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Walker v. True 399 F.3d 315 (4th Cir. 2005)

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I. Facts

A Virginia jury convicted Darick Demorris Walker of capital murder, and the trial judge sentenced Walker to death.[1] In 1999 the Supreme Court of Virginia affirmed Walker's conviction and sentence.[2] After Walker unsuccessfully pursued state postconviction relief, in February 2002 the United States District Court for the Eastern District of Virginia denied Walker's habeas corpus petition.[3] In June 2002 the United States Supreme Court decided *Atkins v. Virginia*,[4] which held that the Eighth Amendment prohibits the execution of the mentally retarded.[5] On appeal to the United State Court of Appeals for the Fourth Circuit, Walker for the first time contended that his execution would violate the Eighth Amendment because he was mentally retarded.[6] The Fourth Circuit construed Walker's belated mental-retardation claim as a motion for authorization to file a successive habeas petition with the district court and then granted that motion.[7] In June 2003 the district court dismissed Walker's amended habeas petition without holding an evidentiary hearing on the mental-retardation claim.[8]

II. Holding

The Fourth Circuit held that the district court erred when it dismissed Walker's mental-retardation claim without an evidentiary hearing and therefore, remanded the claim to the district court with instructions to conduct such a hearing.[9] The court, however, rejected Walker's additional claim that *Ring v.*

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1. Walker v. True, 399 F.3d 315, 318 (4th Cir. 2005).

2. *Id.*; *see also* VA. CODE ANN. § 17.1-313 (Michie 2003) (requiring the Supreme Court of Virginia to review all death sentences); Walker v. Commonwealth, 515 S.E.2d 565, 577 (Va. 1999) (finding no error by the trial court and affirming Walker's conviction and sentence).

3. Walker v. True, 67 Fed. Appx. 758, 761 (4th Cir. 2003).

4. 536 U.S. 304 (2002).

5. Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

6. *Walker*, 399 F.3d at 318.

7. *Id.*; *see also Walker*, 67 Fed. Appx. at 770 (permitting Walker to file a successive habeas petition to assert his mental retardation claim).

8. *Walker*, 399 F.3d at 318.

9. *Id.*

Arizona[10] and Virginia's statutory scheme required that a jury determine his mental-retardation claim on remand.[11] Further, the court rejected Walker's contention that Virginia's statutory scheme violated the Equal Protection Clause by providing jury determinations to defendants still able to bring their mental-retardation claim in state courts, but not to those who must raise their claim in federal courts.[12]

III. Analysis

A. Dismissal of Walker's Mental-Retardation Claim Without an Evidentiary Hearing

Walker's primary assertion was that the district court erred when it dismissed his mental-retardation claim without an evidentiary hearing.[13] The district court dismissed Walker's claim because "the evidence presented by Walker [was] insufficient to conclude, by a preponderance of evidence, that he is mentally retarded."[14] Although a district court may dismiss a claim when the facts alleged clearly would not satisfy Virginia's standard for mental retardation, the Fourth Circuit concluded that dismissal was improper in this case because Walker alleged facts that, if taken as true, established both "significantly subaverage intellectual functioning" and that he suffered from "significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[15]

Specifically, the Fourth Circuit took issue with the manner in which the district court reviewed the I.Q. scores that Walker introduced.[16] Virginia's

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10. 536 U.S. 584 (2002).

11. *Walker*, 399 F.3d at 325; *see* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that a jury must determine any aggravating factor that is necessary for the imposition of the death penalty).

12. *Walker*, 399 F.3d at 325–26.

13. *Id.* at 318. The Fourth Circuit first noted that the deferential standards of review under 28 U.S.C. § 2254 did not apply because the claim had been raised for the first time in Walker's habeas petition and that instead the court would review Walker's claim de novo. *Id.* at 319; *see* 28 U.S.C. § 2254(d) (2000) (providing that the deferential standard of review only applies to claims adjudicated on the merits in state court; part of AEDPA). Further, because the claim arose on a motion to dismiss, the court accepted all the facts pleaded by Walker as true. *Walker*, 399 F.3d at 319. Additionally, although Walker had brought the claim in federal court, the court determined whether Walker was mentally retarded using Virginia's definition of mental retardation. *Id.*

14. *Walker*, 399 F.3d at 321.

