No. _____

In The
Supreme Court of the United States

EDDIE L. PEARSON, WARDEN,
SUSSEX I STATE PRISON,

Petitioner,

v.

LEON J. WINSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In a state prosecution for capital murder, Winston's hand-picked trial expert determined he was not mentally retarded but had an antisocial, and possibly psychopathic, personality. Counsel decided not to claim mental retardation or present the expert at sentencing. Winston later claimed ineffective assistance of counsel for that decision, and the state habeas corpus court dismissed the claim on its merits. The federal habeas court held a hearing and permitted new evidence, but denied relief due to the reasonableness of the state court decision, and found it could not consider the new evidence. The Fourth Circuit reversed and directed the district court to consider the new evidence and give no deference to the state court decision. On *de novo* review, the district court granted relief despite this Court's intervening decisions in *Harrington v. Richter*, 131 U.S. 770 (2011), and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). The Fourth Circuit held again that the state court's decision was due no deference, and also that *Richter* and *Pinholster* did not apply.

The questions presented are:

1. Did the Fourth Circuit create an impermissible end-run around *Richter*, *Pinholster*, and AEDPA by holding that a state court's merits determination is not an "adjudication on the merits" whenever the state prisoner later presents the federal court with new material evidence and the state court decided the

QUESTIONS PRESENTED – Continued

ineffective assistance claim without an evidentiary hearing?

2. Did the Fourth Circuit wrongly ignore 28 U.S.C. § 2254(d) and *Strickland v. Washington*, 466 U.S. 668 (1984), in concluding as a *de novo* matter, and contrary to the Virginia Supreme Court and *Strickland*, that trial counsel were ineffective for deciding not to argue mental retardation at sentencing?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTION

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012). (Pet. App. 1). The opinion of the district court is reported as *Winston v. Kelly*, 683 F. Supp. 2d 489 (W.D. Va. 2012). (Pet. App. 39). The order of the Supreme Court of Virginia is unpublished. (Pet. App. 63, pertinent excerpt).

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on June 25, 2012 (Pet. App. 1), and denied rehearing on July 23, 2012. (Pet. App. 68). The jurisdiction of this Court is timely invoked under 28 U.S.C. §§ 1254(1) and 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. Section 2254 of Title 28 of the United States Code provides the standard for a federal court's collateral review of a state court criminal judgment. *See* 28 U.S.C. § 2254(a-e). (Pet. App. 70).

3. Virginia Code § 19.2-264.3:1.1 provides the definition of mental retardation by which a person found guilty of capital murder may prove a claim of mental retardation. (Pet. App. 72).

STATEMENT OF THE CASE

A. The Crimes

Anthony Robinson was shot eight times and killed in his Lynchburg, Virginia home on April 19, 2002. His wife, Rhonda, who was pregnant, also was shot eight times and killed in their home at the same time. Rhonda's eight-year-old daughter, Niesha, witnessed two black men, one with a "big dog" tattoo, enter the house. She saw the one with the tattoo take Anthony downstairs, while the other intruder stayed upstairs with Niesha, Rhonda, and Niesha's five-year-old sister, Tiesha. Niesha heard gunshots downstairs and watched as the shooter with the tattoo came back upstairs and shot and killed her mother in the presence of the two children. *Winston v. Commonwealth*, 604 S.E.2d 21, 27 (Va. 2004).

B. The Trial

Winston was charged with the capital murder of Anthony Robinson in the commission of attempted robbery, the capital murder of Rhonda Robinson in the commission of attempted robbery, and the capital murder of Rhonda Robinson during the same transaction in which Winston willfully, deliberately

and with premeditation killed Anthony. He also was charged with attempted robbery, statutory burglary, maliciously discharging a firearm, and use of a firearm in the commission of a felony.

Prior to trial, Winston's two defense counsel obtained all of Winston's school, medical, and other background records. They obtained the appointment of Dr. Evan Nelson, who evaluated Winston for mental retardation.[1] Dr. Nelson concluded that Winston could not prove he was retarded under Virginia's post-*Atkins* statute because Winston's IQ scores all were above the statutory cut-off of 70, and because no sources, including Winston himself, described sufficient deficits in adaptive functioning.[2] (4CIR/JA 2111-12). He also concluded that Winston had an antisocial personality and elements of a psychopath, and that the defense should not use him as an expert. (4CIR/JA 2115, 2117). Winston made a lengthy proffer of incriminating facts to the prosecutor in hopes of producing a plea agreement.[3]

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[1] Dr. Nelson was the experienced forensic psychologist who determined that Daryl Atkins was retarded in the case of *Atkins v. Virginia*, 536 U.S. 304, 308 (2002).

[2] The Virginia Supreme Court interprets Virginia Code § 19.2-264.3:1.1's significant sub-average intellectual functioning element (Pet. App. 72) as requiring an IQ score under 70. *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated on other grounds*, 544 U.S. 901 (2005).

[3] The proffer was not used at trial, but came into evidence during Winston's state and federal habeas cases in connection with his frivolous claims of innocence. (4CIR/JA 479-567).

The evidence at trial showed that Winston had a "big dog" tattoo and admitted he was present during the murders. *Winston*, 604 S.E.2d at 27. A cab driver and two women drove the killers to and from the Robinsons' house that morning. *Id*. Winston confessed to a friend that he had killed the Robinsons and stolen their money and drugs. *Id*. at 27-28. Forensic testing identified a gun belonging to Winston as the murder weapon. DNA testing of the gun matched Winston with a one in six billion chance of it being someone else. *Id*. at 28. The jury found him guilty as charged.

At sentencing, Winston did not present Dr. Nelson or a claim of retardation. *Winston*, 604 S.E.2d at 51. The prosecution presented evidence of Winston's extensive criminal history of violence. Defense counsel presented the jury with a vast array of background information about Winston: an employee of the jail testified to his good behavior; his mother, grandmother, and great-grandmother described his impoverished and neglectful upbringing; and four written evaluations of Winston as a child demonstrated, and corroborated, the parental neglect, as well as his sub-average intellectual functioning. The jury sentenced Winston to three death sentences for the capital murder convictions, finding both the future dangerousness and vileness aggravating circumstances, as well as to prison terms for the non-capital offenses.

C. State Post-Trial Proceedings

The Supreme Court of Virginia unanimously affirmed Winston's convictions and sentences in 2004. *Winston*, 604 S.E.2d at 54. The court expressly found that Winston "deliberately declined to raise a claim of mental retardation under the statutory provisions that apply to him and his trial." *Id*. at 51. This Court denied certiorari review. *Winston v. Virginia*, 546 U.S. 850 (2005).

With new counsel, Winston claimed on state habeas review in the Virginia Supreme Court that he was mentally retarded. He also alleged his trial counsel acted ineffectively when they declined to claim that he was retarded. Winston presented documents to the state habeas court which had been reviewed by Dr. Nelson, including three IQ test scores of 77, 73, and 76, obtained when Winston was seven, ten, and fifteen years of age. (Pet. App. 44). He presented his high school's special education reclassification from learning disabled (4CIR/JA 2069) to "mentally retarded" – a document also reviewed by Dr. Nelson – but no IQ score supporting it. (Pet. App. 64). Winston represented to the state court that the school could classify students as mentally retarded, and thus as eligible for special education services, even if they achieved IQ scores above 70. (Pet. App. 65). He also represented that the school had destroyed any supporting records regarding its reclassification to mentally retarded, including IQ scores, testing data, and the like. (Pet. App. 64).

The Virginia Supreme Court found the claim of retardation procedurally barred because Winston could have raised it at trial, but deliberately chose not to. (Pet. App. 64). It dismissed his claim of ineffective assistance because there was no evidence that trial counsel could have used to demonstrate mental retardation under Virginia law. (Pet. App. 64-66). It explained that a capital murderer must have a qualifying IQ score lower than 70, Winston's scores all were higher than 70, and the school could have classified him "mentally retarded" despite an above-70 IQ score. (*Id*.). The court thus found no ineffective assistance under both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). (*Id*.).

D. Federal Habeas Corpus Proceedings

Winston filed a habeas corpus petition in the United States District Court. The district court ordered an evidentiary hearing on the *Atkins*-related claims over the Warden's objections. *Winston v. Kelly*, 624 F. Supp. 2d 478 (W.D. Va. 2008). The district court believed it had discretion to hold a hearing under *Schriro v. Landrigan*, 550 U.S. 465 (2007). *Id*.

Two weeks before the hearing, and for the first time ever, Winston's habeas counsel talked to a psychologist who said she had tested his IQ in high school. *Winston v. Kelly*, 600 F. Supp. 2d 717, 727 (W.D. Va. 2009) (*Winston I*). These were the same habeas attorneys who had told the state court that the high school's records had been destroyed. The

psychologist did not remember Winston or the testing (4CIR/JA 792), but found in her attic a floppy disk with, among other things, a report on it that said Winston had obtained an IQ score of 66. (4CIR/JA 822). She was not part of the eligibility committee meeting that determined Winston's reclassification. (4CIR/JA 809). She had no supporting documents such as the IQ test, her scoring, or notes. (4CIR/JA 791, 820). She did not know if the report on the disk was used by the school or was a final report, but assumed so. (4CIR/JA 818).

At the hearing, the evidence demonstrated that Dr. Nelson advised trial counsel, among other things, that Winston "ran a drug business, managed his own finances, bought his own clothes, found places to live, knew how to drive and generally navigate," and thus did not demonstrate sufficient adaptive deficits to qualify as mentally retarded. *Winston I*, 600 F. Supp. 2d at 725. Dr. Nelson told trial counsel that Winston had an antisocial personality and some elements of psychopathy. (4CIR/JA 2115, 2117, 2127). Dr. Nelson "strongly advised defense counsel not to call [him] for sentencing" because there would be a high risk he would add to aggravation. (4CIR/JA 2117). Counsel viewed Dr. Nelson's potential testimony as "a minefield." (4CIR/JA 2127).

After hearing two days of conflicting evidence from new experts on the issue of whether Winston was mentally retarded, the district court found: Winston's newly-presented IQ score of 66 was a fact that should have been presented to the state court

first; Winston's habeas counsel's "perceived futility" excuse for not attempting to discover it was not legally justifiable; and the new evidence thus could not be considered by the federal court. *Winston I*, 600 F. Supp. 2d at 734. It held that the ineffective assistance claim must be decided by application of the deference standard in § 2254(d), and upon the record which was before the state court at the time of decision. *Id*. at 737-38.[4] Finding the Virginia Supreme Court's decision not unreasonable, the district court denied relief.

The Fourth Circuit reversed, finding it was error not to consider the newly-presented 66 IQ score. *Winston v. Kelly*, 592 F.3d 535, 553 (4th Cir. 2010) (*Winston II*). It concluded that when a state court denies an evidentiary hearing, then "comity and finality do not require deference when material evidence later surfaces in a federal habeas hearing." *Id*. at 553.[5] It held that § 2254(d) bars *de novo* review

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[4] The district court did consider the new IQ score in connection with its determination of whether Winston had shown actual innocence under *Sawyer v. Whitley*, 505 U.S. 333 (1992), as a gateway to consideration of the defaulted facts. *Winston I*, 600 F. Supp. 2d at 736. The court found, "Winston cannot show that no reasonable juror would have found him eligible for the death penalty" because the record was so conflicting on the issue of retardation. *Id*.

[5] The Fourth Circuit also implied that no deference was due to the Virginia Supreme Court's habeas decision because that court denied Winston's discovery motion. *Winston II*, 592 F.3d at 557. However, the record shows that Winston did not seek discovery from the state court with respect to any *Atkins*-related

(Continued on following page)

only in cases where a federal evidentiary hearing develops no new facts, or where the new facts fundamentally alter the claim, and it expressly found that Winston's new IQ score did *not* fundamentally alter his claim. *Id*. at 550. It ordered the district court to: relitigate Winston's ineffective assistance claim *de novo*, without deference to the state court decision but with consideration of the new IQ score. *Id*. at 557 ("we hold that § 2254(d) does not apply . . . and that the district court should not afford deference to the Supreme Court of Virginia's application of *Strickland*.").

On October 4, 2010, this Court denied the Warden's petition for a writ of certiorari. *Kelly v. Winston*, 131 S. Ct. 127 (2010). On January 19, 2011, the Court issued its opinion in *Harrington v. Richter*, 131 S. Ct. 770 (2011), and on April 4, 2011, the Court issued its opinion in *Cullen v. Pinholster,* 131 S. Ct. 1388 (2011).

On remand, the district court granted relief as a *de novo* matter on the pre-existing record. It expressly held that *Pinholster* and *Richter* could not be considered. *Winston v. Kelly*, 784 F. Supp. 2d 623, 631 n.3 (W.D. Va. 2011) (*Winston III*) (Pet. App. 53).

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claim. (State Habeas Motion for Discovery, Va. Sup. Ct. 3/24/06). Indeed, Winston admitted to the district court that he had not sought help from the state habeas court to find any IQ records because he believed such a motion would have been futile. *Winston I*, 600 F. Supp. 2d at 734.

On appeal, the Fourth Circuit affirmed the district court's judgment and reaffirmed its decision in *Winston II*. It held that *Richter* and *Pinholster* were irrelevant to its conclusion there had been no "adjudication on the merits" under § 2254(d). *Winston v. Pearson*, 683 F.3d 489, 500 (4th Cir. 2012) (*Winston IV*) (Pet. App. 21).

REASONS FOR GRANTING CERTIORARI REVIEW

I. THE FOURTH CIRCUIT'S JUDGMENT IS IN IRRECONCILABLE CONFLICT WITH *RICHTER* AND *PINHOLSTER*, AND THE LOWER COURTS ARE IN CONFLICT, ON THE IMPORTANT ISSUE OF WHETHER A STATE COURT'S MERITS DECISION IS AN "ADJUDICATION ON THE MERITS" WHEN MADE WITHOUT AN EVIDENTIARY HEARING.

Two Terms ago, this Court was compelled in *Richter* and *Pinholster* to make clear that the 1996 Antiterrorism and Effective Death Penalty Act: (1) mandated the dismissal of habeas claims which had been decided reasonably by the state court even if summarily decided; and (2) prohibited consideration, in that reasonableness analysis, of any evidence the prisoner had not presented to the state court. Over the next fourteen months, this Court summarily reversed seven decisions of the courts of appeals that had failed to adhere to the statutory mandate. *See*

Kirshbaum, J., "Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience With Circuit Courts' Failure to Defer to State Tribunals," *BNA Insights*, U.S. Law Week, Vol. 81, No. 2 (July 10, 2012) (citing *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (*per curiam*); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (*per curiam*); *Hardy v. Cross*, 132 S. Ct. 490 (2011) (*per curiam*); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (*per curiam*); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (*per curiam*); and *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (*per curiam*)).

The Fourth Circuit's decision in *Winston IV* likewise requires summary reversal. Not only did *Winston IV* violate the principles discussed in *Richter* and *Pinholster* – just like in the seven reversed decisions – but it expressly and openly proclaimed that a federal court could ignore that precedent whenever the prisoner presented new evidence to the federal court that was "material," and the state court had decided the same claim summarily without conducting an evidentiary hearing. That holding is squarely in conflict with this Court's controlling authorities, other courts of appeals, and the statutory mandate. It openly, directly, and expressly disobeys this Court's commands. It does great damage to the principles of federalism and finality which are so deeply imbedded in the statutory writ of habeas corpus. It is an attempt to dilute and avoid the direct command of this Court that federal habeas courts must defer to reasonable state court decisions.

