *Atkins*. Interestingly, we were surprised by a similar finding in the context of "competency to be executed" litigation. The Supreme Court has also held that death row inmates who are insane or incompetent at the time of their execution cannot be executed. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986). There were similar predictions after *Ford* that death-sentenced inmates would feign incompetency and/or insanity to prevent their death sentences from being carried out. Of the 1,308 death-sentenced inmates who were in a procedural posture to raise a claim that they were incompetent and/or insane and thus could not be executed, only 6.7% (87) did so. John H. Blume, Sheri L. Johnson & Katherine Ensler, *Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation*, 82 UMKC L. REV. 335, 343 (2014) [hereinafter Blume et al., *Killing the Oblivious*].

²³ We computed the success rate by looking at cases in which the *Atkins*'s claim was decided on the merits (both reported decisions and all unpublished/unreported decisions we could locate through contacts) in all states with active death penalty regimes, but excluding losing cases decided by a state court on direct appeal from a conviction and death sentence. We excluded the direct appeal losses because the intellectual disability issue is not "final" given that it may still be reviewed in state post-conviction proceedings or by the federal courts habeas corpus proceedings. But, even including those "losses," the overall success rate is still 44%. We did, however, include losses in state court in state post-conviction proceedings even though the question of intellectual disability can be reviewed by the federal

individual *Atkins* claimant was found to be a person with intellectual disability and therefore not eligible for the death penalty. That is substantially higher than the rate at which death-sentenced inmates prevail on other frequently raised claims including allegations of ineffective assistance of counsel,²⁴ prosecutorial misconduct,²⁵ competence to stand trial,²⁶ and other forms of legal error.²⁷ We cannot say that there have been no frivolous claims of intellectual disability (but as will be explained in more detail in Part II, there do not appear to be many). Yet, it is definitely the case that, looking at filing and success rates, *Atkins* has not generated a substantial amount of litigation, much less frivolous litigation.

There was, however, some notable variation in success rates throughout the relevant time period. We previously reported that the success rate from 2002 to 2008 was approximately 40%.²⁸ That number was accurate at the time, as we did not then have access to the unreported and unpublished decisions contained in the current data set. Using that same matrix, however, the success rate in the years from 2009 to 2013 declined to 26%. Using the same method of analysis (but including all known unpublished decisions), we still found a change in success rates. From 2002 to 2008, the overall success rate was 63%, and from 2009 to 2013 the rate at which persons asserting intellectual disability declined to 43%.²⁹

courts. We did so both to avoid objections that we were over-reporting the success rate and because the federal courts can—under most circumstances—only reverse the state court’s decision if it was “contrary to, or involved an unreasonable application of, clearly established Federal law” 28 U.S.C. § 2254(d) (2012). If those “losses” are not tallied because they are not final determinations of the intellectual disability issue, the overall success rate is 70%. If only reported decisions are considered (which would definitely underrepresent the true success rate), *Atkins*’s claimants still prevail at the rate of 35% (excluding direct appeal losses), 50% (excluding direct appeal and post-conviction losses), and 26% when looking at all merits decisions (including all losing cases still under review).

²⁴ See generally Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 842, 845 n.26 (2013) (discussing capital litigation and ineffective counsel).

²⁵ See generally Richard L. Weiner & Roni Reiter-Palmon, *Prosecutorial Misconduct in Death Penalty Cases*, AM. PSYCHOL. ASS’N (June 2004), <http://www.apa.org/monitor/jun04/jn.aspx>.

²⁶ See Blume et al., *Killing the Oblivious*, *supra* note 22, at 349 (analyzing death penalty cases in relation to individual competency claims).

²⁷ See Andrew Gelman, James S. Liebman, Valerie West & Alexander Kiss, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 215 (2004) (discussing legal errors and the death penalty).

²⁸ Blume et al., *An Empirical Look at Atkins*, *supra* note 13, at 628.

²⁹ For the method of calculation, see *supra* note 23. The same basic pattern is observed regardless of whether the direct appeal losses are included (50% versus 36%); or if all losses are excluded (80% versus 54%); as well as if only reported decisions are analyzed (42% versus 26% excluding direct appeal losses) (30% versus 21% including all losses) (66% versus 35% excluding direct appeal and post-conviction losses).

We cannot say with absolute certainty why there was a decrease over the last five years in the rate at which death row inmates and capital defendants prevailed, but we do offer several likely explanations. The first is a difference in the data sets. At the time *Atkins* was decided there were people on death row or awaiting trial whose intellectual disability no one disputed (or seriously disputed).³⁰ The only matter of contention was whether there were any legal impediments to their executions.³¹ When the *Atkins* Court created an Eighth Amendment categorical bar, there were a number of defendants who were clearly ineligible for execution and who were removed from death row.³² Given this reality, one would expect to see higher success rates in the years immediately following *Atkins*. Second, in the post-*Atkins* trial cases, one would expect fewer strong cases to be actually litigated. Undisputed or very strong evidence of a capital defendant's intellectual disability should—in a rational world—lead to either withdrawal of the death notice or a negotiated settlement, i.e., plea bargain. One would then expect in the aggregate that the case set in the post-*Atkins*'s trial level prosecutions would not include as many clear cases of intellectual disability. We do not know—and likely will never know—of all cases where an assertion of intellectual disability led to a resolution of the case without a contested hearing on the issue.³³ Still, we have documented forty-six cases that “settled” due to evidence of intellectual disability.

The third and fourth reasons we posit for the decline of the success rate over time are potentially more nefarious. Some states modified their definitions of intellectual disability or erected procedural obstacles intended to make it more difficult for persons with intellectual disability to prevail. The two most pronounced examples are Florida and Texas. The Sunshine State employed a strict IQ cutoff precluding a finding of intellectual disability if the person had an IQ over 70.³⁴ The Lonestar State created out of non-clinical whole-cloth the so-called “*Briseno* factors” which make it extraordinarily difficult to prove deficits in adaptive functioning.³⁵ Although last Term the Court found that Florida's IQ cutoff frustrated the Eighth Amendment right it created in *Atkins*,³⁶ the *Briseno* factors and other substantive and procedural impediments remain—for the moment at least—intact. The final reason we believe to

³⁰ See Victor L. Streib, *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N.M. L. REV. 183, 197 (2003) (stating that several hundred death row inmates who are intellectually disabled were affected by *Atkins*).