15. *Id.* at 319–20 (citing VA. CODE ANN. § 19.2-264.3:1.1 (Michie 2004)); *see* VA. CODE ANN. § 19.2-264.3:1.1 (requiring that defendants display "significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning . . . that is at least two standard deviations below the mean" in order to qualify as mentally retarded). Walker had introduced various I.Q. tests, two of which he alleged fell two standard deviations below the mean. *Walker*, 399 F.3d at 321. In another test, Walker had scored an 86 but introduced expert testimony stating that the results were unreliable and should be discarded. *Id.* at 323. Additionally, Walker had scored a 77 in 2000 and qualified that score with the examining doctor's opinion that Walker was mentally retarded. *Id.*

16. *Walker*, 399 F.3d at 321–24.

definition of mental retardation permits defendants to show "significantly subaverage intellectual functioning" by establishing that he scored "two standard deviations below the mean" on a standard I.Q. test.[17] An I.Q. of 70 is generally considered to be two standard deviations below the mean.[18] The Fourth Circuit first determined that the district court did not take the facts alleged by Walker as true when it refused to consider Walker's score of 61 on a test taken in May 2003.[19] The district court did not consider the score because Walker took the test when he was 30 and Virginia's statute requires that mental retardation be manifested before the age of 18.[20] The court implied that the district court should have considered Walker's score of 61 even though it came after the age of 18.[21]

Additionally, the Fourth Circuit concluded that the district court erred by failing to consider the effect on Walker's I.Q. scores of the so-called "Flynn Effect" or of the standard of error inherent in I.Q. tests.[22] Walker introduced a score of 76 in an I.Q. test he took in 1984.[23] He then explained that the score of 76 actually fell two standard deviations below the mean because the "Flynn Effect" adjustment of the score down to a 72 and the standard error of measurement inherent in I.Q. tests brings the upper range of I.Q. scores qualifying as mentally retarded to 75.[24] The Fourth Circuit thus determined that the facts alleged by Walker, if taken as true, would have brought his I.Q. score two standard deviations below the mean.[25] The court instructed the district court, on remand, to evaluate whether Walker's "Flynn Effect" argument was valid and whether Virginia's statute permits the consideration of the standard of error inherent in I.Q. tests.[26]

B. Jury Determination of Mental Retardation

Walker next contended that, on remand to the district court, Virginia's statutory scheme required that a jury determine Walker's mental-retardation claim.[27] The court first noted that the statute does not permit defendants in

17. *Id.* at 320 (citing VA. CODE ANN. § 19.2-264.3:1.1).

18. *Id.* at 321–22.

19. *Id.* at 321.

20. *Id.*

21. *Id.*

22. *Walker*, 399 F.3d at 322–23.

23. *Id.* at 322.

24. *Id.* The "Flynn Effect" refers to studies indicating that outdated I.Q. tests may greatly overstate a test taker's I.Q. score due to increasing average I.Q. scores in the general population. Walton v. Johnson, 269 F. Supp. 2d 692, 699 n.5 (W.D. Va. 2003).

25. *Walker*, 399 F.3d at 322–23.

26. *Id.* at 323.

27. *Id.* at 324.