A. The Fourth Circuit's Decision Is In Irreconcilable Conflict With This Court.

In her dissenting opinion in *Pinholster*, Justice Sotomayor expressly singled out the Fourth Circuit's decision in *Winston II* as an example of the position rejected by the *Pinholster* majority. *Pinholster*, 131 S. Ct. at 1417 (Sotomayor, J., dissenting). Indeed, after *Pinholster* and *Richter* came down, even the lower federal courts in the Fourth Circuit assumed that *Winston II* was wrong. *See Hurst v. Branker*, ___ F. Supp. 2d ___, 2011 U.S. Dist. Lexis 58910 at *28 n.15 (M.D. N.C. June 1, 2011); *Parmaei v. Neely*, ___ F. Supp. 2d ___, 2011 U.S. Dist. Lexis 102641 at *14 (W.D. N.C. Sept. 12, 2011).

Justice Sotomayor's observation was correct. The uncontested facts in this case make clear that relitigation should have been prohibited under *Richter* and *Pinholster*:

- Winston presented his claim of ineffective assistance of counsel to the Virginia Supreme Court along with a host of supporting affidavits and exhibits from his trial counsel, teachers, family, and others;
- The Virginia Supreme Court considered all of Winston's evidence and dismissed his claim for lack of merit without an evidentiary hearing;
- Winston presented the same claim and the same evidence to the federal habeas court;

- The federal court held a hearing to see if the state decision had been unreasonable under § 2254(d); and
- Without any discovery or assistance from the federal court, Winston presented new evidence at the hearing on his claim of ineffective assistance of counsel.

Given these circumstances, the Fourth Circuit's creation of a legal fiction that the state court did *not* adjudicate his claim on its merits cannot survive *Richter* and *Pinholster*.

Improperly permeating the Fourth Circuit's opinions is a disdain for the state court's habeas process that runs contrary to all principles of federalism and comity. (Pet. App. 4: "Refusing – without explanation – Winston's requests. . . . ;" Pet. App. 11: "state court unreasonably refuses to permit 'further development of the facts;'" Pet. App. 12: "We stressed that the state court 'had its opportunity to consider a more complete record, but chose to deny Winston's request for an evidentiary hearing;'" Pet. App. 23: "the state court's unreasonable denial of discovery and an evidentiary hearing;" Pet. App. 24: "court's unreasonable denial of his requests for discovery and an evidentiary hearing;" Pet. App. 35 (emphasis added): "because the Supreme Court of Virginia refused discovery and an evidentiary hearing – and the evidence that would have been gleaned from these vehicles is *critical* to Winston's claim – its decision includes few factual findings to which we

must defer;" Pet. App. 36: "where the state court failed to adjudicate a claim on the merits by refusing to facilitate production of new, material evidence, meaningful deference to its factual findings is well-nigh impossible.") *See Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of cert.) ("It is a regrettable reality that some federal judges *like* to second-guess state courts.") (emphasis in original).

Yet nowhere did the court grapple with the uncontested facts showing that *no reasonable court would have granted an evidentiary hearing*. Those facts showed that it was Winston, represented by multiple habeas counsel, who *affirmatively represented* to the state habeas court that (1) the school's testing records had been destroyed so there was no available evidence to support his claim that the high school reclassification report qualified him under Virginia's *Atkins* statute; and (2) the high school could have classified him as retarded for special education services even if he were not retarded for constitutional purposes under *Atkins v. Virginia*, 536 U.S. 304 (2002). Far from the "unreasonable" state court pictured by the Fourth Circuit, the record provided absolutely no reason why any state court would have granted Winston a hearing. After all, *Winston told the state court there was nothing to find* other than what he already had presented to the court by way of habeas affidavits and exhibits, all of which the state court presumed true

for purposes of a dismissal as a matter of law. (Pet. App. 64-67).

It was only after Winston came up on his own with new evidence in the federal court that the Fourth Circuit decided the state court should have held an evidentiary hearing. That backwards-looking, result-oriented analysis, holding that the state court's denial of a hearing was the "linchpin" (Pet. App. 11) of its legal fiction that the state court *did not adjudicate the claim on its merits*, was inexplicable, as well as wrong. It simply rewrote AEDPA to carve out an exception to the deference standard large enough to accommodate, in the great majority of habeas cases, the very *de novo* review condemned by AEDPA and this Court. *See* Brief of *Amici Curiae* State of Idaho and 30 Other States in Support of Respondent, *Bell v. Kelly*, 2007 U.S. Briefs 1223 (2008) (great majority of habeas petitions disposed of without evidentiary hearings in state court).

Its attempt to distinguish *Pinholster* and *Richter* fare no better. The Fourth Circuit defended its decision in *Winston II* (that no deference was due to the merits decision of the state court) as the "law of the case" that was not countermanded by this Court's later decisions. It implied that it was only "conjecture" as to whether this Court meant what it said. (Pet. App. 17). It had to admit that *Pinholster* was a case where the "Supreme Court of California unanimously and summarily dismissed" *without an evidentiary hearing* the prisoner's habeas petitions (Pet. App. 17), and where, nevertheless, this Court

"held that § 2254(d) 'applies even where there has been a summary denial.'" (Pet. App. 19). But because this holding so obviously conflicted with *Winston II*'s conclusion that a summary dismissal (without an evidentiary hearing) disentitled the State to § 2254(d) deference, the Fourth Circuit had to search some distance for an explanation. It found that in Justice Sotomayor's dissenting opinion: "Justice Sotomayor's dissent explored the reach of the majority's analysis" (Pet. App. 19); and "[d]ialogue between Justice Sotomayor and the majority shed light on the Court's holding. . . ." (Pet. App. 20).[6]

The court thus relied, not on the majority opinion, but rather on the Justice's dissenting comment in a footnote, *see Pinholster*, 131 S. Ct. at 1417 n.5, that "the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." (Pet. App. 20). But the majority in *Pinholster* neither discussed nor adopted Justice Sotomayor's comment. It is inexplicable how the Fourth Circuit could fashion a new AEDPA requirement and then, when faced with subsequent controlling authority from this Court to the contrary,

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[6] Of course, the Fourth Circuit reversed course later when it rejected any reliance on Justice Sotomayor's observation that *Winston II* was a case that was *contrary* to *Pinholster*: "[A]s a dissenter, Justice Sotomayor's views on the ramifications of the majority opinion are not sufficient. . . ." (Pet. App. 25).

defend it as "the law of the case" by reference to one comment in a footnote of a dissenting opinion. And this is especially so where the controlling opinions in both *Pinholster* and *Richter* so clearly outlawed second-guessing of exactly that type of a state court's merits decision. It would be appropriate for this Court to grant certiorari and summarily reverse if for no other reason than to corral the lower court in this case.

The Fourth Circuit also relied on Justice Sotomayor's comment in the same footnote that "even when a claim was adjudicated on the merits, . . . 'situations in which new evidence supporting' such a claim 'gives rise to an altogether different' claim that is not subject to the strictures of § 2254(d)(1)." (Pet. App. 20). Justice Sotomayor's observation was not unusual given that this Court and AEDPA treat *new* claims made in federal court differently: they are unexhausted and sometimes procedurally barred. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 162 (1996) (claims not presented to the Virginia Supreme Court are both unexhausted and barred in federal court). But the Fourth Circuit expressly found Winston's claim was *not transformed into a new claim* by his new evidence in federal court, and therefore was not "new." *See Winston II*, 592 F.3d at 550-51. Accordingly, Justice Sotomayor's footnote observation about the possible impact of § 2254(d) on *new* claims is simply irrelevant to Winston's case, no matter what weight it might hold, making the Fourth Circuit's reliance on it in *Winston IV* all the more incomprehensible.

The Fourth Circuit further relied on Justice Sotomayor's hypothetical in which new, withheld evidence comes to light in a state court proceeding to support a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), but a state's procedural rules do not allow its consideration. (Pet. App. 20); *Pinholster*, 131 S. Ct. at 1418-19 (Sotomayor, J., dissenting). The Fourth Circuit pointed out that the *Pinholster* majority, in a footnote, commented on her hypothetical as follows: "Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, . . . Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements . . . may well present a new claim." (Pet. App. 21); *Pinholster*, 131 S. Ct. at 1401 n.10. Again, the Fourth Circuit in Winston's case already found that his new evidence did *not* "present a new claim." Whatever can be said about Justice Sotomayor's hypothetical, it is irrelevant to Winston's case because his case involves no *Brady* claim.[7] And, again, his new evidence did not transform his claim of ineffective assistance into a new one, *as found by the Fourth Circuit*.

[7] *Brady* claims are distinct from almost all other post-conviction claims because the evidence to prove them lies within the complete control of the State. By contrast, claims of ineffective assistance, like Winston's claim, almost always involve evidence which lies within the complete control, and knowledge of, the prisoner, and of which almost always the State has no knowledge.

The Fourth Circuit next recited the precise holding of *Richter*, yet inconceivably concluded that "we find nothing in those decisions that renders infirm our analytical framework in *Winston* [*II*]." (Pet. App. 21). That precise holding of *Richter* follows:

> When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Cf. *Harris* v. *Reed*, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

Richter, 131 S. Ct. at 784-85. Given this holding, the Fourth Circuit's conclusion that "[n]either decision clarifies the 'adjudication on the merits' requirement" is puzzling, at least. What is not clear about a holding stating that if a claim has been presented and denied, it has been adjudicated on the merits under § 2254(d)?

The Fourth Circuit implied that this Court simply glossed over, or must have missed, the fact that, in both *Pinholster* and *Richter*, the state courts had dismissed summarily *without an evidentiary hearing*. (Pet. App. 22, describing this Court's "terse acknowledgment" of adjudication on the merits and the parties' lack of "focus" on whether the claims had been adjudicated on the merits; Pet. App. 24:

describing this Court's "cursory assumption" that there was an adjudication on the merits). Under the Fourth Circuit's reading, it simply escaped this Court's attention that these cases had been decided without a state court evidentiary hearing.

Nothing could be more incorrect. Apart from the unwarranted implicit criticism of this Court's decision-making, it also is a conclusion completely at odds with the decisions themselves. The precise issue in *Richter* was whether Congress intended to bar relitigation in federal court even where the state court proceeding had been so summary as to contain no opinion explaining the denial of the claim, much less an evidentiary hearing. *Pinholster* then built on *Richter* by addressing whether Congress meant to bar federal courts from expending their resources to hold hearings to develop new evidence on claims already decided by state courts when that new evidence could not be considered under § 2254(d).

The only precondition to deference review in both cases, and its corollary bar to relitigation, was that the state court must have decided the claim on its merits instead of on procedural grounds. The very fact that this Court made a point of describing the summary nature of the state court proceedings and decisions in both *Richter* and *Pinholster* demonstrates that the application of § 2254(d) to exactly those kind of summary proceedings was no oversight. But because the Fourth Circuit still persists in maintaining the view that AEDPA deference is preconditioned on the state court having held an

evidentiary hearing, this Court should grant certiorari to close that last loophole of federal court avoidance of AEDPA.

The Fourth Circuit also said this Court's footnote 10 in *Pinholster* showed that the Court did not decide what "adjudicated on the merits" means. (Pet. App. 24). As quoted above, in footnote 10, this Court noted that it was not deciding "where to draw the line between new claims and claims adjudicated on the merits." 131 S. Ct. at 1401 n.10. But again, even if this Court was acknowledging the obvious, *i.e.*, that deference could not be accorded to a decision where the claim had not been presented to a state court, that acknowledgment should have had no impact on the Fourth Circuit's holding in *Winston IV* because it already had found that Winston's claim was *not* new in *Winston II*. *See* 592 F.3d at 550-51. Clearly, the Fourth Circuit should have found that *Pinholster* overruled *Winston II*'s holding that no deference was due to a decision which dismissed the same claim on its merits.

Finally, the Fourth Circuit made the following statement: "*Richter* mentions nothing of possible defects in a state-court decision *save the summary nature of its disposition*, and we accordingly conclude that it does not affect our analysis in *Winston* [*II*]." (Pet. App. 25, emphasis added). It is unclear how this Court could have said more plainly that a summary state court proceeding, denying the merits of the claim, bars relitigation in federal court if not unreasonable under § 2254(d). It must be concluded

that the Fourth Circuit was more interested in maintaining its own erroneous precedent than following the controlling precedent of this Court. The Court should grant certiorari to reverse summarily the Fourth Circuit's intractable adherence to an incorrect interpretation of AEDPA.

B. The Lower Courts Remain In Conflict.

One would think that after *Pinholster* and *Richter*, the lower federal habeas courts would have adhered to this Court's unmistakable admonition against relitigation of reasonably decided claims. But the courts still are relitigating such claims, at great cost to federalism, comity, judicial resources, and the system of justice AEDPA was intended to promote rather than hinder. *See Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) ("the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction. . . .") (second internal quotation marks deleted), *quoting Richter*, 131 S. Ct. at 786.

Richter hopefully took care of one facet of an erroneous theory against AEDPA deference that was based on the brevity, or summary nature, of the state court's decision. In this case, the Fourth Circuit has articulated another facet of that erroneous theory, based on the sufficiency of the state court proceeding itself. As discussed above, the Fourth Circuit believes that this Court's pronouncements in *Pinholster* and

Richter do not apply where the state court denied an evidentiary hearing, under its tortured re-definition of "adjudicated on the merits." That erroneous belief persists in other courts of appeals.

In *Robinson v. Howes*, 663 F.3d 819 (6th Cir. 2011), the Sixth Circuit held that, after *Pinholster*, the issue of whether the claim was adjudicated on the merits now has become more important because this Court has limited the federal courts not only to the deference standard, but also to the record as it existed in the state court. It found that, under its pre-*Pinholster* cases, the claim would get no deference review because the state court had not held an evidentiary hearing. It then held that it would not determine whether *Pinholster* changed the circuit's law because, assuming the state court unreasonably denied a hearing and, as a consequence, the state court's decision was not an adjudication on the merits, the prisoner was not entitled to relief upon *de novo* review. 663 F.3d at 823-25.

The Sixth Circuit followed suit in *Plummer v. Jackson*, 2012 U.S. App. Lexis 16797 at *9-12 (6th Cir. Aug. 8, 2012) (unpub.) where, after reciting the language of *Pinholster*, it went on to hold that, regardless, the prisoner was not barred from developing new evidence because the state court had denied a hearing. And then again in *Williams v. Lafler*, 2012 U.S. App. Lexis 17359 at *7 (6th Cir. Aug. 14, 2012) (unpub.), where it analyzed the claim on its merits, and, finding no merit, assumed *de novo*

review was authorized because the state court held no evidentiary hearing. This "cart-before-the-horse" method is, of course, precisely what *Pinholster* intended to end. *See Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring) (the federal court reaches the merits of the claim, and reaches the issue of whether to hold a hearing, only if the state court unreasonably decided the claim or its procedural bar was inadequate). The Sixth Circuit still adheres to its pre-*Pinholster* cases denying AEDPA deference to state court decisions if the state court did not hold an evidentiary hearing.