³¹ *Id.*

³² See, e.g., *Inmate Removed from Death Row*, ABC11 EYEWITNESS NEWS (Feb. 2, 2012, 8:41 AM), <http://abc11.com/archive/8528653> (showing a recent application of *Atkins* to remove an inmate from death row).

³³ In many such cases there would not be reported decisions on rulings that could be located by our researchers.

³⁴ *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007) (discussing the plain statutory rule).

³⁵ See Blume et al., *Of Atkins and Men*, *supra* note 9, at 702–03, 711–12, 714 (discussing the *Briseno* factors, their applications, and their shortcomings).

³⁶ *Hall v. Florida*, 134 S. Ct. 1986, 1986 (2014).

explain the more recent downward trend is that lawyers representing the state (prosecuting attorneys and deputy attorneys general) have become more “sophisticated” in their litigation strategies. We put the word “sophisticated” in quotation marks because, as will be discussed later in this Article, we observed in the cases an increased use of stereotypes and other irrelevant considerations (e.g., behavior in prison) to defeat strong claims that a capital defendant or death row inmate is a person with intellectual disability.³⁷

However, it is important in concluding this section of the Article to make two observations. First, even the lower success rate for cases decided on the merits from 2009 through the end of 2013 is still very high. In almost half of the cases (43%) the individual claiming intellectual disability prevailed. Second, as the title of this Article foreshadows, if the Supreme Court of the United States is true to the spirit of its recent decision in *Hall v. Florida*, it will eradicate both other substantive glosses on the definition of intellectual disability that conflict with clear “clinical consensus” and procedures, such as Georgia’s requirement that a person claiming intellectual disability establish that condition “beyond a reasonable doubt,” which effectively thwarts many cases that should prevail.³⁸ If this occurs—and we believe it should—there will be an “uptick” in what are already robust rates of success.

II. LOSING CASES BY PRONG

Despite the high overall rates at which persons claiming intellectual disability prevail, there is much to be learned from a closer examination of all the capital cases raising the issue. In this section, we will try to “unpack” cases where death row inmates and capital defendants asserted—without success—that *Atkins*’s categorical bar prevented them from being executed or sentenced to death. We do this to understand how and why claims of intellectual disability are rejected and to identify—by contrasting the losing cases with successful cases—both positive and negative trends in the lower courts.

Is there any such thing as a “typical” rejection of a claim of intellectual disability? Of the cases, a slight majority—approximately 52%—of all unsuccessful *Atkins* claimants lost on all three prongs of the test for intellectual disability: (1) significantly sub-average intellectual functioning, (2) deficits in adaptive functioning, and (3) onset during the developmental period. In other words, in 52% of losing cases we have identified, the reviewing court made a specific finding that the *Atkins* claim failed because the individual did not make a sufficient showing that he or she met any of these three prongs of the relevant state’s definition for intellectual disability.

That being said, approximately 31% of all unsuccessful cases were considered a loss on Prong 1 only. In those cases, the reviewing court specifically found that the

³⁷ See *infra* notes 61–79 and accompanying text.

³⁸ *Head v. Hill*, 587 S.E.2d 613, 620–21 (Ga. 2003).

claim failed because the individual asserting intellectual disability had not demonstrated that he (or much more rarely, she) had significantly subaverage intellectual functioning.³⁹ In most of these cases, the decision of the court contained little or no specific discussion of the evidence relevant to the other two prongs of the intellectual disability criterion.⁴⁰

This stands in contrast to the smaller number of cases that failed on Prong 2 alone. Approximately 12% of the total number of unsuccessful cases were found lacking only because the individual had not proven deficits in adaptive functioning. Even when they did, however, the decisions typically contained a more robust discussion of the evidence relevant to the other two prongs—particularly the individual’s intellectual functioning. Approximately 71.4% of the Prong-2-only losses included a discussion of the evidence on Prong 1, with many including findings that Prong 1 was satisfied.⁴¹

Finally, very few cases, approximately 2%, lost solely on the basis that the person claiming intellectual disability could not demonstrate onset during the developmental period (Prong 3).⁴² This is not surprising, as one would expect it to be the rare case where a person satisfied the reviewing court that he had both significantly subaverage intellectual functioning and deficits in adaptive functioning, but there was some etiology for the compromised intellectual and adaptive functioning other than intellectual disability. In theory it could happen, for example, as a result of some very serious head injury occurring after the age of eighteen, but that would be atypical.⁴³

We also observed that the percentage of losing cases by prong has remained fairly consistent over time; there has been no significant shift in percentages of losses by prong from 2002 through 2013. On the other hand, there has been a change

³⁹ In all jurisdictions, the burden of proof—normally by a preponderance of the evidence—is on the claimant.

⁴⁰ Only three of the fifty-five losses on Prong 1 in our data set of reported *Atkins* decisions contained any discussion about whether the claimant could satisfy Prong 2.

⁴¹ For instance, in *Wood v. Allen*, 542 F.3d 1281, 1286 (11th Cir. 2008), *cert. denied*, 525 U.S. 1042 (1998), the reviewing court found that because Prong 2 had not been satisfied—“Wood did not have significant or substantial deficits in his adaptive functioning”—there was no need to make a determination as to Prong 1. Having said that, however, the court also noted that two mental health professionals “evaluated Wood together and concluded Wood[’s] . . . full-scale IQ was 64 and his true IQ was between 61 and 69 . . .”*Id.*; see also *Rodgers v. State*, 948 So. 2d 655, 667 (Fla. 2006) (“As to the first prong—intellectual functioning—the trial court found that Rodgers fell within the mild mental retardation range.”).

⁴² In 3% of the reported losing decisions, we were unable to determine whether the claimant lost on Prong 1, 2, 3, or all 3 prongs.

