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Wednesday, March 19, 2008

Chief Justice Mark Gibbons
Justice James W. Hardesty
Justice Ron D. Parraguire
Justice Michael Douglas
Justice Nancy M. Saitta
Justice A. William Maupin
Justice Michael A. Cherry

Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701

RE: Oral Arguments on County's Objection to ADKT Order No. 411

Dear Justices:

On behalf of the Pershing County Board of Commissioners, I wish to thank the Court for the five minutes we were given for you to hear our concerns and give an ear to our suggestions. I am writing to clarify what I believe were misunderstandings of argument yesterday. I hope that the Court understands that the County, and I desire to work a solution that will benefit the indigent defendant's in this County. In our opinion, the current order does not benefit the defendants or county. During our short discussion of ADKT Order No. 411, I tried to explain the County's misgivings with respect to both the performance standards and the separation of power issues that are inherent in an order of this nature. I have to admit that, at first blush, the performance standards seemed to be an inherently good thing. We would all like to see counsel that performed at a high level. However, further review gave way to significant misgivings with regard to the Strickland standards and ineffective assistance claims stemming from Strickland violations.

In this letter, I outline our concerns, which are specifically: (1) The detailed guidelines/rules promulgated by this Court are the very type that the U.S. Supreme Court

08-33169

states cannot be imposed upon defense counsel; (2) While the ABA guidelines are good aspirational ideas for defense counsel, they are not promulgated by a government agency that has the authority to regulate defense counsel's conduct, as this body can do; (3) I specifically answer Justice Maupin's question of which rules specifically violate the prohibition in Strickland; (4) I provide a more detailed analysis of the mandatory requirements of the Performance Standards and the fact that there is not a crisis in Pershing County; (5) I reiterate our concern that it will result in frivolous, not legitimate, claims that will tax **both the defense and prosecution** and will cost the Counties thousands of dollars of tax monies because additional staff for both sides will be needed to handle the frivolous claims, appeals, and post-conviction cases (in addition to the costs for investigators and other mandatory requirements); and (6) I very briefly explain our concerns regarding the Separation of Powers and Case and Controversy doctrines with regard to the unfunded mandates imposed by the Order (which time did not allow during our conversation).

We realize that the Court has expended tremendous amounts of time and effort in addressing the concerns raised by the special interests groups of the ACLU, NLADA, and Federal Public Defender. That effort is respected and honored. However, in the end, the County and I encourage the Court to reconsider and reverse the ruling with regard to the role of judges in the appointment process. We ask you to take a look at the Performance Standards in light of the Supreme Court's prohibition against detailed guidelines imposed by a government agency. We ask you to set aside the Performance Standards and adopt a view that the ABA and other guidelines are aspirational and should not be adopted by the Court as mandatory requirements.

In Strickland v. Washington[1], the United State Supreme Court, in a seminal case, established the requirements for competent counsel under the Sixth Amendment. The Supreme Court cautioned several things in that opinion. First, the "government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[2] In other words, defense counsel has to be free to make decisions about the conduct of cases without the inference from a governmental entity. Second, the Court stated that "prevailing norms of practice as reflected in American Bar Association standards and the like...are guides to determining what is reasonable, but they are only guides."[3] The Court's statement here is very telling. Guides are only intended to be aspirational. The guides serve to help counsel as they journey through the trenches of litigation. The serve as ideas that could be implemented if counsel determines they are necessary.

The Court went on to caution further with the language that I cited to you yesterday. Specifically holding that "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal

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1 466 U.S. 668 (1984).

2 Id. at 668 (*Citations Omitted*).

3 Id.

defendant."[4] "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[5] "Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[6] Is I stated yesterday, the significance of this holding is that the government should not try to "micromanage" the conduct of criminal litigation by defense counsel. The aspirational rules of the ABA are good guides as to things that can be done, but they are not supposed to be mandatory. One federal court stated that the Supreme Court has refrained from "micromanaging standards of professional and ethical behavior" because "the interests of both the defendant and society are served by a standard that, as far as possible, does not straitjacket counsel in a stifling" set of rules.[7] "The purpose of the Sixth Amendment is not primarily to police attorneys' ...its purpose is to assure a fair trial based on competent representation."[8]

While my position was assailed by subsequent defense speakers, the fact is that the County and I both desire Constitutionally sound representation of defendants in line with the Sixth Amendment. Because the hearing was treated as an open meeting, rather than litigation, I was not offered any rebuttal time. I would have liked to address some of the comments and will attempt do so herein. I would note that the aspirational guidelines promulgated by the ABA and others clearly should be of benefit for training attorneys and pointing them in the right direction. The criticism of my position ignored the vital issue that the Supreme Court made very clear, to wit: the detailed rules **imposed by a government agency** were a violation of the Sixth Amendment because, in the variety of circumstances that defense counsel face, the imposition of detailed and specific mechanical rules would unduly interfere with the "constitutionally protected independence of counsel" and "distract counsel from the overriding mission of vigorous advocacy." Counsel would have to be checking things off of a checklist instead of worrying about the case.[9] These checklists distract counsel from their duty.

The ABA is not a government institution and does not have authority to impose rules. This Court is a government institution and does have ultimate authority to promulgate rules that govern attorneys admitted to practice in this state. This is a key distinction. When this Court directs attorneys to behave in a certain fashion, the attorneys should so behave. When this Court states that prosecutors must raise certain issues to protect a defendant's rights, we are obliged to comply. Similarly, when this court says defense counsel are obliged to do certain things, the same position of compliance should be taken.

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4 Id. at 668-69.

5 Id.

6 Id.

7 Beets v. Scott, 65 F.3d 1258, 1272, (C.A.5 1995).

8 Id.

9 The Court has to look no further than the No Child Left Behind Act for evidence of the failure this type of top down approach. Teachers instead of teaching have to prepare the students to take standardized tests. The teachers are distracted from teaching and having kids learn because of artificial and mechanical standards imposed by a top-down approach. The requirements do not take into account the variety of circumstances that teachers face on a day-to-day basis. The requirements are also not adequately funded.

When the Court says that these rules impose an obligation[10] upon counsel, it means that the appointed defense counsel are obliged to do as directed whether it says should or some other non-obligatory language. As I stated yesterday, an obligation imposes a legal requirement to act in a certain way. That is the concern we raised. When this court promulgates an obligation like the performance standards, the Court leaves the appointed defense counsel with additional ethical duties not imposed on any other attorney. Furthermore, there is no need to promulgate and impose these standards if they are aspirational and they exist in the ABA rules or elsewhere. **Interestingly enough, the standards do not place similar obligations on private defense counsel as the ABA and other standards do. Why should there be a distinction? Does this raise concerns of equal protection where similarly situated people (those charged with a crime) are treated differently? Does this raise other Constitutional claims in that private counsel are held to a lesser standard of performance? What happens in post-conviction proceedings?**

While I have not researched these issues, I believe that in comparing the Public Defenders that I have seen with private counsel, the County Public Defender is certainly better prepared and does a better job on the whole.[11] They are quick to meet with clients and become quickly informed as to the facts of the cases. The approach of thinking that Public Defenders are some how second-class attorneys in need of detailed rules for engagement is reprehensible at best. They should not have standards that exceed other attorneys just because some national organization looks down their nose at these public servants. In the rural counties, the county public defenders are often more diligent and better at their jobs because they have a specialized niche in the criminal arena, while private counsel often have to do divorces, PI, and other civil cases.

JUSTICE MAUPIN'S QUESTION: Justice Maupin asked me a very interesting question, "which of the standards specifically violate the Strickland?" I then cited to a specific rule and Justice Maupin asked what specifically violated the Strickland standard. I struggled to answer that question because specific answer is that the conglomeration of

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[10] The words "required," "must," "shall," "obligated," "obligation" "duty" "ensure" "responsibility (ies)" are used approximately, and probably in excess of, 100 times in the rules. They are clearly obligatory on appointed counsel.