In *Black v. Workman*, 682 F.3d 880, 895 (10th Cir. 2012), the Tenth Circuit stated that its prior law in *Mayes v. Gibson*, 210 F.3d 1284 (10th Cir. 2000), barring deference to state court decisions that had been made without an evidentiary hearing, was of "questionable authority" after *Pinholster*. But then, much like the Fourth Circuit, it relied on Justice Sotomayor's dissenting footnote comment in *Pinholster* which "'assume[d] that the majority d[id] not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself.'" *Black*, 682 F.3d at 895, *quoting Pinholster*, 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting). Because the Tenth Circuit found the prisoner was at fault for not developing the facts in state court, it proceeded to apply AEDPA deference. *Id*., 682 F.3d at 895. Presumably, had it found the

state court's process to blame, it would have applied its pre-*Pinholster* law as described in *Mayes*. In any event, the Tenth Circuit clearly relies on Justice Sotomayor's view that the majority in *Pinholster* limited its holding requiring deference.

In contrast to the Fourth, Sixth, and Tenth Circuits are the First, Fifth, and Ninth Circuits. In *Atkins v. Clarke*, 642 F.3d 47 (1st Cir.), *cert. denied*, 132 S. Ct. 446 (2011), the First Circuit rejected the prisoner's argument that his claim had not been adjudicated on the merits because the state court had held no hearing. The prisoner relied on the Fourth Circuit's decision in *Winston II* as well as the Tenth Circuit's *en banc* decision in *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). *Atkins*, 642 F.3d at 49. *Atkins* explained that *Winston II* and *Workman* had been overruled by *Pinholster*. *Id*. Likewise, in *Valdez v. Cockrell*, 274 F.3d 941, 950-51 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002), the Fifth Circuit held that AEDPA deference applies to claims the state court rejected on their merits even if the state court held no hearing and the state process was not "full and fair."

In *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), the Ninth Circuit held as follows:

> We decline to hold that AEDPA's reference to "adjudicated on the merits" authorizes us to review the form or sufficiency of the proceedings conducted by the state court. Thus, we will not read into "adjudicated on the merits" a requirement that the state

> have conducted an evidentiary hearing, or indeed, any particular kind of hearing. Rather, we give the phrase its ordinary meaning: in general, "an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice.'"

Lambert, 393 F.3d at 965-66. Still, the Ninth Circuit sees nothing wrong with the federal courts grading a state court's process when determining whether the federal court should hold an evidentiary hearing. *See Miles v. Martel*, ___ F.3d ___, 2012 U.S. App. Lexis 20346 at *38 n.9 (9th Cir. Sept. 28, 2012) (holding that *Pinholster* did not prohibit such assessment).

It is clear that, even after *Richter* and *Pinholster*, the lower courts are in conflict on the issue of whether AEDPA deference applies when the state court has decided the claim on its merits but without an evidentiary hearing. The Court should grant certiorari to resolve this ongoing, important issue.

C. AEDPA Does Not Permit The Exception Created By The Fourth Circuit.

Nowhere in AEDPA do the words "evidentiary hearing" appear except in § 2254(e)(2) where Congress expressly *forbade* evidentiary hearings in federal court unless the prisoner meets certain stringent requirements. As the court held in *Lambert*, 393 F.3d at 965-66, there is no requirement in the statute, explicit or otherwise, that a state court must

have held a hearing in order to obtain deference under § 2254(d).

Giving the words "adjudicated on the merits" their ordinary meaning, the decisive qualifying factor is "not an 'evidentiary hearing' [in state court]; rather, it is whether the state court adjudicated the defendant's claims" on the merits, however summarily, instead of on procedural grounds. *Id*., 393 F.3d at 968. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (undefined terms in a statute should be given their ordinary meaning). That ordinary meaning comports with *Richter*'s and *Pinholster*'s statutory analyses, whereas the Fourth Circuit's rule impermissibly rewrites the statute, and continues incorrectly to conflate the "diligence" requirement in § 2254(e)(2) with the threshold analysis required by § 2254(d).

That ordinary meaning also comports with the principles of federalism and comity. In a federal habeas proceeding, a district court's decision to deny an evidentiary hearing and discovery is reviewed for an abuse of discretion. *See, e.g., Muhammad v. Kelly*, 575 F.3d 359, 375 (4th Cir.), *cert. denied*, 130 S. Ct. 541 (2009). Yet the Fourth Circuit's "grading papers" approach to second-guessing the state court's process, down to deciding whether it was best to hold an evidentiary hearing instead of dismissing on the papers filed, inequitably inflicts on the state court a standard which the federal court is not required to reach in its own cases.

AEDPA intends to get the federal courts out of the business of micro-judging what the state courts already have litigated. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1396 (2012) (Scalia, J., dissenting) ("federal habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a license to penalize a state court for its opinion-writing technique," quoting *Richter*, 131 S. Ct. at 786). The Fourth Circuit's "readiness to find error in the [Virginia] court's opinion is 'inconsistent with the presumption that state courts know and follow the law. . . .'" *Id*., 132 S. Ct. at 1376 (Scalia, J., dissenting), *quoting Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Its extra-statutory creation invites the federal courts into a never-ending re-assessment, not only of *what* the state court decided, but also of *how* the state court decided.

As this Court recognized, § 2254(e)(2) does not come into play until § 2254(d)'s hurdle has been overcome by the prisoner. *See Pinholster*, 131 S. Ct. at 1400 (where prisoner does not prove the state court's decision was unreasonable under § 2254(d), there is no need to reach the issue under § 2254(e)(2) of whether the prisoner is entitled to a hearing). In its quest to evade the strictures of § 2254(d), the Fourth Circuit created a legal fiction that the state court did not "adjudicate on the merits" a claim it unquestionably addressed, assessed, and denied for lack of merit. Certiorari is required to insure that the mandate of Congress in AEDPA will not be circumvented.

II. THE FOURTH CIRCUIT VIOLATED *STRICKLAND v. WASHINGTON*'S BEDROCK TWIN PRINCIPLES THAT TRIAL COUNSEL MAY NOT BE FOUND INEFFECTIVE BASED ON EVIDENCE THAT WAS UNAVAILABLE TO COUNSEL AT THE TIME OF THE TRIAL AND THAT COUNSEL'S CONDUCT ACTUALLY MUST HAVE PREJUDICED THE JURY'S SENTENCING VERDICT.

The Fourth Circuit's *de novo* judgment that trial counsel were ineffective simply cannot be squared with *Strickland* or this Court's most recent analysis of *Strickland* in *Richter* and *Pinholster*. The Fourth Circuit gave lip service only to the *Strickland* standard and then proceeded to apply a *post hoc* rationalization of what it believed counsel should have done. It then rubber-stamped the district court's perfunctory conclusion that prejudice had been shown, with hardly any analysis of the facts, much less an application of the law to the facts.

Even a cursory reading of the record of the federal evidentiary hearing demonstrates that Winston failed utterly to overcome the strong presumption that counsel performed reasonably under the circumstances existing at the trial. *See Strickland*, 466 U.S. at 689 ("[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time."). It likewise demonstrates that Winston failed to prove a reasonable probability that the jury would have sentenced him to life had counsel attempted a retardation defense. *See id.* at 695.

A. The Virginia Supreme Court's Decision Was Not Unreasonable.

The district court found in 2009 that the state court's decision was not unreasonable under § 2254(d). *Winston I*, 600 F. Supp. 2d at 737-38. That correct finding was based on the following facts and circumstances:

- the record did not support a finding of retardation under Virginia law;
- the Virginia Supreme Court fairly summarized the evidence that three IQ tests were above the level for retardation, the school's reclassification to mild mental retardation was for special education purposes, the school could find a student mentally retarded who did not meet the standard for retardation so as to bar a death sentence, and the prisoner submitted no objective data to show retardation for that purpose;
- the Virginia Supreme Court was the final arbiter of Virginia law as to whether the IQ scores could be manipulated by use of Winston's

proposed score-lowering theories, and it properly found they could not; and

- as a *de novo* matter, Winston presented no evidence at the federal hearing compelling the use of the score-lowering theories because the experts were in dispute on the matter.

Id., 600 F. Supp. 2d at 738-40. That decision unquestionably was correct. As *Richter* made clear, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 785-86; *accord, Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009). "[A] state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. *Strickland* claims must receive double deference by the federal courts. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003); *Pinholster*, 131 S. Ct. at 1403; *Richter*, 131 S. Ct. at 788; *Mirzayance*, 556 U.S. at 123.

Winston affirmatively represented to the state habeas court that there was no IQ score in existence at the time of trial (or during state habeas review) to support the high school's reclassification. *Winston I*, 600 F. Supp. 2d at 725-26. The uncontradicted evidence in the district court demonstrated that trial counsel's premier mental retardation expert, Dr.

Nelson, had all the records, interviewed the family, and concluded that a claim of retardation could not be supported. He also concluded that Winston had an antisocial personality disorder, and probably psychopathy, and that counsel thus should not use him as a witness. Counsel therefore affirmatively, and reasonably, took another tack, arguing that the Commonwealth had to *disprove* mental retardation. That defense was directly contrary to a strategy of *proving* mental retardation.

Applying "double deference," the Virginia Supreme Court's decision cannot be deemed unreasonable. In *Wood v. Allen*, 558 U.S. 290, 130 S. Ct. 841, 846-47 (2010), the court of appeals had upheld the State's reasonable determination that trial counsel made a reasonable, strategic decision not to claim mental retardation at trial. Just as in Winston's case, Wood's trial counsel had an expert's opinion that Wood was not retarded, and, also as in Winston's case, that expert otherwise would not have been beneficial to their client's case. 130 U.S. at 846. Just as in *Wood*, the district court here properly held in its first decision that the state court's decision was reasonable.

B. There Could Be No *Strickland* Ineffectiveness Even Reviewed *De Novo*.

The district court's second, *de novo* decision, and the Fourth Circuit's decision below, categorically conflicted with the controlling standard of review. As

shown, the *Strickland* analysis requires great deference to counsel's strategy.

> An attorney can avoid activities that appear "distractive from more important duties." *Bobby* v. *Van Hook*, 130 S. Ct. 13[, 19] (2009) (*per curiam*). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See *Knowles*, 556 U.S. 111[, 127]; *Rompilla* v. *Beard*, 545 U.S. 374, 383 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 525 (2003); *Strickland*, 466 U.S., at 699.

Richter, 131 S. Ct. at 789. The lower courts' criticism of trial counsel for not reading the one-page school reclassification record (Pet. App. 32-33), when it is uncontested that counsel obtained that record and provided that record to the premier retardation expert for assessment, is precisely the type of hindsight criticism forbidden by *Strickland*. *See Richter*, 131 S. Ct. at 789 ("It is only because forensic evidence has emerged . . . that the issue could with any plausibility be said to stand apart. Reliance on 'the harsh light of hindsight' to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent. *Cone*[*v. Bell*], 535 U.S. [685], 702 [(2002)]; *see also Lockhart*[*v. Fretwell*], 506 U.S. [364,] 372 [(1993)].").

The Fourth Circuit pointed out that trial counsel said at the federal hearing that the reclassification

record "would have raised the potential for a successful claim." (Pet. App. 33). However, the fact that counsel did not read that one record could not remove or lessen its "potential." Counsel gave that record, along with all the hundreds of others, to their expert. Dr. Nelson reviewed it and its potential was explored, but that potential was insufficient to support a claim of retardation in the expert's opinion. Neither the district court nor the Fourth Circuit ever contended with the unrebutted fact in this case that Dr. Nelson, who had the records, did *not* support such a claim.[8] The issue under *Strickland*'s performance prong is reasonableness, not hindsight likelihood of success had another course been taken. *See Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").

The Fourth Circuit completely ignored Dr. Nelson's damning assessment of psychopathy, counsel's belief his testimony would be a "minefield,"

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[8] The Fourth Circuit's reliance on Dr. Nelson's after-the-fact testimony at the federal hearing to *support* the claim of ineffectiveness is puzzling. As the Fourth Circuit recounted, all Dr. Nelson could say, four years after the trial, was that he did not remember specifically reviewing the school reclassification report, that it would have been important to his analysis, and that it was "possible" his opinion might have been different had he had the other new evidence of testimony from teachers about Winston's abilities. (Pet. App. 34-35). *Dr. Nelson never testified he did not review the record, much less that his opinion had changed*.

and the fact that, had counsel used Dr. Nelson, the Commonwealth would have obtained all of Dr. Nelson's opinions and presented its own expert to demonstrate Winston was not retarded, just as the Commonwealth did at the federal hearing. *See Richter*, 131 S. Ct. at 790 ("It would have been altogether reasonable to conclude that this concern justified the course Richter's counsel pursued. Indeed, the Court of Appeals. . . . failed to recognize that making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter's case."). *Accord Pinholster*, 131 S. Ct. at 1410 (opening door to rebuttal by State's expert is two-edged sword that supports counsel's decision not to do so).

And even more inexplicably, the Fourth Circuit completely ignored the fact which never has been challenged, that, at the time of the trial, the school system told counsel that all the records had been destroyed and thus the 66 IQ score *was not available*.[9] As a matter of law, counsel cannot be

[9] Only by the most speculative hindsight reasoning did the Fourth Circuit conclude that trial counsel could have found the new IQ score: *if* counsel read the reclassification report, *if* counsel then found the psychologist who turned up years later, and *if* the psychologist then found her report, counsel could have made a retardation defense. The court, however, persisted in ignoring the fact that Dr. Nelson did not support the defense and

(Continued on following page)

faulted for not obtaining, or presenting, that which did not exist at the time of trial.[10] The Fourth Circuit simply jettisoned *Strickland*'s core admonition to avoid hindsight analysis of counsel's performance. *See Strickland*, 466 U.S. at 689.

The Fourth Circuit's brief assessment of *Strickland* prejudice was equally contrary to the law. As *Richter* made clear:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. . . . This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.,* at 693.

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therefore counsel would have been left with a claim and no expert, no matter what new IQ score existed.

[10] Winston never has faulted trial counsel for not finding the missing IQ score. This is not surprising given that it took his *state and federal habeas counsel four years*, until two weeks before the district court hearing, to find what they presented as the missing score.

131 S. Ct. at 792; *see also Pinholster*, 131 S. Ct. at 1408. Contrary to this directive lies the district court's perfunctory *de novo* decision finding prejudice: it recited the fact that the experts at the federal hearing *disagreed* as to whether Winston was retarded, and the fact that Winston presented four IQ scores, with only one slightly below the cut-off point. It then concluded that it could *not* say "the outcome likely would be different," but still there was a reasonable probability the outcome would have been different. (Pet. App. 60). How that quixotic finding could have withstood appellate scrutiny is a mystery.

But the Fourth Circuit's brief analysis was equally unfaithful to *Strickland*'s principles. It found prejudice based on the new IQ score alone. (Pet. App. 35). In doing so, it illogically rejected *Green v. Johnson*, 515 F.3d 290 (4th Cir.), *cert. denied*, 553 U.S. 1073 (2008), wherein the Virginia Supreme Court had found that retardation was not shown by presenting three IQ scores above 70, and one below. (Pet. App. 36). The Fourth Circuit rejected *Green* because *Green* accorded deference to the Virginia court (Pet. App. 36), entirely missing the point that the Virginia court had pronounced what the law was governing Virginia claims of retardation in a case that could not have been more identical. As a matter of law, Winston could not show the required sub-average intelligence to support a claim of retardation even with the fourth, below-70 score. *See Atkins*, 536 U.S. at 317 ("we leave to the States the task of developing appropriate ways to enforce the

constitutional restriction upon its execution of sentences."). Thus, the prejudice required by *Strickland* also could not be shown.