⁴³ For a good discussion of the difficulties with the eighteen-year-old threshold, see Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the “Childhood Onset” Requirement in Atkins Claims*, 37 VT. L. REV. 591 (2013).

in average IQ scores, and how the courts handle those scores, in both winning and losing cases over time. For cases that lost on Prong 1 only, the total average IQ score was 78. Almost all of the claimants (94%) who lost on Prong 1 had an average IQ score over 70, and a majority (71%) had an average IQ score over 75.⁴⁴ Eighty-five percent of claimants who lost on Prong 1 had at least one IQ score over 75, and virtually all (96%) had at least one IQ score over 70. By contrast, the average IQ score for successful cases was 68. This figure has increased from an average score of 66 in prevailing cases decided from 2002 to 2008 to an average of 69 in successful cases decided between 2009 and 2013, indicating a slightly increased likelihood of success with somewhat higher IQ scores as *Atkins* litigation has progressed in the lower courts over the past twelve years. This is likely due to the difference in case sets in the two time periods, as discussed previously.⁴⁵ At the time of the Court's decision in *Atkins*, there were a number of people on death row who undisputedly were intellectually disabled (and thus with lower average IQ's). The majority of those cases were resolved in the years immediately following *Atkins*.

Accordingly, at first blush, it may seem that the courts are generally getting it right when it comes to the proper assessment of Prong 1, and in some cases that is surely correct. But averages provide limited information, and a closer look at certain cases paints a different, more troubling picture. From the pool of unsuccessful losses on Prong 1, we identified a smaller set of cases in which the intellectual functioning issue was not nearly so cut and dry as the deciding court viewed matters. The claimants in this group lost when—in our assessment—they should have prevailed for generally three basic reasons: (1) the cases were adjudicated in states that utilized a strict IQ cutoff of 70 or a rebuttable presumption against a finding of intellectual disability if the person had an IQ score over 70;⁴⁶ (2) the court failed to account for clinically accepted concepts such as the Standard Error of Measurement (SEM),⁴⁷

⁴⁴ By “average IQ score,” we mean that in each reported loss on Prong 1, the average of all raw IQ scores reported in the decision exceeds 70 for 94% of claimants who lost on Prong 1, and the average raw IQ score exceeds 75 for 71% of that same pool of claimants. While this calculation produces informative and interesting information about general trends from a large pool of cases, we are not suggesting that an “average IQ score” is an individual person's “true IQ.” Nor do we think that calculating an individual's average IQ score is necessarily an appropriate method for making a clinical assessment of whether a person has an intellectual disability.

⁴⁵ See *supra* notes 30–34 and accompanying text.

⁴⁶ See, e.g., *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *37 (Tenn. Crim. App. July 1, 2009).

⁴⁷ See *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014) (“Each IQ test has a ‘standard error of measurement,’ often referred to by the abbreviation SEM. A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. . . . The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score.”(citation omitted)).

practice effects,⁴⁸ or aging norms⁴⁹ (sometimes referred to as the “Flynn Effect”);⁵⁰ and (3) the court credited scores derived from clinically unacceptable methods, such as relying on short form and screening tests, making adjustments for “cultural factors” and other types of scientifically invalid estimates.⁵¹

Phillip Elmore, who lost an *Atkins* claim in Ohio on Prong 1 after his counsel failed to raise the issue of intellectual disability at trial, is a good example of a claimant not prevailing when we believe he should have won.⁵² In post-conviction, Elmore offered

⁴⁸ “Practice effect” refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test within a relatively short period of time—generally within one year. “For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee’s true intelligence.” AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATIONS, *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 38 (11th ed. 2010); see also Alan S. Kaufman, *Practice Effects*, in 2 *ENCYCLOPEDIA OF HUMAN INTELLIGENCE* 828, 828–33 (Robert J. Sternberg et al. eds., 1994).

⁴⁹ “[V]irtually all nations in the developed world show an upward trend in performance on IQ tests from and after the date they are developed or ‘normed.’” *United States v. Davis*, 611 F. Supp. 2d 472, 485 (D. Md. 2009). Accordingly,

the population generally will achieve higher scores on IQ tests proportional to the amount of time between when the test was normed and when it was taken. . . . Standardized measures of IQ are normalized (“normed”) on a given population such that the average, or mean, score is 100. . . . [O]ver time, the test norms become outdated, such that the average score is no longer 100, but something higher. . . . Corrections for the Flynn effect adjust scores to account for the amount of time between when the test was originally normed and when it was administered to an individual. This allows for fair comparisons between scores obtained at different times

Id. at 485–86; see also James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 *PSYCHOL. PUB. POL’Y & L.* 170, 174–75 (2006) (“Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery—a matter of luck about what test a school psychologist happened to administer.”).

⁵⁰ See, e.g., *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010).

⁵¹ *Henderson v. Director*, No. 1:06-CV-507, 2013 WL 4811223, at *9 (E.D. Tex. Sept. 6, 2013) (stating that a State’s expert testified that the highest IQ score is the most reliable because “‘you can’t fake knowing the answer’”); *Anderson v. State*, 163 S.W.3d 333, 355–56 (Ark. 2004) (relying on a ten-question questionnaire that provides an estimated IQ score, as well as expert testimony extrapolating an estimated IQ range from scores on the Wide Range Achievement Test (WRAT), which is not a test designed to measure IQ); *State v. Were*, 890 N.E.2d 263, 293 (Ohio 2008) (rejecting an *Atkins* claim where the defendant offered an IQ score of 69 because of expert testimony that the test scores should be adjusted due to “cultural bias” that tends to depress the IQ scores of minorities); *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *11 (Tex. Crim. App. May 5, 2010) (stating that the State’s expert adjusted IQ scores upward because “Hispanic test subjects historically score 7.5 points lower on IQ tests than Caucasian subjects” due to “culture and influence” rather than cognitive deficiency).

