No. 12-492

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE L. PEARSON, WARDEN,

Petitioner,

v.

LEON J. WINSTON,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LEIGH M. SKIPPER
Chief Federal Defender, By:

JENNIFER L. GIVENS
Counsel of Record
JAMES MORENO
AREN ADJOIAN
FEDERAL COMMUNITY DEFENDER FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
601 Walnut St., Suite 545-W
Philadelphia, PA 19106
(215) 928-0520
Jennifer_Givens@fd.org

Counsel for Leon J. Winston

CAPITAL CASE

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court deny review of the Fourth Circuit's unanimous, "case-specific," fact-bound, law-of-the-case holding that the state court unreasonably declined to adjudicate the full merits of Winston's *Atkins*-related ineffectiveness claim – a holding that was inappropriately mischaracterized by the Warden in his Petition – where state habeas counsel presented the state court with a colorable constitutional claim, including a childhood diagnosis of mental retardation; where the state court dismissed the claim after having refused Winston's requests for a mental retardation expert, discovery, and an evidentiary hearing to develop and present evidence regarding disputed material facts; and where the new evidence of mental retardation Winston presented in federal court was entirely consistent with the state court proffer?

2. Should this Court deny review of the unanimous Fourth Circuit's straightforward application of *Strickland v. Washington* where the Warden does not even contend that the lower court misstated any legal standard and where the Warden's argument depends on significant factual misrepresentations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

The petition for a writ of certiorari should be denied for several reasons, most simply because this case is such a poor vehicle for certiorari. This case has been twice-decided by unanimous Fourth Circuit panels and twice-denied en banc review without a single judge on the full Fourth Circuit calling for a vote. The Fourth Circuit's second decision was appropriately governed by the law-of-the-case doctrine. The Warden's current questions presented are substantially the same as those raised in his first certiorari petition in this case, which was filed while *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), were pending before this Court. *Kelly v. Winston*, No. 09-1431, 131 S. Ct. 127 (2010). The Court denied certiorari on the Warden's first petition, and his current attempt is no more worthy of review. Review – particularly the summary reversal requested by the Warden – is especially unwarranted because the petition is based upon substantial factual and legal misrepresentations. The Court of Appeals did not even render the holding that the Warden attacks, and his split of authority is illusory.

The Fourth Circuit's narrow, fact-bound holding is correct. The Fourth Circuit correctly concluded that the state court did not adjudicate the full merits of Winston's ineffectiveness claim – and that de novo review was therefore appropriate – where the state court unreasonably ignored material factual allegations in Winston's pleading and exhibits and denied his colorable claim without permitting even modest development of the critical facts and compelling allegations. Winston was diligent in attempting to develop his claims in state court and his new evidence in federal court did not fundamentally alter his claims. In any event, the state court's adjudication was unreasonable under § 2254(d), and therefore de novo review is undeniably warranted in Winston's case regardless of whether § 2254(d) applies. Thus, a reversal in this case would not affect the outcome.

As a practical matter, the summary reversal sought by the Warden also would lead to an ironic result in light of the principles of federalism he purports to defend. Summary reversal would require a remand to the lower federal courts to resolve the as-yet unadjudicated underlying *Atkins* claim. By contrast, should this Court deny certiorari, the writ will issue and the case will return to the state courts for a determination of whether Winston is mentally retarded – a result that is plainly more deferential to the state courts.

Finally, with regard to the second question presented, the Warden does not allege that the Fourth Circuit misstated the governing legal standard for ineffectiveness claims – he simply disagrees with the Fourth Circuit's (correct) result. Certiorari, let alone summary reversal, is inappropriate.

COUNTERSTATEMENT OF THE CASE

At age sixteen, Leon Winston was classified as a child with mental retardation by the Fairfax County, Virginia school district. *Winston v. Kelly*, 592 F.3d 535, 541 (4th Cir. 2010) (*Winston I*). Although Winston was not officially classified as mentally retarded until age sixteen, his deficits in intellectual functioning and adaptive behavior have been lifelong and were evident from his first contacts with the school system, when he failed kindergarten two years running. JA 1909.[1] As a result of Winston's serious academic struggles, he was placed at age eight in the Leary School, a school of last resort for students in Fairfax County with severe intellectual or behavioral problems. JA 739, 741. Winston was first referred for intelligence testing in 1987 because even in his third

[1]JA refers to the joint appendix filed in the Fourth Circuit upon its initial review of the case. A supplemental joint appendix (SJA) was filed during the second appeal to the Fourth Circuit.

year of kindergarten, "academically he [was] rapidly falling behind the rest of his class." JA 1909. Winston's lack of academic progress was not for want of effort. He "was always a very hard worker" and his "attendance was good." JA 746.

Trial counsel obtained Winston's school records but did not see the mental retardation diagnosis because – as they candidly acknowledged – they did not review the records in their entirety. *Winston I*, 592 F.3d at 542. Counsel testified that "they had no strategic reason for neglecting to review the records." *Winston v. Pearson*, 683 F.3d 489, 494 (4th Cir. 2012) (*Winston II*). And penalty phase counsel testified that "review of the Reclassification would have prompted him to investigate Winston's mental retardation." *Id.* at 495. In counsel's words, had he noticed the diagnosis, he "would have played it to the hilt." JA 696. The jury deciding Winston's fate never heard the words "mentally retarded." Winston was sentenced to death.

Following direct appeal, Winston filed a state habeas petition in the Virginia Supreme Court, which raised claims that his execution would be unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), and that counsel was constitutionally ineffective for failing to read his records and raise the *Atkins* claim at trial. *Winston I*, 592 F.3d at 542. In Virginia, all habeas petitions in capital cases are within the exclusive jurisdiction of the Virginia Supreme Court. Va. Code Ann. § 8.01-654(C)(1). An evidentiary hearing is available to these applicants only if the state's highest court refers the matter to the trial court with instruction to hold a hearing. *Id.*

In support of the mental retardation claims, Winston presented his childhood IQ scores of 73, 76, and 77 on Wechsler standardized intelligence tests. Winston alleged that these scores are artificially high and did not reflect his actual level of intelligence. When these results are interpreted in conformity with accepted professional practice, taking into account the Flynn Effect[2] and standard error of measure,[3] all three scores satisfy the Virginia mental retardation definition. *Winston I*, 592 F.3d at 541, 550. Winston further alleged that pursuant to the requirements for a mental retardation classification in Fairfax County, the school district would have administered yet another intelligence test and, to receive the classification, his score was required to be at least two standard deviations below the mean. *Winston I*, 592 F.3d at 541. Although state habeas counsel attempted to obtain the test results that supported the classification, they were advised by school officials that the record likely had been destroyed. *Id.* Winston alleged that because he had been classified as mentally retarded in Fairfax County (by a Commonwealth entity), he necessarily met the materially identical diagnostic criteria set forth in the Virginia statute. 50-Page Prophylactic Petition for Writ of Habeas Corpus at 32-34.

Winston also presented voluminous educational, psychological, and social services records along with affidavits from family members, teachers, counselors, and social workers, which described Winston's significant adaptive deficits. Winston submitted affidavits from both trial attorneys and alleged that counsel had no strategic reason for failing to discover, pursue, or present evidence of Winston's mental retardation, including the Fairfax County classification. Finally,

---

[2]The Flynn Effect is a phenomenon demonstrating that "as an intelligence test ages – or moves farther from the date on which it was standardized ('normed') – the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects." *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1276 (N.D. Ala. 2009). For Wechsler tests normed on the United States population, the rate of increase has consistently been 0.3 points per year. *Id.* at 1275-76. The Warden has acknowledged the existence of this phenomenon, although he disputes its applicability in this case. *E.g.* JA 1117-18.