Walker's position to bring their claim in state court.[28] Although Virginia Code section 8.01-654.2 allows defendants to bring their mental-retardation claims in state court if they were sentenced to death prior to April 29, 2003, and have not completed both their direct appeal and state habeas proceedings, the statute requires defendants to bring their claims in federal court if they have already exhausted state habeas review.[29] Further, the court explained that Virginia Code section 19.2-264.3:1.1(C), which requires a jury to determine mental retardation if the defendant's trial was before a jury, applies only to claims brought in state court.[30] Thus, the court concluded that Virginia Code section 19.2-264.3:1.1(C) had no bearing on whether the defendant was entitled to a jury determination in federal court and consequently Virginia's statutory scheme did not require that a jury determine Walker's mental-retardation claim on remand in district court.[31]

Walker also claimed that the court should interpret Virginia's statutory scheme as providing him with a jury determination on remand because the statutory scheme would otherwise violate the Equal Protection Clause.[32] Walker argued that there is no rational basis for a statute that withholds juries from defendants who have completed their state habeas proceedings but provides juries to defendants who not have completed their state habeas proceedings.[33] The court noted that United States Supreme Court precedent requires it to determine whether the " 'classification drawn by the statute is rationally related to a legitimate state interest.' "[34] The court determined that the statute was rationally related to the state's interest in "efficient utilization of its judicial resources."[35] Thus, Virginia's statutory scheme did not violate the Equal Protection Clause.[36]

Dissenting in part and concurring in the judgement, Judge Gregory contended that Virginia Code section 8.01-654.2 violated the Equal Protection Clause.[37] Contrary to the majority's decision to apply rationality review to the statutory classification, Judge Gregory argued that strict scrutiny review was appropriate because the statute infringed on a defendant's constitutional right not to be executed if mentally retarded.[38] Under a strict scrutiny review, the statutory

28. *Id.* (citing VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004)).
29. *Id.* (citing VA. CODE ANN. § 8.01-654.2).
30. *Id.* at 324–25 (citing VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004)).
31. *Walker*, 399 F.3d at 325.
32. *Id.*
33. *Id.*
34. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).
35. *Id.*
36. *Id.*
37. *Walker*, 399 F.3d at 327–28 (Gregory, J., dissenting).
38. *Id.* at 328.

classification must be " 'suitably tailored to serve a compelling state interest.' "[39] Judge Gregory rejected the Commonwealth's contention that it had a compelling interest in providing finality and avoiding delay in judgements.[40] Further, even if the Commonwealth's reasons were sufficient, the statute was not narrowly tailored to serve those interests.[41] Judge Gregory contended that forcing federal courts to harmonize Virginia's mental-retardation statute with federal habeas procedures may actually prolong the time it takes to adjudicate petitioners' mental-retardation claims.[42] He also urged the district court to permit a jury to determine Walker's claim even if a jury determination was not required.[43]

Finally, Walker claimed that *Ring* required that a jury determine his mental-retardation claim.[44] The Supreme Court in *Ring* held that a jury must determine the existence of any aggravating factor that is necessary to impose a sentence of death.[45] Walker claimed that the absence of mental retardation was the equivalent of such an aggravating factor because the court could not impose a death sentence without a finding that he was not mentally retarded.[46] First, the Fourth Circuit questioned whether *Ring* applied because Walker's conviction had become final before the Supreme Court decided *Ring* and the Court in *Schriro v. Summerlin*[47] held that *Ring* [did] not apply retroactively.[48] Walker, however, contended that he was not seeking retroactive application of *Ring* because he raised his mental-retardation claim for the first time in district court after *Ring* was decided.[49] Because the court was unsure whether this was a retroactive application of *Ring*, it addressed the merits of whether *Ring* required a jury to determine Walker's claim.[50]

The court first acknowledged that Virginia's statute setting the authorized punishments for class one felonies supports Walker's claim because it states that " '[f]or class 1 felonies, [the punishment may be] death, *if the person so convicted* was 16 years of age or older at the time of the offense and *is not determined to be mentally retarded.*' "[51] However, the court stated that "the finding of mental retardation does not increase the penalty for the crime beyond the statutory maximum—