⁵² *State v. Elmore*, No. 2005-CA-32, 2005 WL 2981797, at *7–9 (Ohio Ct. App. Nov. 3, 2005).

an affidavit from an expert, Dr. Timothy Rheinscheld, who opined that Elmore's IQ score was 72, but that a full diagnosis could not be made without an opportunity to assess Elmore's adaptive skills.⁵³ The state court declined to give Elmore that opportunity, instead granting the State's motion for summary judgment and denying Elmore's petition for post-conviction relief, because an IQ score over 70 creates a rebuttable presumption under Ohio law that a defendant is not intellectually disabled.⁵⁴ The court concluded:

Dr. Rheinscheld does not dispute that appellant's IQ is above 70; rather he relies on the five-point margin of error which was not adopted by the Supreme Court in *Lott*. Without this five-point margin of error, appellant would not meet the first prong of the *Atkins-Lott* test. Accordingly, Dr. Rheinscheld's affidavit adds nothing new to the record and is based on an assumption that, *while it may be valid in the field of psychology, is not a valid factor in assessing [intellectual disability] for an Atkins-Lott claim.*⁵⁵

Similarly, the Fifth Circuit found Virgilio Maldonado not to be a person with intellectual disability after the State's expert used an unqualified translator to administer the English version of the WAIS and made upward adjustments to the score based on "cultural and educational factors" because Maldonado is Hispanic.⁵⁶

Whether an *Atkins* claimant can win on Prong 1 depends, of course, on the actual scores themselves. Sometimes, however, based on our analysis of the cases, even more attention should be given to the thoroughness and accuracy of defense expert testimony and the particular court's willingness to engage with and accept clinical consensus and scientifically reliable information. It is not impossible for claimants with relatively high IQ scores to succeed on an *Atkins* claim. Of all 49 reported decisions finding intellectual disability, 46% of the individuals had at least one IQ score over 75, and 20% involved one or more IQ scores over 80. One of the most significant differences between successful and unsuccessful claims on Prong 1 was the deciding court's acceptance of the idea that only a reliable, individually-administered, full-scale IQ score should be considered. Many losing cases involved purportedly high IQ scores that the court accepted at face value when clinical standards would not necessarily have considered them to be a valid measure of intellectual functioning.⁵⁷ On

⁵³ *Id.* at *7.

⁵⁴ *Id.* at *8–9.

⁵⁵ *Id.* at *9 (emphasis added).

⁵⁶ *Maldonado v. Thaler*, 625 F.3d 229, 237–38 (5th Cir. 2010), *cert. denied*, 552 U.S. 1298 (2008).

⁵⁷ *See, e.g.,* *Esparaza v. Thaler*, 408 F. App'x 787, 795 (5th Cir. 2010) (relying, in part, on IQ scores of 86 and 88 listed on Esparaza's penitentiary packets where no other information was given), *cert. denied*, 131 S. Ct. 2446 (2011); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *16 (Tenn. Crim. App. July 1, 2009) (focusing on a score of

the other hand, successful claims often occurred before judges who were willing to consider and give effect to accepted clinical standards, including, as noted previously, the SEM, practice effect, and Flynn Effect.⁵⁸ For similar reasons, claimants with high “outlier” IQ scores fared much better when courts were willing to evaluate the totality and quality of the available evidence relevant to the individual’s intellectual functioning. This is in sharp contrast with judges who mistakenly treated single IQ scores as creating various presumptions or strict cutoff limitations.⁵⁹

We now turn to losses on the adaptive deficits prong. As we previously noted, approximately 12% of the losing claimants in the reported decisions lost on Prong 2 alone. Although most of these cases do not contain a specific finding that the claimant satisfied Prong 1, many of these opinions did report the claimant’s IQ scores. These scores typically were in the range needed to demonstrate significantly subaverage intellectual functioning of approximately 70 on an appropriate test.⁶⁰ Cases that lost on Prong 2 generally lost based on one or more of the following factors: (1) the individual’s prison behavior;⁶¹ (2) accusations that the individual claiming intellectual disability is malingering;⁶² (3) the alleged facts of the crime;⁶³ and (4) stereotypes of what persons with intellectual disability can (and cannot) do.⁶⁴

82 from the Ammons Picture Vocabulary test); *Ex parte* Hearn, 310 S.W.3d 424, 429 n.13 (Tex. Crim. App. 2010) (using an IQ score of 82 from a short-form test).

⁵⁸ See, e.g., *Holladay v. Allen*, 555 F.3d 1346, 1357–58 (11th Cir. 2009); *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D. La. 2011); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *8, *11–12 (N.D. Ohio Dec. 23, 2010); *Wiley v. Epps*, 668 F. Supp. 2d 848, 893–96 (N.D. Miss. 2009); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1281, 1291 (N.D. Ala. 2009); *United States v. Davis*, 611 F. Supp. 2d 472, 475, 477 (D. Md. 2009); *Green v. Johnson*, No. CIV A 2:05CV340, 2006 WL 3746138, at *43–45 (E.D. Va. Dec. 15, 2006) (recognizing the *Flynn* effect, but rejecting the SEM and the practice effect); *Commonwealth v. Williams*, 61 A.3d 979, 982–83 (Pa. 2013).

⁵⁹ See, e.g., *Wiley v. Epps*, 625 F.3d 199, 215 (5th Cir. 2010); *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010); *Smith*, 790 F. Supp. 2d at 495–96; *Hughes v. Epps*, 694 F. Supp. 2d 533, 544 (N.D. Miss. 2010); *Williams*, 61 A.3d at 982–83.

⁶⁰ See, e.g., *Chester v. Thaler*, 666 F.3d 340, 355 (5th Cir. 2011); *Wood v. Allen*, 542 F.3d 1281, 1286 (11th Cir. 2008), *cert. denied*, 525 U.S. 1042 (1998); *Ladd v. Thaler*, No. 1:03cv239, 2013 WL 593927, at *8 (E.D. Tex. Feb. 15, 2013); *Ex parte Smith*, No. 1080973, 2010 WL 4148528, at *3 (Ala. Oct. 22, 2010); *Lane v. State*, No. CR-10-1343, 2013 WL 5966905, at *6 (Ala. Crim. App. Nov. 8, 2013); *Lee v. State*, 898 So. 2d 790, 809–10 (Ala. Crim. App. 2003); *Dufour v. State*, 69 So. 3d 235, 244–45 (Fla. 2011); *Rodgers v. State*, 948 So. 2d 655, 667 (Fla. 2006); *Rodriguez v. State*, 919 So. 2d 1252, 1265 (Fla. 2005); *State v. Dunn*, 41 So. 3d 454, 462–63 (La. 2010); *State v. Campbell*, 983 So. 2d 810, 825 (La. 2008); *Doss v. State*, 19 So. 3d 690, 710 (Miss. 2009); *State v. Hill*, 894 N.E.2d 108, 121 (Ohio Ct. App. 2008); *State v. Pruitt*, 415 S.W.3d 180, 199 (Tenn. 2013).

