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Walker v. True No. 02-22, 2003 WL 21008657, at *1 (4th Cir. May 6, 2003)

Walker v. True
No. 02-22, 2003 WL 21008657, at *1
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I. Facts

On November 22, 1996, Darick Demorris Walker ("Walker") kicked in the front door of the apartment of Stanley Beale ("Beale") and Catherine Taylor ("Taylor"). After kicking down the front door, Walker shot Beale three times. Beale's thirteen-year-old daughter Bianca Taylor ("Bianca") later identified Walker in a photospread as her father's killer. That same night, fourteen-year old Tameria Patterson ("Patterson") was visiting a friend in Beale's apartment complex. Patterson testified at trial that Walker entered her friend's apartment and said, "I shot him."[1]

On June 18, 1997, approximately seven months after Beale was murdered, Walker entered the home of Clarence Threat ("Threat") and Andrea Noble ("Noble"). Noble awoke to find Walker standing in her living room with a gun. Walker hit Noble with the gun and shot Threat in the leg. After a brief exchange of words, Walker shot Threat six more times. Walker threatened to kill Noble and her children if she told anyone what happened. Threat died from a gunshot wound to the chest.[2]

Walker was indicted for capital murder under Virginia Code section 18.2-31(8) for the murders of Beale and Threat within a three-year period.[3] In the Circuit Court for the City of Richmond, a jury found Walker guilty and recommended death, and the court sentenced him in accord with the jury's verdict.[4] The Supreme Court of Virginia affirmed Walker's conviction and death sentence.[5] The United States Supreme Court denied Walker's petition for a writ

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1. Walker v. True, No. 02-22, 2003 WL 21008657, at *1 (4th Cir. May 6, 2003). Bianca testified that she knew Walker as "Todd." *Id.* Patterson also testified that she knew Walker as "Todd." *Id.*

2. *Id.* at *2. Noble testified that she knew Walker as "Paul." *Id.*

3. *Id.*; *see* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2003) (stating that the "willful, deliberate, and premeditated killing of more than one person within a three-year period" shall constitute capital murder). Walker was also indicted on four counts of the use of a firearm in the commission of a felony and two counts of burglary. *Walker*, 2003 WL 21008657, at *2.

4. *Walker*, 2003 WL 21008657, at *2. Walker was found guilty of the firearm and burglary charges and sentenced to life imprisonment for each of the burglaries and eighteen years for the firearms offenses. *Id.*

5. *Id.*; Walker v. Commonwealth, 515 S.E.2d 565, 577 (Va. 1999).

of certiorari.[6] In March 2001 the Supreme Court of Virginia denied Walker's habeas corpus petition.[7] On October 29, 2001, the United States Supreme Court again denied Walker's petition for a writ of certiorari.[8]

On February 1, 2002, Walker filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.[9] The district court dismissed Walker's petition and declined to grant him a Certificate of Appealability ("COA").[10] Walker sought a COA from the United States Court of Appeals for the Fourth Circuit to appeal the district court's decision.[11]

II. Holding

The Fourth Circuit granted Walker a COA on two of the three claims he presented, but denied them on the merits.[12] First, the Fourth Circuit held that the district court correctly dismissed Walker's ineffective assistance of counsel ("IAC") claims because he failed to show sufficient prejudice.[13] Second, the court held that Walker's claim that the Commonwealth withheld exculpatory evidence was barred because it could have been raised on direct appeal.[14] Finally, the Fourth Circuit held that Walker's claim that his execution would violate the Eighth Amendment should be treated as a successive habeas petition and should be considered by the district court because the claim rested on a new rule of constitutional law that applies retroactively.[15]

III. Analysis

A. Certificate of Appealability

According to 28 U.S.C. § 2253(c)(1), a petitioner must obtain a COA in order to appeal a district court's denial of habeas relief.[16] The district court provides the petitioner with his first chance to obtain a COA.[17] When "an applicant files a notice of appeal, the district judge who rendered the judgment

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6. Walker v. Virginia, 528 U.S. 1125, 1125 (2000) (mem.).

7. *Walker*, 2003 WL 21008657, at *2.

8. Walker v. True, 534 U.S. 1003, 1003 (2001) (mem.).

9. *Walker*, 2003 WL 21008657, at *2.