[11] I would note that because the individual's capacity is what really distinguishes the difference, the comparison is difficult to access. However, a good portion of the private counsel that I have dealt with were not as capable as the Public Defenders. As I addressed with Justice Douglas's question, the problem with the State Public Defender's Office is not necessarily the personnel. The problem centers on the systemic problems, management problems, the lack of accountability, of flexibility, and of adaptability, and the lack of good local leadership. As with many of the state entities, there is a management down philosophy which is not attuned to the differences in the areas in the state. The County Public Defender's System is infinitely more attuned to the realities of the County. While there could be a collaboration in making the system better, by for example having a state investigator's office for the Rural County Public Defenders, perhaps a State Appellate Public Defender's Office to handle the appeals, or even a State Public Capital Case Unit that assists with cases in which the Death Penalty is sought. We agree that the State should provide funding to our local counties to fund the systems that we have that are working. We oppose being placed under the State Public Defender's Office.

detailed rules violate Strickland's prohibition against "detailed rules" or "guidelines." While my answer was correct, I believe that the following situation illustrates a specific manner in which the rules violate the proscriptions of the 6th Amendment:

> A defendant burglarized a convenience store. He was witnessed breaking in by people who knew him. He was caught on video tape doing it. During the break-in he broke a plate glass window with a value in excess of $2500.00. A block from the scene, he was caught with the stolen goods in his hands. At the time he was caught, he admitted to the police that he had broken in, broke the window, and stole some money and beer. He was arrested. He is properly "mirandized," waives his rights, and gives a tape-recorded confession at the police station. Charges of Burglary, a Category B Felony, of Category C Felony of Destruction of Property, and of Petite Larceny, a Misdemeanor, were filed. The man was in jail and facing at a minimum, a Category B Felony.
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> The DA spoke with the owners of the business and was told their feelings, including that their primary issue is that they want the individual to take immediate responsibility and want restitution (the DA speaks with them about the possible resolution that is proposed below and they like it if the individual takes immediate responsibility). The DA decided that he could either put on the preliminary hearing or, in accordance with the desires of the business owners, make an offer for a plea. Furthermore, the District Attorney would like to move the case along to get restitution for the victims. The Defendant's criminal history indicates that he has failed to appear for some court cases, resulting in warrants. The DA also is informed by the arresting officer that the defendant was intoxicated at the time of the offense. The DA offers to the Public Defender the following resolution with an expiration date in the near future (because preparations have to be made for preliminary hearing): If the Defendant pleads to the charge of Petite Larceny at the advisement on the Felony Charges (which is three days following the arrest); Agrees to pay restitution within three months; Agrees to obtain an evaluation for substance/alcohol abuse (following the recommendations); Agrees to not commit any other crimes (other than minor traffic offenses); Agrees to six months in jail with the sentence being suspended for one year subject to the conditions set forth in the offer; and the DA will agree to defer prosecution during the probationary period and will dismiss the Burglary and Destruction of Property after the one year if there is compliance. Furthermore the DA agrees not to use the conviction for the Petite Larceny in the trial (unless the Defendant denies under oath that he stole the merchandise and money).
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> In addition to the charging documents, the only document that the DA and Public Defender have is the probable cause sheet. The probable cause sheet does not mention the tape-recorded interview or the names of the witnesses or what they exactly saw. The witnesses have given tape-recorded and written statements. In an interview with the Public Defender, the defendant admitted to facts constituting the crimes charged. There were no legitimate defenses or

suppression motions based upon his story. The exact figure for restitution is not known.

Under Standard 9 A. on Page 31, the Public Defender was obligated and could not recommend that he take the offer because a full investigation had not been done and a study of the evidence to be introduced at trial would not have been completed because all the reports, statements, and the videos are not provided. Under Standard 7 A. on Page 29, the Public Defender was obligated and required to continue to investigate the matter even though the case has been resolved. Under Standard 9 C. on Page 32, the Public defender cannot comply with all the "must" obligations listed therein. Under Standard 4, it is possible that it took 72 hours to meet with the client.

This example illustrates the exact reason why the rules violate Strickland. While the aspirational rules are fine in the abstract, even aspirational rules would unduly tie the hands of defense counsel and encroach upon the reasonable strategic decisions that counsel make in every day life. The Public Defender would have been objectively unreasonable if he did not counsel the man to take the deal in the example I gave, even though he did not have every discovery document/item/ evidence in he is possession. He probably would have violated Strickland because if the offer expired, he would have lost the deal which significantly effected the outcome.

The very situation above is similar with variations to a multiplicity of cases (with perhaps less favorable detail), including ones that resulted in Gross Misdemeanor charges or possibly lesser felonies (i.e. the destruction of property) or a diversion program (because we know the defendant really has a drug addiction). Real-life examples similar to the preceding are legion. These decisions are extremely necessary and commonplace in the real world litigation. The detailed standards promulgated by the Court would violate the Sixth Amendment because they would tie counsel to a certain course of action that is objectively unreasonable. I believe that this answers Justice Maupin's pointed and appropriate question. However, under the language of Strickland, the correct answer to Justice's Maupin's question is the same that I gave yesterday (i.e. that the combination of all the detailed rules of practice together have the effect of limiting counsel's legitimate choices and, thereby, interfering with the constitutionally protected attorney-client relationship, and, thus, they violate the 6th Amendment.)

The Constitution mandates that the government not interfere with the decision making of counsel. A state supreme court, as a co-equal branch of government, qualifies as a governmental entity that may not interfere with legitimate decision-making. The special interests that are pushing the Court to mandate these detailed rules do not have the State's interest or the indigent defendant's interests at heart because they want the Court to provide the straightjacket or the checklist that will give them better appellate and post-conviction issues. This means justifies the end approach is not appropriate. The rules are simply not necessary.

Without regard to this Court's duty to uphold the Constitution, these special interests simply recommend that the Court violate the Sixth Amendment by promulgating detailed guidelines for criminal representation by incorrectly asserting that the Sixth Amendment requires that appointed counsel comply with these performance standards. A review of Strickland clearly illustrates that this is not the state of the law. The light at the end of the tunnel spoken of at the hearing is the newly enacted litigation training coming down the tracks. The appropriate request would have asked that the Court ensure that appropriate training is occurring so that the aspiration guidelines of the ABA and others can be implemented when, in the professional judgment of the defense attorney, the specific guidelines application is needed or necessary as dictated by the facts of the case.[12] The special interests are not looking for making the system better in this respect.

Subsequent speakers stated emphatically that the performance guidelines were the "floor" or minimum standards required under the Constitution. One attorney stated that they were a good "checklist" of things that should be done. These statements fly directly in the face of Strickland's caution against the use of "detailed rules" to govern the constitutionally protected role of defense counsel or to guide their representation of defendants. In fact, Strickland stands in direct opposition to the position taken by these subsequent speakers. The Supreme Court in Strickland went on to say that "moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."[13] The Performance Standards and ADKT Order No. 411 specifically state that the highest quality representation is required of appointed counsel. In opposition to that statement, the County and District Attorney of Pershing County desire fair trials and constitutionally appropriate representation. The notion promulgated by some that we want less is simply inaccurate. If there are portions of the ABA or other guidelines that counsel think should be implemented on a case-by-case basis. Subject to budgetary constraints, neither the County nor the District Attorney would oppose that. The sky is not the limit with regard to the finances. Furthermore, the positions of these special interest groups stand in juxtaposition to the mandates of the Constitution.

The argument that the District Attorneys are afraid of litigation flies in the face of the reality of what we have accomplished in Pershing County. I gave the example that my first jury trial loss was to the current public defender in Pershing County. The Pershing County Board of Commissioners, with my assistance, and the Humboldt County Board of Commissioners, with the assistance of Mr. Smith, have worked to ensure that there is a competent system of public defenders. This year, we are collaborating further to provide even better representation. With an increase in Litigation in Humboldt County, the Counties are looking at expanding the Office by another attorney. This will allow some fantastic collaborative efforts.

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[12] Meyer, 506 F.3d at 372 ("[T]he touchstone of effective representation must be sound, evidence-based judgment, rather than a set of mandates counsel must programmatically follow without deviation").

[13] Id.

None of these efforts to improve the local system required mandates from this Court or others. We are doing it because it is right. These efforts contradict the statements that we are afraid of litigation or that we want poor representation for indigent clients. The term "crisis" was used over and over again during the hearing. Yet, there is no crisis in Pershing or Humboldt County with respect to indigent defense. There may be a crisis in other parts of the state that needs to be addressed. That is not the case in the Sixth Judicial District. The imposition of the standards is also not needed. If they are only aspirational guidelines as has been suggested, why not just refer counsel to the ABA guidelines and encourage counsel to follow them (not placing an obligation on anyone).

INCREASED COSTS: While the county strongly argues that the Court should repeal the standards because they constitute a clearly and unequivocal violation of the Sixth Amendment's prohibition against detailed rules, the County also believes that the standards will increase litigation amongst the counties. There will be case after case challenging the effectiveness of the counsel under these standards. This is the reason that the Federal Public Defender is pushing for these standards. Even though it is clear that these types of detailed rules are repugnant to the Constitution and violate Strickland.