⁶¹ See, e.g., cases cited *infra* note 65.

⁶² See, e.g., *United States v. Umana*, No. 3:08cr134, 2010 WL 1052271, at *6 n.22 (W.D.N.C. Mar. 19, 2010).

⁶³ See, e.g., *Walker v. Kelly*, 593 F.3d 319, 324–25 (4th Cir. 2010), *cert. denied*, 560 U.S. 921 (2010).

⁶⁴ See, e.g., *id.* at 326 (noting the defendant’s “ability to ingratiate himself to women and

In Prong 2 losses, courts increasingly rely upon prison behavior in finding that a death row inmate or capital defendant is not a person with intellectual disability. *All* of the reported losses on Prong 2 from 2008 to 2012 discussed some aspect of the claimant's prison behavior as support for the court's conclusion that the claimant failed to demonstrate deficits in adaptive functioning sufficient to satisfy Prong 2. Courts have concluded that (1) a positive adjustment to prison life; (2) employment in prison; (3) officer testimony that the defendant was a "normal" inmate, seemed to be of average intelligence, could communicate effectively, or was "polite" and well groomed; (4) testimony that the prisoner was seen with books or magazines; and (5) prison gang affiliation, all justified findings that an intellectual disability claim failed.⁶⁵ Courts have made such findings despite the fact that the clinical literature in the field specifically advises against doing so.⁶⁶ And the reasons for this admonition are quite obvious. How an individual adjusts to the intensely structured environment of death row is—for the most part—irrelevant to whether the person can function in the "free world."⁶⁷ Persons on death row operate within a world where choices are extremely limited, even for such basic matters as when to get up and go to bed, what to eat, when to shower or change clothes, and other life basics. Also, any "employment" available to a death row inmate would be of the type that could be performed by a person with intellectual disability. The same would be true with being recruited into a gang given the gullibility of many persons with intellectual disability.⁶⁸ And, it almost goes without saying, the opinion of a correctional officer that an individual was "normal" is the thinnest of reeds upon which to decide whether a person should live or die.⁶⁹

establish intimate relationships with them in a relatively short period of time as evidence of his social skills").

⁶⁵ See, e.g., *Walker*, 593 F.3d at 325–27; *Umana*, 2010 WL 1052271, at *5–6; *Webster v. United States*, No. Civ.A. 4:00-CV-1646-, 2003 WL 23109787, at *13 (N.D. Tex. Sept. 30, 2003); *State v. Hill*, 894 N.E.2d 108, 124–25 (Ohio Ct. App. 2008); *Ex parte Briseno*, 135 S.W.3d 1, 18 (Tex. Crim. App. 2004).

⁶⁶ See, e.g., *United States v. Smith*, 790 F. Supp. 2d 482, 517 (E.D. La. 2011) ("[T]he authors of the ABAS-II [a standardized measure of adaptive functioning] strongly recommend against using correctional officers as respondents . . . [because] adaptive behavior is supposed to be assessed in a 'real community' where the person has to make his own choices, as opposed to a structured prison setting, where much of the inmate's daily life is scheduled by the institutional staff."). As stated in *United States v. Hardy*, 762 F. Supp. 2d 849, 899 (E.D. La. 2010), "An institutional environment of any kind necessarily provides 'hidden supports' whereby the inmates . . . are told when to get up, when to eat, when to bathe, and their movements are highly restricted."

⁶⁷ See *supra* note 66.

⁶⁸ See, e.g., Martha E. Snell et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 226 (2009), available at <http://www.aaidjournals.org/doi/pdf/10.1352/1934-9556-47.3.220> (describing the impact that gullibility has on individuals with intellectual disabilities).

⁶⁹ *Smith*, 790 F. Supp. 2d at 518 ("Prison guards can hardly be expected to be able to [determine adaptive functioning]. Furthermore, as was noted in *Hardy*, 'prison officers'

With regard to malingering, there are no formalized, reliable assessments designed to determine whether a person is attempting to fake symptoms of intellectual disability.⁷⁰ The best method for ruling out malingering is consistency in both deficits in intellectual functioning and adaptive behavior over time.⁷¹ However, even claimants with strong evidence of deficits in adaptive behavior and/or intellectual functioning have lost due to accusations of malingering.⁷² These generally come in the form of a prosecution expert's subjective feeling or perception based on experience, or an opinion based on other evidence in the case, which may or may not be reliable, such as the defendant's self-reported social history information.⁷³ The facts of the crime, including whether they demonstrate planning or deception, are often used as reasons to deny an *Atkins* claim on Prong 2—particularly in Texas where the *Briseno* factors⁷⁴ require

observations are limited to an extremely unusual set of circumstances, and are likely to be filtered through their experience with other prisoners, many of whom may also suffer from intellectual limitations.' A further shortcoming relating to the use of prison personnel as respondents is the bias they might have, as law enforcement officers, against a criminal . . ." (quoting *Hardy*, 762 F. Supp. 2d at 900)).

⁷⁰ See *Allen v. Wilson*, No. 1:01-cv-1658-JDT-TAB, 2012 WL 2577492, at *7 (S.D. Ind. July 3, 2012); *Smith*, 790 F. Supp. 2d at 499.

⁷¹ *Allen*, 2012 WL 2577492, at *7; *Tarver v. Thomas*, No. 07-00294-CG-B, 2012 WL 4461710 (S.D. Ala. Sept. 24, 2012); *Smith*, 790 F. Supp. 2d at 535.