Again, at the time of trial, counsel's *own expert opined that Winston was not retarded* and that expert never has opined differently. It is legally impossible to conclude that, if counsel had read the one-page high school reclassification report, there is a reasonable probability they would have elected to make an affirmative claim of retardation despite the fact their own expert could not support it. It is equally legally impossible to conclude there is a reasonable probability that, had a challenge been made by counsel, a jury would have found Winston proved he was retarded. The Court should grant certiorari and summarily reverse the lower court's decision that is so completely at odds with controlling authority.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

LEON J. WINSTON, Petitioner-Appellee, v. EDDIE L. PEARSON, Warden, Sussex I State Prison, Respondent-Appellant.
LEON J. WINSTON, Petitioner-Appellee, v. EDDIE L. PEARSON, Warden, Sussex I State Prison, Respondent-Appellant.

No. 11-4, No. 11-5

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

683 F.3d 489; 2012 U.S. App. LEXIS 12937

May 15, 2012, Argued
June 25, 2012, Decided

JUDGES: Before GREGORY, DUNCAN, and DIAZ, Circuit Judges. Judge Diaz wrote the opinion, in which Judge Gregory and Judge Duncan joined.

OPINION BY: DIAZ

OPINION

DIAZ, Circuit Judge:

A Virginia jury convicted Leon Winston of capital murder. The court, following the jury's recommendation, sentenced Winston to death. Winston's direct appeals failed and his conviction became final, at which point he sought habeas relief in state court. The Supreme Court of Virginia denied relief, rejecting Winston's requests for discovery and an evidentiary hearing.

Winston then filed a habeas petition in federal court. The district court granted him an evidentiary hearing to explore whether his trial attorneys were

ineffective for failing to raise the claim under *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that his mental retardation categorically barred imposition of a death sentence. But the court, after presiding over the hearing, reversed course and held that it was precluded from considering any evidence adduced during the federal proceeding. Looking only to facts presented in the state habeas proceeding and conducting a deferential review of the state-court decision, the court denied Winston's petition for habeas relief. *Winston v. Kelly,* 600 F. Supp. 2d 717, 722-23 (W.D. Va. 2009).

We vacated in part the district court's decision on appeal, ordering it to conduct a de novo review of Winston's ineffectiveness claim while entertaining the evidence offered during the federal hearing. *Winston v. Kelly (Winston I),* 592 F.3d 535, 553 (4th Cir. 2010). On remand, the district court granted Winston's petition for habeas relief and vacated his death sentence. *Winston v. Kelly,* 784 F. Supp. 2d 623, 626 (W.D. Va. 2011). Virginia timely filed this appeal.

The Commonwealth contends principally that intervening Supreme Court precedent has eroded the foundation of our prior opinion in *Winston I,* compelling us to forgo de novo review and instead accord substantial deference to the Supreme Court of Virginia's decision denying habeas relief. Under the appropriate standard, maintains the Commonwealth, Winston's habeas petition lacks merit.

We disagree and find nothing in recent Supreme Court decisions that calls into question our reasoning in *Winston I,* which, as law of the case, we may not lightly disturb. Reviewing Winston's ineffectiveness claim de novo, we agree with the district court that Winston has established that his trial attorneys rendered deficient performance that prejudiced him. We therefore affirm the district court's grant of habeas relief.[1]

I.

A.

On the morning of April 19, 2002, two men broke into Rhonda and Anthony Robinson's home and killed them. Police later arrested Winston, and the Commonwealth charged him with capital murder and several lesser crimes. Winston proceeded to trial, at which a jury found him guilty of capital murder and related crimes.

During the sentencing phase of the trial, Winston's attorneys presented records of his psychological evaluations and testimony about his family history. The attorneys used the records and testimony as ordinary mitigating evidence to illuminate Winston's troubled childhood and subaverage intellectual functioning, but not to establish mental retardation.

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[1] As we explain below, we reject Winston's cross-appeal and affirm the district court's judgment as to remedy.

At the conclusion of the sentencing proceeding, the jury recommended a sentence of death for each of the murders. Agreeing with the jury's recommendation, the court sentenced Winston to death. The Supreme Court of Virginia affirmed the convictions, and the U.S. Supreme Court denied Winston's petition for certiorari.

B.

Winston filed a habeas petition in the Supreme Court of Virginia, raising dozens of claims. Refusing – without explanation – Winston's requests for an evidentiary hearing and discovery, the Supreme Court of Virginia denied all relief.

Germane to this appeal, the court rejected Winston's *Atkins* and *Atkins-related* claims. Winston maintained that *Atkins* barred his execution because he met Virginia's statutory definition of mental retardation. In support of this contention, Winston offered a Fairfax County Public Schools special-education eligibility reclassification form ("Reclassification"), which indicated that school officials had reclassified him as mentally retarded. He was unable to proffer any IQ scores or other data on which counselors relied to make this determination. Winston also submitted the scores of three IQ tests, all of which exceeded 70, the maximum score that Virginia accepts as evidence of mental retardation.

The Supreme Court of Virginia first held that Winston's *Atkins* claim, raised for the first time in the habeas petition, was barred for failure to exhaust. It then considered whether the failure of Winston's trial attorneys to present evidence of his mental retardation amounted to ineffectiveness of counsel, such that it would excuse the procedural default. The court answered this query in the negative, concluding that Winston had "failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different." J.A. 306. It found no evidence that Winston had been "diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature." *Id.* 305-06. None of the three IQ scores presented to the court were 70 or below, which precluded Winston from meeting the state's criteria for mental-retardation classification. Although Winston presented the Reclassification, the court noted that students may be classified as mentally retarded for educational purposes even if they have an IQ above 70.

C.

1.

Winston next filed a habeas petition in the U.S. District Court for the Western District of Virginia, pursuant to 28 U.S.C. § 2254. Winston's petition

raised in excess of thirty claims. In an initial decision, the court rejected all of the claims save for his *Atkins* and *Atkins-related* claims. As to those, the court "conclude[d] that an evidentiary hearing [was] appropriate to determine whether counsel rendered ineffective assistance at sentencing both as a free-standing claim and as cause and prejudice to excuse procedural default of Winston's *Atkins* claim." J.A. 611. Winston's diligence in pursuing the claims, combined with the real possibility that he could prevail even under the deferential standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), confirmed the propriety of ordering an evidentiary hearing, reasoned the court.

Winston used the evidentiary hearing to sharpen his ineffective-assistance-of-counsel claim. Most crucial, the hearing enabled Winston to produce for the first time a 1997 IQ test, taken when he was sixteen years old, reflecting a score of 66. Because Virginia law mandates that an individual prove an IQ of 70 or below to support his classification as mentally retarded, presentation of the 1997 test was vital to Winston's *Atkins* ineffectiveness claim.

The attorneys who represented Winston at trial, Glenn Berger and B. Leigh Drewry, Jr., testified at the evidentiary hearing. Although they obtained Winston's educational records from Fairfax County Public Schools, neither Berger nor Drewry read the complete records. Instead, they sent them to Dr. Evan Nelson, Winston's court-appointed mental-health expert. The attorneys testified that they had no

strategic reason for neglecting to review the records prior to forwarding them to Nelson. Included in the records that counsel failed to review was the Reclassification, which reflected school officials' determination that Winston was mentally retarded. As Drewry, who led preparation for the penalty phase of the trial, testified, review of the Reclassification would have prompted him to investigate Winston's mental retardation.

Not only did counsel not review Winston's school records, they failed to interview any of Winston's teachers or counselors at the school. At the evidentiary hearing, several school officials recounted their experiences with Winston, which convinced them of his severe limitations in cognitive functioning. These officials would have testified during Winston's sentencing hearing, but his attorneys never sought them out. Marilynn Lageman, one such official, would have provided evidence of Winston's 66 IQ score had she been contacted by Winston's attorneys. Although the result of that test was not included in the school records obtained by counsel, Lageman testified that the score was saved on a computer disk in her office at the time of the trial. Because she was a school psychologist who was actively involved with Winston's education, Lageman's name appeared on some of the records obtained by counsel. Drewry testified that he would have interviewed Lageman if he had seen the records listing her name.

Nelson, Winston's court-appointed mental-health expert, testified about his evaluation of Winston's

case. Based on the information at his disposal, Nelson concluded at the time of trial that Winston likely did not satisfy the diagnostic criteria for mental retardation under Virginia law. Although he reviewed the school records obtained by counsel, Nelson did not recall specifically considering the Reclassification. He stated that a closer review of that form along with receipt of information from Winston's school teachers and counselors would have been important to his analysis. Indeed, had Nelson noticed the Reclassification, he would have investigated the circumstances surrounding it. For his part, Drewry stated that he would have followed up with Nelson and brought the Reclassification to his attention, had he noticed it. Nelson further testified that the 66 IQ score would have been significant to his analysis. In sum, Nelson stated that consideration of the Reclassification, the 66 IQ score, and information from Winston's school teachers and counselors could have impelled him to determine that Winston was, in fact, mentally retarded under state law. "It's certainly possible," testified Nelson, "my opinion might have been different with this wealth of other information." *Id.* 720.[2]

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[2] Two other experts submitted reports for use in the evidentiary hearing. Dr. Daniel Reschly, Winston's expert, determined that Winston was mentally retarded under Virginia law. The Commonwealth countered with a report from Dr. Leigh Hagan, who concluded that Winston was not mentally retarded pursuant to Virginia law.

As it played out at trial, however, Winston's attorneys decided not to call Nelson to testify. Drewry felt that Nelson's testimony would in fact damage Winston's case, as it would allow the Commonwealth to introduce Nelson's conclusions that Winston exhibited antisocial behavior and had a capacity for future dangerousness. Berger and Drewry thus chose not to press the claim that Winston was mentally retarded under Virginia law.

Though the district court allowed Winston to develop his *Atkins* and *Atkins-related* claims at an evidentiary hearing, it ultimately determined that it could not consider any of the evidence produced for the first time in the federal arena. Finding that the 66 IQ score "fundamentally alter[ed] Winston's ineffective assistance claim and [Winston] [could not] account for his failure to present it to the Supreme Court of Virginia," the court held that Winston failed to exhaust the newly positioned claim, constraining it to consider the claim only "as it was fairly positioned before the Supreme Court of Virginia." *Winston,* 600 F. Supp. 2d at 722.

The district court moreover noted that the state-court decision qualified as an adjudication on the merits, requiring it to apply the deferential standards of 28 U.S.C. § 2254(d). Viewing only the evidence presented in state court through the prism of § 2254(d), the court concluded that "the Supreme Court of Virginia's adjudication on the merits of Winston's ineffective assistance claim, at least as to *Strickland*'s [*Strickland v. Washington,* 466 U.S. 668,

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] prejudice prong, was not unreasonable." *Winston,* 600 F. Supp. 2d at 723. The court consequently denied Winston's habeas petition.

2.

We vacated in part the district court's decision on appeal, deeming erroneous its denial of Winston's *Atkins* and *Atkins-related* claims but affirming on all other grounds. We first held that "it was error for the district court to refuse to consider [the 66 IQ score] because the score does not fundamentally alter Winston's claims and because habeas counsel was diligent in searching for it." *Winston I,* 592 F.3d at 539. Explaining that a district court may "consider new evidence if it supports factual allegations for which there is already at least some support in the state record," we concluded that Winston had cleared this bar by "offer[ing] some evidence in state court to support the factual claim that he possesses significantly sub-average intellectual functioning as measured by a standardized test." *Id.* at 550. And because Winston was diligent in seeking the evidence to support his *Atkins* and *Atkins-related* claims, we determined that the court on remand was required to consider the claims with the 66 IQ score as evidence.

We then weighed the appropriate standard under which the district court was required to review the state-court denial of Winston's habeas petition. We ultimately concluded that deference to the Supreme

Court of Virginia's decision was unwarranted under § 2254(d), because that court had not adjudicated Winston's claims on the merits. The district court was obligated, however, to extend deference to any relevant factual findings made by the state court, as provided in § 2254(e)(1).

That the Supreme Court of Virginia did not adjudicate Winston's *Atkins* ineffectiveness claim on the merits served as the linchpin of our decision. We reasoned that, when a state court does not adjudicate a claim on the merits, AEDPA deference is inappropriate and a federal court must review the claim de novo. Whether a claim has been adjudicated on the merits is a case-specific inquiry, and we consequently rejected Winston's entreaties to hold that § 2254(d) "will never apply once the district court has granted an evidentiary hearing." *Id.* at 553. But when a state court unreasonably refuses to permit "further development of the facts" of a claim, de novo review might be appropriate:

> [W]hen a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures. If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d). New, material evidence, introduced for the first time during federal

> habeas proceedings, may therefore require a de novo review of petitioner's claim.

Id. at 555-56 (citations omitted). Lest our holding be viewed as a pliable safety valve for habeas petitioners, we reiterated that "the requirements that petitioners exhaust their state remedies and diligently develop the record in state court are exacting burdens." *Id.* at 556. Indeed, new evidence submitted in federal court that fundamentally alters a claim presented in state court will render that claim unexhausted. Similarly, that a petitioner requested an evidentiary hearing from the state court, without more, might not always suffice to satisfy AEDPA's diligence requirement.

Turning to the facts of Winston's case, we determined that the Supreme Court of Virginia had not adjudicated his *Atkins* ineffectiveness claim on the merits. We first reasoned that Winston's 66 IQ score "is material to whether he is retarded under Virginia law and therefore material to whether he was prejudiced . . . by his counsel's conduct." *Id.* at 557. We stressed that the state court "had its opportunity to consider a more complete record, but chose to deny Winston's request for an evidentiary hearing." *Id.* at 553. The state court's denial of discovery and an evidentiary hearing produced an adjudication of "a claim that was materially incomplete." *Id.* at 557. And because the ineffectiveness analysis requires a "collective evaluation of the evidence rather than an analysis confined to a subset of the facts," we concluded that the state court's legal

conclusions were not "neatly separable into those based on a complete record and those based on an incomplete record." *Id.* We accordingly instructed the district court to extend no deference under AEDPA to the Supreme Court of Virginia's application of the ineffectiveness standards.

Relevant factual findings made by the Supreme Court of Virginia were entitled to deference under § 2254(e)(1), we acknowledged. Such findings included those made on the basis of Winston's three above-70 IQ scores and the standards used by the Fairfax County Public Schools when assessing whether a student is mentally retarded. But "[w]here the [Supreme Court of Virginia] did not make a factual finding," we instructed the district court to "make its own without regard to what the state court might have done." *Id.*

3.

On remand, the district court granted Winston's habeas petition as to his *Atkins* ineffectiveness claim. The court first concluded that Winston's trial attorneys rendered deficient performance for failing to review the school records and conduct follow-up investigations on the legal issues implicated by the documents. It adjudged the deficiency prejudicial, ascertaining a "reasonable probability that but for counsel's unprofessional errors, the outcome of Winston's proceeding would have been different" – i.e., he would not have been sentenced to death.