[3]The standard error of measure is a confidence interval, or range of scores (generally accepted as plus or minus five points), within which an individuals true IQ most likely lies given that testing instruments are not capable of perfect precision. *E.g. Thomas*, 614 F. Supp. 2d at 1271-73.

Winston asked the Virginia Supreme Court for funds to hire a mental health expert and for a referral for an evidentiary hearing to develop the claims and to resolve any factual disputes raised by the Commonwealth. Both requests were denied. *Winston v. Warden of the Sussex I State Prison*, No. 052501, 2007 Va. LEXIS 43, at *51 (Va. March 7, 2007) (unpub.).

The Virginia Supreme Court then denied Winston's claims, *Winston I*, 592 F.3d at 542, even though his allegations, if taken as true, would require a grant of relief. It did not adjudicate Winston's allegations about the Flynn Effect and the standard error of measure. *Winston I*, 592 F.3d at 557 ("The only time the Virginia Supreme Court has even mentioned the Flynn effect in a published opinion was in this case, and it has never considered the effect of the SEM. The Virginia court did not discuss the Flynn effect beyond stating that Winston had offered evidence concerning it."). It also did not address Winston's allegation that the score that precipitated Winston's mental retardation classification was at least two standard deviations below the mean and unreasonably rejected his allegation that the Fairfax County definition of mental retardation is identical to the Virginia statutory definition. *Winston v. Warden*, 2007 Va. LEXIS 43 at *42-*44.

Winston proffered the *exact* same evidence in federal court that he had presented in state court, and the district court granted a hearing on his *Atkins*-related claims and appointed a mental health expert to assist Winston. JA 617.[4] In preparation for the hearing, counsel discovered the report of the intelligence test upon which Winston's mental retardation classification in the Fairfax County School District was partially based, which showed that Winston had obtained an IQ score

[4]The Warden claims that "[t]he federal court held a hearing to see if the state decision had been unreasonable under § 2254(d)." Pet. 13. This is incorrect; throughout the pendency of the federal litigation, Winston has never claimed that the consideration of new evidence is appropriate in making reasonableness determination under § 2254(d), nor has any federal court conducted such an analysis in this case.

of 66. *Winston I*, 592 F.3d at 542-43. At the hearing, the district court heard testimony from nine witnesses over the course of two days: the two trial attorneys, two mental retardation experts, the defense expert at trial, Winston's aunt, Winston's special education teacher of four and a half years, the school psychologist who administered the IQ test on which Winston scored a 66, and a member of the Fairfax County special education eligibility committee.

At the hearing, Winston's expert, Dr. Daniel Reschly, concluded that Winston is mentally retarded under Virginia law. *Winston I*, 592 F.3d at 543. Dr. Reschly opined – as he would have done in state court had funding been granted – that Winston was a person with mental retardation even on the basis of the evidence available prior to the discovery of the report that included the IQ score of 66.[5] JA 1259. Trial counsel confirmed that they did not notice Winston's mental retardation classification, that had they done so they would have conducted further investigation and raised a mental retardation defense, and that they had no strategic reasons for their failings. JA 651, 656-57, 674-76, 681, 696. Dr. Evan Nelson, the defense expert at trial, testified that while he reported to trial counsel that he did not believe Winston could satisfy the Virginia definition of mental retardation, "it's certainly possible [his] opinion might have been different with this wealth of other information" that was developed post-conviction. JA 720.[6]

[5]The Warden's expert, Dr. Leigh Hagan, testified that Winston does not suffer from mental retardation. *Winston I*, 592 F.3d at 543. Dr. Hagan, however, did not address anywhere in his 38-page report the fact that at age sixteen Winston was classified as mentally retarded by Fairfax County Schools. JA 1985-2022. When questioned about this omission at the evidentiary hearing, Dr. Hagan responded: "I did address it in my thought process. I don't put every thought, every jot and tittle into the report." JA 1177.

[6]Even without the benefit of the additional available evidence, Dr. Nelson noted in his trial report that "[t]he question of Mental Retardation will naturally emerge from the above data." JA 2113.

In its March 6, 2009, memorandum opinion denying relief, the district court assumed without deciding that counsel provided constitutionally deficient performance in failing to read their client's educational and psychological records. JA 2147, 2161. Although the district court assumed deficient performance, it denied relief after conducting a "retrospective" § 2254(d) analysis and concluding that the state court was not unreasonable in finding that Winston could not demonstrate *Strickland* prejudice. JA 2156-61.

The Fourth Circuit unanimously reversed.[7] The court held that the district court correctly found that Winston did not fail to develop the factual basis of his claims in state court; therefore a hearing was permitted. *Winston I*, 592 F.3d at 551-52. The court further opined that the IQ score of 66 did not fundamentally alter the state court claims; thus the district court erred by failing to consider the score. *Id.* at 549-51. It directed the district court, on remand, to consider Winston's claims de novo because the state court chose not to adjudicate the full merits when it dismissed the colorable claims without providing discovery or an evidentiary hearing. *Id.* at 553-59. The Fourth Circuit reiterated that an assessment under § 2254(d) must be limited to the record before the state court. *Id.* at 553. Winston never claimed, nor did the Fourth Circuit ever suggest, that evidence from the federal evidentiary hearing could or should be used to demonstrate unreasonableness under §§ 2254(d)(1) or (d)(2). Lastly, the Fourth Circuit directed that upon remand, the district court would nonetheless be bound by 28 U.S.C. § 2254(e)(1) and therefore must presume that the relevant

[7]The Fourth Circuit affirmed the denial of Winston's three remaining claims over the dissent of Judge Gregory on two of the claims. Judge Gregory would have granted relief on Winston's claim that he was unconstitutionally denied a lesser included offense charge under *Beck v. Alabama*, 447 U.S. 625 (1980), and on Winston's claim that he received ineffective assistance of counsel at the penalty phase. *Winston I*, 592 F.3d at 561 (Gregory, J., concurring in part and dissenting in part).

findings of fact made by the Virginia Supreme Court were correct unless rebutted by clear and convincing evidence. *Id.* at 557. The Warden petitioned for rehearing en banc, which the full Fourth Circuit denied without calling for a poll.

The Warden then filed a petition for certiorari. *Kelly v. Winston*, No. 09-1431, 131 S. Ct. 127 (2010). His petition was filed while *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), were pending before this Court. The petition presented the following questions, which are materially the same as those presented in his current petition:

1. In reversing the district court's denial of habeas corpus relief to a state prisoner, did the Fourth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254 by holding that the state court's judgment was not an adjudication on the merits and thus entitled to no deference because the state court dismissed the claim without an evidentiary hearing, by confusing the application of §§ 2254(d)(1) and (e)(1), by approving a hearing in federal court contrary to AEDPA, and by accepting, without finding cause and prejudice for the default, new evidence to support a claim of mental retardation which the state prisoner affirmatively had told the state court had been destroyed?

2. In granting habeas corpus relief to a state prisoner, did the Fourth Circuit impermissibly enlarge the Sixth Amendment right to effective assistance of counsel, in conflict with *Strickland v. Washington*, by permitting consideration of evidence which did not exist at the time of counsel's representation?