⁷² See, e.g., *State v. Grell*, 135 P.3d 696 (Ariz. 2006) (en banc) (stating one reason for heightened standard of review for mental retardation, by clear and convincing evidence, is because of the legislature's fear of malingering); *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007) (overruling on appeal the trial court's finding of mental retardation due to possible malingering).

⁷³ See, e.g., *United States v. Umana*, No. 3:08cr134, 2010 WL 1052271 (W.D.N.C. Mar. 19, 2010); *Doss v. State*, 19 So. 3d 690 (Miss. 2009).

⁷⁴ The Texas Court of Criminal Appeals adopted the *Briseno* factors for decisionmakers to consider when determining whether an *Atkins* claimant's evidence weighs "as indicative of mental retardation or a personality disorder[.]" *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). There are seven *Briseno* factors:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the

the court to consider this factor as an indicator relevant to a decision on intellectual disability.⁷⁵ We can imagine situations in which the “sophistication” of the crime could be beyond the means of a person with intellectual disability. However, most of the reported decisions relying on this consideration to reject a claim of intellectual disability do not fall in that category.⁷⁶ Finally, stereotypes and general misunderstandings about what people with intellectual disabilities can achieve are likely the most significant factors affecting Prong 2 losses. Although people with intellectual disabilities are “often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families,”⁷⁷ many courts have relied on these factors and other stereotypes to deny *Atkins* claims.⁷⁸ Among other reasons, courts have found that the claimant did not have deficits in adaptive functioning sufficient to satisfy Prong 2 because he (1) could read, write, and perform some rudimentary math; (2) had friends; (3) was able to maintain his personal hygiene; (4) drove a car on occasion; (5) was appropriately groomed and possessed a driver’s license; and (6) maintained relationships with women.⁷⁹ None of these skills or abilities are necessarily inconsistent with intellectual disability.

And finally, we look at losses on Prong 3 (onset during the developmental period). Very few persons raising claims of intellectual disability lose on Prong 3 alone; in fact, we were only able to identify three cases appropriately classified as a loss on

capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8–9.

⁷⁵ See, e.g., *Matamoros v. Thaler*, No. H-07-2613, 2010 WL 1404368 (S.D. Tex. Mar. 31, 2010); *Chester v. Quarterman*, No. 505cv29, 2008 WL 1924245 (E.D. Tex. Apr. 29, 2008); *Hodges v. State*, 55 So. 3d 515, 526 (Fla. 2010); *State v. Dunn*, 41 So. 3d 454, 458–59 (La. 2010).

⁷⁶ Compare *State v. Vela*, 777 N.W.2d 266 (Neb. 2010) (finding that the defendant failed on Prong 2 because of his job and relationships), with *United States v. Jiménez-Benceví*, 934 F. Supp. 2d 360 (D.P.R. 2013) (finding that the defendant failed on Prong 2 because of the sophistication of the crime).

⁷⁷ *Wiley v. Epps*, 625 F.3d 199, 203, 204 (5th Cir. 2010); see also DSM-IV-TR, *supra* note 7, at 151 (stating that people with mental retardation may “be able to live independently” and “[d]ocumented successful outcomes of individuals with appropriate supports contrasts sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children”); *id.* at 46 (“There are no specific physical features associated with Mental Retardation”); *id.* at 43 (people with mild mental retardation “can acquire academic skills up to approximately the sixth-grade level[.]” “have minimal impairment in sensorimotor areas, . . . often are not distinguishable from children without Mental Retardation until a later age[.]” and “usually achieve . . . vocational skills” and even successfully live independently).

⁷⁸ See, e.g., *United States v. Williams*, Criminal No. 06-00079 JMS-KSC, 2014 WL 869217 (D. Haw. Mar. 6, 2014) (rejecting defendant’s claim because he functioned “normally” in the “real world”).

⁷⁹ See *Walker v. Kelly*, 593 F.3d 319 (4th Cir. 2010); *Lane v. State*, No. CR-10-1343, 2013 WL 5966905 (Ala. Crim. App. Nov. 8, 2013); *Dufour v. State*, 69 So. 3d 235 (Fla. 2011); *State v. Campbell*, 983 So. 2d 810 (La. 2008); *Branch v. State*, 961 So. 2d 659 (Miss. 2007).

Prong 3 only. Ohio death row inmate Michael Stallings presented evidence of two IQ scores of 76, one obtained at age sixteen and another post-crime.⁸⁰ Stallings's expert testified that both of these scores were inflated due to the out-of-date testing instruments used.⁸¹ Based on these scores and the score of an adaptive functioning scale administered while Stallings was in prison, his expert concluded that he satisfied the first two prongs of intellectual disability.⁸² The expert waived, however, on the third prong because Stallings was never specifically evaluated for intellectual disability prior to age 18.⁸³ A second expert, who was originally retained by the state, agreed with Stallings's expert and ultimately opined that it was more likely than not that Stallings satisfied all three prongs of Ohio's definition of intellectual disability.⁸⁴ The state court rejected the expert testimony, however, finding that Stallings failed to rebut Ohio's presumption that he was not intellectually disabled because he had an IQ score above 70.⁸⁵ Although Stallings had proven both Prongs 1 and 2, the court concluded that he had not proven that it was more likely than not that his condition began prior to age 18 as required by the criteria for Prong 3.⁸⁶

III. VARIATION

Aggregated filing and success rates conceal great variation. Both the identity of the decisionmaker—judge or jury—and the state in which the claim is brought powerfully influence the likelihood that an *Atkins* claim will succeed.

A. Variation by Decisionmaker

As noted above, *Atkins* “le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”⁸⁷

⁸⁰ *Stallings v. Bagley*, 561 F. Supp. 2d 821 (N.D. Ohio 2008).

⁸¹ *Id.* at 881.

⁸² *Id.*

⁸³ *Id.* at 881–82.

⁸⁴ *Id.* at 882–83.

⁸⁵ *Id.* at 883.