Winston, 784 F. Supp. 2d at 626. Heeding our directive in *Winston I,* the court accorded § 2254(e)(1) deference to two factual findings of the state court: that Winston achieved scores of 77, 76, and 73 on three IQ tests; and that he could have been reclassified as mentally retarded by school officials even without scoring 70 or below on an IQ test. In its statement of remedy, the court ordered the Commonwealth to "conduct a trial on the question of whether Winston is mentally retarded, and sentence him accordingly, or otherwise resentence him without the possibility of death." *Id.* at 635.

Challenging the form of relief, Winston moved to alter or amend the judgment so that the court would expressly grant him a full sentencing retrial, not merely a limited trial on mental retardation. The court denied Winston's motion. It first acknowledged that its "notation concerning the consequences of [its] decision is essentially surplusage," as it lacked authority to describe with precision the steps that the Commonwealth must take to comply with its mandate. Supp. J.A. 35. In any event, reasoned the court, its "wording [of the remedy] was intended to make it plain that Virginia could comply with the writ without conducting a full resentencing." *Id.*

These appeals followed.

II.

To effectuate a regime that embraces federalism in the habeas realm, AEDPA carefully circumscribes

federal review of the habeas claims of state prisoners. The statute erects a formidable obstacle to state prisoners seeking to disturb state-court habeas decisions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "[A] determination of a factual issue made by a State court shall be presumed to be correct" in such a case, with the petitioner bearing "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* § 2254(e)(1).

We consider the Commonwealth's appeal against the backdrop of AEDPA and our prior opinion in this case.

III.

We turn first to determine the amount of deference properly accorded the Supreme Court of Virginia's decision denying Winston's habeas petition. It is critical, at the outset, to frame the bounds of our inquiry, constrained as it is by the law-of-the-case doctrine. We are not writing on a blank slate, at liberty to revisit our decision in *Winston I* on a whim. *Winston I,* as the law of the case, "'continue[s] to govern the same issues in subsequent stages in the same case,'" *TFWS, Inc. v. Franchot,* 572 F.3d 186, 191 (4th Cir. 2009) (quoting *United States v. Aramony,* 166 F.3d 655, 661 (4th Cir. 1999)), and we will not "reconsider our previous holding" absent "extraordinary circumstances," *Athridge v. Aetna Cas. & Sur. Co.,* 604 F.3d 625, 632, 390 U.S. App. D.C. 317 (D.C. Cir. 2010) (alteration and internal quotations omitted). Thus our legal conclusions in *Winston I* are subject to challenge only, as is relevant here, if "'controlling authority has since made a contrary decision of law applicable to the issue.'" *TFWS, Inc.,* 572 F.3d at 191 (quoting *Aramony,* 166 F.3d at 661).

The Commonwealth contends that intervening Supreme Court precedent has impeached the legal framework of *Winston I,* compelling us to review the state-court decision under § 2254(d)'s unreasonableness standard. According to the Commonwealth, *Cullen v. Pinholster*, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and *Harrington v. Richter*, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), establish that the Supreme Court of Virginia's denial of Winston's habeas claims

was an adjudication on the merits, entitled to substantial deference under AEDPA.

As we explain below, we are not persuaded by the Commonwealth's interpretation of *Pinholster* and *Richter*. Neither case expressly delineates the contours of an "adjudication on the merits" for AEDPA purposes, and we require more than conjecture about the views of the Supreme Court before we retreat from a decision that is the law of the case. Our decision in *Winston I* therefore endures. The Supreme Court of Virginia's denial of Winston's *Atkins* ineffectiveness claim was not an "adjudicat[ion] on the merits" under § 2254(d). We must consequently proceed to review the claim de novo.

A.

The Commonwealth anchors its argument in its reading of *Pinholster* and *Richter*. A review of these cases will accordingly focus our analysis.

The Supreme Court in *Pinholster* reviewed the Ninth Circuit's grant of habeas relief to a California prisoner. The Supreme Court of California unanimously and summarily dismissed two habeas petitions submitted by Pinholster. *Pinholster,* 131 S. Ct. at 1396-97. Pinholster sought habeas relief in federal court, and the district court held an evidentiary hearing and granted his petition. *Id.* at 1397. The Ninth Circuit affirmed en banc, holding that new evidence adduced at a federal evidentiary hearing

could be considered in performing analysis under § 2254(d)(1). *Id.*

Holding that "review under § 2254(d)(1) is limited to the record that was before the state ourt that adjudicated the claim on the merits," the Supreme Court rejected the Ninth Circuit's construction of AEDPA and reversed. *Id.* at 1398. The Court characterized § 2254(d)(1)'s language as "backward-looking" and "requir[ing] an examination of the state-court decision at the time it was made." *Id.* "It follows," continued the Court, "that the record under review is limited to the record in existence at that same time *i.e.,* the record before the state court." *Id.* Summarizing its discussion, the Court wrote, "If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court." *Id.* at 1400.

The Court rejected the argument that its holding rendered § 2254(e)(2)[3] superfluous, in that § 2254(d) would now impose a wholesale bar on federal evidentiary hearings, affording § 2254(e)(2) no independent significance. It reasoned that

[3] Section 2254(e)(2) cabins a federal habeas court's discretion to grant an evidentiary hearing where a habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." As we concluded in *Winston I*, § 2254(e)(2) does not apply to Winston, as he was diligent in pursuing his *Atkins* ineffectiveness claim in state court. 592 F.3d at 551-52.

§ 2254(e)(2) "continues to have force where § 2254(d)(1) does not bar federal habeas relief," as when a habeas claim does not fall under its compass because it was not adjudicated on the merits in state court. *Id.* at 1401.

Applying the foregoing principles to Pinholster's petition, the Court held that § 2254(d) controlled the case. *Id.* at 1402. Pinholster's ineffectiveness claim had been adjudicated on the merits in state court, and the parties agreed that the federal claim was the same as that included in his state petitions. *Id.* Though the Supreme Court of California summarily adjudicated Pinholster's petitions, the Court held that § 2254(d) "applies even where there has been a summary denial." *Id.*

Justice Sotomayor's dissent explored the reach of the majority's analysis. She first expressed agreement with the majority's rejection of an approach apparently advanced by some circuit courts. Citing *Winston I,* Justice Sotomayor asserted, "Some courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, § 2254(d)(1) does not apply at all and the federal court may review the claim *de novo*." *Id.* at 1417 (Sotomayor, J., dissenting). "[A]gree[ing] with the majority's rejection of this approach," Justice Sotomayor reasoned that endorsing this practice "would undermine the comity principles motivating AEDPA" by authorizing federal habeas courts to "decline to defer to a state-court adjudication of a claim because the state court, through no fault of

its own, lacked all the relevant evidence." *Id.* She limited her rejection of the approach to claims adjudicated on the merits in state court, "assum[ing] that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." *Id.* n.5. And even when a claim was adjudicated on the merits in state court, Justice Sotomayor pointed to "situations in which new evidence supporting" such a claim "gives rise to an altogether different claim" that is not subject to the strictures of § 2254(d)(1). *Id.*

Dialogue between Justice Sotomayor and the majority shed light on the Court's holding in *Pinholster.* Justice Sotomayor proffered a hypothetical in her dissent: A petitioner diligently attempts in state court to develop the factual foundation of a claim that prosecutors withheld *Brady*[4] material. The state court denies relief on the grounds that the withheld evidence produced does not rise to a sufficient level of materiality. After its disposition, the state court orders the state to disclose additional documents that the petitioner had timely requested. The disclosed documents reveal that the state withheld other *Brady* material, but state law prevents the petitioner from presenting this new evidence in a successive habeas petition. Justice Sotomayor wondered whether the majority's holding

[4] *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

would allow the petitioner to bolster his *Brady* claim, which was already adjudicated on the merits by the state court, in federal habeas court. *Id.* at 1417-18.

Responding to Justice Sotomayor's hypothetical, the majority first declined "to draw the line between new claims and claims adjudicated on the merits." *Id.* at 1401 n.10. It then recognized that Justice Sotomayor's hypothetical "may well present a new claim" not subject to § 2254(d). *Id.*

In *Richter,* the Court briefly added gloss to AEDPA's "adjudicated on the merits" requirement. "When a federal claim has been presented to a state court and the state court has denied relief," the Court declared that "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter,* 131 S. Ct. at 784-85. That a state court fails to attach an explanation to its decision does not preclude its classification as an adjudication on the merits. *Id.* at 785.

B.

Closely scrutinizing the import of *Pinholster* and *Richter,* we find nothing in those decisions that renders infirm our analytical framework in *Winston I.* Neither decision clarifies the "adjudicated on the merits" requirement of § 2254(d)(1) such that it compels disturbing our prior holding that the state-court denial of Winston's habeas petition was not an adjudication on the merits. Remaining bound by that

determination from *Winston I,* we reaffirm that § 2254(d) does not apply to Winston's *Atkins* ineffectiveness claim and that de novo review of the claim is appropriate.

Underpinning the Supreme Court's discussion in *Pinholster* is the terse acknowledgment that the habeas petitioner's claims had been adjudicated on the merits in state-court proceedings. Neither party in that case appeared to focus energy on questioning whether § 2254(d)'s adjudicated-on-the-merits requirement had been fulfilled. Echoing the parties and assuming the incandescence of the state-court decision's status, the Court phrased its holding as applying only to claims that had been adjudicated on the merits in state court. *Pinholster,* 131 S. Ct. at 1398 ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that *adjudicated the claim on the merits*." (emphasis added)); *id.* at 1400 ("If a claim has been *adjudicated on the merits* by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." (emphasis added)). Not only that, the Court made plain that its analysis and the strictures of § 2254(d) do not apply to claims that had not been adjudicated on the merits in state court. *Id.* at 1401 (rejecting argument that the majority's holding rendered § 2254(e)(2) superfluous by reasoning that § 2254(d) will not apply when "federal habeas courts . . . consider new evidence when deciding claims that were not adjudicated on the merits in state court").

To the extent that *Pinholster* confronted the adjudication-on-the-merits requirement, interplay between the majority opinion and Justice Sotomayor's dissent lends strength to our holding in *Winston I*. As we found in *Winston I,* Winston was hindered from producing critical evidence to buttress his *Atkins* ineffectiveness claim – such as the 66 IQ score – by the state court's unreasonable denial of discovery and an evidentiary hearing. Like the hypothetical petitioner posited by Justice Sotomayor in *Pinholster,* Winston's inability to produce potentially dispositive evidence in state habeas proceedings came about through no fault of his own. The Court's tacit acknowledgment that the hypothetical petitioner would be free to present new, material evidence – because his claim had not been adjudicated on the merits in state court – thus lends at least some support to our holding in *Winston I*.

In any event, we need not discern in *Pinholster* an enthusiastic endorsement of *Winston I*. Quite the opposite, to disrupt our earlier adjudication we are required to conclude that *Pinholster* "'made a contrary decision of law applicable to the issue,'" *TFWS, Inc.,* 572 F.3d at 191 (quoting *Aramony,* 166 F.3d at 661). This we cannot do. Our holding in *Winston I* was premised on the Supreme Court of Virginia's failure to adjudicate Winston's *Atkins* ineffectiveness claim on the merits. Absent an adjudication on the merits, we determined that § 2254(d) deference was not owed to the state-court decision.

Pinholster would thus impeach *Winston I* only if it rejected our conclusion that the Supreme Court of Virginia's decision was not an adjudication on the merits. We are not persuaded that it did. The Court's opinion contains almost no discussion of the parameters of the adjudication-on-the-merits requirement, beyond its cursory assumption that the state-court decisions at issue satisfied the mandate of § 2254(d). Far from announcing a new rule to govern resolution of whether a claim was adjudicated on the merits in state court, the Court expressly declined to "decide where to draw the line between new claims and claims adjudicated on the merits," *id.* at 1401 n.10. At bottom, nothing in *Pinholster* indicates that the Court's disposition casts doubt on – much less overrules – our discussion of the adjudicated-on-the-merits requirement in *Winston I*.

Nor does *Richter* demand that we reconsider our holding in *Winston I*. The Court there simply presumed that, absent "any indication or state-law procedural principles to the contrary," a summary decision from a state habeas court constitutes an adjudication on the merits. *Richter,* 131 S. Ct. at 784-85. *Richter*'s reasoning is inapposite here, where Winston does not contest the thoroughness of the state-court decision but rather the court's unreasonable denial of his requests for discovery and an evidentiary hearing. We found in *Winston I* that the state court's refusal to allow Winston to develop the record, combined with the material nature of the evidence that would have been produced in state

court were appropriate procedures followed, rendered its decision unbefitting of classification as an adjudication on the merits. *Richter* mentions nothing of possible defects in a state-court decision save the summary nature of its disposition, and we accordingly conclude that it does not affect our analysis in *Winston I*.

To forestall the conclusion that *Winston I* remains valid, the Commonwealth emphasizes Justice Sotomayor's citation of the decision in her dissent. Justice Sotomayor cited *Winston I* to support the proposition that "[s]ome courts have held that when a federal court admits new evidence supporting a claim adjudicated on the merits in state court, § 2254(d)(1) does not apply at all and the federal court may review the claim *de novo,*" an approach that she claimed the majority rejected. *Pinholster,* 131 S. Ct. at 1417 (Sotomayor, J., dissenting). The Commonwealth maintains that this language necessarily means that the majority overruled *Winston I*.

But the Commonwealth's reliance on Justice Sotomayor's dissent is misplaced. First, as a dissenter, Justice Sotomayor's views on the ramifications of the majority opinion are not sufficient, without more, to compel us to reject the law of the case. Second, we respectfully disagree with Justice Sotomayor's view of *Winston I*. We did not hold that any time a federal habeas court "admits new evidence supporting a claim *adjudicated on the merits* in state court, § 2254(d)(1) does not apply at all," *id.* (emphasis added). We reasoned, rather, that § 2254(d)(1) does not apply to

Winston's case, as his *Atkins* ineffectiveness claim was *not* adjudicated on the merits in state court. This principle in fact finds support in Justice Sotomayor's dissent, which acknowledges, "Of course, § 2254(d)(1) only applies when a state court has adjudicated a claim on the merits," *id.* at 1417 n.5. Indeed, Justice Sotomayor "assume[d] that the majority does not intend to suggest that review is limited to the state-court record when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself." *Id.* Such is the case here. Thus Justice Sotomayor's dissent, if anything, endorses our holding in *Winston I*.

That *Winston I* was not abrogated by intervening Supreme Court precedent also finds support in our recent decision in *Richardson v. Branker,* 668 F.3d 128 (4th Cir. 2012). There, we cited with approval *Winston I*'s holding that the state-court decision did not qualify as an adjudication on the merits because "Virginia state courts did not afford Winston an evidentiary hearing and thus passed on the opportunity to adjudicate his claim on a complete record." *Richardson,* 668 F.3d at 152 n.26 (alteration and internal quotations omitted). Nevertheless, we distinguished the petitioner's case, in which the state court "held an evidentiary hearing and received evidence," from *Winston I*. *Id.* Nowhere did we express doubt about the continuing validity of *Winston I* in light of *Pinholster* and *Richter*.