Furthermore, the frivolous cases will cost the counties in manpower and time. I have one deputy in my office. If the standards are implemented, even with State funding for the Public Defender, I will be required to hire another full time attorney just to keep up even though significantly less than 50% of my cases involve the appointed counsel. These kinds of costs and unfunded mandates need to be taken into consideration because it will literally cost Pershing County thousands and thousands of dollars.

The prosecutors bear much of the burden of the system. Yet we do so as reasonably as possible. Most cases are resolved in a mutually agreeable fashion. I have had numerous defendants come to me after their cases are done and state their appreciation for the way we treated them. They are happy to get their lives back on track. Others may not feel that way. However, there is absolutely no reason to cause additional expenditures by the County for frivolous litigation where there is no proven need. The litigation spurred by these types of rules would be frivolous at best. The Court would do better to provide avenues for training to defense counsel (and even prosecutors) and encourage each attorney to understand the Guidelines of the ABA[14] for best practices and try to implement the guidelines. While the ABA guidelines are aspirational and not mandatory, they could provide a good training tool and a good indicator of areas for improvement.

There were statements that the performance standards are not mandatory because of the use of the word "should." I respectfully differ with those opinions. The standards clearly indicate that the rules are obligations placed upon counsel. These obligations place a legal duty upon appointed counsel and bind appointed to a course of action which requires that they follow the rules contained therein. A cased decided by the Fourth

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[14] I used the ABE guidelines because they are arguably the easiest to read and see footnotes for illustrations.

Circuit Court of Appeals on Monday, March 17, 2008, best describes my concerns with the Performance Standards and why they should be repealed.[15] The opinion reads:

> To argue that Ward's performance was "outside the wide range of professionally competent assistance," Yarbrough relies heavily, and almost exclusively, on the ABA Guidelines, which were originally drafted in 1989 and revised in 2003. He argues that the ABA Guidelines establish "prevailing professional norms" that, when applied to measure Ward's performance, render it constitutionally deficient. He asserts that the ABA Guidelines require that "expert assistance should *always* be requested and provided" for the proper preparation of capital cases (emphasis added), and that the rules are "not aspirational," but minimum constitutional standards. The district court rejected this argument, holding that the failure to comply with the ABA Guidelines regarding the requesting of funds for expert assistance does not establish counsel's performance as constitutionally deficient *per se*. *See* Yarbrough VII, 490 F.Supp.2d at 723-24.
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> We agree. Indeed, the ABA Guidelines themselves deliver a mixed message about whether they are aspirational or mandatory in every circumstance. On the one hand they would impose on defense counsel a mandatory, non-aspirational, minimum requirement to request public funds and obtain expert assistance in the preparation of virtually every capital case, because everywhere that the Guidelines direct what counsel "should" do, they advise that the term "should" is to be construed as a mandatory term. *See* ABA Guidelines intro. (1989) (" 'Should' is used throughout as a mandatory term and refers to activities which are minimum requirements"). In this manner, the ABA Guidelines appear to mandate that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases," *id.* 1.1 cmt., and "counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial," *id.* 11.4.1 cmt. On the other hand, the Guidelines also seem to acknowledge that a defendant cannot routinely have experts, because to have them requires calling upon local jurisdictions "to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation ... and to procure the necessary expert witnesses and documentary evidence," *id.* 8.1 cmt., which suggests an aspirational nature to the Guidelines. The Guidelines observe that "funds available to appointed defense counsel are *substantially* below those available to the prosecution" and that "[t]his inequity is unconscionable." *Id.* In short, the ABA Guidelines say that defense counsel should-now meaning only "should"-try to use experts more routinely, but that this goal depends on government funding which, for now, does not allow this goal to be *achieved* routinely. This therefore can hardly be the mandated minimum standard, as Yarbrough claims.
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> Moreover, were we to treat the ABA Guidelines as establishing the ***minimum constitutional floor*** of "prevailing professional norms" for determining ineffective assistance of counsel, we would be forced to hold that a defense

[15] **Yarbrough v. Johnson,** --- F.3d ----, 2008 WL 697710 C.A.4 (Va.),2008. March 17, 2008 (See Attached a Copy of this Case).

attorney who failed to obtain the expert assistance he "should" have secured was constitutionally deficient, *even if the jurisdiction in question would not have provided funds* for such an expert had the attorney asked for them. As the district court noted, the practice of providing defense attorneys " 'few, if any, resources' to hire experts ... has plainly been held to be constitutional and has continued for decades ." Yarbrough VII, 490 F.Supp.2d at 723. It simply is not the case that a lawyer who fails to request funds that are not available, or to which his client is not entitled under governing local law, has rendered ineffective assistance of counsel.

More fundamentally, to hold defense counsel responsible for performing every task that the ABA Guidelines say he "should" do is to impose precisely the "set of **detailed rules** for counsel's conduct" that the Supreme Court has long since rejected as being unable to "satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89. Such a categorical holding would lead to needless and expensive layers of process with the unintended effect of compromising process. Would it lead to the requirement, for example, that anytime the government uses a sample of DNA in prosecuting a case, the defense lawyer would have to retain a DNA expert, regardless of the expert's likely contribution to the defense? Would such a rule similarly require a defense lawyer to retain experts every time the government introduces expert evidence that a substance is, for example, cocaine? Recognition of the ABA Guidelines as the minimum prevailing community standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation. Those needs call for more nuanced responses than can be provided by following preestablished mechanical rules of representation. *See* Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); Strickland, 466 U.S. at 688-89 (cautioning against the fallacy of treating guidelines as a "checklist for judicial evaluation of attorney performance"); Meyer, 506 F.3d at 372 (same); *id.* at 371 ("[T]he touchstone of effective representation must be sound, evidence-based judgment, rather than a set of mandates counsel must programmatically follow without deviation"); Walker v. True, 401 F.3d 574, 583 n. 7 (4th Cir.2005) (noting that the Strickland inquiry "does not entail the application of *per se* rules" derived from ABA standards), *vacated on other grounds,* 546 U.S. 1086 (2006).

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as "guides," Strickland, 466 U.S. at 688, not minimum constitutional standards.

This case clearly stands in direct support of the position that I was trying to articulate to you yesterday and I am articulating to you now. I would urge you to read

this case. It provides direct confirmation of the points that Mr. Smith and I made to you. The use of the word "should" does not automatically transform the performance standards into an aspirational goal. The use of obligatory language throughout the document mandates that counsel do certain things. Furthermore, the ordering of appointed counsel takes this out of the realm of aspirational goals by the ABA and makes it a government mandated obligation. The arguments by the Federal Public Defender, the ACLU, the NLADA, and others indicated that these performance standards were the minimum constitutional standard. This argument not only flies the face of clear precedent, it also previews the post-conviction arguments to come (i.e. counsel was not reasonable in the representation because counsel did not follow the rules enacted by ADKT Order No. 411).

As noted above, "such a categorical" enactment of binding obligations "would lead to needless and expensive layers of process with the unintended effect of compromising process." In other words, it will costs the State and Counties thousands of real dollars to implement. Furthermore, Recognition by this Court of the Performance Standards "as the minimum prevailing community standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation." Counsel's latitude in making decisions calls for more "nuanced responses" than can be provided by following the "preestablished mechanical rules of representation." In other words, these rules would tie defense counsel's proverbial hands by prohibiting them from making appropriate and range of legitimate and often "nuanced responses" to "the variety of circumstances faced by defense counsel" on a daily basis.

UNFUNDED MANDATES: In the beginning of my statement yesterday, I told you that we wanted to be involved in the process. The fact is that special interests should never drive the bus as they too often do in the political arena. The Court is different. Under the Doctrine of Separation of Powers, this Court is in a unique position in that when it exercises legislative powers, there is no check or balance to that action. Furthermore, unless there is some specific constitutional restriction, a statute should be construed as being constitutional. The Legislature has exercised its authority and funded the judges which allow them to make appointments of counsel. As argued in our Motion, the Legislature's provisions are very clear that Judges should make appointments.

The Court, by requiring a commission, has created an unfounded mandate. In the hearing, it was suggested that attorneys could serve in pro bono role to appoint counsel. However, the general input during the hearing was that the rural counties do not have the wealth of attorneys that would be required to have such a process. Additionally, such a process would not be attuned to the realities of the court system. It would require such volunteers to be available on a daily basis. Such a requirement is unrealistic in its scope. Furthermore, no problem has every been shown in the rural counties. Part of the problem in this issue is that there is no case or controversy before the Court showing a problem. We would ask that the Court step back from the order and allow the judges to continue with the appointment process.