⁸⁶ *Id.* at 883–84; *see also* *Commonwealth v. Vandivner*, 962 A.2d 1170, 1186 (Pa. 2009) (finding defendant failed to satisfy Prong 3 because there were no IQ scores from his childhood and no evidence that he was placed in special education classes as a result of intellectual disability); *Williams v. Cahill*, 303 P.3d 532 (Ariz. Ct. App. 2013) (affirming the lower court's finding that although Williams's current IQ was significantly subaverage, his IQ was likely higher now than at age 18 due to substance abuse and worsening mental illness). The reported decisions also contain one “Reverse Prong 3” loss. In a decision that appears to be one of a kind, the Ohio Court of Appeals found that Andre Williams satisfied all three prongs prior to the age of 18, but nonetheless failed to win his *Atkins* claim because he could not show “substantial limitations in *present* functioning,” as required by Ohio law. *State v. Williams*, No. 2007-T-0105, 2008 WL 2582849, at *1 (Ohio Ct. App. 2008) (quoting *State v. White*, 885 N.E.2d 905, 907 (Ohio 2008)).

⁸⁷ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (alterations in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986)).

Consequently, each state had to make a variety of decisions concerning the implementation of the *Atkins* ban, including the identity of the decisionmaker, the timing of the eligibility determination, and the allocation of the burden of proof.⁸⁸ For pre-*Atkins* cases—cases where a death sentence had already been imposed when *Atkins* was decided—all states elected to have a judge make the determination.⁸⁹ Thus our earlier data, comprised almost entirely of post-verdict remands, gave us no opportunity to consider differences between judge and jury determinations of intellectual disability.

Given the cost of impaneling a jury, as well as the greater likelihood of reversible error inherent in a jury proceeding, this unanimous choice was not surprising. In the post-*Atkins* cases, one would expect that efficiency considerations would still have weighed against jury determinations; a judicial determination of intellectual disability would have obviated the need for impaneling a jury, or at least permitted the impaneling of a non-capital jury—a much less costly process. Nonetheless, ten states—Alabama, Arkansas, Georgia, Louisiana, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia—chose to allocate the determination of intellectual disability in the post-*Atkins* cases to juries.⁹⁰ In addition, California permits the defendant to elect a judge or jury.⁹¹ South Carolina provides for an initial judicial determination and, in the event of a finding of no intellectual disability, permits the defendant to submit the issue to the jury as well.⁹²

If the state legislatures that chose jury determinations did so believing that juries would be more reluctant to find intellectual disability, it appears that they guessed right. From 2002 to 2014 there have been 23 jury determinations of intellectual disability, and in 22 of those cases, or 96%, the jury determined that the defendant did not have intellectual disability. The contrast between this rate and the overall success rate—43%—is striking. Although it is possible that intellectual disability claims presented to juries vary in some systematic way from those presented to judges, we have no hypothesis as to why this should be so. Perhaps, however, a comparison of the success rate in jury cases in the more recent period—post-2008—is more appropriate than a comparison to the overall rate for all *Atkins* cases, given that most jury determinations occurred in that stretch. Moreover, as discussed above, one *would* expect that success rates between pre- and post-*Atkins* cases would differ because some of the pre-*Atkins* cases are ones that were so strong they would have been settled had they been decided after *Atkins*—and the set of judge cases (unlike the set of jury cases) include

⁸⁸ See, e.g., *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003).

⁸⁹ *Id.*

⁹⁰ See ALA. CODE § 13A-5-45(a) (1975); ARK. CODE ANN. § 5-4-618(d)(2)(B)(i) (1993); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2003); N.C. GEN. STAT. ANN. § 15A-2005(e) (2001); OKLA. STAT. tit. 21, § 701.106(E) (2006); PA. R. CRIM. P. 844(B); VA. CODE ANN. § 19.2-264.3:1.1(C) (2003); *Rogers v. State*, 653 S.E.2d 31 (Ga. 2007); *State v. Flores*, 93 P.3d 1264 (N.M. 2004); *Williams v. State*, 270 S.W.3d 112 (Tex. Crim. App. 2008).

⁹¹ CAL. PENAL CODE § 1376(b)(1) (West 2003).

⁹² *Franklin*, 588 S.E.2d at 606.

some of those “would-have-settled” cases. But even if jury cases are compared to all post-2008 cases, a huge discrepancy in success rates remains: 26% versus 4%.⁹³ While the perfect comparison is not obvious, any way we slice it, juries seem to be vastly harsher in their evaluation of intellectual disability claims than are judges.

This is an interesting finding because other comparisons of judge and jury decision-making have found that juries tend toward greater leniency.⁹⁴ Prior empirical studies find great judge-juror agreement in both civil and criminal trials, and that when disagreement does occur in criminal cases, juries are likely to be more lenient.⁹⁵ Sentencing in capital cases follows the pattern of greater jury lenience, but the disparity is much more pronounced.⁹⁶

Perhaps juries are more lenient than judges in ordinary guilt and sentencing determinations but harsher in determinations of intellectual disability because—in the context of a horrible crime—judges are more able to set aside their feelings and correctly apply a legal standard than jurors. Another factor may be the timing of the decision; juries determine intellectual disability after hearing all of the evidence in aggravation, including victim impact evidence as compared to judges, who generally make pretrial rulings of intellectual disability and consequently have been exposed to

⁹³ A comparison to overall success rates during the later period can also be criticized. Because overall success rates reflect both the initial decisionmaker’s determination and subsequent reversals, it could be argued that the overall success rate overstates the willingness of judges to find intellectual disability. Yet a comparison limited to initial decisions is also an “apples and oranges” comparison because our review shows that jury decisions are amazingly invincible on appeal and judge decisions are not; we have only encountered two jury determinations of no intellectual disability that have been reversed on appeal. *See Lambert v. State*, 126 P.3d 6646 (Okla. Crim. App. 2005); *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005).

⁹⁴ *See, e.g.*, Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL’Y 19, 22–23 (2007).

⁹⁵ *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 148–51 (2007); *see also* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 173 (2005); Hans, *supra* note 94, at 22–23; Valerie P. Hans et al., *The Hung Jury: The American Jury’s Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003); Valerie P. Hans, *What Difference Do Juries Make?*, in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 105 (K.C. Huang ed., 2009).