C.

Looking past the four corners of the *Pinholster* opinion, the Commonwealth points to two decisions that it asserts establish that *Winston I* is no longer valid. We reject the Commonwealth's interpretations of these cases and locate nothing in them that mandates rejecting our analysis in *Winston I.*

The Commonwealth first contends that our decision in *Jackson v. Kelly,* 650 F.3d 477 (4th Cir. 2011), implicitly determined that *Pinholster* had overruled *Winston I.* We disagree. In *Jackson,* we characterized *Pinholster* as instructing that, "when a habeas petitioner's claim has been adjudicated on the merits in state court, a federal court is precluded from supplementing the record with facts adduced for the first time at a federal evidentiary hearing." 650 F.3d at 492. Although the district court had held an evidentiary hearing on the petitioner's claim – noting generally that the claim had not been adequately developed in state court – we limited our review to the state-court record, concluding that the state court had adjudicated the claim on the merits. *Id.* at 485.

Nowhere in *Jackson,* however, did we illuminate the adjudicated-on-the-merits requirement. Rather, in *Jackson* we merely noted matter-of-factly that which did not seem to be in dispute – that the state court had adjudicated the claim on the merits. Here, in contrast, we are required to critically analyze the status of the state-court decision. In that regard, we must confront our own prior conclusion – which, as

we have explained, we cannot casually overrule – that the Supreme Court of Virginia expressly did *not* adjudicate Winston's *Atkins* ineffectiveness claim on the merits. This important distinction, viewed in tandem with the limited discussion of the adjudication-on-the-merits requirement in *Jackson,* convinces us that the decisions are not incongruous.

Next, the Commonwealth directs our attention to *Atkins v. Clarke,* 642 F.3d 47 (1st Cir. 2011), which it asserts recognizes that *Pinholster* overruled *Winston I.* A closer review of *Clarke* reveals that the Commonwealth's interpretation is erroneous. The petitioner in *Clarke* contended that his claims had not been adjudicated on the merits in state court, and he relied in part on *Winston I* in framing the argument. The First Circuit initially noted unremarkably, "To the extent [*Winston I* is] inconsistent with [*Pinholster*] . . . , [it is], of course, overruled." *Clarke,* 642 F.3d at 49. Because there was "no doubt that this case was adjudicated on the merits," the First Circuit found the petitioner's reliance on *Winston I* misplaced. *Id.* The court did not, as the Commonwealth intimates, suggest that our analysis of § 2254(d) in *Winston I* had been assailed by *Pinholster.* It instead distinguished the case before it from *Winston I,* noting that extending the rule in *Winston I* to cover the petitioner's case – in which all material facts had been presented to the state

court – would contravene *Pinholster*. Nothing in the opinion detracts from our holding in *Winston I*.[5]

IV.

After reaffirming that § 2254(d) does not apply to Winston's *Atkins* ineffectiveness claim, which the state court failed to adjudicate on the merits, we proceed to review de novo Winston's claim and the district court's decision to grant habeas relief, *Richardson,* 668 F.3d at 138.

Winston contends that his trial attorneys were ineffective for failing to argue to the jury during sentencing that Winston is mentally retarded. Had the court concluded that he was mentally retarded, *Atkins* would have barred imposition of a death sentence as contrary to the Eighth Amendment's prohibition on cruel and unusual punishments. Virginia law provides that an individual is mentally retarded – and hence ineligible for a death sentence – if he establishes a disability originating before eighteen years of age characterized by "significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of

[5] The Commonwealth cites a bevy of other circuit decisions issued after *Pinholster* that reviewed state-court habeas dismissals under § 2254(d). But none of the cases present the factors that we found crucial to our holding in *Winston I,* and the courts in these cases cursorily assumed that the claims had been adjudicated on the merits in state court. The decisions are therefore of little aid to our task.

intellectual functioning" and "significant limitations in adaptive behavior." Va. Code Ann. § 19.2-264.3:1.1(A). To meet the first prong of the formulation, a petitioner must show an IQ score of 70 or less. *Hedrick v. True,* 443 F.3d 342, 367 (4th Cir. 2006).

Reviewing the claim de novo, we conclude that Winston is entitled to habeas relief. As we explain below, Winston has demonstrated both deficient performance by his attorneys and prejudice, as required under Supreme Court precedent. Had Winston's trial attorneys presented evidence of his mental retardation at sentencing, there is a reasonable probability that the court would not have sentenced him to death. We accordingly affirm the district court's grant of habeas relief.

A.

The familiar *Strickland* formulation governs our ineffectiveness inquiry. To succeed on a claim of ineffective assistance of counsel, a petitioner must demonstrate deficient performance and prejudice. *Richter,* 131 S. Ct. at 787. Review of counsel's actions is hallmarked by deference, and we are mindful that "[i]t is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* at 788 (quoting *Strickland,* 466 U.S. at 689). We are not at liberty to rely on hindsight to reconstruct the circumstances of counsel's conduct, "indulg[ing] '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's

actions." *Id.* at 790 (quoting *Wiggins v. Smith,* 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)).

Demonstrating deficient performance requires showing that "'counsel's representation fell below an objective standard of reasonableness.'" *Id.* at 787 (quoting *Strickland,* 466 U.S. at 688). A reviewing court conducting the deficient-performance inquiry "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* (quoting *Strickland,* 466 U.S. at 689). The critical question is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* at 788 (quoting *Strickland,* 466 U.S. at 690).

Yet deference to the decisions of counsel is not limitless. Attorneys have a duty to investigate their client's case so as to enable them to make professional decisions that merit distinction as "informed legal choices." *See Elmore v. Ozmint,* 661 F.3d 783, 858 (4th Cir. 2011). Genuinely evaluating tactical options is a necessity, and "[c]ounsel's lack of preparation and research cannot be considered the result of deliberate, informed trial strategy." *Hyman v. Aiken,* 824 F.2d 1405, 1416 (4th Cir. 1987). The strong presumption that counsel's choices were part of an overarching strategy "does not overcome the failure of . . . attorneys . . . to be familiar with readily available

documents necessary to an understanding of their client's case." *Id.*

Once a petitioner has established deficient performance, he must prove prejudice – "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Richter,* 131 S. Ct. at 787 (quoting *Strickland,* 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland,* 466 U.S. at 694). Pointing to some "'conceivable effect on the outcome of the proceeding'" is insufficient to satisfy *Strickland*'s demanding test. *Id.* at 788 (quoting *Strickland,* 466 U.S. at 693). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 792.

B.

Applying the *Strickland* formulation to the actions of Winston's attorneys during sentencing, we hold that they rendered deficient performance that prejudiced Winston.

As to the first prong of the standard, the failure of Winston's attorneys to review his school records and interview school officials about his mental functioning amounts to deficient performance. Counsel were obligated "to be familiar with readily available documents necessary to an understanding of [Winston's] case," *Hyman,* 824 F.2d at 1416. By neglecting to review Winston's school records and instead relying

on Nelson to ascertain their import, counsel abdicated their responsibility. As the attorneys admitted, reading the documents would have raised the potential for a successful claim that *Atkins* barred imposition of a death sentence on Winston. This would have prompted them to interview Winston's school teachers and counselors, facilitating an investigation that carried dual significance under Virginia's mental-retardation statute. Not only would interviews with school officials have enabled counsel to obtain from Lageman Winston's 66 IQ score, these conversations would have provided counsel with compelling evidence of Winston's limitations in adaptive behavior, which in turn would have prompted them to press Nelson to explore further the merits of mental retardation as a sentencing defense.

Counsel's lack of diligence in pursuing a mental-retardation defense contravened their duty to investigate to make defensible professional decisions qualifying as "informed legal choices." *See Elmore,* 661 F.3d at 858. Contrary to the Commonwealth's suggestions, the presumption that the attorneys' omissions were part of trial strategy "does not overcome [their] failure . . . to be familiar with readily available documents," *Hyman,* 824 F.2d at 1416. As in *Hyman,* counsel's "lack of preparation and research cannot be considered the result of deliberate, informed trial strategy," *id.*

Having shown deficient performance, Winston has also demonstrated "'a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different,'" *Richter,* 131 S. Ct. at 787 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052). Establishing a successful *Atkins* defense to a death sentence requires presenting proof of an IQ of 70 or below, *Hedrick,* 443 F.3d at 367, and "significant limitations in adaptive behavior," Va. Code Ann. § 19.2-264.3:1.1(A). As to the first prong, had counsel reviewed the school records and found the Reclassification, they testified that they would have interviewed Lageman and searched for a potential below-70 IQ score. And Lageman, as she testified, would have given Winston's attorneys the report of Winston's 66 IQ score. Investigation by counsel would have similarly uncovered evidence of significant limitations in Winston's adaptive behavior. Through interviews of school officials and review of school records, counsel could have presented evidence at sentencing demonstrating that Winston met the second prong of the mental-retardation test.

Nelson's testimony at the federal evidentiary hearing further bolsters our conclusion that Winston has shown prejudice. Nelson, the court-appointed mental-health expert, conceded that he could not remember reading the Reclassification. Nor was he presented with the 66 IQ score or information from school officials and counselors. A close review of such documents, according to Nelson, would have been important to his analysis, including his conclusions about Winston's adaptive functioning. "It's certainly possible," testified Nelson, "my opinion might have

been different with this wealth of other information." J.A. 720.

Considering the question anew, we therefore agree with the district court that, "had counsel read the overlooked records, followed up, raised the issue, and marshaled the evidence" of mental retardation, *Winston,* 784 F. Supp. 2d at 634, there is a reasonable probability that the outcome of the proceeding would have been different. Accordingly, Winston is entitled to habeas relief.

The Commonwealth attempts to resist this result by referencing the district court's alleged disregard of § 2254(e)(1)and our decision in *Green v. Johnson,* 515 F.3d 290 (4th Cir. 2008). Its contentions are unavailing.

Turning first to the import of § 2254(e)(1), because the Supreme Court of Virginia refused discovery and an evidentiary hearing – and the evidence that would have been gleaned from these vehicles is critical to Winston's claim – its decision includes few factual findings to which we must defer under § 2254(e)(1). The district court properly credited the state court's findings that Winston had scored 77, 76, and 73 on three IQ tests and that Winston could have been classified by the school system as mentally retarded without scoring 70 or below on an IQ test. But it correctly found that the new evidence produced by Winston – pursuant to which the state court made no factual findings – compelled granting him relief. Section 2254(e)(1)

obviously presupposes that the state court made factual findings to which a federal habeas court might defer. Thus where the state court failed to adjudicate a claim on the merits by refusing to facilitate production of new, material evidence, meaningful deference to its factual findings is well-nigh impossible.

Similarly, the Commonwealth's reliance on *Green* is unpersuasive. The Commonwealth maintains that *Green* stands for the proposition that federal courts are bound by a state court's determination that presentation of a single below-70 IQ score, when accompanied by three above-70 scores, does not satisfy the statutory definition of subaverage intellectual functioning. The Commonwealth's argument is misplaced, for two reasons. First, we reviewed the state-court decision in *Green* for objective unreasonableness under § 2254(d). 515 F.3d at 300. In contrast, we review Winston's ineffectiveness claim de novo. Second, the state court in *Green* discredited the lone below-70 score, leaving it to consider three above-70 scores. *Id.* Here, however, the Supreme Court of Virginia did not impugn the validity of Winston's 66 IQ score, as it did not even review it.

To summarize, we agree with the district court that Winston has made a clear showing of prejudice flowing from his attorneys' deficient performance. Presentation of the 66 IQ score, the Reclassification, and testimony from school officials and counselors would have significantly strengthened Winston's

sentencing case such that we can confidently ascertain a "'reasonable probability that, but for counsel's unprofessional errors,'" *Richter,* 131 S. Ct. at 787 (quoting *Strickland,* 466 U.S. at 694), the court would not have sentenced Winston to death.

V.

In his cross-appeal, Winston asks us to revise the remedy ordered by the district court to reflect that he is entitled to a new full sentencing proceeding. We find modifying the relief ordered by the district court both unwarranted and unnecessary in light of our understanding of the district court's statement of remedy.

The district court had no authority to fashion a particular procedure to remedy the *Atkins* violation. *See Henderson v. Frank,* 155 F.3d 159, 168 (3d Cir. 1998) ("This is not a direct appeal from a federal conviction, where upon vacating the judgment this Court would have unlimited power to attach conditions to the criminal proceedings on remand. Rather, this is federal habeas corpus relating to a state conviction." (citation omitted)). We therefore construe the district court's directive to the Commonwealth to "conduct a trial on the question of whether Winston is mentally retarded, and sentence him accordingly," J.A. 635, as not restricting the range of remedies for the *Atkins* violation to a single-issue trial on mental retardation. Instead, that language must be understood to mean that, should

the Commonwealth continue to seek the death penalty, Virginia law governs the question of whether our grant of the writ necessitates an entirely new sentencing phase or permits a narrow trial on the issue of mental retardation. Having afforded Winston habeas relief, at this stage we leave it to the Commonwealth's prerogative to craft a remedy consonant with the strictures of state law.

Framing the district court's order in its proper context moreover persuades us that the cross-appeal is likely moot. The Commonwealth has conceded in its supplemental briefing that, if Winston is entitled to relief, state law likely requires it to give Winston a full resentencing proceeding. This is all that Winston requests.

VI.

For the foregoing reasons, we affirm the district court's grant of habeas relief.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LEON JERMAINE WINSTON,	)	**Civil Action No.: 7:07CV00364**
PETITIONER,	)	**MEMORANDUM OPINION**
v.	)	(Filed May 16, 2011)
LORETTA K. KELLY, Warden, Sussex I State Prison,	)	**By: Samuel G. Wilson United States District Judge**
RESPONDENT.	)	

A jury in the Circuit Court for the City of Lynchburg, Virginia found petitioner, Leon Jermaine Winston, guilty in June 2003 of three counts of capital murder and imposed three death sentences. Having exhausted his state court remedies, *see Winston v. Commonwealth,* 604 S.E.2d 21 (Va. 2004) and *Winston v. Warden of Sussex I State Prison,* 2007 WL 678266 (Va. Mar. 7, 2007) (unpublished), Winston filed a habeas petition in this court pursuant to 28 U.S.C. § 2254 raising more than 30 claims. The court rejected all of his claims except two interrelated claims: the claim that because he is mentally retarded, *Atkins v. Virginia,* 536 U.S. 304 (2002), bars his execution, a claim he procedurally defaulted because he failed to raise it at trial, and the claim that his counsel was ineffective in relation to that claim, thereby excusing his procedural default. *Winston v. Kelly,* 624 F. Supp. 2d 478 (W.D. Va. 2008).

Although the Supreme Court of Virginia earlier rejected Winston's ineffective assistance claim on the merits because he had failed to satisfy the deficient performance and prejudice prongs of *Strickland v. Washington,* 466 U.S. 668 (1984), *Winston v. Warden of Sussex I State Prison,* 2007 WL 678266, this court concluded that it was not wholly implausible that Winston could establish the claim even in light of the AEDPA's deferential standards. *Winston v. Kelly,* 624 F. Supp. 2d at 512-16. Accordingly, this court held an evidentiary hearing to resolve the claim.