10. *Id.*; *see* 28 U.S.C. § 2253(c)(2) (2000) (stating that a COA will issue only "if the applicant has made a substantial showing of the denial of a constitutional right"; part of AEDPA).

11. *Walker*, 2003 WL 21008657, at *2.

12. *Id.* at *1.

13. *Id.* at *7.

14. *Id.* at *8.

15. *Id.* at *11.

16. *Id.* at *2; *see* 28 U.S.C. § 2253(c)(1) (2000) (stating that an appeal may be taken to the court of appeals only if "a circuit justice or judge issues a certificate of appealability"; part of AEDPA).

17. *Walker*, 2003 WL 21008657, at *2.

must either issue a certificate of appealability or state why a certificate should not issue."[18] The Fourth Circuit stated that its COA determination was based on an overview and general assessment of the merits of Walker's claims.[19] Under the standard set forth in *Miller-El v Cockrell*,[20] the court noted that a COA must be granted "if, after a threshold inquiry, reasonable jurists would find the district court's assessment of Walker's claims debatable or wrong."[21] When a district court rejects a petitioner's constitutional claim on the merits, the petitioner must show that reasonable jurists would find the rejection debatable or wrong in order to obtain a COA.[22] When a district court denies habeas relief on procedural grounds, the petitioner must show " 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.' "[23]

The Fourth Circuit granted Walker a COA on two issues but denied a COA on his third claim.[24] Walker's third claim was based on his trial counsel's failure to investigate and present important mitigating evidence during the sentencing phase of his trial.[25] Walker argued that the state court's denial of his IAC claim was based on an unreasonable application of federal law.[26] The district court, holding that the state court correctly applied the two-part test set forth in *Strickland v Washington*,[27] disagreed with Walker.[28] The Fourth Circuit found that reasonable jurists could not debate the district court's decision and denied Walker a COA on this claim.[29]

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18. *Id.* (quoting FED. R. APP. P. 22(b)(1)).

19. *Id.*

20. 537 U.S. 322 (2003).

21. *Walker*, 2003 WL 21008657, at *2 n.2; Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); *see* Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)).

22. *Walker*, 2003 WL 21008657, at *3; *see* Slack v. McDaniel, 529 U.S. 473, 484 (2000) (discussing the standard for obtaining a COA).

23. *Walker*, 2003 WL 21008657, at *3 (quoting *Slack*, 529 U.S. at 484).

24. *Id.* at *1.

25. *Id.* at *4. "Walker claims that his trial counsel was ineffective because he failed to timely discover and effectively present school records and mental health history, failed to investigate and provide records to . . . Walker's court-appointed mental health expert, and failed to discover Walker's brain dysfunction." *Id.*

26. *Id.* The state court concluded that Walker failed to show deficient performance by counsel. *Id.*

27. 466 U.S. 668 (1984).

28. *Walker*, 2003 WL 21008657, at *4; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (stating that "the defendant must show that counsel's performance was deficient . . . [and] that the deficient performance prejudiced the defense"). The district court determined that Walker's trial counsel was justified in pursuing an alternate theory. *Walker*, 2003 WL 21008657, at *4.

29. *Walker*, 2003 WL 21008657, at *4.

B. Prejudice Before Performance

Walker argued that he was denied his Sixth Amendment right to counsel because "his trial counsel rendered ineffective assistance by failing to challenge the constitutionality" of his single trial for two murders under section 18.2-31(8).[30] The state court held that Walker failed to prove his IAC claim under the two-part test set forth in *Strickland*.[31] Walker claimed that the state court's decision was "an unreasonable application of *Strickland*" and that he was entitled to federal habeas relief.[32] In addition, Walker argued that the district court erred in denying this claim.[33] In order for the court to issue a COA, only one circuit judge must find that the petitioner made a substantial showing that he was denied a constitutional right.[34] The Fourth Circuit issued a COA on Walker's first claim "because Judge Gregory . . . [found] that reasonable jurists could debate whether the district court should have resolved this claim differently."[35]

Under *Strickland*, defendants must prove IAC claims by showing that counsel's performance was deficient and, as a result, the defense was prejudiced.[36] The state court held that Walker failed to satisfy either *Strickland* prong.[37] Walker asserted that the state court's decision rested on an unreasonable application of *Strickland*.[38] Pursuant to 28 U.S.C. § 2254(d)(1), the Fourth Circuit cannot grant habeas relief unless the state court's adjudication "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."[39] In

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30. *Id.*; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence"); VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2003) (stating that multiple murders within a three-year period may be joined in a single trial).

31. *Walker*, 2003 WL 21008657, at *4 (citing *Strickland*, 466 U.S. at 687).

32. *Id.* at *5; *see* 28 U.S.C. § 2254(d)(1) (2000) (stating that a federal court may not grant habeas relief unless the state court's adjudication "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"; part of AEDPA).

33. *Walker*, 2003 WL 21008657, at *3.

34. *Id.* at *3 n.3; *see* 4TH CIR. R. 22(a) (stating that "if any judge of [a] panel is of the opinion that the applicant has made a substantial showing of the denial of a constitutional right, the certificate will issue").

35. *Walker*, 2003 WL 21008657, at *3.

36. *Id.* at *5 (quoting *Strickland*, 466 U.S. at 687).

37. *Id.* (citing *Strickland*, 466 U.S. at 687).

38. *Id.*

39. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2000)); *see* Lockyer v. Andrade, 123 S. Ct. 1166, 1174 (2003) (stating that "[t]he 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous" rather, "[t]he state court's application of clearly established federal law must be objectively unreasonable").

Commonwealth v Smith,[40] the Supreme Court of Virginia concluded that the Commonwealth may join multiple murder charges in a single prosecution under section 18.2-31(8).[41] The Fourth Circuit noted that *Smith* did not violate clearly established federal law because the United States Supreme Court has never addressed this issue.[42]

The Fourth Circuit first addressed whether Walker established that his defense was prejudiced by his trial counsel's failure to challenge the constitutionality of section 18.2-31(8).[43] In order to establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[44] According to *Strickland*, a reasonable probability exists if confidence in the outcome is sufficiently undermined.[45] The state court concluded that no reasonable probability existed that a challenge to the constitutionality of section 18.2-31(8) would have changed the result of the proceeding.[46] In light of *Smith*, the Fourth Circuit did not find the state court's conclusion objectively unreasonable.[47] The Fourth Circuit, concluding that there was not a reasonable probability that a challenge to the constitutionality of section 18.2-31(8) would have been successful, found that Walker failed to satisfy the prejudice prong.[48]

Walker also argued that his trial counsel was ineffective because counsel failed to move for separate trials.[49] The Fourth Circuit found that it was "not objectively unreasonable for the state court to conclude that there was no reasonable probability that moving for separate trials . . . would have produced a different result."[50] The Fourth Circuit found that trial counsel's failure to move for a severance did not cause Walker prejudice.[51] The Fourth Circuit stated that

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40. 557 S.E.2d 223 (Va. 2002).

41. *Walker*, 2003 WL 21008657, at *6; Commonwealth v. Smith, 557 S.E.2d 223, 226 (Va. 2002).

42. *Walker*, 2003 WL 21008657, at *6.

43. *Id.* at *5; *see* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2003) (discussing the "willful, deliberate, and premeditated killing of more than one person within a three-year period").

44. *Walker*, 2003 WL 21008657, at *5 (quoting *Strickland*, 466 U.S. at 694).

45. *Id.* (quoting *Strickland*, 466 U.S. at 694).

46. *Id.*; *see* § 18.2-31(8) (discussing the "willful, deliberate, and premeditated killing of more than one person within a three-year period"); *Strickland*, 466 U.S. at 694 (stating that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

47. *Walker*, 2003 WL 21008657, at *6; *see Smith*, 557 S.E.2d at 227 (stating that two or more murders may be joined in one trial if the murders occurred within a three-year period).

48. *Walker*, 2003 WL 21008657, at *6.

49. *Id.*

50. *Id.*

51. *Id.* The Fourth Circuit stated that "[t]o show prejudice, Walker must demonstrate that there is a reasonable probability that the jury confused evidence of the predicate murder and

it did not address the alleged deficient performance of counsel because Walker failed to satisfy the prejudice prong under *Strickland*.[52]

C. Brady *Claims*

Walker claimed that the Commonwealth violated *Brady v. Maryland*[53] because it failed to disclose certain exculpatory evidence.[54] He argued that the undisclosed materials could have been used by the defense to impeach the testimony of Bianca, Patterson, and Chris Miller ("Miller").[55] The state court determined that Walker was procedurally barred from raising his *Brady* claim regarding Bianca and that his *Brady* claims regarding Patterson and Miller were without merit.[56] The district court held that Walker failed to show cause for his failure to bring the *Brady* claim on direct appeal and affirmed the state court's decision.[57] The Fourth Circuit issued a COA on Walker's *Brady* claim because reasonable jurists could find the correctness of the district court's ruling debatable.[58]

1. Bianca

The Fourth Circuit first considered the state court's application of the procedural bar to Walker's *Brady* claim regarding Bianca.[59] At trial, Bianca testified that she saw the shooter enter her house and shoot her father.[60] Walker claimed that the prosecution suppressed evidence that indicated that Bianca did not see the man who shot her father.[61] The state court ruled that Walker lacked

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evidence of the capital murder." *Id.* at *6. "Because the evidence for each murder was easily distinguishable and the jury was instructed to consider each murder separately... Walker suffered no prejudice from his counsel's failure to move for separate trials ...." *Id.* at *7.

52. *Id.* at *5; *see* Hedrick v. Warden, 570 S.E.2d 840, 862–63 (Va. 2002) (Kinser, J., concurring) (stating that if it is easier to dispose of an ineffectiveness claim because petitioner failed to show sufficient prejudice, then disposing quickly on such grounds is the best course to follow).

53. 373 U.S. 83 (1963).

54. *Walker*, 2003 WL 21008657, at *3; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose evidence favorable to the accused if the suppression of that evidence will deny the accused a fair trial).

55. *Walker*, 2003 WL 21008657, at *7.

56. *Id.*

57. *Id.*; *see* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (stating that a federal court conducting habeas review is barred from reviewing a claim that was procedurally defaulted under an "independent and adequate" state rule unless the petitioner can show cause for the default and prejudice, or that failure to consider the claim would result in a "fundamental miscarriage of justice").

58. *Walker*, 2003 WL 21008657, at *3. Based on Judge Gregory's determination, the Fourth Circuit issued a COA on this claim. *Id.*

59. *Id.* at *7–*8.

60. *Id.* at *7.

61. *Id.* Walker claimed that the Commonwealth suppressed the following: (1) the Supple-

"standing to attack his final judgment of conviction by habeas corpus" because the *Brady* issue "could have been raised and adjudicated at [Walker's] trial and upon his appeal."[62]

The district court declined to consider the merits of Walker's *Brady* claim regarding Bianca.[63] According to *Coleman v Thompson*,[64] a federal court may not review the merits of a claim that was procedurally defaulted under an "independent and adequate state procedural rule . . . unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[65] The Fourth Circuit stated that it had repeatedly found that the procedural default rule relied on by the state court constitutes an independent and adequate state procedural rule.[66]

Walker did not challenge the "adequate and independent" nature of the state rule, but instead argued that he could show cause and prejudice for the default.[67] In *McCleskey v Zant*,[68] the Supreme Court explained that cause excuses a defendant's failure to raise a claim during state proceedings when "the factual or legal basis for [the] claim was not reasonably available."[69] Walker argued that the Commonwealth caused him to default his *Brady* claim regarding Bianca by withholding documents until eight months after his direct appeal.[70] As support for his assertion, Walker pointed to the Supreme Court's decision in *Strickler v Greene*.[71] *Strickler* stated that "a defendant cannot conduct a 'reasonable and diligent investigation' [as] mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State."[72] However, *Strickler*

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mentary Offense Report of Officer Ernst; (2) the Supplementary Offense Report of Detective Mullins; (3) handwritten notes of Detective Mullins; and (4) statements made by Bianca and Catherine Taylor to Detective James Hickman. *Id.*

62. *Id.* (quoting Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974)).

63. *Id.* at *7.

64. 501 U.S. 722 (1991).

65. *Coleman*, 501 U.S. at 750; *see* Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (stating that a state rule is adequate if it is regularly or consistently applied by the state court); Ake v. Oklahoma, 470 U.S. 68, 75 (1985) (finding that a state rule is independent if it does not depend on a federal constitutional ruling).

66. *Walker*, 2003 WL 21008657, at *8; *see* Fisher v. Angelone, 163 F.3d 835, 844–45 (4th Cir. 1998) (discussing the "independent and adequate" procedural default rule set forth in *Slayton*).

67. *Walker*, 2003 WL 21008657, at *8. Walker did not argue that a fundamental miscarriage of justice would occur if the Fourth Circuit refused to consider his claim. *Id.* at *8 n.5.

68. 499 U.S. 467 (1991).

69. McCleskey v. Zant, 499 U.S. 467, 494 (1991); *see Walker*, 2003 WL 21008657, at *8 (quoting *Fisher*, 163 F.3d at 845).

70. *Walker*, 2003 WL 21008657, at *8.

71. *Id.*; Strickler v. Greene, 527 U.S. 263, 263 (1999).

72. Walker, 2003 WL 21008657, at *8 (quoting *Strickler*, 527 U.S. at 287–88) (internal citation

distinguished cases in which the defendant was aware of the factual basis for his claim but nonetheless failed to raise the claim.[73] The Fourth Circuit determined that Walker "was aware or should have been aware" of the suppressed documents when he filed for direct review.[74] Walker admitted receiving a *presentence* report before trial which referenced specific undisclosed police reports containing the same information.[75] Thus, the Fourth Circuit held that Walker did not show cause for his failure to raise the *Brady* claim on direct review and that the court was barred from considering the claim.[76]

2. *Patterson and Miller*

Walker also argued that the Commonwealth violated *Brady* by withholding evidence which could have been used to impeach the testimonies of Patterson and Miller.[77] The state court found that no exculpatory evidence regarding Patterson and Miller was withheld and rejected this part of Walker's *Brady* claim.[78] The Fourth Circuit agreed with the state court that some of the evidence could not be "characterized as impeachment evidence" because the evidence was based on statements by persons who did not testify.[79] The Fourth Circuit also stated that Walker's defense counsel was aware of some of the allegedly exculpatory evidence before trial.[80] The court explained that "[i]nformation known by the defense falls outside of the *Brady* rule."[81] Thus, the Fourth Circuit affirmed the state court's decision that Walker's *Brady* claim regarding Patterson and Miller was without merit.[82]

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omitted).

73. *Id.* (citing *Strickler*, 527 U.S. at 287).

74. *Id.*

75. *Id.* The Fourth Circuit is likely referencing the Virginia Code section 19.2-264.5 *post-sentence* report. *Id.*; *see* VA. CODE ANN. § 19.2-264.5 (Michie 2000) (stating that "[w]hen the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just").

76. *Walker*, 2003 WL 21008657, at *8.

77. *Id.* at *9. Patterson testified that she saw Walker enter the apartment of Karen Randolph ("Randolph") and heard Walker say "I shot him" on the night of Beale's murder. *Id.* Miller testified that he observed an unidentified person leave Beale's apartment after the shooting and enter Randolph's apartment. *Id.*

78. *Id.*

79. *Id.* at *10.

80. *Id.*

81. *Id.*; *see* United States v. Agurs, 427 U.S. 97, 103 (1976) (explaining that *Brady* only applies when information is unknown to the defense).

82. *Walker*, 2003 WL 21008657, at *10. The Fourth Circuit found that the state court did not unreasonably apply federal law in determining that the allegedly withheld material was not

D. Atkins *Claim*

In *Atkins v. Virginia*,[83] the United States Supreme Court held that the execution of a mentally retarded individual violates the Eighth Amendment's ban on cruel and unusual punishment.[84] Walker argued that the imposition of the death penalty in his case would violate *Atkins*.[85] Walker did not present this claim in state or district court.[86] The Fourth Circuit "construe[d] Walker's assertion of this claim as a motion for authorization to file a successive habeas corpus application under 28 U.S.C. § 2244(b)" because "Walker's *Atkins* claim [was] 'a brand-new, free-standing allegation of constitutional error in the underlying criminal judgment.' "[87]

Under 28 U.S.C. § 2244(b)(2)(A), a successive habeas petition is allowed if "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[88] In *Atkins*, the Supreme Court announced a new rule of constitutional law that applied retroactively.[89] Thus, the Fourth Circuit found that Walker's claim satisfied the requirements of § 2244(b)(2)(A).[90] The court granted Walker's motion and authorized him to file a successive habeas petition in the district court.[91] The Fourth Circuit noted that the district court was free to dismiss Walker's petition "without prejudice to afford the Commonwealth of Virginia the first opportunity to assess Walker's *Atkins* claim."[92]

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impeachment evidence and that a different result was not probable. *Id.*

83. 536 U.S. 304 (2002).

84. *Walker*, 2003 WL 21008657, at *11; *see* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of a mentally retarded person violates the Eighth Amendment ban on cruel and unusual punishment).

85. *Walker*, 2003 WL 21008657, at *11 (citing *Atkins*, 536 U.S. at 321). *See generally* U.S. CONST. amend. VIII (stating that cruel and unusual punishments shall not be inflicted); Meghan Morgan, Case Note, 16 CAP. DEF. J. 267 (2003) (analyzing Atkins v. Commonwealth, 581 S.E.2d 514 (Va. 2003)).

86. *Walker*, 2003 WL 21008657, at *11.

87. *Id.* (quoting United States v. Winestock, 340 F.3d 200, 207 (4th Cir. 2003)); *see* 28 U.S.C. § 2244(b) (2000) (discussing when successive habeas applications shall be dismissed; part of AEDPA).

88. *Walker*, 2003 WL 21008657, at *11 (quoting 28 U.S.C. § 2244(b)(2)(A)).

89. *Id.*; *see Atkins*, 536 U.S. at 321 (concluding "that death is not a suitable punishment for a mentally retarded criminal").

90. *Walker*, 2003 WL 21008657, at *11; *see* 28 U.S.C. § 2244(b)(2)(A) (stating that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; part of AEDPA).

91. *Walker*, 2003 WL 21008657, at *11.

92. *Id.*; *see* Bell v. Cockrell, 310 F.3d 330, 332–33 (5th Cir. 2002) (stating that "[t]he state must be given the first opportunity to apply the Supreme Court's holding in order to insure consistency

IV. Application in Virginia

A. Brady

The Fourth Circuit's decision to deny Walker's *Brady* claim illustrates the importance of discovering undisclosed exculpatory evidence.[93] The court denied Walker's claim because Walker's defense was aware of suppressed documents when he appealed his conviction.[94] The Fourth Circuit cited *Strickler* for the proposition that a defendant cannot show cause for his failure to bring a *Brady* claim if he "was aware or should have been aware" that the exculpatory evidence existed.[95] The court in *Strickler* held that "mere suspicion is not enough 'to impose a duty on counsel to advance a claim for which they have no evidentiary support.' "[96] The court found that the existence of the presentence report provided Walker's counsel with more than the "mere suspicion" of suppressed evidence discussed in *Strickler*.[97]

It is evident that the Fourth Circuit did not require substantial evidence that Walker's counsel was aware of the suppressed reports.[98] Walker's admission that the defense was aware of "a Presentence Report referencing two undisclosed police reports" was enough for the court to deny his *Brady* claim.[99] Attorneys should constantly comb documents for any hint of undisclosed *Brady* material. If defense counsel misses even a reference to undisclosed evidence, the court may find that counsel should have been aware of the material and deny a *Brady* claim.[100]

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among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule"); Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) (stating that "[t]he Supreme Court's decision to return Atkins's case to state courts suggests that we should return [petitioner's] Eighth Amendment retardation claim to the state for further proceedings .... [The state] should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death").

93. *Walker*, 2003 WL 21008657, at *7–*8; *see Brady*, 373 U.S. at 87 (holding that the prosecution must disclose evidence favorable to the accused if the suppression of that evidence will deny the accused a fair trial).

94. *Walker*, 2003 WL 21008657, at *8.

95. *Id.* (citing *Strickler*, 527 U.S. at 287).

96. *Id.* at *8 n.6 (quoting *Strickler*, 527 U.S. at 286).

97. *Id.* at *8; *see Strickler*, 527 U.S. at 286 (stating that "[m]ere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review ... [n]or, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support").

98. *Walker*, 2003 WL 21008657, at *8.

99. *Id.*

100. *See id.* (denying Walker's *Brady* claim because his counsel "was aware of the factual basis" of the claim before direct appeal).

B. Atkins

The Fourth Circuit's discussion of *Atkins* highlights the court's willingness to recognize successive habeas petitions for mental retardation claims in capital cases.[101] In federal habeas cases concerning possible mental retardation issues, counsel should file a motion for a successive petition.[102] In *Walker*, the Fourth Circuit authorized the district court to consider Walker's successive habeas petition, but recommended that the district court "dismiss it without prejudice to afford the Commonwealth of Virginia the first opportunity to assess Walker's *Atkins* claim."[103] Defense counsel in Virginia should be aware that when the case gets back to the state court, Virginia's new statutory procedures for considering mental retardation claims will apply.[104] Under Virginia Code section 19.2-264.3:1.1, enacted in response to the Supreme Court's decision in *Atkins*, the defendant bears the burden of proving mental retardation by a preponderance of the evidence.[105] The burden *should* fall on the Commonwealth to prove the absence of mental retardation beyond a reasonable doubt before the defendant becomes death eligible.[106] Under *Ring v. Arizona*,[107] the absence of mental retardation is an element of the death-eligible offense that must be found by a jury.[108] The absence of mental retardation is analytically identical to the Eighth Amendment requirement that mens rea and actus reus must be proven beyond a reasonable doubt before the jury can consider death.[109] Virginia should treat mental retarda

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101. *Id.* at *11; *see Atkins*, 536 U.S. at 321 (holding that executing a mentally retarded individual violates the Eighth Amendment ban on cruel and unusual punishment).

102. *See* 28 U.S.C. § 2244(b)(2)(A) (2000) (stating that a successive habeas petition is allowed if "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; part of AEDPA).

103. *Walker*, 2003 WL 21008657, at *11.

104. *See* VA. CODE ANN. § 19.2-264.3:1.1 (Michie Supp. 2003) (discussing the determination of mental retardation in capital cases); VA. CODE ANN. § 19.2-264.3:1.1(A) (Michie Supp. 2003) (stating that " 'mentally retarded' means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning . . . and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills").

105. *See* VA. CODE ANN. § 19.2-264.3:1.1(C) (stating that "the defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence"); *Atkins*, 536 U.S. at 321 (holding that executing a mentally retarded individual violates the Eighth Amendment's ban on cruel and unusual punishments); Morgan, *supra* note 85, at 271 (analyzing Atkins v. Commonwealth, 581 S.E.2d 514 (Va. 2003)).

106. *See generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117, 123–24 (2002) (analyzing Atkins v. Virginia, 536 U.S. 304 (2002)).

107. 536 U.S. 584 (2002).

108. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that any "factor" which makes the defendant death eligible functions as an element of the offense and the Sixth Amendment demands that it be found by a jury).

109. *See* Tison v. Arizona, 481 U.S. 137, 156–58 (1987) (holding that if an individualized inquiry into a defendant's mental state reveals major participation in a felony and reckless indiffer-

tion as a factor that the Government must prove beyond a reasonable doubt before the jury can consider the issue of death.[110] However, practitioners should be aware that Virginia presently requires the defendant to prove mental retardation by a preponderance of the evidence.[111]

V. Conclusion

The Fourth Circuit granted Walker a COA on his claims that he was denied effective assistance of counsel during the guilt phase of his trial and that the Commonwealth failed to disclose *Brady* material.[112] However, the Fourth Circuit denied habeas relief for both claims because the state court's adjudication did not result in an unreasonable application of federal law.[113] The Fourth Circuit also determined that *Atkins* is retroactive and authorized the district court to treat Walker's Eight Amendment claim as a successive habeas petition.[114]

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ence to human life, the culpability requirement of *Enmund* is sufficient to warrant imposition of the death penalty); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that a sentence of death is excessive and in violation of the Eight Amendment when imposed on an accomplice to murder).

110. *See* VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (subsuming the *Tison* issue because "willful, deliberate, and premeditated killing" is an element of capital murder in Virginia); VA. CODE ANN. § 18.2-18 (Michie Supp. 2003) (subsuming the *Enmund* actus reus requirement by setting forth the limited circumstances under which a principal in the second degree or an accessory before the fact may be charged with capital murder).

111. *See* VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie Supp. 2003) (placing the burden of proving mental retardation on the defendant).

112. *Walker*, 2003 WL 21008657, at *12.

113. *Id.*

114. *Id.*