39. *Id.* (quoting *Cleburne Living Ctr.*, 473 U.S. at 440)).
40. *Id.* at 328–29.
41. *Id.* at 329.
42. *Id.*
43. *Walker*, 399 F.3d at 329 (Gregory, J., dissenting).
44. *Walker*, 399 F.3d at 325–26.
45. *Ring*, 536 U.S. at 609.
46. *Walker*, 399 F.3d at 326.
47. 124 S. Ct. 2519 (2004).
48. *Walker*, 399 F.3d at 325 (citing Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004)).
49. *Id.* at 325–26.
50. *Id.* at 326.
51. *Id.* (quoting VA. CODE ANN. § 18.2-10 (Michie 2004) (alteration by Fourth Circuit)).

death;" rather, it only decreases the permissible punishment.[52] Further, the prosecution has no duty to prove that the defendant is not mentally retarded if the defendant does not raise the issue.[53] Thus, the court concluded that *Ring* does not require that a jury determine Walker's mental-retardation claim on remand.[54]

IV. Application in Virginia

Although the Fourth Circuit did not require the district court to adjust the defendant's I.Q. scores according to the "Flynn Effect" and the standard of error inherent in I.Q. tests, the court did require the district court to consider whether these effects should be factored into Walker's I.Q. test scores.[55] The "Flynn Effect" posits that I.Q. tests that have not been updated for some time tend to overstate the test taker's I.Q. due to generally increasing I.Q. scores across the nation.[56] In *Walton v. Johnson*,[57] the United States District Court for the Western District of Virginia also addressed the "Flynn Effect" but, like the *Walker* court, did not expressly hold that courts should apply it to I.Q. scores derived from outdated I.Q. tests.[58] Other state courts, however, have credited the "Flynn Effect" and used it to determine whether a given defendant's I.Q. score falls two standard deviations below the mean.[59] Although studies regarding the "Flynn Effect" are ongoing, whenever a defendant has taken an outdated I.Q. test, counsel should investigate whether the effect calls for a downward adjustment in the defendant's I.Q. score.[60]

Walker also argued that Virginia Code section 8.01-654.2 violated the Equal Protection Clause by guaranteeing a jury determination for a mental-retardation claim raised on state direct or habeas appeal, while denying it to those required

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52. *Id.*

53. *Id.*

54. *Walker*, 399 F.3d at 326.

55. *Id.* at 323–24.

56. *See* LaJuana Davis, *Death Penalty Appeals and Post-Conviction Proceeding: Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 309–10 (2003) (explaining the "Flynn Effect").

57. 269 F. Supp. 2d 692 (W.D. Va. 2003).

58. *Walton*, 269 F. Supp. 2d at 699 n.5.

59. *See, e.g.*, People v. Vidal, 124 Cal. App. 4th 806, 851 (Cal. Ct. App. 2004) (noting that courts must consider the "Flynn Effect" in determining whether a defendant's I.Q. score falls two standard deviations below the mean and adding that the "Flynn Effect" is generally accepted within the field).

60. *See* Davis, *supra* note 56, at 309–10 (noting that courts must consider the "Flynn Effect" on I.Q. scores derived from I.Q. tests that have not been re-normed recently).

by statute to bring their claim in federal court.[61] In *Burns v. Warden* ("*Burns I*"),[62] the Supreme Court of Virginia's analysis of Virginia Code section 8.01-654.2 initially seemed to provide support for Walker's claim.[63] In *Burns I*, the court determined that the Equal Protection Clause prohibited Virginia from providing juries to defendants who first raised their mental-retardation claim on direct appeal, but not to defendants first raising the same claim in their state habeas petitions.[64] Indeed, Judge Gregory, dissenting in *Walker*, cited *Burns I* in arguing that Virginia's statutory scheme for determining mental retardation violates the Equal Protection Clause.[65] The *Walker* majority, however, determined that the statutory scheme did not violate the Equal Protection Clause.[66] After the Fourth Circuit decided *Walker*, the Supreme Court of Virginia in *Burns v. Warden*[67] ("*Burns II*"), on rehearing from the court's decision in *Burns I*, issued a revised opinion that included no reference to the defendant's federal equal protection argument, and held only that Virginia's statutory scheme requires that a jury determine a defendant's mental-retardation claim if he first raised the claim on state habeas review and his original trial was before a jury.[68] Thus, unlike the Supreme Court of Virginia's initial reasoning in *Burns I*, its revised opinion in *Burns II* does not conflict with the Fourth Circuit's equal protection analysis in *Walker*.[69]

Finally the court determined that *Ring* does not require that a jury determine mental-retardation claims.[70] The decision is consistent with the Supreme Court of Virginia's opinion in *Winston v. Commonwealth*,[71] which held that the prosecution does not need to prove the absence of mental retardation beyond a reason-

61. *Walker*, 399 F.3d at 325; *see* VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004) (requiring defendants to bring their mental-retardation claim in federal court if their sentence was final before April 29, 2003, and they have exhausted their direct appeals and state habeas proceedings).

62. 597 S.E.2d 195 (Va. 2004).

63. *See* Burns v. Warden, 597 S.E.2d 195, 195–96 (Va. 2004) [hereinafter *Burns I*] (holding that interpreting Virginia Code section 8.01-654.2 in a manner that does not provide a jury determination to defendants who first raise their mental-retardation claim on state habeas appeal would violate the Equal Protection Clause). *See generally*, Justin Shane, Case Note, 17 CAP. DEF. J. 205 (2004) (analyzing Burns v. Warden, 597 S.E.2d 195 (Va. 2004)).

64. *Burns I*, 597 S.E.2d at 195–96.

65. *Walker*, 399 F.3d at 328 n.2 (Gregory, J., dissenting) (citing *Burns I*, 597 S.E.2d at 196).

66. *Walker*, 399 F.3d at 325.

67. No. 020971, 2005 WL 564114, at *1 (Va. Mar. 11, 2005).

68. *See* Burns v. Warden, No. 020971, 2005 WL 564114, at *1–*3 (Va. Mar. 11, 2005) [hereinafter *Burns II*] (omitting any reference to the Equal Protection Clause in holding that Burns, who had raised his mental-retardation claim for the first time in his state habeas petition, was entitled to a jury determination of his mental-retardation claim on remand).

69. *See Walker*, 399 F.3d at 325 (finding that Virginia Code section 8.01-654.2 does not violate the Equal Protection Clause); *Burns II*, 2005 WL 564114, at *1–*2 (omitting any reference to the Equal Protection Clause).

70. *Walker*, 399 F.3d at 325.

71. 604 S.E.2d 21 (Va. 2004).

able doubt.[72] Both opinions concluded that mental retardation is not the equivalent of an element of death-eligible capital murder under *Ring*.[73] Thus, both federal and state defendants will continue to have difficulty asserting that any of *Ring*'s requirements apply to mental-retardation determinations.

V. Conclusion

The Fourth Circuit held that the district court erred when it dismissed Walker's mental-retardation claim without an evidentiary hearing and remanded the claim to the district court for such a hearing.[74] The court indicated that it was error for the district court to disregard evidence introduced by the defendant concerning the standard error of measurement inherent in I.Q. tests and concerning the "Flynn Effect."[75] The court also concluded that neither Virginia's statutory scheme nor the Constitution required that a jury determine Walker's mental-retardation claim on remand.[76] Although the court's holding with respect to jury determinations is potentially adverse to defendants, it has limited application in Virginia because, for all future cases, state courts must permit a jury to determine a defendant's mental-retardation claim if his trial is held before a jury.[77]

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72. Winston v. Commonwealth, 604 S.E.2d 21, 50–51 (Va. 2004).

73. *See Winston*, 604 S.E.2d at 50 ("Proof of the lack of mental retardation is not an element of a capital offense in Virginia, nor is it an aggravating factor in sentencing."); *Walker*, 399 F.3d at 326 (" '[A]n *increase*' in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease." (alteration in original)).

74. *Walker*, 399 F.3d at 327.

75. *Id.* at 322–23.

76. *Id.* at 324–25.

77. VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004).

CASE NOTES:

Supreme Court of Virginia