At that hearing, Winston presented new evidence, evidence that he had not presented to the Supreme Court of Virginia, including an intelligence quotient ("IQ") score of 66 that he received as part of a psychological exam in 1997. The court found that this new IQ score fundamentally altered Winston's ineffective assistance claim and that Winston had failed to account for his failure to present it to the Supreme Court of Virginia, thus rendering that claim, as newly positioned, unexhausted and procedurally defaulted. *Winston v. Kelly,* 600 F. Supp. 2d 717, 734-36 (W.D. Va. 2009). The court then reviewed the new evidence to determine whether Winston was "actually innocent of the death penalty" so as to excuse his procedural default, and concluded that Winston could not make the stringent showing actual innocence required. *Id.* at 735-36. This court then noted that it considered its handling of the ineffective assistance claim to be procedurally problematic, because the procedure the court followed effectively

skirted the temporal nature of review 28 U.S.C. § 2254(d)(2) requires by holding an evidentiary hearing on Winston's ineffective assistance claim without first expressly deciding whether the Supreme Court of Virginia's adjudication of that claim, as it was fairly positioned before that court, was based on an unreasonable determination of facts or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. *Id.* at 737-38. The court then examined Winston's claim in light of the record it found to have been fairly presented to the Supreme Court of Virginia, and found that the Supreme Court of Virginia's adjudication of the merits of Winston's ineffective assistance claim, at least as to *Strickland*'s prejudice prong, was not unreasonable. *Id.* at 738-40.

The Court of Appeals affirmed this court's dismissal of all of Winston's claims except his *Atkins*-related ineffective assistance claim. *Winston v. Kelly,* 592 F.3d 535 (4th Cir. 2010) *cert. denied,* 131 S.Ct. 136 (2010). It vacated this court's decision as to that claim, and remanded that claim for further consideration. It gave explicit instructions to this court to consider all the evidence, including Winston's additional IQ score, affording deference under § 2254(e)(1) "to any relevant factual findings" made by the Supreme Court of Virginia, but affording no deference under § 2254(d) to the Supreme Court of Virginia's adjudication of the claim. *Id.* at 557-58. Following the directives of the Court of Appeals, this court now concludes from all the evidence it heard,

including the new evidence, that there is a reasonable probability that but for counsel's unprofessional errors, the outcome of Winston's proceeding would have been different. Accordingly, the court grants Winston's petition for a writ of habeas corpus. As a consequence, Virginia must conduct a trial on the question of whether Winston is mentally retarded, and sentence him accordingly, or otherwise resentence him without the possibility of death.

I.

The procedural history, legal setting, and summary of the evidence pertinent to the issue that is before this court on remand are explained in the three published opinions referenced above, two by this court and one by the Court of Appeals. Though the court will not repeat all of those matters here, it repeats enough background information to provide context for this court's findings of fact and its decision.

The United States Supreme Court held in *Atkins* that the Eighth Amendment prohibits the execution of the mentally retarded, but tasked the states with developing "appropriate ways" to enforce that restriction. 536 U.S. at 317. Virginia law defines mental retardation as

> a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance

> on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean, and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va. Code Ann. § 19.2-264.3:1.1(A) (2006). Defendants bear the burden of proving mental retardation by a preponderance of the evidence. § 19.2-264.3:1.1(C).

The intellectual functioning prong is "demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean." § 19.2-264. 3:1.1(A). The Supreme Court of Virginia, consistent with the standards of the American Psychiatric Association, has determined a full-scale IQ score of 70 or less is the "standardized measure of intellectual functioning" that indicates mental retardation. *Johnson v. Commonwealth,* 591 S.E.2d 47, 59 (Va. 2004), *vacated on other grounds,* 544 U.S. 901 (2005). However, "a habeas petitioner is not required to submit an IQ score of 70 or less from a test taken before he turned the age of eighteen," but rather must prove only "that his intellectual functioning would have fallen below this standard before he turned the age of eighteen." *Hedrick v. True,* 443 F.3d 342, 367 n.2 (4th Cir. 2006). Virginia law requires adaptive behavior assessments to be "based on multiple sources . . . including clinical interview, psychological

testing and educational, correctional and vocational records," and at least one standardized, generally accepted measure of adaptive functioning. § 19.2-264. 3:1.1(B)(2).

In Winston's capital murder trial, B. Leigh Drewry, Jr., one of two court-appointed lawyers, "accepted responsibility for gathering the mitigation evidence." (App. to Pet. Writ of Habeas Corpus 337.) In carrying out that responsibility Drewry obtained Winston's "school records, social service records, and hospital records." (App. 338.) Those records included three psychological evaluations, each accompanied by an intelligence test. (App. 1-2, 3-6, 11-15.) Winston took the first of these intelligence tests, the Wechsler Intelligence Scale for Children-Revised (WISC-R), in 1987 at age seven and received a verbal IQ score of 91, a performance IQ score of 67, and a full-scale IQ score of 77. (App. 1.) At that time he was judged to have "mentally deficient to average intelligence." (App. 2.) Winston took the WISC-R again in 1990 at age ten and received a verbal IQ score of 74, a performance IQ score of 75, and a full-scale IQ score of 73. (App. 4.) The evaluating psychologist noted that Winston was functioning in the "[b]orderline range of general intellectual ability," but believed that the test was an "underestimate" of Winston's abilities. (App. 4.) The psychologist also wrote, "[Winston's] ability to recall specific verbal facts which are typically acquired through education and experience is extremely deficient and falls within the Mentally Retarded range (1st percentile)." (App. 5.) Winston

took the third intelligence test, the Wechsler Intelligence Scale for Children-III (WISC-III), in 1995 at age fifteen and received a verbal IQ score of 60, a performance IQ score of 89, and a full-scale IQ score of 76. (App. 13.) The evaluating clinical psychologist attributed the precipitous decline in Winston's verbal IQ score to a "neurological insult" and found that he had "borderline intellect and severe verbal processing problems." (App. 14.) She noted that Winston's immaturity and passiveness "place him at a risk to be easily manipulated by others. He is likely to always follow the easiest path, the strongest leader. He is not likely to initiate activity, either good or bad, on his own." (App. 14-15.)

According to other records Drewry received, on October 30, 1996, the local screening committee of the Fairfax County Department of Student Services and Special Education ("Special Education Department") issued a report that recommended an additional psychological evaluation for Winston. (Evid. Hr'g Pet'r's Ex. D, at 843, Nov. 19-20, 2008.) Three months later, on February 5, 1997, a Special Education Department committee determined Winston was eligible for special education due to "mild retardation" and that Winston "demonstrate[d] a reduced rate of intellectual development and a level of academic achievement below that of age peers" and "concurrently demonstrate[d] deficits in adaptive behavior." (App. 69.)

At sentencing, Drewry did not attempt to prove that Winston was mentally retarded and therefore

not subject to execution under *Atkins*. Instead, he attempted to shift the burden of proof to the Commonwealth, arguing to the court that the Commonwealth was required to prove Winston was eligible for the death penalty by showing that he was *not* mentally retarded. (Trial Tr. 31, June 13, 2003.)[1] The trial court rejected Drewry's argument, and Drewry had not prepared for and did not mount an *Atkins* defense before the jury. The jury found Winston guilty of three counts of capital murder and imposed three death sentences. Winston's direct appeals were unsuccessful. *Winston v. Commonwealth,* 604 S.E.2d 21, 50 (Va. 2004) *cert. denied,* 546 U.S. 850 (2005), *reh'g denied,* 546 U.S. 1056 (2005). Winston then challenged his conviction and death sentence in a state habeas corpus petition raising more than thirty claims, including the claim that, because he is mentally retarded, *Atkins* bars his execution, and that his counsel were ineffective because they failed to investigate, adduce evidence, and make this argument at sentencing.

According to Drewry's own account in an affidavit filed in the state habeas proceedings and later in this court, Drewry did not notice or read the records

[1] Virginia Code § 19.2-264.3:1.1, passed after Winston's offense, but before, and therefore applicable to, Winston's trial, requires a defendant raising mental retardation as a bar to execution to give notice before trial and to prove by a preponderance of the evidence that he or she is mentally retarded.

relating to Winston's 1997 classification as mildly retarded. Instead, he forwarded all the records to Dr. Evan Nelson, the clinical psychologist appointed to assist Winston in capital sentencing. Drewry claimed to have been unable to review all the records on his own and "relied on Dr. Nelson to thoroughly review the records and tell [him] what [he] needed to know." (App. 338.) According to Drewry's affidavit, "Dr. Nelson told [Drewry] he did not think [Drewry and his co-counsel, Glenn Berger] could prove [Winston] was mentally retarded as defined by the Virginia statute." (App. 339.) But Drewry considered his own failure to read these records significant. In his words:

> If I had noticed this record before trial, I certainly would have pointed it out to Dr. Nelson and followed-up on this information. I would have challenged his conclusion regarding mental retardation, particularly because the school record indicates [Winston] had adaptive deficits prior to age 18. This record would have been very valuable to us because it was documentation the Commonwealth diagnosed [Winston] with mental retardation as a child.

(App. 338-39.) In any event, there was no follow-up.

At this court's evidentiary hearing, both Drewry and Berger testified that they did not read every page of Winston's records before sending them to Dr. Nelson, and that they did not recall seeing any records referencing Winston's 1997 mild retardation classification during their representation. Both

testified that if they had seen these records, they would have claimed that Winston was mentally retarded and not eligible for the death penalty under *Atkins* and that they had no strategic reason to not pursue such a defense. Dr. Nelson testified at the hearing that though he likely saw the 1997 mild retardation classification in Winston's records, he could not be certain because he could not recall seeing it and did not list it among the sources in his Capital Sentencing Evaluation. Nelson also testified that counsel did not provide him with information from certain teachers, social workers, and family members whose input would have been relevant in assessing adaptive functioning. He acknowledged that had he possessed this additional information while he was assisting the defense, he might have rendered a different opinion concerning the viability of a mental retardation defense.

Marilynn Schneider Lageman also testified at the evidentiary hearing. Lageman was a psychologist in the Fairfax County schools and a member of the Special Education Department committee that recommended the 1997 psychological evaluation. Winston's federal habeas counsel, who was also his state habeas counsel, first located Lageman on November 6, 2008, in Blanco, Texas, twenty-one months after the Supreme Court of Virginia dismissed Winston's state habeas petition and two weeks before this court's evidentiary hearing. Lageman testified that she had performed a psychological evaluation that led to Winston's 1997

mild retardation classification and that she had retrieved this psychological evaluation from a computer disk stored in her home.

As a part of this evaluation, Lageman administered the WISC-III IQ test. On that test, Winston received a verbal IQ score of 60, and a performance IQ score of 77, and a full-scale IQ score of 66. Lageman's report noted that Winston "was cooperative and attempted all tasks presented" during the evaluation, but that his "verbal cognitive skill development falls within the mild range of mental retardation for his age" while "[n]onverbal areas of cognitive functioning are somewhat more developed." (Evid. Hr'g Pet'r's Ex. F, at 2-3.) Though another psychologist was on the committee that ultimately determined Winston was mildly retarded, Lageman noted that such determinations depended on diagnostic criteria, including "[c]ognitive delays . . . based on an IQ test with a score below 70, taking into consideration . . . standard error measurements," "[s]ocial and adaptive skills that also fell in the mild range of mental retardation," and "teacher narratives, parent comments, classroom behavior [and] any information that [the committee] could get regarding people's impressions of the student, to make sure all areas were pretty much falling below that level." (Evid. Hr'g Tr. 5, Nov. 19-20, 2008.) She testified that the committee "typically requested" a standardized adaptive skills test "when mental retardation was an area of possible concern." (Evid. Hr'g Tr. 9-10.)

Christine Johnson, who worked in the Special Education Department and signed Winston's 1997 mild retardation classification form, also testified at this court's hearing. According to Johnson, the form indicates that the committee was unanimous in its determination that Winston was eligible for special education based on mild retardation. She also stated that the committee would have assessed the student's adaptive behavior based on a standardized measure before making a mental retardation determination.

Winston's expert, Dr. Daniel Reschly, opined that "to a reasonable degree of psychological certainty," Winston was mentally retarded under Virginia law before he reached age 18. (Evid. Hr'g Tr. 72-73.) As to the intellectual functioning component, Dr. Reschly testified that, when considering both the standard error of measurement ("SEM") and the "Flynn Effect," the low range for Winston's 1987, 1990, and 1995 IQ test scores is more than two standard deviations below the mean.

As Dr. Reschly explained at the evidentiary hearing, an individual's score on a single IQ test is not necessarily that person's true IQ, but rather indicates the range within which his or her true IQ would fall. The SEM to be applied is 3 to 5 points on either side of the individual's score on a single test, depending on the accuracy desired. A full-scale IQ score of 70 on a single test indicates a 68% probability that the test-taker's true IQ falls between 67 and 73, or a 90% probability that the test-taker's true score falls within 65 and 75.

The Flynn Effect refers to the phenomenon, or perhaps paradox, of rising IQs discovered by the researcher James Flynn in 1987. Flynn observed that every time IQ test scores were renormed, the raw data indicated that a substantial increase in IQ had occurred in the general population since the last time the test was normed. IQ tests are generally renormed every 15-20 years. From these results, two competing theories emerge. Some experts conclude that IQ tests become less accurate over time, and can eventually greatly overstate a person's actual IQ. Other experts draw the opposite conclusion – that over time, IQ among the general population is increasing, due largely to environmental factors such as better nutrition, improved education, and increased access to information.

Though Dr. Reschly described the Flynn effect as "controversial" and noted that "there is not a consensus" on applying it to reduce the test-taker's score, the phenomenon is an established fact.[2] He also

[2] Dr. Reschly noted that the task force of Division 33 of the American Psychological Association does "take into account the Flynn Effect through either adjusting the population mean or though subtracting points from IQ scores obtained with tests whose norms are out of date." (Evid. Hr'g Tr. 84-86.) Further, he read passages from the 2007 user guide of the American Association of Mental Retardation's classification manual which acknowledges the existence of the Flynn Effect and states "[i]n cases where tests with aging norms [are] used, a correction for the aging norms is warranted[,]" and he gives an example of how to adjust the population norm. (Evid. Hr'g Tr. 83.) However, as to Winston's 1987, 1990, and 1995 IQ tests, adjustment for the

(Continued on following page)

noted seemingly inconsistent variations in Winston's scores on IQ subtests, but could not explain them. Dr. Reschly opined "to a reasonable degree of psychological certainty" that Winston had conceptual, social, and practical adaptive deficits before age 18. Dr. Reschly based these conclusions on, among other sources, his interviews with Winston, some of Winston's relatives, a former guardian, and a former teacher, and on his review of Winston's criminal file, school records, and Dr. Nelson's report.