Pet. for Cert. at i, *Kelly v. Winston*, 131 S. Ct. 127. This Court denied certiorari.

On remand, the district court conducted de novo review and concluded that counsel's failure to "read the overlooked records, follow[] up, raise[] the issue, and marshal[] the evidence" of mental retardation constituted deficient performance under *Strickland*, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different." SJA 31.

The Fourth Circuit affirmed, again unanimously, noting that its inquiry was constrained by the law-of-the-case doctrine and that it would not reconsider its prior holding absent "extraordinary circumstances." *Winston II*, 683 F.3d at 498. After "[c]losely scrutinizing the import of *Pinholster* and *Richter*," the Fourth Circuit found "nothing in those decisions that renders infirm our analytical framework." *Id.* at 500. It emphasized that de novo review was appropriate in Winston's case not only because the state court decided Winston's colorable claim without resolving important factual disputes or permitting any fact development, but also because Winston was diligent and his new evidence did not fundamentally alter the claim he presented in state court. *Id.* at 495.

In summarizing its initial opinion in the case, the court explained that the determination of whether § 2254(d) applies is a "case-specific inquiry," and stated only that "when a state court *unreasonably* refuses to permit 'further developments of the facts' of a claim, de novo review *might* be appropriate." *Id.* (emphasis added). The Fourth Circuit made clear: "that a petitioner requested an evidentiary hearing from the state court, without more, might not always suffice to satisfy AEDPA's diligence requirement." *Id.* at 497.

The Fourth Circuit also addressed Justice Sotomayor's mention of *Winston I* in her dissent in *Pinholster*. *See Pinholster*, 131 S. Ct. at 1417 (Sotomayor, J., dissenting). Respectfully, it made clear that it "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.'" *Winston II*, 683 F.3d at 502 (alteration in original) (citation omitted). The Fourth Circuit "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." *Winston II*, 683 F.3d at 502 (emphasis in original). It also noted that Winston's case presents the situation contemplated by Justice Sotomayor's dissent, where she assumed "'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.'" *Winston II*, 693 F.3d at 502 (internal citations omitted).

The Warden again sought rehearing en banc, which the full Fourth Circuit again denied without calling for a poll.

REASONS FOR DENYING THE WRIT

I. THE IDIOSYNCRACIES OF THIS CASE AND THE WARDEN'S SIGNIFICANT MISREPRESENTATIONS MAKE THE CASE A POOR CANDIDATE FOR THIS COURT'S REVIEW.

The Warden previously sought review of questions substantially the same as those posed here, and this Court denied certiorari. The Fourth Circuit's subsequent opinion, rendered pursuant to the law-of-the-case doctrine, presents no additional bases upon which a grant of certiorari would be appropriate. What the Warden is really seeking is a second opportunity to request this Court's review of the initial Fourth Circuit decision.

Moreover, a number of the Warden's representations, with regard to both the factual record and the lower court cases in support of his so-called circuit split, are misleading or simply false. Certiorari review – and summary reversal in particular – is particularly inappropriate in light of the Warden's misrepresentations. And lastly, summary reversal would require a remand for the lower federal courts to adjudicate Winston's underlying *Atkins* claim, whereas a denial of certiorari would result in the case returning to the state courts for a mental retardation determination. Summary reversal would thus run contrary to the principles of federalism that the Warden purports to defend.

A. The Fourth Circuit's "Law-of-the-Case" Holding Is Not a Basis for this Court's Review.

This Court denied review of *Winston I* despite the pendency of *Richter* and *Pinholster* in this Court at the time of the Warden's prior petition, and despite the Warden's attempts to draw parallels between this case and those two then-pending cases. Pet. for Cert. at 12-14, *Kelly v. Winston*, 131

S. Ct. 127. Had this Court believed that the Fourth Circuit's original opinion might have been implicated by its upcoming decisions *Richter* and *Pinholster*, as the Warden now claims, it easily could have held the case pending those decisions. It did not because (as the Fourth Circuit correctly held) *Winston I* did not address the issues presented in either case. The Fourth Circuit's first opinion in this case was an exceedingly fact-bound, narrow, and correct ruling, unworthy of certiorari in its own right. The judgment from which the Warden now seeks review is even less cert-worthy.

The manner in which the Warden has framed his petition illuminates just how unworthy of review this case is. The Warden is asking this Court to summarily reverse the unanimous panel of the Fourth Circuit; the Warden has not requested plenary review. *See* Pet. 39. Despite the Warden's evident belief that the purported error in this case "is so apparent as to warrant the bitter medicine of summary reversal," *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting), he simultaneously argues that "the lower courts are in conflict" over what he refers to as an "ongoing, important issue." Pet. 26. Certiorari, let alone summary reversal, is inappropriate where the Warden himself cannot articulate a consistent theory as to why review is warranted.

Additionally, the history of this case makes clear that the Warden's request for summary reversal is particularly inappropriate. The Warden's argument has now been twice-denied by unanimous panels of the Fourth Circuit, and twice-rejected by the en banc Fourth Circuit without so much as a single call for a poll, let alone a vote in favor of en banc review. The Warden's requested relief requires this Court to believe that every member of the en banc Fourth Circuit is incapable of comprehending (or is deliberately disobeying) this Court's recent precedents.[8]

[8]Undergirding the Warden's arguments is the notion that the Fourth Circuit is a rogue court, uncommonly willing to disobey this Court's clear directives. But the Warden points to nothing, other than his dissatisfaction with the Fourth Circuit's fact-bound ruling in this case, to support his

B. The Warden's Portrayal of the Record, the Relevant Procedural History, the Lower Court Opinion, and the Alleged Circuit Split Is Replete With Errors and Misrepresentations.

In his discussion of both questions presented, the Warden makes countless misrepresentations and omissions with regard to the factual record, the lower court opinion, and the alleged circuit split. The distorted picture of the case presented by the Warden to this Court should not be countenanced and by itself merits denial of certiorari. S. Ct. R. 14.4 ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

1. The Warden's Petition is Based Upon Multiple Misstatements of Fact.

The Warden's portrayal of facts in his petition bears almost no resemblance to the actual record of this case. Because this Court's rules dictate that respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition," S. Ct. R. 15.2, Winston begins with a catalogue of the Warden's factual misrepresentations.

a. Winston "*affirmatively represented* to the state habeas court that . . . 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*." Pet 14 (emphasis in original); *see also* Pet. 5.

Winston did not make such a representation to the state habeas court. To the contrary, after quoting the Virginia statute, Winston specifically alleged in state court that "[t]he diagnosis made

---

sweeping criticisms. It is implausible that the Fourth Circuit's supposed hostility towards both this Court and the notion of federalism is so great that it extends to all members of the en banc court, none of whom found the Warden's claims worthy of review.

by Fairfax County in 1997 was based on a definition of mental retardation that is consistent with" the statutory definition. 50-Page Prophylactic Petition for Writ of Habeas Corpus at 34. The Warden's misleading allegation is a reference is to the school district's commentary to its definition, which appears following the definition itself. The commentary states that IQ scores that are "slightly" above 70 "may not be statistically significant." JA 454. This is an obvious reference to the standard error of measure, which must be taken into account under prevailing professional norms, and about which Winston would have offered testimony had the state court granted funds for an expert and a hearing. JA 891-92.

b. "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." Pet. 31; *see also* Pet. 5-6, 14.

Winston never made any such categorical representation to the state habeas court. Winston's actual pleading to the state habeas court stated that a member of Fairfax County's special education eligibility committee had "been thus far unable to locate the standardized testing (and supporting raw data) that would have likely been done in conjunction with this eligibility determination." 50-Page Prophylactic Petition for Writ of Habeas Corpus at 33 n.20. Winston further noted that this eligibility specialist assumed, without actual knowledge, that the documents had been destroyed as part of routine destruction practices. *Id.*

It is of course now undisputed that the report of the 66 IQ score did, in fact, exist at the time of trial and was in the possession of the school district. Marilynn Lageman, the psychologist who administered the test, conducted her evaluation on January 3, 1997, and she testified that she likely would have issued her report within two weeks of that date. JA 792, 817. At the time of Winston's June 2003 trial, Lageman was still employed as a school psychologist in Fairfax County. JA 783,

807. Lageman testified in district court that if trial counsel had contacted her in 2002 or 2003, she would have provided them with her report, which she had in her possession at that time, and she would have been willing to testify at trial. JA 808, 828.[9]

c. After receiving Dr. Nelson's trial report, "[c]ounsel . . . 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." Pet. 32 (emphasis in original).

This representation by the Warden is flatly contradicted by the record, which speaks for itself:

> Q Would it be fair to say that, based upon the opinion of Dr. Nelson, you and Mr. Drewry both participated in a decision not to present evidence, affirmative evidence of mental retardation?
>
> A Yes. Leigh Drewry and I obviously chose not to present any evidence. Did we do it solely on this report? No. I think we did it because we didn't feel we had the evidence to produce to prove mental retardation.
>
> Q And because you didn't feel you had evidence to produce, did you make a tactical decision to attempt to shift the burden of proof to the prosecution?
>
> A No.
>
> Q Isn't it true that you and Mr. Drewry argued to the trial judge that the Commonwealth should be required to disprove mental retardation as an element of the capital offense?

---

[9]The Warden's suggestion that the Fourth Circuit employed "speculative hindsight reasoning" to determine that counsel could have found this psychological report is therefore unfounded. Pet. 35-36 n.9. Lageman was employed by the school system, with the report in her possession, and willing to turn it over to defense counsel at the time of trial. Trial counsel, for their part, would have followed up with the school district had they read the school records in their possession. JA 668 (testimony of counsel Berger: "Q: And what would you have done to look for that psychological report? Would you have called the schools? A: I would have contacted the schools, and I would have contacted the people on the committee to find out from them what they had done.").

A I'm sure we probably did, but that's not an either/or situation. I think if we felt we could prove it, we would still prove it. But I think we would also attempt to argue the legal position in addition to the factual position. If we had had the facts to present, that wouldn't have caused me to abandon the burden-of-proof argument, but I would have still presented the evidence to prove affirmatively that, and then argue to the judge as to whose burden it would be after we presented our evidence.

Q But you did not have facts to support it at that time?

A Well, apparently we did, but we didn't – I didn't know we had those facts.

JA 665-66 (testimony of trial counsel Glenn Berger under questioning by counsel for the Warden); *see also* JA 696 (Leigh Drewry, under questioning by counsel for Winston, testifies that had he seen the mental retardation classification, he "would have played it to the hilt.").

d. "Counsel gave that record [the MR classification], 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." Pet. 34 & n.8; *see also* Pet. 5.

This claim by the Warden is false. *See* JA 708 (testimony of Dr. Nelson: "I don't recall specifically considering this particular document. I clearly did have it in my possession. It's not mentioned in my report, which is what I used to refresh my memory of my logic from five years ago."); *see also Winston v. Kelly*, 784 F. Supp. 2d 623, 629 (W.D. Va. 2011) (finding that Dr. Nelson "could not be certain" whether he saw the mental retardation classification "because he could not recall seeing it and did not list it among the sources in his Capital Sentencing Evaluation."); *Winston I*, 592 F.3d at 542 (Dr. Nelson "cannot recall whether he saw the Fairfax County record changing Winston's disability classification to mild retardation"). And Dr. Nelson most certainly did not state that he "explored" the "potential" of this document that he did not recall reviewing:

Q: Did you ever discuss the February 1997 mental retardation classification with Mr. Winston's trial attorneys?

A: No, not that I recall.

Q: Would this classification have been important information in your analysis?

A: Yes.

Q: If you had noticed this document, would it have been helpful to consider information regarding the reclassification?

A: If I understand the question, would this have caused me to wonder why they reclassified him and want more information about that decision?

Q: Yes.

A: And the answer to that would be "yes."

JA 711-12. Because Dr. Nelson did not recall ever reviewing the mental retardation classification – indeed, his contemporaneous notes from trial indicate that he erroneously believed at the time that Winston had never been classified as mentally retarded, JA 1899 – the Warden's further claim that the document's "potential was insufficient to support a claim of retardation in the expert's opinion," Pet. 34, is obviously incorrect as well.[10]

e. "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*." Pet. 35 (emphasis in original).

The Warden offers no citation for his allegation that the school district informed trial counsel that all records had been destroyed or that the 66 IQ score was not available, and Winston is aware

[10]The Warden makes the related misrepresentation throughout his petition that Dr. Nelson "determined [Winston] was not mentally retarded." Pet. i; *see also* Pet. 3, 7, 31-32, 34 & n.8. He goes so far as to say that Dr. Nelson "*opined that Winston was not retarded* and that expert never has opined differently." Pet. 38 (emphasis in original). In making these claims, the Warden simply chooses to ignore Dr. Nelson's testimony that his opinion at trial may well have been different had he been provided complete information. JA 720.

of nothing in the record to support it. Trial counsel never provided any such testimony. Rather, trial counsel testified that they did not see the Fairfax County mental retardation classification in the school records they possessed, nor did they follow up with any staff member of Fairfax County Schools in order to determine the basis of this reclassification. *See* JA 667 (testimony of counsel Berger: "Q: So [the report of the 66 IQ score] was not available to you at the time of the trial; is that correct? A: I think it was available. I think I did not have it in my file, and I didn't go and look for it because I didn't know that it was there to look for"). At no point during counsel's pre-trial investigation did they ask for additional school, psychological or IQ records, nor were they ever told by anyone that such records had been destroyed. JA 680 (testimony of counsel Drewry: "Q: Now, did you make any attempt to follow up on the information in here, particularly the fact that Ms. Schneider (Lageman) was again involved in this case? A: No."); JA 682 (testimony of counsel Drewry: "Q: Do you today, at this time, have any reason to believe that the Fairfax County Public Schools had possession of that document at the time you made your request? A: I don't know what Fairfax County had at the time I made the request.").

f. "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." Pet. 37.

The Warden here discusses *Green v. Johnson*, 515 F.3d 290 (4th Cir.), *cert. denied*, 553 U.S. 1073 (2008), seemingly making the contention that as a matter of Virginia law it is impossible to make out a case for mental retardation with a below-70 where there is another, above-70 score. That is not correct – the Virginia Supreme Court has never made any such blanket rule. In *Green*, the Virginia Supreme Court simply listed the petitioner's four scores (and the tests on which they were obtained) and then stated: "[b]ased on these test scores, Green has failed to meet his burden of proving that his claim of mental retardation is not frivolous." *Green v. Warden of the Sussex I State Prison*, No. 040932, slip op. at *9-*10 (Va. Feb. 9, 2005) (unpub.). As the Fourth Circuit noted, although the Virginia Supreme Court did not provide its reasoning, the state court implicitly discredited Green's sole below-70 score. *Green*, 515 F.3d at 300. While it is unclear why the state court did so, an obvious explanation is that the below-70 score in that case was obtained on an abbreviated test. *Id.* at 296.

2. The So-Called Split in the Circuits Is Illusory, and Even If There Were a True Split, Its Resolution Would Not Affect the Outcome of Winston's Case.

According to the Warden, a lower court split exists because some circuits believe that *Pinholster* and *Richter* do not apply where a state court has not granted an evidentiary hearing, while others faithfully adhere to this Court's precedents regardless of whether a hearing was held in state court. Pet. 22-23. The Warden pits the Fourth, Sixth, and Tenth Circuits against the First, Fifth, and Ninth Circuits. *Id.* at 22-26. The Warden's contentions regarding the need for clarification from this Court are baseless, as they are once again premised upon legal and factual misrepresentations. Contrary to the Warden's claims, the lower courts are not plagued by confusion and conflict over this question, or any of the other issues identified by the Warden.[11] The cases he cites make it clear that certiorari review, let alone summary reversal, is unwarranted in this case.

The Warden begins with citation to three Sixth Circuit cases, and uses them to conclude that the Sixth Circuit "still adheres to its pre-*Pinholster* cases denying AEDPA deference to state court

---

[11]And, as discussed more fully in Section II.A, *infra*, the Fourth Circuit did not hold that there were any necessary and inevitable consequences of the denial of a state court hearing, thus the Fourth Circuit cannot be considered to be on either side of such a split. Accordingly, resolution of this issue would not affect the outcome in Winston's case.

decisions if the state court did not hold an evidentiary hearing." Pet. 24. The first case cited by the Warden is *Robinson v. Howes*, 663 F.3d 819 (6th Cir. 2011). The Sixth Circuit in *Robinson* simply noted that the petitioner was claiming that the state court had not adjudicated the claim on its merits and the state was claiming that it had, and concluded that "[b]ecause we find that Petitioner fails to make a showing of ineffective assistance of counsel even under the pre-AEDPA standard, we assume without deciding that his ineffective assistance claim was never 'adjudicated on the merits in State court proceedings' and apply the pre-AEDPA standard of review." *Robinson*, 663 F.3d at 823. In no way does this case announce a blanket rejection of deference to state courts any time they refuse to hold a hearing. The Sixth Circuit made a nearly identical, and equally irrelevant, ruling in *Williams v. Lafler*, No. 09-2137, 2012 U.S. App. LEXIS 17359 (6th Cir. Aug. 14, 2012) (unpub.), where it simply held that even under de novo review, the petitioner's claim would necessarily fail on the merits. *Id.* at *8, *26-*27.

The Warden's citation to *Plummer v. Jackson*, No. 09-2258, 2012 U.S. App. LEXIS 16797 (6th Cir. Aug. 8, 2012) (unpub.), is similarly inapposite. In *Plummer*, the issue was whether counsel was ineffective for informing jurors that Plummer would testify in support of a self-defense theory, only to renege on that promise and present a theory that Plummer did not fire the gun at all. *Plummer*, 2012 U.S. App. LEXIS at *17-*18. Plummer alleged that he had consistently told his counsel that he did not wish to testify. *Id.* at *18. In state court, "Plummer submitted an affidavit, and affidavits from his father and his wife, attesting to his consistent desire not to testify and his expression of this position to his counsel." *Id.* at *26. But the state court instead "assumed, without sufficient evidentiary support, that Plummer unexpectedly changed his mind about testifying." *Id.* The Sixth Circuit, without explicitly stating it in these terms, determined that the state court made an unreasonable determinations of the facts under § 2254(d). *Id.* at *18-*19. Contrary to the Warden's claim, the Sixth Circuit did not hold that where a state court denies an evidentiary hearing, § 2254(d) does not apply, nor did the Sixth Circuit render any holding that is inconsistent with *Pinholster* or *Richter*.

The Warden next turns to the Tenth Circuit's decision in *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012). The Tenth Circuit in *Black* quoted from Justice Sotomayor's *Pinholster* dissent in which she "'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,'" and then stated that "this assumption would not help Defendant, because he has no acceptable excuse for not developing the facts in state court." *Black*, 682 F.3d at 895-96 (alterations in original). Again, it is difficult to understand how the Warden can view this denial of habeas relief after deferring to the state court as a flouting of this Court's decisions.

These four cases from the Sixth and Tenth Circuits represent the sum total of the Warden's evidence that lower federal courts regularly disregard this Court's *Richter* and *Pinholster* decisions. In three of the four cases the lower courts *denied relief* without making any holding as to the appropriate standard of review, while in the fourth the court remanded for a hearing after determining that the state court acted unreasonably, based solely on the evidence presented in state court. The Warden simply offers no convincing evidence that courts are routinely ignoring this Court's directives.

On the other side of the Warden's supposed split are the First, Fifth and Ninth Circuits. Pet. 25. The Warden begins with a discussion of *Atkins v. Clarke*, 642 F.3d 47 (1st Cir.), *cert. denied*, 132 S. Ct. 446 (2011). In that case, "[u]ntil oral argument, Atkins conceded in all of his habeas filings that the claims were in fact adjudicated on the merits in the state courts." *Id.* at 49. At oral argument (post-*Pinholster*), Atkins drastically changed his position to claim that "a state court has not adjudicated a claim on the merits unless it has given a full and fair evidentiary hearing and that therefore federal courts must hear new evidence if the state court has declined to give a petitioner such a hearing." *Id.* The petitioner in *Atkins* cited the Fourth Circuit's decision in *Winston I* and the Tenth Circuit's decision in *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc), in support of his dubious claim. The fact that the petitioner in that case erroneously believed that the Fourth Circuit's decision supported his argument is of no moment.[12] Atkins' reliance on *Wilson* and *Winston I* was presumably based on his mischaracterization of the holdings in each case. Similar to the Fourth Circuit's holding in *Winston I*, the Tenth Circuit made it clear that it was not creating a blanket rule precluding the application of Section 2254(d) wherever a state court denied an evidentiary hearing. *Wilson*, 577 F.3d at 1292 (the court's holding "does not mean that the state court fails to reach the merits in every case in which it denies the defendant's motion for an evidentiary hearing under [Oklahoma state court rules]").

The Warden next points to the Fifth Circuit's decision in *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001). Pet. 25. According to the Warden, the Fifth Circuit's *Valdez* decision is in conflict with the Fourth Circuit because it "held that AEDPA deference applies to claims the state court rejected on their merits even if the state court held no hearing." Pet. 25. The Warden's citation to *Valdez* as evidence of a circuit split is curious in light of the Fifth Circuit's citation to, and explicit

[12]Contrary to the Warden's claim, the First Circuit did not explain that *Winston I* "had been overruled by *Pinholster*." Pet. 25. The First Circuit stated simply, and without any analysis, that "[t]o the extent [*Winston I* and *Wilson*] are inconsistent with *Cullen* as to claims asserted under § 2254(d)(1), . . . they are, of course, overruled." *Atkins*, 642 F.3d at 49. It went on to note, however, that "neither of those cases is like this one." *Id.*

reliance on, an en banc Fourth Circuit opinion to form the basis of its decision. As the *Valdez* court stated: "our interpretation is in step with the Fourth Circuit's view of AEDPA deference." *Valdez*, 274 F.3d at 953 (citing *Bell v. Jarvis*, 236 F.3d 149, 158-60 (4th Cir. 2000) (en banc)). The Fifth Circuit described how in *Bell v. Jarvis*, "the Fourth Circuit found that the AEDPA standards applied, implying that there is no full and fair hearing requirement under AEDPA. Moreover, the Fourth Circuit's reasoning is sweeping, finding that AEDPA standards of review apply whenever there has been an adjudication on the merits." *Id.* at 954.

Finally, the Warden addresses the Ninth Circuit's opinion in *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004). The Warden states that in *Lambert* the Ninth Circuit made clear that a state court need not conduct an evidentiary hearing in order for the state court's assessment to qualify as an "adjudication on the merits." Pet. at 25-26. In *Lambert*, the Ninth Circuit declined to accept Lambert's invitation to inject a full evidentiary hearing requirement as a prerequisite to application of § 2254. *Lambert*, 393 F.3d at 968-69. The lower court's opinion in Winston's case does not hold otherwise.[13]

C. As a Practical Matter, Summary Reversal Would Undermine the Principles of Federalism that the Warden Espouses.

Throughout the initial round of federal habeas proceedings in this case, as well as the post-remand proceedings in the district court and Fourth Circuit, Winston has argued that the courts

[13]The Warden also attempts to place a different Ninth Circuit case on the opposite side of his proposed split. Pet. 26 (citing *Miles v. Martel*, 696 F.3d 889 (9th Cir. 2012)). The Warden's attempt to place the Ninth Circuit on both sides of his alleged split further reveals just how contrived his assertion is. In any event, subsequent to the filing of the Warden's petition, the Ninth Circuit's *Miles* opinion has been withdrawn and the prisoner ordered released by joint motion of the parties. *Miles v. Martel*, No. 10-15633, 2012 U.S. App. LEXIS 24084 (9th Cir. Nov. 21, 2012). Whatever relevance this opinion may have had is now gone.

should rule on his underlying Eighth Amendment *Atkins* claim in addition to his related Sixth Amendment ineffectiveness claim that is the subject of this petition. Winston has argued that an *Atkins* claim, like a *Roper v. Simmons* claim[14] (and unlike a typical constitutional claim) can never be waived for failure to raise it in state court, given that it serves as a categorical ban on a type of punishment for a class of offenders.

Because both the district court and Fourth Circuit below granted relief on the Sixth Amendment claim, they did not need to reach Winston's underlying *Atkins* claim.[15] Were this Court to grant the summary reversal sought by the Warden, a remand to the lower courts would be necessary to make a determination 1) whether an *Atkins* claim can ever be waived; and 2) if it cannot, whether Winston is in fact mentally retarded.

Given the posture of this case, the practical effect of a summary reversal would be ironic in light of the Warden's belief that the Fourth Circuit's opinion reflects "a disdain for the state court's habeas process that runs contrary to all principles of federalism and comity." Pet 13. Should this Court decline to review the case, the writ of habeas corpus will issue and the case will return to the state court system for additional penalty phase proceedings, which would include a mental retardation determination by a Virginia jury. But should this Court summarily reverse the Fourth Circuit, the case would be remanded for a federal court to make the mental retardation determination

[14]*Roper v. Simmons*, 543 U.S. 551 (2005).

[15]In state post-conviction proceedings, the Virginia Supreme Court ruled only on Winston's Sixth Amendment ineffectiveness claim for failure to raise Winston's mental retardation at trial. The state court deemed the underlying Eighth Amendment *Atkins* claim to be waived for failure to raise it at trial or on direct appeal. *Winston v. Warden of the Sussex I State Prison*, 2007 Va. LEXIS 43 at *41. No court has ever made a determination as to whether Winston is, in fact, mentally retarded.

– a result that is substantially more at odds with the principles of federalism that the Warden espouses.

II. THE FOURTH CIRCUIT'S DECISION WAS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING ITS DECISIONS IN *RICHTER* AND *PINHOLSTER*, AND A GRANT OF CERTIORARI WOULD NOT AFFECT THE OUTCOME IN THIS CASE.

The Warden contends that the Fourth Circuit held 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 ineffective assistance claim without an evidentiary hearing." Pet. i-ii. As explained in detail below, the Fourth Circuit made no such ruling. To be clear, Winston agrees that, had the Fourth Circuit done so, its holding would be inconsistent with this Court's AEDPA jurisprudence.

However, even if the Fourth Circuit has rendered such a holding, a reversal by this Court would not change the outcome in this case, as the state court's adjudication was undeniably unreasonable under § 2254(d). Hence, de novo review of Winston's ineffectiveness claim was nonetheless warranted.

A. The Fourth Circuit's Holding Was Narrow, Correct, and Confined to the Specific Circumstances of Winston's Case.

The Warden argues at great length that the Court of Appeals meant something other than what it actually said. According to the Warden, the Fourth Circuit broke new ground in its opinion. In truth, the Warden makes several inaccurate and exaggerated claims regarding the lower court's holding: 1) he contends that the Fourth Circuit held that "AEDPA deference is preconditioned on the state court having held an evidentiary hearing," Pet. 20-21; *see also* Pet. 11 (the Fourth Circuit held that "whenever" a petitioner presents new evidence to a federal court that is material and the state court decided the claim without an evidentiary hearing, a federal court is free to ignore the precedent set forth in *Pinholster* and *Richter*); Pet. 22-23 ("the Fourth Circuit believes that this Court's pronouncements in *Pinholster* and *Richter* do not apply where the state court denied an evidentiary hearing"); 2) that the Fourth Circuit fashioned a new AEDPA requirement that is directly contrary to controlling authority of *Pinholster* and *Richter*, Pet. 16; and 3) that "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)." Pet. 27.

None of these assertions accurately reflect the Fourth Circuit's holding. The Court of Appeals did not ignore the teachings of *Pinholster* and *Richter*, nor did it create any blanket rule regarding the consequences of a state court's election not to grant an evidentiary hearing. The Fourth Circuit's determination that § 2254(d) did not apply to the particular claim at issue here was fact-intensive and limited to the circumstances present in Winston's case. The court made clear that the question of whether § 2254(d) applies is a "case-specific inquiry," and is not merely dependent upon whether a state court granted a hearing. *Winston II*, 683 F.3d at 495. The Fourth Circuit explained that de novo review is not inevitable where a state court denies a hearing; it held instead that "when a state court *unreasonably* refuses to permit 'further development of the facts' of a claim, de novo review *might* be appropriate." *Id.* (emphasis added).

The Fourth Circuit's case-specific holding was correct in this case, where the state court unreasonably failed to adjudicate essential factual questions and ignored the allegations and evidence proffered by Winston. Winston pled a compelling claim of ineffective assistance of counsel in state court, alleging that he had been diagnosed with mental retardation at age sixteen by Fairfax County Schools and that the documents reflecting this diagnosis were found in trial counsel's files, but counsel failed to review and notice the records. Winston also alleged that all four of his pre-eighteen IQ scores fall within the statutory range for mental retardation. Winston then sought the appointment of a mental health expert, as well as an evidentiary hearing, in order to further develop and prove his claims and to resolve important factual disputes. The state court denied both requests, as well as Winston's discovery motion.

The Fourth Circuit correctly found that the state court's refusal to resolve factual disputes between parties and permit further factual development in light of the facts and allegations proffered in support of his claim was "unreasonable" and that de novo review was therefore appropriate. That decision was not merely based on the state court's refusal to grant an evidentiary hearing, but was instead founded upon the facts presented to the state court, the assistance requested by the petitioner, and the fact-finding process through which the state court considered the merits of the claims at issue.

Finally, the Fourth Circuit made clear that the presumption of correctness set forth in § 2254(e)(1) continued to apply with full force in Winston's case, regardless of the fact that the state court denied an evidentiary hearing, a mental health expert, and discovery. *Winston II*, 683 F.3d at 497. Thus, while the Warden claims that the Fourth Circuit "carve[d] out an exception to the deference standard large enough to accommodate, in the great majority of cases, the very *de novo* review condemned by AEDPA and this Court," (Pet. 15), the implications of the Fourth Circuit's narrow opinion in reality are quite limited. This is especially the case in light of the decision's law-of-the-case backdrop. Contrary to the Warden's suggestion, the Fourth Circuit has not opened the proverbial floodgates for habeas petitioners, guaranteeing them de novo review any time a state court declines to conduct a hearing.[16]

B. In Any Event, De Novo Review of Winston's Ineffectiveness Claim Was Warranted Because the State Court's Adjudication Was Unreasonable Under § 2254(d).

The Fourth Circuit's analysis of the problems with the state court's treatment of Winston's ineffectiveness claim is entirely consistent with a finding that Winston satisfied § 2254(d). Thus, regardless of the language employed by the Fourth Circuit, it no doubt landed in the right place (de novo review) when faced with a defective state court adjudication. There can be no question that the state court's refusal to allow modest factual development, despite ample reason to believe such development would be necessary to adjudicate a colorable claim, was unreasonable under both §§ 2254(d)(1) and (d)(2).

The Fourth Circuit's holding in this case is in line with this Court's law regarding a federal court's assessment of state court decisions. There are two categories of cases in which petitioners

---

[16]Because it is so narrow, the Fourth Circuit's decision has had minimal impact and courts in that Circuit have continued to apply § 2254(d) in cases where state court hearings were denied. In *Waters v. Clarke*, No. 11-CV-630, 2012 U.S. Dist. LEXIS 140762 (E.D. Va. Sept. 28, 2012) (unpub.), for example, the district court noted the Fourth Circuit's *Winston* opinion, but appropriately recognized that a state court must do more than simply deny a request for a hearing or discovery before deferential review under § 2254(d) will cease to apply. The district court applied the deferential provisions of 2254(d) because "[u]nlike in *Winston*, here, there is no evidence . . . suggesting that the Supreme Court of Virginia's decision not to authorize discovery or conduct an evidentiary hearing was 'unreasonable.'" *Id.* at *25.

In *Atkins v. Lassiter*, No 12-1, 2012 U.S. App. LEXIS 22992 (4th Cir. Nov. 7, 2012) (unpub.), the Fourth Circuit discussed its *Winston* decision and declined to hold that a capital petitioner was entitled to de novo review of his ineffectiveness claim, despite the fact that he did not receive an evidentiary hearing in state court. *Id.* at *10-11 n. 1. In *Estep v. Ballard*, No. 11-6540, 2012 U.S. App. LEXIS 22989 (Nov. 7, 2012) (unpub.), the Fourth Circuit similarly applied § 2254(d) and denied relief on a habeas petitioner's ineffectiveness claim, despite the fact that the state court denied petitioner's claim in a summary dismissal, without an evidentiary hearing or written opinion. *Id.* at *11, *20.

request, but do not receive, factual development in state court: (1) a large category comprised of cases in which the state court allegations are either inadequate on their face, conclusively refuted by the record, or implausible, any of which make it reasonable for a state court to deny relief without investigation or additional resources; and (2) a much smaller category of cases, including this one, in which the state court allegations and evidence, if taken as true, indicate a harmful constitutional violation, such that a denial of relief without the provision of an evenhanded fact-finding process is necessarily based upon uninformed and/or arbitrary resolutions of disputed, material issues.

This smaller category of cases implicate this Court's long-settled rules regarding the adjudication of well-pleaded federal constitutional claims. Such rules are relevant here because, although a prisoner has no constitutional right to state collateral review, when a state chooses to provide habeas review, it must comply with the basic requirements of federal due process. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Smith v. Robbins*, 528 U.S. 259, 276-77 (2000). First, a well-pleaded federal claim cannot be summarily dismissed. *See, e.g., Herman v. Claudy*, 350 U.S. 116, 119 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1951). Next, summary dismissal is not appropriate merely because the respondent "files an answer denying some or all of the allegations." *Herman*, 350 U.S. at 119. A well-pleaded federal claim cannot be rejected "by a resort to speculation or surmise." *Palmer*, 342 U.S. at 137. A dispute over material facts "should be decided only after a hearing." *Herman*, 350 U.S. at 121; *see also McNeal v. Culver*, 365 U.S. 109, 117 (1961). Implicit in each of these holdings is the requirement that the allegations in a well-pleaded complaint be taken as true for purposes of determining how to proceed. *See, e.g., McNeal*, 365 U.S. at 117.[17]

---

[17]The Warden asserts that the Virginia Supreme Court did presume all of Winston's allegations as true when it dismissed his state habeas petition. Pet. 14-15. This is obviously incorrect, as made clear by Winston's allegations regarding the Flynn Effect and the standard error

The language of § 2254(d) embraces such minimal requirements, as (d)(1) requires "reasonable" applications of clearly established federal law (e.g., applications based on reliable information produced through fair process), and (d)(2) requires that state court adjudications be based on reasonable determinations of fact in light of the state court record. This Court has established a set of standards through which a federal court must view a state court's adjudication. Where a state court ignores the clear guidance provided by this Court in adjudicating a petitioner's constitutional claims, it acts unreasonably.

In *Panetti v. Quarterman*, this Court held that the state court's failure to provide the petitioner a "rudimentary process" by which to litigate his competency claim constituted an unreasonable application of clearly established federal law under § 2254(d)(1). *Panetti*, 551 U.S. 930, 948-52 (2007). Here, the "factfinding procedures upon which the [state] court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Id.* at 954 (quoting *Ford v. Wainwright*, 477 U.S. 399, 423 (1986) (Powell, J., concurring in part and concurring in judgment)). Consequently, this Court held that the state court decision was not entitled to deference under AEDPA. *Id.* at 953-54. *See also Williams v. Woodford*, 859 F. Supp. 2d 1154, 1160-61 (E.D. Cal. 2012) (Kozinski, J., sitting by designation) (citing *Winston I* with approval and holding that the "petitioner surmounts section 2254(d) because he was not allowed to develop the record in state

---

of measure. *Winston I*, 592 F.3d at 557 ("The only time the Virginia Supreme Court has even mentioned the Flynn effect in a published opinion was in this case, and it has never considered the effect of the SEM. The Virginia court did not discuss the Flynn effect beyond stating that Winston had offered evidence concerning it."). Given that Winston's allegations regarding the Flynn Effect and standard error of measure, if actually taken as true, would necessitate a grant of relief, it is clear that the Virginia Supreme Court did not view them as true. If it did view them as true, then its decision was unreasonable under § 2254(d).

court" due to a flawed state court fact-finding process); *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007).

Winston's state court allegations were supported with abundant documentation, including a pre-eighteen mental retardation classification, four scores falling within the applicable IQ range, and affidavits from trial counsel, teachers, social workers, family, and friends. The state court's application of the federal standards governing Winston's claims – *Atkins v. Virginia* and *Strickland v. Washington* – was unreasonable because the court failed to take the steps necessary to properly inform its application of those standards. *See* § 2254(d)(1). Where a state court denies a well-pleaded colorable claim after refusing to facilitate development and consideration of evidence necessary to the application of the federal standard, its adjudication is unreasonable.

The unreasonableness of the state court's adjudication here is evidenced by its factual determinations. First, the Virginia Supreme Court unreasonably concluded that "[p]etitioner 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." JA 305-06. This conclusion rests upon multiple unreasonable factual determinations under § 2254(d)(2). For instance, contrary to the suggestion of the Virginia Supreme Court, the Fairfax County Schools definition of mental retardation is identical to, if not more stringent than, the Virginia definition.[18] The Fairfax County definition of the intellectual functioning prong, presented by Winston to the

[18] In addition to provisions in the Fairfax County Schools definition that mandate a level of intellectual functioning that is two standard deviations below the mean and significant deficits in adaptive functioning, the Fairfax definition further requires that "[a]cademic achievement is below age-appropriate norms in the basic skills of reading, writing, and mathematics," and that deviations in intellectual and academic functioning are "not the result of sensory, environmental, or emotional deficits which would best be addressed in other programs." JA 454. Thus, the Fairfax definition is even more exacting than the Virginia definition.

state court, requires that "[p]erformance on an appropriate, individually administered intelligence measure falls between two and three standard deviation units (plus or minus the standard error of measurement) below the age-appropriate norms."[19] JA 453. The Virginia definition requires "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." Va. Code Ann. § 19.2-264.3:1.1. There simply is no meaningful distinction that can be drawn between the two definitions. The only stylistic difference is that the Fairfax definition talks explicitly in terms of the standard error of measure, whereas the Virginia definition speaks in terms of accepted professional practice.

Dr. Reschly testified at the federal evidentiary hearing that accounting for the standard error of measure is the accepted professional practice when interpreting obtained IQ scores.[20] JA 891-92. Thus, the Fairfax definition and the Virginia definition provide for identical IQ thresholds, and the Virginia Supreme Court unreasonably found otherwise.

---

[19]The commentary to the Fairfax definition, which appears directly following the definition itself, confirms that the Fairfax definition is identical to the Virginia definition. The commentary states that IQ scores that are "slightly" above 70 "may not be statistically significant." JA 454. This is a reference to the standard error of measure. It does not, as the Virginia Supreme Court has found, suggest that individuals with levels of intellectual functioning above 70 can still be classified as MR. Rather, it allows for individuals who have obtained scores that are slightly above 70, but who nevertheless have true levels of intellectual functioning that are below 70, still to be classified as MR. This is evident from the requirement in the Fairfax criterion that individuals with scores slightly above 70 can *only* be classified as MR "[i]f all additional information is consistent with the MR definition."

[20]To the extent that the Virginia Supreme Court did not have the benefit of expert testimony, it is because it refused Winston's requests for expert assistance and for a hearing. In any event, Winston explained in his state habeas petition that taking into account the standard error of measure is part of accepted professional practice when assessing mental retardation.

In addition, the Virginia Supreme Court found that "petitioner offers no objective data in support of his claim of mental retardation." JA 305. This is facially unreasonable. Winston presented the state court with a diagnosis of mental retardation, when he was sixteen years old, under a definition of mental retardation that is materially indistinguishable from the definition Virginia uses for capital cases. Further, he presented the state court with an affidavit from a Fairfax County Schools special education eligibility committee member that "it was the usual practice to perform updated psychological testing as well as an adaptive skills measure before classifying a student with mild retardation." JA 1349. Finally, Winston presented the state court with affidavits and educational records documenting his significant adaptive deficits. He also presented allegations and all the evidence he could without expert assistance regarding the Flynn Effect and the standard error of measure.[21] Thus, Winston presented evidence that he satisfied each prong of the Virginia definition of mental retardation.

The Fourth Circuit's grant of relief following factual development and resolution of factual disputes in district court was nothing more than an appropriate reaction to the deficiencies and arbitrariness it found in the state court's adjudication. At its core, the Fourth Circuit's holding is consistent with the holdings of other federal courts having granted relief upon de novo review, after finding deficiencies in the state court's legal or factual conclusions under § 2254(d).

[21]In its May 30, 2008, memorandum opinion granting an evidentiary hearing on this claim, the district court concluded that the Virginia statute requires that an inmate possess an IQ score that "corresponds to an IQ of 70 or less." JA 612 (citing *Johnson v. Commonwealth*, 591 S.E.2d 47 (Va. 2004)). The district court acknowledged that, "of course, the operative language of the Virginia statute is 'two standard deviations below the mean," and that "[a]n IQ score of 70 would only correspond to two standard deviations below the mean on a properly normed test." JA 612, n.12 (citing *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005)).

III. THE FOURTH CIRCUIT CORRECTLY STATED AND APPLIED THE STANDARD SET FORTH IN *STRICKLAND V. WASHINGTON*.

The Warden criticizes the Fourth Circuit's ineffective assistance of counsel analysis as giving "lip service only to the *Strickland* standard." Pet. 29. Despite the Warden's characterization, in reality the lower court recited a lengthy, and unquestionably correct, statement of this Court's precedents.

Immediately after reciting "[t]he familiar *Strickland* formulation" that requires a habeas petitioner to "demonstrate deficient performance and prejudice," the Fourth Circuit noted that "[r]eview 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.'" *Winston II*, 683 F.3d at 504 (quoting *Richter*, 131 S. Ct. at 788) (internal quotations omitted). The Fourth Circuit went on to note that "[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 *Richter*, 131 S. Ct. at 787) (internal quotations omitted).

Regarding prejudice, the Fourth Circuit correctly quoted the *Strickland* prejudice standard, and then noted that "[p]ointing to some 'conceivable effect on the outcome of the proceeding' is insufficient to satisfy *Strickland*'s demanding test." *Winston II*, 683 F.3d at 505 (quoting *Richter*, 131 S. Ct. at 788) (internal quotations omitted). The Fourth Circuit concluded by stating that "[t]he likelihood of a different result must be substantial, not just conceivable." *Winston II*, 683 F.3d at 505 (quoting *Richter*, 131 S. Ct. at 792).

In sum, the Fourth Circuit could not have been more aware of this Court's precedents or of the demanding and deferential standard that *Strickland* imposes. The Warden has not pointed to a single misstatement of law made by the Fourth Circuit. Instead, the Warden simply asks this Court to engage in error correction over the application of an unquestionably correct standard as if it were taking an appeal as of right. *But see* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The Warden has not even attempted to argue that this Court's review of this question would clarify an unsettled area of law.

What is more, the Warden is asking for error correction – without full briefing and argument – based upon a series of outright factual misrepresentations. *See* Section I.B, *supra*. The Fourth Circuit's decision is not only fact-bound and free from legal error, it is correct. This case unquestionably does not merit review in light of the actual record below.

CONCLUSION

For the foregoing reasons, the Warden's petition for writ of certiorari should be denied.

Respectfully Submitted,

LEIGH M. SKIPPER
Chief Federal Defender, By:

JENNIFER L. GIVENS
Counsel of Record
JAMES MORENO
AREN ADJOIAN
FEDERAL COMMUNITY DEFENDER FOR THE EASTERN DISTRICT OF PENNSYLVANIA
601 Walnut St., Suite 545-W
Philadelphia, PA 19106
(215) 928-0520
Jennifer_Givens@fd.org

Counsel for Leon J. Winston