⁹⁶ *See* Michael Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793, 828–33 (2011) (reporting 166 judicial overrides of jury life sentences in Florida); *see also* *Judicial Override in Alabama*, EQUAL JUST. INITIATIVE (Mar. 2008), http://www.eji.org/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf (“Since the death penalty was reinstated in 1976, Alabama judges have overridden 84 cases from life to death. In the same period, judges overruled death verdicts to life sentences in only a handful of cases. Of the 198 prisoners currently on Alabama’s death row, 40 (20%) were condemned to death by a judge who threw out the jury’s decision that death was not the appropriate punishment.” (emphasis omitted)).

fewer emotional, retributive triggers.⁹⁷ Regardless of the reason, it is obvious that jurors are vastly more reluctant to find intellectual disability than are judges.

B. Variation by State

In an earlier article, two of the authors found substantial variation by state, citing as an example the success rate in North Carolina—about 80%—as compared to that of Alabama—about 12%.⁹⁸ We observed that this disparity “corresponds with the availability of funding for post-conviction litigation” which is minimal in Alabama and adequate in North Carolina.⁹⁹ We also looked at the restrictiveness of the applicable definition of intellectual disability, in that Alabama (unlike North Carolina) “applies a strict IQ cutoff and assesses adaptive functioning deficits by focusing on what the claimant can do rather than focusing, as those clinical definitions require, on the individual’s limitations.”¹⁰⁰

The table below reflects all of the win-loss data as of the end of 2013,¹⁰¹ and it reveals that the disparities we observed earlier were not transitory:

State	Claims Decided On Merits	Merit Wins	Merit Losses
Alabama	34	5	29
Arizona	11	5	6
Arkansas	4	1	3
California	5	2	3
Colorado	4	3	1
Florida	24	0	24
Georgia	9	1	8
Idaho	1	0	1
Illinois	0	0	0

⁹⁷ See, e.g., *Franklin*, 588 S.E.2d at 606 (detailing procedural process for post-*Atkins* mental retardation cases in South Carolina).

⁹⁸ Blume et al., *An Empirical Look at Atkins*, *supra* note 13, at 629.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ This table reflects the current status of all cases by state, regardless of what stage of litigation the case is now in. Overall success rates would rise in most states if we counted only the cases that are final as “losses.” As discussed in the Introduction, any method of determining success rates has its disadvantages, but for the purpose of examining variation by state, we thought it was most instructive to include the largest set of cases possible.

Indiana	6	2	4
Kentucky	9	1	8
Louisiana	11	4	7
Mississippi	14	8	6
Missouri	6	3	3
Nebraska	1	0	1
Nevada	2	1	1
New Jersey	1	0	1
New Mexico	0	0	0
New York	0	0	0
North Carolina	34	28	6
Ohio	20	5	15
Oklahoma	10	3	7
Oregon	1	0	1
Pennsylvania	16	10	6
South Carolina	6	5	1
Tennessee	8	0	8
Texas	45	8	37
Utah	2	1	1
Virginia	7	0	7
Federal DP	12	4	8
Military	1	0	1
Total	304	100	204

Of course, some of the jurisdictions have so few cases that the success rate is not meaningful; Oregon's 0% success rate cannot profitably be compared to anything, given that it is derived from one case. On the other hand, 24 cases have been litigated in Florida, and through 2013, the claimant lost in every single one of those cases.¹⁰² The success rates in Alabama (5 out of 34), Georgia (1 out of 9), Kentucky (1 out of 9), Tennessee (0 out of 8), Texas (8 out of 45), and Virginia (0 out of 7) are also strikingly

¹⁰² As discussed earlier, in 2014, the Supreme Court reversed Hall's conviction in its case, *Hall v. Florida*, 134 S. Ct. 1986 (2014), improving Florida's success rate to 1 in 24.

low. In contrast, the North and South Carolina rates (28 out of 34 and 5 out of 6, respectively) are strikingly high.

Our additional data not only confirms the jurisdictional variation we saw in the earlier cases, but also aligns with procedural and substantive differences in the state system. Rates are lower in states with substantive deviations from clinical definitions. Florida and Alabama are in that category, as both of them (prior to *Hall*) adhered to an IQ cutoff.¹⁰³ Texas also deviates greatly, having adopted its own idiosyncratic approach to adaptive functioning.¹⁰⁴ And Georgia, too, is an oddity, as it requires proof of intellectual disability beyond a reasonable doubt.¹⁰⁵

CONCLUSION

We have told a tale of two *Atkins*: the first tale was one of extraordinary success rates, with deviations from a few states beginning to appear; the second tale is one born of the first—some states attempt, either through procedural obstacles or substantive deviations, to eviscerate the holding of *Atkins*, while others grow in their own commitment to understanding and enforcing clinical norms. Meanwhile, the litigants grow in sophistication.

The third *Atkins* tale has yet to unfold. Now that the Supreme Court in *Hall v. Florida* has prohibited a rigid IQ cutoff, it remains to be seen whether parallel deviations from the second prong, adaptive functioning, will be likewise disciplined.¹⁰⁶ *Hall* was not yet a month old when the Fifth Circuit declared that it had no effect on Texas's gross deviations from clinical definitions of adaptive functioning.¹⁰⁷ If the Supreme Court is committed to equal enforcement of *Atkins*, it will need to respond to adaptive functioning deviations from clinical definitions and to procedural barriers, such as jury determinations and prohibitive burdens of proof, to its realization. And by “need to respond”, we mean the Court ought to strike down as unconstitutional such deviations and barriers.

¹⁰³ *Hall*, 134 S. Ct. at 1986; *Morris v. State*, 60 So. 3d 326 (Ala. Crim. App. 2010).

¹⁰⁴ *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (instructing a focus upon factors related to the crime and perceptions of the defendant by lay persons).

¹⁰⁵ *Head v. Hill*, 587 S.E.2d 613 (Ga. 2013).

¹⁰⁶ *Hall*, 134 S. Ct. at 1986.

¹⁰⁷ *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014).