With regard to unfounded mandates within the Performance Standards[16], there are numerous issues in that regard. Washoe County stated that it expected to have to pay an additional ten million dollars ($10,000,000.00) in implementing the standards. This kind of requirement will also press upon the budgetary constraints of Pershing County. It will literally cost the County hundreds of thousands of dollars. The end result will only be frivolous claims and further placing the County in financial peril This County has worked hard to serve the needs of the "needy." The County funded the drug court program for its early existence, coming up with thousands of dollars that were frankly needed elsewhere. The Historic Courthouse here in Lovelock is in need of very costly renovations (including, but not limited to, a overhaul of the stairs to the tune of nearly $200,000.00 and a new dome and major repairs to the building). The law library is in need of space for its books. The I believe that Mr. Smith intends to send a letter addressing this issue of the costs imposed by the caseload and performance standards so I will leave it to his letter to address this issue.

In the end, it is clear that the intentions of the Court were very noble. You want to improve the quality of services offered in Nevada. However, no evidence has been produced to show that there is a crisis in the legal services being offered in the rural counties in Nevada. There are no caseload problems. If there is a crisis, it would be that the State Legislature needs to be convinced to fully fund the Counties with hard cash to help with the current levels of service in the rural counties. That is the crisis. The crisis is not that the services are not being performed and performed appropriately.

I beg your indulgences for any punctuation or grammatical errors because I have sent this letter in haste to ensure that you can fully consider these issues. I thank you for your consideration of these issues.

Sincerely,

Jim C. Shirley
District Attorney

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16 Very easily identifiable unfounded mandate. Standard 3 of the Standards on Page 25, provides that "Counsel ***must*** maintain an appropriate, professional office in which to consult with clients and witnesses, and must maintain a system for receiving collect telephone calls from incarcerated clients." Who will pay for this system?

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Yarbrough v. Johnson
C.A.4 (Va.),2008.
Only the Westlaw citation is currently available.
United States Court of Appeals,Fourth Circuit.
Robert Stacy YARBROUGH, Petitioner-Appellant,
v.
Gene M. JOHNSON, Director, Virginia Department of Corrections, Respondent-Appellee.
No. 07-10.

Argued Dec. 6, 2007.
Decided March 17, 2008.

Background: Following affirmance of capital murder and robbery convictions, and death sentence, 262 Va. 388, 551 S.E.2d 306, petitioner sought federal habeas relief. The United States District Court for the Eastern District of Virginia, Jerome B. Friedman, J., 490 F.Supp.2d 694, denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:
(1) defense counsel's failure to seek funds to hire DNA expert during guilt phase of capital murder prosecution was not deficient;
(2) failure to seek funds to hire DNA expert did not prejudice defendant; and
(3) Virginia did not unreasonably apply federal law in determining that petitioner's trial counsel did not provide ineffective assistance.

Affirmed.

[1] Criminal Law 110 ⇐0

110 Criminal Law
Defense counsel's failure to seek funds to hire DNA expert during guilt phase of capital murder prosecution was not deficient, as element of claim of ineffective assistance; Virginia state funds were not available for an expert witness unless defendant was able to show particularized need, particularized need could not be demonstrated by conclusory assertions, defendant simply hoped that an expert could find something to help his case, and overwhelming forensic evidence tied him to scene and corroborated codefendant's testimony placing defendant in role of primary perpetrator. U.S.C.A. Const.Amend. 6.

[2] Habeas Corpus 197 ⇐0

197 Habeas Corpus
In a habeas claim, a state decision is contrary to clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent. 28 U.S.C.A. § 2254(d).

[3] Habeas Corpus 197 ⇐0

197 Habeas Corpus
In a habeas claim, an unreasonable application of clearly established Federal law occurs when a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of a petitioner's case. 28 U.S.C.A. § 2254(d).

[4] Habeas Corpus 197 ⇐0

197 Habeas Corpus
When reviewing a state decision on a habeas claim, the question is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable, a substantially higher threshold. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 197 ⇐0

197 Habeas Corpus
The Court of Appeals reviews the district court's dismissal of a habeas petition de novo.

[6] Criminal Law 110 ⇐0

110 Criminal Law
In determining whether defense counsel's performance was constitutionally deficient, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, in order to avoid the distorting effects of hindsight. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⇐0

110 Criminal Law
A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment and the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⇐0

110 Criminal Law
In any claim of ineffective assistance of counsel, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⇐0

110 Criminal Law
The failure to comply with the American Bar Association (ABA) Guidelines regarding the requesting of funds for expert assistance does not establish defense counsel's performance as constitutionally deficient per se. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 110 ⇐0

110 Criminal Law
Defense counsel's failure to seek funds to hire DNA expert during guilt phase of capital murder prosecution did not prejudice defendant, as element of claim of ineffective assistance; it was unlikely that, even with an expert, defendant could have overcome totality of evidence against, which included not just forensic evidence, but also testimony from codefendant and eyewitnesses. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 ⇐0

110 Criminal Law
Supreme Court of Virginia did not unreasonably apply federal law or make unreasonable determinations of facts in determining that habeas petitioner's trial counsel did not provide ineffective assistance by failing to adequately investigate and present additional mitigation evidence at sentencing phase of capital murder prosecution; there was no evidence that petitioner had suffered extreme abuse or deprivation as child or that petitioner had a mental deficiency attributable to his background. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(2).

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Jerome B. Friedman, District Judge. (2:05-cv-00368-JBF).
ARGUED:F. Nash Bilisoly, IV, Vandeventer & Black, L.L.P., Norfolk, Virginia, for Appellant. Matthew P. Dullaghan, Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:**Trey R. Kelleter, Vandeventer & Black, L.L.P., Norfolk, Virginia; Jennifer L. Givens, Virginia Capital Representation Resource Center, Charlottesville, Virginia, for Appellant. Robert F. McDonnell, Attorney General, Jerry P. Slonaker, Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before NIEMEYER and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge TRAXLER and Senior Judge HAMILTON joined.

OPINION

NIEMEYER, Circuit Judge:
*1 A jury in Mecklenburg County, Virginia, convicted Robert Yarbrough of the 1997 capital murder and robbery of Cyril Hamby, and sentenced him to death. The Supreme Court of Virginia vacated his sentence because of an erroneous jury instruction. On remand, a second jury sentenced Yarbrough to death again, and the Supreme Court of Virginia affirmed.

After exhausting state procedures for post-conviction relief, Yarbrough filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2254, asserting six grounds for relief. The district court denied Yarbrough's petition, but granted him a certificate of appealability with respect to his claim that his trial counsel was constitutionally ineffective because he failed to request that the trial court appoint a DNA expert at public expense. We expanded the certificate of appealability to include Yarbrough's claim that the trial counsel was constitutionally ineffective for inadequately investigating and presenting evidence in mitigation at sentencing.

For the reasons that follow, we affirm the district court's dismissal of Yarbrough's two claims for which a certificate of appealability has been issued, concluding that in denying these claims on the merits, the Supreme Court of Virginia neither unreasonably applied clearly established federal law nor made an unreasonable determination of the facts. *See*28 U.S.C. § 2254(d).

I

The facts, as stated by the Supreme Court of Virginia in *Yarbrough v. Commonwealth (Yarbrough I)*, 258 Va.347, 519 S.E.2d 602, 603-07 (Va.1999), begin with Yarbrough inviting his high-school friend, Dominic Rainey, to join him in his plan to rob Cyril Hamby, the 77-year-old owner of Hamby's Store, located a short walk from Yarbrough and Rainey's homes on U.S. Route 1 in Mecklenburg County, Virginia. An eyewitness' testimony placed the two men walking along the highway toward the store between 9:30 and 10:30 p.m. on May 8, 1997. The two then waited outside the store until there were no customers inside, entered the store, and locked the door behind them.

Yarbrough, armed with a shotgun, ordered Hamby to lie on the floor in an aisle, and, with Rainey's help, bound Hamby's hands behind his back. Yarbrough shut off the store's outside lights and demanded that Hamby reveal where guns were hidden in the store. When Hamby denied having any guns, Yarbrough kicked Hamby in the head and upper arms. Yarbrough then forced open the cash register and took the money inside. After returning to Hamby, he again demanded to know the location of the guns. Hamby continued to deny having any guns, at which point Yarbrough put down the shotgun, took out a pocketknife, and proceeded to cut deeply into the front and the back of Hamby's neck with a sawing motion. According to Rainey, Hamby pleaded with Yarbrough to stop cutting him, but Yarbrough did not stop and inflicted at least 10 deep wounds before rifling through Hamby's clothing and taking his wallet. Yarbrough and Rainey then stole beer, wine, and cigarettes, as well as the money Yarbrough had taken from the cash register, and exited the store from the rear. Yarbrough gave Rainey $100 and kept the remainder of the money for himself.

*2 The two proceeded to Rainey's residence, where they changed clothes, and then went to the nearby home of Conrad Dortch, where they drank the wine from Hamby's store and waited for Dortch to arrive so they could buy marijuana from him. Dortch came home at approximately 12:45 a.m. and sold Yarbrough a marijuana joint for $10. According to Rainey, Yarbrough was "flashing" his money. Yarbrough and Rainey then returned to Rainey's home, where they spent the rest of the night. The next morning, Yarbrough threw his blood-stained tennis shoes in a trash barrel behind Rainey's house and left.

After Hamby's body was discovered on May 9, 1997, and an autopsy was conducted, it was determ-

inced that Hamby had bled to death from multiple deep wounds around his neck. The Commonwealth's medical examiner described the wounds as "entirely consistent" with "an attempted beheading," but because no major arteries were cut, it likely took several minutes for Hamby to bleed to death. The examiner also noted the blunt force injuries on Hamby's head and upper arm, which were consistent with having been kicked.

A day later, Dortch informed the police of his encounter with Yarbrough and Rainey on the night of Hamby's murder, prompting the police to obtain and execute a search warrant at Yarbrough's home where they recovered clothing and a pocketknife, both stained with blood. Police also recovered the tennis shoes from Rainey's home.

Subsequent forensic analysis of the items recovered, the crime scene, and samples taken from Hamby, Yarbrough, and Rainey, strongly supported the conclusion that both Yarbrough and Rainey were present at the scene of the murder and that Yarbrough was most likely the person who inflicted the fatal wounds on Hamby. DNA tests of the shoes and clothing established a match with Hamby's blood, and the DNA test of the knife established a mix of Hamby and Yarbrough's DNA on the blade. The blood stains on Yarbrough's clothes were consistent with a spray of blood resulting from trauma and were made "in close proximity to the trauma that released the blood."Prints from Yarbrough's tennis shoes were found near the circuit box in the store, behind the counter, and in the blood stains near Hamby's head. Prints from Rainey's boots were found near Hamby's feet and in the living quarters of the store.

Following a four-day trial, at which the Commonwealth presented the testimony of Rainey, other witnesses, police investigators, and forensic experts, as well as extensive physical evidence, the jury convicted Yarbrough of capital murder and robbery. In exchange for his testimony, Rainey was charged with first degree murder rather than capital murder, and he later pleaded guilty, receiving a sentence of 50 years' imprisonment, 25 of which were suspended.

At the sentencing phase, which followed immediately upon the completion of the guilt phase, the Commonwealth argued that the death penalty was appropriate for Yarbrough because his crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."*See*Va.Code Ann. § 19.2-264.2. Yarbrough presented mitigation evidence in the form of testimony from his mother. The jury sentenced Yarbrough to death for the capital murder conviction and to life imprisonment for the robbery conviction.

*3 On direct appeal, Yarbrough assigned several errors, and the Virginia Supreme Court rejected all but one. Because the trial court failed to inform the jury during the sentencing phase that if it sentenced Yarbrough to life imprisonment, he would be ineligible for parole, the court vacated the death sentence and remanded the case for a new sentencing trial. *See Yarbrough I,* 519 S.E.2d at 611-17.

The second sentencing trial took place before a newly empaneled jury. The evidence presented at that trial is summarized by the Virginia Supreme Court in *Yarbrough v. Commonwealth (Yarbrough II),* 262 Va.388, 551 S.E.2d 306, 308 (Va.2001). The Commonwealth presented evidence that Yarbrough stabbed Hamby at least 10 times in the neck and that the wounds "penetrated to the junction between the neck and the skull at several locations on the rear of Hamby's neck."Other evidence described several blows to the head, and indicated that Hamby was still alive during the infliction of these wounds, remaining alive for up to 15 minutes as he bled to death. The Commonwealth also produced Rainey, who testified that Hamby begged for mercy while Yarbrough continued his "sawing motion" on Hamby's neck. In addition, several family members and neighbors testified to Hamby's warmth, generosity, kindness, and thoughtfulness, as well as to the devastating impact his murder had on his family.

In mitigation, Yarbrough again presented testimony from his mother, who indicated that Yarbrough had lived with her his entire life except for two years when he lived with his grandmother. Yarbrough also called a prison counselor to testify that he had not received any adverse disciplinary reports while incarcerated. In opening and closing arguments, Yarbrough's counsel, Buddy Ward, attempted to cast doubt on Rainey's veracity and urged the jury to "stop the killing" by sparing Yarbrough's life.

After less than an hour of deliberation, the jury sentenced Yarbrough to death, finding explicitly that the murder was "vile" and that the mitigating evidence did not outweigh this aggravating factor. On his second direct appeal, the Virginia Supreme Court affirmed, *Yarbrough II,* 551 S.E.2d at 399-400, and the United States Supreme Court denied Yarbrough's petition for a writ of certiorari, *Yarbrough v. Virginia,* 535 U.S. 1060, 122 S.Ct. 1925, 152 L.Ed.2d 832 (2002).

Seeking state post-conviction relief, Yarbrough filed a petition for a writ of habeas corpus with the Supreme Court of Virginia on July 12, 2002. The petition raised several claims, including, as relevant here, claims that Yarbrough's trial counsel (1) was ineffective by failing adequately to challenge the Commonwealth's forensic evidence, specifically by failing to request appointment of a DNA expert at public expense, and (2) was ineffective by failing adequately to investigate and present relevant evidence in mitigation at the second sentencing trial. The Virginia Supreme Court rejected Yarbrough's claims and dismissed his petition in an unpublished opinion. *Yarbrough v. Warden (Yarbrough III),* No. 021660 (Va. May 29, 2003).

*4 Relying in part on the decision of the United States Supreme Court in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), which was handed down on June 26, 2003, Yarbrough petitioned the Virginia Supreme Court for rehearing, claiming that his trial counsel was deficient in failing to investigate and present mitigation evidence. The Virginia Supreme Court granted Yarbrough's petition for a rehearing limited to the mitigation evidence claim, and it ordered the Circuit Court of Mecklenburg County to conduct an evidentiary hearing. *See*Va.Code Ann. § 8.01-654(C).

At the hearing, Yarbrough presented testimony from his trial counsel, his mother, his father, his mother's ex-boyfriend, his grandmother, his cousin, and his half-sister. The Commonwealth recalled Yarbrough's trial counsel and presented testimony from his trial counsel's investigator. Following the hearing, the Circuit Court submitted proposed findings of fact and conclusions of law to the Virginia Supreme Court, recommending a finding that Yarbrough's trial counsel's performance was constitutionally deficient but that it did not result in prejudice to the outcome of the case and therefore that Yarbrough was not entitled to relief. *Yarbrough v. Warden (Yarbrough IV),* No. 021660 (Va.Cir.Ct. May 6, 2004).

The Supreme Court of Virginia adopted most of the Circuit Court's recommendations for findings of fact, as well as its recommendation that there was no prejudice, and it dismissed Yarbrough's petition. *Yarbrough v.Warden (Yarbrough V),* 269 Va.184, 609 S.E.2d 30, 40 (Va.2005). Because the Virginia Supreme Court found no prejudice, it did not review or adopt the Circuit Court's recommended conclusion that Yarbrough's trial counsel was deficient. *Id.* at 38 n. 2.

Yarbrough commenced the present action by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising six issues, including the ineffective assistance claims for failure to seek public funds for a DNA expert and for failure to investigate and present mitigating evidence. The district court referred the petition to a magistrate judge, who submitted a report and recommendation that all six claims be denied and that Yarbrough's petition be dismissed. *Yarbrough v. Johnson (Yarbrough VI),* No. CIV A 205CV368, 2006 WL 2583418 (E.D.Va. Sept.5, 2006). The district court adopted most of the magistrate judge's recommendations, modified others, and arrived at the same

conclusion that all six of Yarbrough's claims should be denied. *Yarbrough v. Johnson (Yarbrough VII),* 490 F.Supp.2d 694 (E.D.Va.2007). Concluding that Yarbrough's DNA evidence claim was his "strongest argument," the district court granted Yarbrough's motion for a certificate of appealability on that issue.*Id.* at 740-41.By order dated October 2, 2007, we expanded the certificate of appealability to include Yarbrough's mitigation evidence claim.

II

[1] Yarbrough contends first that he was denied effective assistance of counsel during the guilt phase of his state trial because "DNA evidence was critical to the prosecution and the defense in this case not involving a confession" and his counsel "fail [ed] to request funds to engage an expert in DNA collection, testing and analysis."The failure to seek funds to hire an expert, he argues, fell below "prevailing professional norms" as they are defined by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"), which he asserts require that "expert assistance should *always* be requested and provided" for the "proper preparation of capital cases" (emphasis added), and which are not to be taken as "aspirational" but as a minimum standard under the Sixth Amendment.

*5 The Commonwealth of Virginia contends that the district court properly dismissed Yarbrough's habeas claim because Yarbrough failed "to establish that his trial counsel successfully could have moved for the appointment of such an expert."Adopting the district court's conclusion that public funds for a DNA expert would be available only if Yarbrough established a "particularized need" for the expert under *Husske v. Commonwealth,* 252 Va. 203, 476 S.E.2d 920 (Va.1996), Virginia argues that because Yarbrough could not establish such a need, his counsel's "failure to move for the appointment [could] not have been deficient."

Yarbrough first presented his ineffective assistance of counsel claim to the Virginia Supreme Court in a petition for a writ of habeas corpus filed on July 12, 2002, relying on *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).FN1 In dismissing the claim the Supreme Court ruled:

> The Court holds claim (III)(C)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland.*Petitioner has failed to allege any facts that would suggest that counsel's performance was inadequate. Petitioner has failed to show a particularized need for the assistance of an independent expert or that he was prejudiced by the lack of expert assistance. *Husske v. Commonwealth,* 252 Va. 203, 213, 476 S.E.2d 920, 926 (1996). Furthermore, petitioner has failed to identify the items that were not tested by the Commonwealth or how testing of those items would disprove petitioner's guilt. Thus, petitioner has failed to demonstrate how counsel was ineffective for failing to obtain an independent expert and failing to request that the unspecified items undergo testing. Furthermore, he has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

Yarbrough III, No. 021660, op. at 8-9.

In considering this claim again on a petition under 28 U.S.C. § 2254, a federal court owes considerable deference to the judgment entered in the state court proceeding. *See*28 U.S.C. § 2254(d), (e).Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Su-

preme Court of the United States; or

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

And § 2254(e)(1) instructs that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

***6** [2][3][4] A state decision is "contrary to" clearly established Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent."*Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Meyer v. Branker,* 506 F.3d 358, 364-65 (4th Cir.2007)."An 'unreasonable application' occurs when a state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of [a] petitioner's case."*Rompilla v. Beard,* 545 U.S. 374, 380, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (internal quotation marks omitted); *Lenz v. Washington,* 444 F.3d 295, 300 (4th Cir.2006). In applying these standards when reviewing a state decision under § 2254(d), the question, therefore, is not "whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold."*Schriro v. Landrigan,* --- U.S. ----, ----, 127 S.Ct. 1933, 1939, 167 L.Ed.2d 836 (2007) (citing *Williams,* 529 U.S. at 410);*Strong v. Johnson,* 495 F.3d 134, 140 (4th Cir.2007).

[5] We review the district court's dismissal of a habeas petition *de novo.Meyer,* 506 F.3d at 364.FN2

In presenting his ineffective assistance of counsel claim to the district court, Yarbrough argued that the performance of his trial counsel, Buddy Ward, was deficient because, inasmuch as the prosecution's case depended on DNA evidence, it was "incumbent on competent counsel to make some attempt to, at the least, investigate the DNA analysis and discredit the scientific evidence through an independent expert and education on DNA analysis."Yarbrough maintained, "Had the forensic evidence been tested and found to be flawed or even false, only the testimony of an admitted felon with a deal would have placed [him] inside Mr. Hamby's store that night."

Identifying areas in which an expert could have assisted counsel, Yarbrough pointed to multiple alleged errors or deficiencies in the Commonwealth's forensic analysis. For example, certain samples were tested at only 10 genetic loci, instead of 23, because the State only had the capability to test at the 10. Certain samples failed to yield interpretable results. With respect to certain results, no statistical probabilities were given. Finally, certain items were not tested at all. But Yarbrough never explained how the test results that *were* obtained and that pointed only at him as the murderer could be reversed or ignored, nor how an expert's review might otherwise have helped him in the context of these alleged deficiencies. He simply *hoped* that the expert might find something to help his case.

Yarbrough also never explained how he overcame "the presumption that, under the circumstances, the challenged action [of his attorney] might be considered sound trial strategy," namely, a decision to focus on advancing arguments that counsel could actually make or reasonably found more persuasive. *Strickland,* 466 U.S. at 689 (internal quotation marks omitted). This presumption was especially strong here in view of the fact that in Virginia state funds were not available for an expert witness unless a defendant was able to show a "particularized need" for the expert testimony. *See Husske,* 476 S.E.2d at 925. And under state law, such a "particularized need" could not have been demon-

strated by conclusory assertions, but rather had to be demonstrated by a specific showing of how expert testimony would assist in the defense. *Id.* at 925-26;*see also Commonwealth v. Sanchez,* 268 Va. 161, 597 S.E.2d 197, 200 (Va.2004). In *Sanchez,* the Virginia Supreme Court denied a request for state funds for an expert specifically because the defendant's demonstration of need was not particularized and rested on nothing more than the petitioner's "hope or suspicion." In accordance with *Strickland,* we presume that Ward knew of these barriers and developed a "sound trial strategy" in light of his inability to surmount them. And Yarbrough has given us no basis to rebut that presumption.

*7 Yarbrough faced overwhelming forensic evidence that tied him to the scene, that corroborated Rainey's testimony, and that placed him (Yarbrough) in the role of primary perpetrator. Without any indication or theory about how the DNA evidence might be wrong, any expectation of what benefit might be obtained from retaining a DNA expert could only be characterized as a dim hope. Ward was fighting an uphill battle for Yarbrough, and he performed as ably as one could expect in the circumstances. This is meaningful when recognizing that Ward was a seasoned criminal lawyer who had tried more capital cases than he could remember.

Not only did the Virginia Supreme Court have all of this information before it, the district court separately and exhaustively examined Ward's cross-examination of the Commonwealth's forensic experts, noting that he effectively subjected the Commonwealth's evidence to adversarial testing such that the proper functioning of the adversarial process was not undermined and could be relied on to produce a just result. *Yarbrough VII,* 490 F.Supp.2d at 724-27;*see also Strickland,* 466 U.S. at 685-86. While the district court did acknowledge that Ward made some errors, which revealed limits of his knowledge, it did not conclude that these errors in any way lessened Ward's ability to test the Commonwealth's case and to ensure that the trial was reliable.

[6][7] In view of these facts, we cannot say that the Virginia Supreme Court's conclusion that Ward's performance was not deficient was an unreasonable application of federal law, particularly *Strickland. See*28 U.S.C. § 2254(d)(1). In determining whether Ward's performance was constitutionally deficient, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," in order to avoid "the distorting effects of hindsight." *Strickland,* 466 U.S. at 689. As the Supreme Court in *Strickland* stated:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.
>
> * * *
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> [8] In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

[9] To argue that Ward's performance was "outside the wide range of professionally competent assistance," Yarbrough relies heavily, and almost exclusively, on the ABA Guidelines, which were originally drafted in 1989 and revised in 2003. He argues that the ABA Guidelines establish "prevailing professional norms" that, when applied to measure Ward's performance, render it constitutionally deficient. He asserts that the ABA Guidelines require that "expert assistance should *always* be requested and provided" for the proper preparation of capital

cases (emphasis added), and that the rules are "not aspirational," but minimum constitutional standards. The district court rejected this argument, holding that the failure to comply with the ABA Guidelines regarding the requesting of funds for expert assistance does not establish counsel's performance as constitutionally deficient *per se*. *See Yarbrough VII*, 490 F.Supp.2d at 723-24.

*8 We agree. Indeed, the ABA Guidelines themselves deliver a mixed message about whether they are aspirational or mandatory in every circumstance. On the one hand they would impose on defense counsel a mandatory, non-aspirational, minimum requirement to request public funds and obtain expert assistance in the preparation of virtually every capital case, because everywhere that the Guidelines direct what counsel "should" do, they advise that the term "should" is to be construed as a mandatory term. *See* ABA Guidelines intro. (1989) (" 'Should' is used throughout as a mandatory term and refers to activities which are minimum requirements"). In this manner, the ABA Guidelines appear to mandate that "[u]tilization of experts has become the rule, rather than the exception, in proper preparation of capital cases,"*id.* 1.1 cmt., and "counsel should demand on behalf of the client all necessary experts for preparation of both phases of trial,"*id.* 11.4.1 cmt. On the other hand, the Guidelines also seem to acknowledge that a defendant cannot routinely have experts, because to have them requires calling upon local jurisdictions "to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation ... and to procure the necessary expert witnesses and documentary evidence,"*id.* 8.1 cmt., which suggests an aspirational nature to the Guidelines. The Guidelines observe that "funds available to appointed defense counsel are *substantially* below those available to the prosecution" and that "[t]his inequity is unconscionable." *Id.* In short, the ABA Guidelines say that defense counsel should-now meaning only "should"-try to use experts more routinely, but that this goal depends on government funding which, for now, does not allow this goal to be *achieved* routinely. This therefore can hardly be the mandated minimum standard, as Yarbrough claims.

Moreover, were we to treat the ABA Guidelines as establishing the minimum constitutional floor of "prevailing professional norms" for determining ineffective assistance of counsel, we would be forced to hold that a defense attorney who failed to obtain the expert assistance he "should" have secured was constitutionally deficient, *even if the jurisdiction in question would not have provided funds* for such an expert had the attorney asked for them. As the district court noted, the practice of providing defense attorneys " 'few, if any, resources' to hire experts ... has plainly been held to be constitutional and has continued for decades ."*Yarbrough VII*, 490 F.Supp.2d at 723. It simply is not the case that a lawyer who fails to request funds that are not available, or to which his client is not entitled under governing local law, has rendered ineffective assistance of counsel.

More fundamentally, to hold defense counsel responsible for performing every task that the ABA Guidelines say he "should" do is to impose precisely the "set of detailed rules for counsel's conduct" that the Supreme Court has long since rejected as being unable to "satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."*Strickland*, 466 U.S. at 688-89. Such a categorical holding would lead to needless and expensive layers of process with the unintended effect of compromising process. Would it lead to the requirement, for example, that anytime the government uses a sample of DNA in prosecuting a case, the defense lawyer would have to retain a DNA expert, regardless of the expert's likely contribution to the defense? Would such a rule similarly require a defense lawyer to retain experts every time the government introduces expert evidence that a substance is, for example, cocaine? Recognition of the ABA Guidelines as the minimum prevailing community

standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation. Those needs call for more nuanced responses than can be provided by following preestablished mechanical rules of representation. *See Roe v. Flores-Ortega,* 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Strickland,* 466 U.S. at 688-89 (cautioning against the fallacy of treating guidelines as a "checklist for judicial evaluation of attorney performance"); *Meyer,* 506 F.3d at 372 (same); *id.* at 371 ("[T]he touchstone of effective representation must be sound, evidence-based judgment, rather than a set of mandates counsel must programmatically follow without deviation"); *Walker v. True,* 401 F.3d 574, 583 n. 7 (4th Cir.2005) (noting that the *Strickland* inquiry "does not entail the application of *per se* rules" derived from ABA standards), *vacated on other grounds,*546 U.S. 1086, 126 S.Ct. 1028, 163 L.Ed.2d 849 (2006).

*9 While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as "guides," *Strickland,* 466 U.S. at 688, not minimum constitutional standards.

Inasmuch as we conclude that the Virginia Supreme Court's application of *Strickland* to this case was not unreasonable, we affirm the district court's decision dismissing Yarbrough's claim that his counsel's performance was deficient.

[10] Because Yarbrough has not satisfied the deficient-performance prong of *Strickland,* we only briefly discuss the prejudice prong. Although an expert might have helped Buddy Ward poke a few more holes in the Commonwealth's case than he accomplished on his own, there is no basis to assume that any such minor victories would have created a reasonable probability that Yarbrough would have been acquitted. Short of expert testimony revealing gross incompetence or a criminal conspiracy to falsely implicate Yarbrough-and there is certainly no reasonable probability of either-it is most unlikely that, even with an expert, Yarbrough could have overcome the totality of evidence against him, which included not just forensic evidence, but also Rainey's testimony, eyewitness testimony placing him in the vicinity of the store, and Dortch's testimony regarding his actions after the murder.

At bottom, we hold that Yarbrough has established neither the performance prong nor the prejudice prong of *Strickland,* and his first claim for habeas relief was properly denied.

III

[11] Yarbrough also contends that his trial counsel performed below an objective standard of reasonableness because he failed adequately to investigate and present relevant evidence in mitigation at the second sentencing trial and that, but for this failure, there was a reasonable probability that the jury would not have sentenced him to death. *See Wiggins v. Smith,* 539 U.S. 510, 521, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Strickland,* 466 U.S. at 690, 694.

When this claim was first presented to the Supreme Court of Virginia, the Court denied it on the merits, holding that Yarbrough had satisfied neither the performance prong nor the prejudice prong of *Strickland* because he had failed "to allege that such mitigation evidence was available to counsel or that petitioner desired such evidence to be presented at sentencing."The Court also gave as a reason the fact that such mitigation evidence could have been "cross-purpose evidence capable of aggravation as well as mitigation."*Yarbrough III,* No. 021660, op. at 13-14 (citing *Barnes v. Thompson,* 58 F.3d 971, 980-81 (4th Cir.1995)).

After the United States Supreme Court decided *Wiggins,* the Virginia Supreme Court granted Yarbrough's petition for rehearing and directed the Cir-

cuit Court of Mecklenburg County to conduct an evidentiary hearing on the claim. The facts developed at this hearing are related by the Virginia Supreme Court in *Yarbrough V*, 609 S.E.2d at 33-36.

*10 The Court described how Yarbrough's mother, Lorraine Mitchell, testified that when Yarbrough was seven or eight years old, she became addicted to crack cocaine, first as a "functional" addict who managed to provide for herself and her children and later as a "dysfunctional" addict who permitted bills to go unpaid and the cleanliness of her home, herself, and her children to deteriorate. She and her children-Yarbrough and his half-sister Dorian Jenkins, who was six years Yarbrough's junior-were eventually evicted from their home in Camden, New Jersey, and forced to move to a drug-infested low-income housing project. Also, Dorian Jenkins' father, Willis Jenkins, eventually moved out of the home, leaving only Mitchell and the two children in the house.

Mitchell testified that after she hit "rock bottom" in the summer of 1989 or 1990, when Yarbrough was eleven or twelve years old, Yarbrough's father, Robert Yarbrough, arranged for Yarbrough to live with relatives and attend school in Illinois for a year. That same year, Willis Jenkins permanently removed Dorian from Mitchell's care. When Yarbrough returned from Illinois the following summer, Mitchell had substantially recovered from her addiction, and she and Yarbrough thereafter lived in New Jersey, the Eastern Shore of Virginia, and finally Mecklenburg County, Virginia. During this period Yarbrough sometimes lived with his grandmother in Mecklenburg County.

Willis Jenkins, Robert Yarbrough, and Yarbrough's grandmother, Annie Mae Riley, also testified and substantially supported Mitchell's testimony. All four witnesses agreed that Mitchell had been addicted to crack cocaine and that she had neglected her parental responsibilities as a result. But they also testified that Yarbrough had always been a relatively well-behaved and responsible person and that there was never any indication, hint, or suggestion that Yarbrough had been physically or sexually abused. Evidence showed that when Yarbrough's mother was unable to care for herself or her children, Yarbrough would often do so, seeing to it that his half-sister got something to eat or was safely near her mother before he left for school.

Yarbrough's final two witnesses, his cousin Anthony Riley and his half-sister Dorian Jenkins, gave testimony about events that occurred when they were young children, no more than 14 and 5 years old, respectively. Their testimony roughly tracked that of the adults, although it painted an even harsher picture about conditions when Yarbrough and his half-sister lived with Mitchell in New Jersey.

Buddy Ward, Yarbrough's trial counsel, testified that both he and his investigator interviewed Yarbrough, Mitchell, and Mitchell's mother extensively, and that they conducted a "deep background check" that involved school and medical records from New Jersey and Virginia. According to Ward, none of the people interviewed were willing to say anything negative to him about Yarbrough's childhood or Mitchell's parenting. The picture Ward got from his investigation was simply that Mitchell had tried to be a good mother but encountered problems and hard times, so she sent Yarbrough to live with her mother temporarily while she worked through her difficulties. In addition, Ward testified that a court-appointed psychologist, Dr. Evan Nelson, examined Ward and obtained some "clues" as to Mitchell's drug problems and a possible mitigation case based on maternal neglect. But Nelson also warned Ward not to call him as an expert witness to connect Yarbrough's upbringing to his crime, because in his opinion Yarbrough was "dangerous."

*11 In response to the testimony given at the hearing by the Yarbrough family members, Ward testified that he had been aware of most of the circumstances they described, except the extent of Mitchell's drug use. While he acknowledged that he would have liked to have presented some of the lay testimony, particularly that of Yarbrough's half-

sister Dorian Jenkins, he remained concerned that the testimony would have been a double-edged sword because it would have given the Commonwealth an opportunity to argue that Yarbrough deserved the death penalty not only due to the "vileness" of his crime, but also because he posed a "future danger." *See* Va.Code Ann. § 19.2-264.2.

After receiving the testimony, the Circuit Court of Mecklenburg County submitted proposed findings of fact to the Virginia Supreme Court and recommended finding that Ward had been deficient in failing to uncover, during his investigation, the full extent of Yarbrough's childhood difficulties but that Yarbrough had failed to establish prejudice because, after weighing the totality of mitigation evidence against the aggravating evidence, there was no reasonable probability that the jury would not have sentenced him to death. *Yarbrough IV*, No. 021660, op. at 16-20. The Supreme Court of Virginia accepted most of the Circuit Court's proposed factual findings and adopted its recommendation to deny Yarbrough's claim because he did not demonstrate prejudice. *Yarbrough V*, 609 S.E.2d at 37-40. The Supreme Court did not adopt the Circuit Court's conclusion that Yarbrough had established deficient performance and expressed no opinion as to that dimension of the claim. *Id.* at 38 n. 2.

Again, federal review of the Virginia Supreme Court's judgment is limited to whether the judgment was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent, or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d).

Yarbrough argues that the Virginia Supreme Court "unreasonably applied" federal law because it "failed to weigh the mitigating evidence in this case independently and appropriately; instead, it merely compared it to that present in *Wiggins* and determined that it did not stack up." *Yarbrough VI*, 2006 WL 2583418, at *13. The district court "summarily" rejected this claim, observing that the state court did not compare the facts of *Wiggins*, *Williams*, *Rompilla*, and *Strickland* with the facts of Yarbrough's case "in a checklist fashion," but rather "merely for illustrative purposes," and that it weighed the totality of mitigating evidence against the evidence in aggravation and found no reasonable probability of a different result. *Yarbrough VII*, 490 F.Supp.2d at 702. The district court concluded that it was "readily apparent that Yarbrough ha[d] failed to set forth an unreasonable application of United States Supreme Court precedent." *Id.*

**12 We agree with the district court. The Virginia Supreme Court did not apply federal law unreasonably when it compared Yarbrough's evidence to that in *Wiggins* or *Williams* in order to evaluate its relative strength and ability to offset the aggravating evidence Yarbrough faced and to show a reasonable probability of a different result. Indeed, it was appropriate for the Virginia Supreme Court to have observed that unlike in *Wiggins* and *Williams*, Yarbrough presented no evidence at all of a diminished mental capacity, nor did he present any evidence to support a finding that he had been physically or sexually abused. *Yarbrough V*, 609 S.E.2d at 40. Mental capacity and extreme abuse were significant factors in the United States Supreme Court's determination that Wiggins and Williams had established prejudice, as such evidence was "powerful" in offsetting the State's evidence in aggravation in each case. *See Wiggins*, 539 U.S. at 534-38; *Williams*, 529 U .S. at 396-98; *see also Rompilla*, 545 U.S. at 390-93. When mitigation evidence presents significantly less hardship than that found in *Wiggins*, *Williams* and *Rompilla*, however, it follows that the evidence is significantly less "powerful." The question a reviewing court must answer in determining whether a petitioner was prejudiced by a failure to present such evidence, then, is not whether the evidence was as "powerful" as the mitigation evidence in *other* cases, but rather whether the evidence was "powerful" enough to offset the aggravating evidence and demonstrate a reasonable probability of a different result in the *petitioner's* case.

The Supreme Court of Virginia concluded that Yarbrough's mitigation evidence was not "powerful" enough, when weighed against the State's evidence in aggravation, to demonstrate a reasonable probability of a different result. As the Court explained:

> The evidence in aggravation at Yarbrough's second penalty phase proceeding included the brutal nature of the attack on Hamby, a 77-year old man, which appeared to be an attempted decapitation. Also in aggravation was the fact that Hamby was alive when all ten of the knife wounds were inflicted on him, and that he may have lived for 15 minutes as he bled to death. The evidence also showed that Yarbrough continued to cut Hamby's neck in a sawing motion even after Hamby pleaded with Yarbrough to stop cutting him.

Yarbrough V. 609 S.E.2d at 39-40;*see also id.* at 32-33 (describing additional testimony from Hamby's family, friends, neighbors and customers). Weighing this evidence against the totality of Yarbrough's evidence in mitigation, the Virginia Supreme Court held that the record failed to demonstrate a reasonable probability of a different result. *Id.* at 40.

What is especially lacking from Yarbrough's claim is any evidence that attributes his crime to his suboptimal childhood. *See Wiggins,* 539 U.S. at 535 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background ... may be less culpable than defendants who have no such excuse") (emphasis added) (internal quotation marks omitted). Yarbrough's evidence establishes that he came from a disadvantaged background, but offers no support for the inference that his murder of Hamby was somehow attributable to that background. To the contrary, all those who testified about his disadvantaged background also maintained generally that he was a fundamentally decent, well-behaved child and young man.

***13** In the absence of any extreme abuse, deprivation, or mental deficiency that would readily permit a jury to attribute Yarbrough's acts to his background, or in the absence of any expert testimony to connect Yarbrough's upbringing to the crime-a connection that Ward deliberately chose not to draw because of its double-edged nature-we cannot conclude that there was a reasonable probability that a jury would decide Yarbrough's fate differently if it heard this evidence. Indeed, it seems reasonably probable that the jury would wonder why, after so many years of being mature and responsible beyond his years to care for his mother and his sister when necessary, Yarbrough suddenly lashed out and committed such a vile act of violence against an elderly man. A jury hearing this evidence might therefore be led to find Yarbrough more culpable for his criminal acts, rather than less. *See Bowie v. Branker,* 512 F.3d 112, 121 (4th Cir.2008); *Moody v. Polk,* 408 F.3d 141, 152 (4th Cir.2005).

Considering the Virginia Supreme Court's weighing of the evidence and the deficiencies in the mitigation evidence available, we conclude that its decision was not an unreasonable application of federal law.

Yarbrough also takes issue with several factual findings made by the Virginia Supreme Court. But he has offered no new evidence in rebuttal. He simply contests determinations made by the Court, pointing to other portions of the evidentiary hearing transcript that, in his view, support the characterization of the facts he prefers.

The Supreme Court of Virginia's factual findings regarding the evidence in mitigation are, of course, presumptively correct. *See*28 U.S.C. § 2254(e)(1). Moreover, they appear to us to be substantially correct, or if not correct, at least a reasonable summation of the testimony presented at the evidentiary hearing. *See id.* § 2254(d)(2).

Accordingly, we affirm the district court's judgment that the Supreme Court of Virginia did not unreasonably apply clearly established federal law in re-

jecting Yarbrough's claim of prejudice due to Ward's failure to present additional mitigating evidence at sentencing and that the Virginia Supreme Court's decision was not based on an unreasonable determination of the facts.

Therefore, on the two claims included within the certificate of appealability, we affirm.

AFFIRMED

FN1.***Strickland*** held that to establish a claim under the Sixth Amendment for ineffective assistance of counsel, the petitioner must demonstrate "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense."*Strickland,* 466 U.S. at 687;*see also Emmett v. Kelly,* 474 F.3d 154, 160 (4th Cir.2007).

FN2. The district court reviewed the Virginia Supreme Court judgment *de novo* because it concluded that the Supreme Court had incorrectly observed that Yarbrough had failed to identify specific items that were not tested but should have been. *Yarbrough VII,* 490 F.Supp.2d at 714-15. Because our review of the district court is *de novo,* we also examine the state court's judgment directly, as the district court did, giving it the deference that is due in the circumstances.

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--- F.3d ----, 2008 WL 697710 (C.A.4 (Va.))

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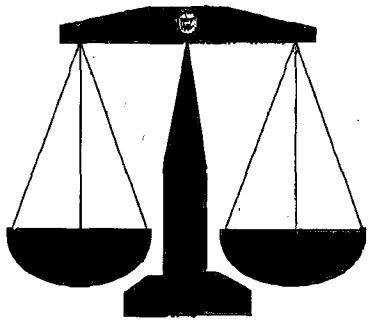

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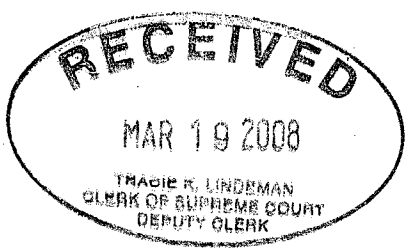

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