The Warden's expert, Dr. Leigh Hagan, reached the opposite conclusion based on an interview with Winston and a review of Winston's educational and court records. He opined "that the totality of the behavioral science evidence does not indicate the onset of [mental retardation] originating before the age of 18 years." (Evid. Hr'g Resp't's Ex. A, at 34.) Dr. Hagan testified that there is a lack of consensus as to the cause of the Flynn effect, though the generally accepted practice is to account for the Flynn effect by renorming standardized tests or by "address[ing] it in narrative form, but not to subtract IQ points that the individual has earned." (Evid. Hr'g Resp't's Ex. A, at 32.) He also noted that there is no basis in practice for using SEM to find that an individual's true IQ falls in the range below the earned score on a given IQ test because it was equally likely that the

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Flynn Effect alone (that is, without account for the SEM) results in only the 1990 test score falling to at least two standard deviations below the mean.

test-taker's true IQ could fall in the range above the earned score. Dr. Hagan noted the "wide variability" in Winston's scores on individual subtests of the IQ test (Evid. Hr'g Tr. 319), and noted that "[s]everal factors can suppress scores." (Evid. Hr'g Resp't's Ex. A, at 32.) Finally, he concluded that Winston's limitations in adaptive behavior did not significantly impair his functioning.

II.

Following the Court of Appeals' directive to consider Winston's *Atkins*-related ineffective assistance claim *de novo* and only to afford deference under § 2254(e)(1) "to any relevant factual findings" made by the Supreme Court of Virginia,[3] *see Winston,* 592 F.3d at 557-58, the court conducts the well-worn two-part analysis that *Strickland v. Washington,* 466 U.S. 668, requires and concludes: (1) that Winston's counsel's representation fell below an objective standard of reasonableness when he obtained, but failed to review, Winston's school records indicating that Winston was mildly retarded, and (2) that there

[3] Respondent has filed two notices of "new authority." According to respondent, "[n]otwithstanding the mandate from the United States Court of Appeals," the Supreme Court's decisions in *Cullen v. Pinholster,* 131 S.Ct. 1388 (2011), and *Harrington v. Richter,* 131 S.Ct. 770 (2011), "necessarily overrule[ ] the Fourth Circuit and require[ ] dismissal of Winston's petition. . . ." (Resp't's Notice New Auth. 1, ECF No. 165, Apr. 5, 2011.) Clearly, this is not an appropriate forum for the argument.

is a reasonable probability that but for counsel's unprofessional errors, the outcome of the proceeding would have been different. As a consequence, the court will grant Winston's petition for a writ of habeas corpus, and Virginia must conduct a trial on the question of whether Winston is mentally retarded, and sentence him accordingly, or otherwise resentence him without the possibility of death.

1.

To satisfy *Strickland*'s performance prong, Winston must show that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To overcome that presumption, Winston must show that counsel failed to act "reasonab[ly] considering all the circumstances." *Id.* at 688. In assessing counsel's performance, a reviewing court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Counsel's "strategic choices made after thorough investigation . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. "A

decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Wiggins v. Smith,* 539 U.S. 510, 533 (2003) (quoting *Strickland,* 466 U.S. at 691). "An attorney can avoid activities that appear 'distractive from more important duties.'" *Harrington,* 131 S.Ct. at 789 (quoting *Bobby v. Van Hook,* 130 S.Ct. 13, 19 (2009) (per curiam)), in order to "formulate a strategy that [is] reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Id.* And "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appears to be remote possibilities." *Id.* at 791. The court assesses "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* at 788 (quoting *Strickland,* 466 U.S. at 690).

With these principles in mind, the court concludes that trial counsel performed deficiently on the question of whether Winston is mentally retarded and not subject to a sentence of death. Capital defense counsel must have a command of reasonably discoverable evidence that is material to the question of life and death. Though they often must necessarily rely on paralegals, investigators, experts, and other members of the defense team to gather essential evidence, they are responsible for having a command

of that evidence. Their right to rely on the opinions of experts does not relieve them of the responsibility of familiarizing themselves with the evidence they have gathered. Winston's trial counsel essentially testified that had they seen Winston's 1997 mental retardation classification, evidence that they had gathered, they would have claimed that Winston was mentally retarded and not eligible for the death penalty under *Atkins* and that they had no strategic reason not to pursue such a defense. But they did not review the records because they simply shipped them to their expert, Dr. Nelson, and expected him to tell them what they needed to know. As the court views it, Dr. Nelson was not responsible for telling counsel what they needed to know. Rather, they were responsible for knowing what evidence they had and for asking him searching questions raised by that evidence.

"The Sixth Amendment entitles criminal defendants to the effective assistance of counsel – that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms." *See Bobby,* 130 S.Ct. at 16 (internal quotations omitted). To the extent that they "describe the professional norms prevailing when the representation took place," professional standards "can be useful as 'guides' to what reasonableness entails." *Id.* (quoting *Strickland,* 466 U.S. at 688). The American Bar Association's 2003 guidelines provide that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt

and penalty." ABA Guidelines for the Appointment and Performance of Defense Counsel and Death Penalty Cases § 10.7. The standard hardly seems remarkable. But as general as the standard is, it carries the necessary corollary that counsel must not only conduct a reasonable investigation, but he must also be familiar with it. This directive is not merely a laudatory goal, a best practice, or a most common custom in a capital case, but rather, a prevailing professional norm. Counsel must "be familiar with readily available documents necessary to an understanding of their client's case." *See Hyman v. Aiken,* 824 F.2d 1405, 1416 (4th Cir. 1987). Winston's counsel had in their hands, but did not read, a school record reflecting that Winston was eligible for special education due to "mild retardation" and that Winston "demonstrate[d] a reduced rate of intellectual development and a level of academic achievement below that of age peers" and "concurrently demonstrate[d] deficits in adaptive behavior." As the court noted when it first granted Winston an evidentiary hearing on his *Atkins* related ineffective assistance claims:

> The court is aware of and sensitive to the difficulties and burdens capital trial counsel must frequently shoulder. It is essential that they be able to delegate certain tasks and rely on expert opinions with confidence. *Cf. Wilson v. Greene,* 155 F.3d 396, 403 (4th Cir. 1998) (observing that, where counsel had received a psychologist's opinion that defendant was not mentally ill at time

> of offense, "counsel was not required to second-guess the contents of this report," but rather "understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation." (internal quotation marks omitted)). However, capital trial counsel cannot outsource their fundamental responsibilities.

Winston, 600 F. Supp. 2d at 732 n.14. Reading essential, reasonably available documents is one of capital counsel's fundamental responsibilities, and the court finds that counsel's failure to read the document was not reasonable under all the circumstances. Accordingly, the evidence establishes counsel's deficient performance in handling the issue of whether Winston is retarded and, under *Atkins,* not subject to execution.

2.

For the prejudice prong, Winston must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Thus, the central focus of the prejudice inquiry is "whether

counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 506 U.S. 364, 372 (1993). But unlike the rule of contemporary assessment which requires the court to review counsel's conduct from his perspective at the time of trial, in assessing prejudice (the probability of a different outcome), a post conviction court considers the totality of the evidence – the evidence adduced at trial, and the evidence adduced in the habeas proceeding. *See Sears v. Upton,* 130 S.Ct. 3259, 3267 (2010). As the Supreme Court most recently explained in *Harrington*:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asked whether it is "reasonably likely" the result would have been different. [Citations omitted]. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more probable than not standard is slight and matters "only in the rarest case." [Citations omitted]. The likelihood of a different result must be substantial, not just conceivable.

Harrington, 131 S.Ct. at 791-792.

At the evidentiary hearing, the court heard from acknowledged experts in the field of mental retardation who have reached nearly opposite conclusions on the fact-laden determination of whether, before age 18, Winston had significantly sub-average intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that was at least two standard deviations below the mean, and whether he concurrently exhibited significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Along the way, the experts have sparred over the application of the Flynn Effect and disagreed concerning the proper application of the SEM. But however viewed, Winston has no more than a borderline intellect, seemingly confirmed by unadjusted, full-scale IQ scores of 77, 73, 76, and 66, with the fourth of these being the more recent in time. This court is not called upon to decide whether Winston is mentally retarded. Rather, it is called upon to decide whether there is a reasonable probability a sentencing jury might have so concluded, had counsel read the overlooked records, followed up, raised the issue, and marshaled the evidence. Though the court cannot say that the outcome likely would be different, it can say that the likelihood of a different result is not insubstantial. Accordingly, the court finds that there is a reasonable probability that, but for counsel's unprofessional

errors, the outcome of the proceeding would have been different.

III.

The Court of Appeals gave this court explicit instructions to consider all the evidence, including Winston's additional IQ score, affording deference under § 2254(e)(1) "to any relevant factual findings" made by the Supreme Court of Virginia, and affording no deference under § 2254(d) to the Supreme Court of Virginia's adjudication of the claim. The court has done so and now concludes from all the evidence it heard, including the new evidence, that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Accordingly, the court grants Winston's petition for a writ of habeas corpus. As a consequence, Virginia must conduct a trial on the question of whether Winston is mentally retarded, and sentence him accordingly, or otherwise resentence him without the possibility of death.[4]

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[4] As the Court of Appeals noted, the Supreme Court of Virginia made "several factual findings entitled to deference concerning the tests Winston took and the Fairfax County assessment procedures." *Winston,* 592 F.3d at 557. The court directed the parties to identify all relevant factual findings entitled to deference under § 2254(e)(1). Predictably, the parties are not in agreement. The court has identified two findings it considers relevant to its current decision. Specifically, the Supreme Court of Virginia found that Winston "achieved full-scale scores of 77, 76 and 73 on three administrations of the

(Continued on following page)

ENTER: May 16, 2011.

Welsher [sic] Intelligence Scale for Children-Revised," and it found that though Winston was "once described as 'mildly mentally retarded' for purposes of special education eligibility" according to the definition Winston provided, Winston could have been so regarded even with "an IQ score above 70." *Winston v. Warden of Sussex I State Prison,* 2007 WL 678266, at *15. This court has made the same findings. Winston's first three full-scale scores, unadjusted for SEM or the Flynn effect, are those noted by the Supreme Court of Virginia. Winston also could have been considered mildly mentally retarded for special education purposes even with an IQ score above 70. Nevertheless, his actual score on the test associated with the special education evaluation was 66.

**Leon Jermain Winston, Petitioner,
against Warden of the Sussex I State Prison,
Respondent.**

Record No. 052501

SUPREME COURT OF VIRGINIA

March 7, 2007, Decided

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed January 27, 2006, the respondent's motion to dismiss, and petitioner's opposition to the motion to dismiss, the Court is of the opinion that the motion should be granted and the writ should not issue.

Leon Jermain Winston was convicted in the Circuit Court of the City of Lynchburg of capital murder of Anthony Robinson in the commission of robbery or attempted robbery, capital murder of Rhonda Whitehead Robinson in the commission of robbery or attempted robbery, capital murder of Rhonda Whitehead Robinson during the same act or transaction in which another person was willfully, deliberately and with premeditation killed, two counts of attempted robbery, statutory burglary, maliciously discharging a firearm, and five counts of use of a firearm in the commission of a felony. The jury fixed Winston's punishment at death for each of the three capital murder convictions and at seventy-three years imprisonment for the remaining convictions. The trial court sentenced Winston in accordance with the jury verdict. This Court affirmed

Winston's convictions and upheld the sentences of death in *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (2004), *cert. denied*, 546 U.S. 850, 126 S. Ct. 107, 163 L. Ed. 2d 120 (2005).

* * *

In claims (VIII)(A) and (VIII)(B), petitioner alleges that his execution is barred by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he was diagnosed with mental retardation at age sixteen and allegedly meets the statutory definition for mental retardation as prescribed in Code § 19.2-264.3:1.1. In support of this claim, petitioner relies on a cover page from a Fairfax County Public Schools Special Education Eligibility Form that indicates that petitioner was eligible to receive special education services after school officials determined that he was disabled due to mild mental retardation. Petitioner additionally submits an affidavit indicating that the test scores and data relied upon to reach this determination are unavailable.

The Court holds that claims (VIII)(A) and (VIII)(B) are not cognizable in a petition for a writ of habeas corpus, as these non-jurisdictional issues could have been raised at trial and on direct appeal. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In claim (VIII)(C), petitioner alleges he was denied the effective assistance of counsel because counsel unreasonably failed to present evidence of petitioner's mental retardation, including petitioner's

school record diagnosing his mental defects and evidence of the "Flynn Effect," a multiplier that petitioner asserts must be accounted for in calculating a person's true intelligence quotient (IQ) score.

The Court holds that claim (VIII)(C) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the evidence presented at trial and the documents upon which petitioner now relies, demonstrates that petitioner was administered three standardized tests for measuring intellectual functioning. Petitioner achieved full-scale scores of 77, 76, and 73 on three administrations of the Wechsler Intelligence Scale for Children-Revised. While petitioner offered evidence that he was once described as "mildly mentally retarded" for the purposes of special education eligibility, the definitions of mental retardation provided by petitioner demonstrate that for special-education eligibility, a candidate may, nonetheless, have an IQ score above 70. Furthermore, petitioner offers no objective data in support of his claim of mental retardation. The legislature has defined mental retardation as:

> [A] disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with

> accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Code § 19.2-264.3:1.1(A).

This Court has previously held that the maximum score for a classification of mental retardation is an I.Q. score of 70. *See Johnson v. Commonwealth*, 267 Va. 53, 75, 591 S.E.2d 47, 59 (2004), *vacated on other grounds*, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 270 (2005). Petitioner provides no documentation that he was diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VIII)(D), petitioner alleges he was denied the effective assistance of counsel because counsel failed to present evidence about petitioner's subaverage intellectual functioning. Petitioner contends that there was abundant evidence of his low functioning and its impact on his life.

The Court holds that claim (VIII)(D) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*.

The record, including the trial transcript and the exhibits admitted at trial, demonstrates that counsel moved into evidence copies of four different psychological evaluations made of petitioner in 1987, 1990, 1994 and 1995. These reports included the following findings: petitioner "is a youngster of mentally deficient to average intelligence" with "functional deficits . . . evidenced in short and long term auditory memory, visual memory, visual motor integration, visual sequencing, and perception and integration of part-whole relationships;" petitioner had "extreme problems maintaining attention and effort;" "declining" verbal scores over the years; and "many emotional concerns resulting from his abandonment and rejection from various family members." Petitioner does not identify the substance of any additional evidence he contends counsel should have presented and does not explain how such evidence would not have been cumulative. Furthermore, petitioner does not allege how the presentation of this evidence would have affected the proceedings. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

* * *

Accordingly, for the reasons stated, the petition is dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4 (L)
(7:07-cv-00364-SGW)

LEON J. WINSTON

Petitioner-Appellee

v.

EDDIE L. PEARSON, Warden, Sussex I State Prison

Respondent-Appellant

No. 11-5
(7:07-cv-00364-SGW)

LEON J. WINSTON

Petitioner-Appellant

v.

EDDIE L. PEARSON, Warden, Sussex I State Prison

Respondent-Appellee

ORDER

(Filed Jul. 23, 2012)

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under

Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Duncan and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

28 USCS § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

CODE OF VIRGINIA

TITLE 19.2. CRIMINAL PROCEDURE
CHAPTER 15. TRIAL AND ITS INCIDENTS
ARTICLE 4.1. TRIAL OF CAPITAL CASES

Va. Code Ann. § 19.2-264.3:1.1 (2003)

Capital cases; determination of mental retardation

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

"*Mentally retarded*" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and

(ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being

assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards.

C. In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

In any case in which the offense may be punishable by death and is tried before a judge, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the

judge as part of the sentencing proceeding required by § 19.2-264.4.

The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence.