No. ___

IN THE
Supreme Court of the United States

RON NEAL,
Superintendent, Indiana State Prison,

Petitioner,

v.

TOMMY R. PRUITT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel, Appeals
ANDREW A. KOBE
HEATHER H. MCVEIGH
GRAHAM T. YOUNGS
Deputy Attorneys General

**Counsel of Record*

Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

Tommy Pruitt stands convicted of murdering Deputy Sheriff Daniel Starnes and is sentenced to death. Pruitt claims that intellectual disability renders him ineligible for the death penalty and that his trial counsel were ineffective for failing to present additional mitigation evidence of mental illness. Indiana courts rejected both claims, crediting Pruitt's IQ test scores, academic achievement tests and other evidence of intellectual functioning, as well as his trial counsel's mitigation evidence that Pruitt suffers from "schizotypal personality disorder." The Seventh Circuit granted Pruitt's habeas petition, giving greater weight to different intelligence test scores and his trial counsel's failure to present evidence of "paranoid schizophrenia."

1. Does a federal court exceed its authority under 28 U.S.C. § 2254(d)(2)—and thereby usurp state authority to define "intellectual disability"—when it reweighs competing evidence of intellectual functioning?

2. Did Indiana courts reasonably apply both *Strickland* inquiries in concluding that evidence of Pruitt's "schizotypal personality disorder" satisfied any duty of trial counsel to investigate and present evidence of Pruitt's mental illness in mitigation of his crimes?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

FEDERAL STATUTES

STATE STATUTES

STATE STATUTES [CONT'D]

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through Ron Neal, Superintendent of the Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015), *reh'g and reh'g en banc denied*, and is reprinted in the Appendix at 1a. The Northern District of Indiana's opinion and order denying a writ of habeas corpus is unreported and is reprinted in the Appendix at 66a. The Indiana Supreme Court's opinion denying post-conviction relief is reported at *Pruitt v. State*, 903 N.E.2d 899 (Ind. 2009), *reh'g denied*, 907 N.E.2d 973 (Ind. 2009), and is reprinted in the Appendix at 158a. The Dearborn Circuit Court's order denying Pruitt's petition for post-conviction relief is unreported and is reprinted in the Appendix at 244a. The Indiana Supreme Court's opinion on direct appeal is reported at *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005), *cert. denied, Pruitt v. Indiana*, 548 U.S. 910 (2006), and is reprinted in the Appendix at 304a. The Dearborn Circuit Court's pronouncement of sentence for murder is unreported and is reprinted in the Appendix at 374a. The Dearborn Circuit Court's order denying a finding of mental

retardation is unreported and is reprinted in the Appendix at 377a. The Seventh Circuit's order denying Ron Neal's petition for rehearing and rehearing en banc is unreported and is reprinted in the Appendix at 390a.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2015. The court of appeals' order denying rehearing and rehearing en banc was entered on July 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (d)(1)–(2)

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

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

STATEMENT

I. The Underlying Offense

On June 14, 2001, Morgan County Deputy Sheriff Daniel Starnes was driving his patrol car on a routine assignment serving warrants. Pet. App. 305a. His son, Ryan Starnes, accompanied him as part of a college internship. *Id.* As the two drove, a vehicle caught Deputy Starnes's attention and he began to follow it, observing increasingly erratic driving. *Id.* Eventually the vehicle stopped, Deputy Starnes positioned his patrol car behind it, and activated his emergency lights. *Id.* at 306a. Behind the wheel of the vehicle sat Tommy Pruitt. *Id.*

Deputy Starnes approached Pruitt's vehicle, obtained Pruitt's license and registration, and returned to his police car to relay the information to the dispatcher. *Id.* Hearing Starnes's report over the radio, a detective conveyed that Pruitt might be in possession of stolen weapons. *Id.* Indeed, Pruitt had recently burglarized gun stores and had active warrants out for his arrest. Trial Tr. 3547, 3579; State's Ex. 197.

Meanwhile, inside his vehicle, Pruitt listened to the detective's broadcast to Starnes through his own police scanner, which he had set to the frequency used by the Morgan County Sheriff's Department. Pet. App. 382a; Trial Tr. 4231. At that point, in short, Pruitt knew that Starnes knew about the stolen guns.

Unfortunately, Deputy Starnes did not know Pruitt had been listening. When he approached Pruitt's car a second time, Pruitt emerged with a handgun, shot Starnes five times, and fired at Ryan Starnes who was still inside the police cruiser. Pet. App. 306a. Hospitalized, Deputy Starnes developed an infection and died a few weeks later. *Id.* Pruitt later admitted that he was listening to police radio traffic and fired at Deputy Starnes because he did not want to go to jail over the stolen guns in his vehicle. *Id*. at 382a; State's Ex. 197.

II. The State Trial Court Proceedings

The State of Indiana charged Pruitt with murder, attempted murder (for shooting at Ryan Starnes), and several other related offenses. Pet. App. 3a, 306a. The State requested a sentence of death because Starnes was a law enforcement officer killed in the line of duty. *Id.* at 3a. Pruitt's counsel retained Dennis Olvera, Ph.D., to evaluate Pruitt's intellectual ability. *Id.* at 4a, 7a. After testing Pruitt, Dr. Olvera advised counsel that Pruitt did not meet the definition of intellectual disability. *Id.*

at 21a. However, after consulting with other experts, Pruitt invoked Indiana's procedure for determining intellectual disability. *See* Ind. Code § 35-36-9-1 *et seq*.; Pet. App. 160a. Accordingly, the court appointed forensic psychologist George W. Schmedlen, Ph.D., J.D., to evaluate Pruitt.

A. Indiana's approach for determining "intellectual disability"

Under Indiana law, an individual with "intellectual disability" is someone "who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report." Ind. Code § 35-36-9-2. To decide what constitutes "significantly subaverage intellectual functioning," Indiana courts look, in part, to Intelligence Quotient (IQ) tests, as set forth in guidance from the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). *See State v. McManus*, 868 N.E.2d 778, 785 (Ind. 2007).

Applying these guidelines, a person's IQ scores inform one of three conclusions about the individual's intellectual functioning. First, a person may be able to meet the "subaverage intellectual functioning component if the person's full-scale IQ test score is two standard deviations below the

mean; i.e., an IQ between 70 and 75 or lower" for most IQ tests. *Id.* (quotation omitted). Second, IQ scores may demonstrate that a person *does not* meet the test for subaverage intellectual functioning. *See, e.g.*, *Williams v. State*, 793 N.E.2d 1019, 1028 (Ind. 2003) (reasoning that a defendant's full-scale IQ scores of 78 and 81 were not within cutoff range for intellectual disability). And finally, where a person's IQ scores are inconsistent, the scores themselves may not be determinative and courts must consider other evidence of mental capacity such as school and work history. *See McManus*, 868 N.E.2d at 785 (citing *Pruitt v. State*, 834 N.E.2d 90, 105–106 (Ind. 2005)).

B. The pre-trial *Atkins* hearing

In August of 2003, the trial court held a week-long evidentiary hearing to assess Pruitt's intellectual capacity. As noted by the trial court, there was "wide disagreement among the experts on standards and tests to be used and considered in making a determination of intelligence" and "even some disagreement as to the manner of scoring of actual test results." Pet. App. 383a. Pruitt's experts, Bryan A. Hudson, Ph.D., and Charles J. Golden, Ph.D., testified that he was intellectually disabled based on his IQ test scores and their assessment of his adaptive functioning. *Id.* at 4a. The State's expert, psychologist Martin G. Groff, Ph.D., and the court-appointed expert, Dr. Schmedlen, both reached the opposite conclusion,

testifying that Pruitt was not intellectually disabled based on their review of the same evidence. *Id.* at 13a.

The conflicting evidence underlying these conclusions, adduced during both the pre-trial evidentiary hearing and penalty phase, demonstrated the following:

1. Born on March 4, 1962, Pruitt attended public schools in Morgan County, Indiana. Pet. App. 366a, 379a. From 1971 to 1972 he was held back for two grades and placed in special education classes. *Id.* Although his grades were normally poor, Pruitt's teachers indicated that he "worked substantially below his academic ability." *Id.* The trial court found that Pruitt showed an ability to earn grades up to a B in mainstream classes. *Id.*

After being held back in school, in March of 1973 Pruitt took a group-administered Lorge-Thorndike test resulting in a verbal IQ of 64 and a non-verbal IQ of 65. *Id.* at 8a. In December of 1976, he took a second Lorge-Thorndike test, resulting in a verbal IQ of 64 and a non-verbal IQ of 63. *Id.* The experts disagreed about how these test results should be considered. The State's expert, Dr. Groff, thought the scores should be given little weight because the tests were group-administered, and defense expert Dr. Hudson agreed that individually-administered tests better indicate an individual's ability. *Id.* at 8a, 320a. But Drs. Golden and Hudson also believed

that Pruitt's scores were an accurate reflection of his intelligence because they were obtained when he was a child. *Id.* at 8a.

2. While still in school, Pruitt took other tests. In March 1975 he took an Otis-Lennon School Ability Test and scored an 81, which Dr. Schmedlen testified was "inconsistent" with the claim that Pruitt is intellectually disabled. *Id.* at 320a. The defense experts, Drs. Hudson and Golden, disagreed, opining that when properly considered, this test was consistent with their findings of subaverage intellectual functioning.

Pruitt also took an academic achievement test—the Iowa Basic—a month later in April 1975. *Id.* Pruitt achieved a score that Dr. Schmedlen testified was "consistent with his Otis-Lennon score" and therefore inconsistent with subaverage intellectual functioning. *Id.* at 9a, 321a. Again, defense expert Dr. Golden disagreed, testifying that the score would be consistent with subaverage intellectual functioning. *Id.* at 9a–10a.

3. Pruitt underwent further testing after his schooling. In 1981, while incarcerated on a separate matter, Pruitt took a group-administered Revised Beta intelligence test and scored a 93. *Id.* at 10a. Dr. Schmedlen testified that the test was useful and Pruitt's score was inconsistent with subaverage intellectual functioning, but admitted that individually-administered tests are more reliable.

Id. Defense experts were critical of the Revised Beta, with Dr. Golden explaining that if a Revised Beta score is the only score available, his practice is to subtract "20 to 30 points" to determine an individual's "actual intellectual functioning." *Id.* at 10a–11a.

4. After killing Deputy Starnes, Pruitt scored a 76 on the Weschler Adult Intelligence Scale (3rd ed.) (WAIS-III), which defense expert Dr. Olvera administered in April 2002. *Id.* at 11a. Including the standard error measurement (SEM) of five points, Pruitt's score fell within the range of 71 to 81, and accordingly, Dr. Olvera advised trial counsel that the score did not meet the intellectual functioning prong for intellectual disability. *Id.* Dr. Hudson stated there was a one-point error in scoring and that Pruitt was under the influence of the antipsychotic medication Trilifon at the time of the test. *Id.* This medication, surmised Dr. Hudson, superficially increased Pruitt's abilities, resulting in an over-estimation of the test by three to six points. *Id.* at 322a. But the trial court specifically rejected this theory, concluding that "insufficient evidence has been presented as to what, if any, effect this medication may have had on Mr. Pruitt's testing results." *Id.* at 384a.

Pruitt took two more IQ tests in 2003, both prior to the August evidentiary hearing. In February Pruitt was given a Stanford-Binet (4th ed.) individually-administered test resulting in a score of

65. *Id.* at 12a. The Stanford-Binet has a standard error measurement of six points, so Pruitt scored within the range of 59 to 71, with significantly subaverage intelligence measured as a score below 69. *Id.* Dr. Schmedlen testified that this score was consistent with subaverage intellectual functioning. *Id.* But Pruitt's expert, Dr. Golden, acknowledged that alternative scoring methods could have placed Pruitt's full-scale score at 67 or even 69. *Id.*

In July, one month before the evidentiary hearing, Pruitt took another WAIS-III, administered this time by Dr. Schmedlen; Pruitt received a full-scale IQ score of 52. *Id.* Dr. Schmedlen testified that he believed Pruitt was not working up to his full potential, and Drs. Golden and Hudson agreed. *Id.* The trial court concluded that Pruitt "was, in fact, malingering." *Id.* at 79a, 385a.

5. The trial court also heard other evidence bearing on Pruitt's intellectual functioning. During the 1980s Pruitt held jobs at a fast food restaurant, a truck stop, and in construction. *Id.* at 15a, 276a. In 1990, he received a union carpenter's card and enjoyed membership in the union for almost eight years. *Id.* at 15a. He served as a pre-apprentice for Calino Construction and worked for several different construction companies. *Id.* Also during the 1990s, Pruitt worked as a long-distance truck driver. *Id.* To do so, he obtained not only a commercial driver's license but also several endorsements that required him to score at least an 80% on multiple written

tests. *Id.* at 16a. These endorsements allowed Pruitt to transport liquid bulk tanks and hazardous materials. *Id.* at 277a. On at least one occasion, Pruitt drove a load from Indiana to California and back by himself. *Id.* at 380a. When not working, Pruitt collected unemployment benefits. *Id.* at 278a.

C. The trial court's finding on Pruitt's *Atkins* motion

Having heard this evidence, the trial court denied Pruitt's pre-trial *Atkins* motion. It found that Pruitt "does not have significantly subaverage intellectual functioning," noting that at most "Pruitt's functioning would be considered border-line—not mentally retarded." *Id.* at 4a, 388a. "[A]t best," said the court, IQ tests provide "an estimate of a person's IQ" to be considered alongside "functioning work history, school history and all other evidence presented regarding [a person's] intellectual functioning." *Id.* at 384a, 388a. The trial court was "particularly impressed with Mr. Pruitt's ability to fill out applications for employment . . . and his ability to pass the Indiana CDL test," and noted that Pruitt had an adjusted gross income of $27,862 for the tax year 1999. *Id.* at 387a.

Accordingly, the trial court ruled that the State could pursue the death penalty if the jury found Pruitt guilty of capital murder, which it ultimately did (along with attempted murder, among other crimes). *Id.* at 4a, 305a–307a.

D. The penalty phase proceedings

At the penalty phase, defense counsel presented mitigating evidence about both Pruitt's intellectual disability and mental illness. Through Drs. Hudson and Golden, Pruitt's counsel presented testimony that Pruitt was intellectually disabled. Pet. App. 70a. Pruitt's counsel then elected to present mental illness mitigation evidence through the expert testimony of Dr. Golden (a clinical neuro-psychologist and professor of psychology). *Id.* at 4a, 16a–19a.

Dr. Golden explained that in January 1996, while imprisoned for another offense, federal Bureau of Prisons doctors diagnosed Pruitt with "schizotypal personality disorder." *Id.* at 195a. He further testified that in August 2001, about two months after Pruitt was arrested for killing Starnes, an Indiana Department of Correction psychologist diagnosed Pruitt with "schizophrenia, chronic undifferentiated type compensated residual" and prescribed him the antipsychotic medication Trilafon. *Id.* at 18a, 70a, 195a. This diagnosis, explained Dr. Golden, means that a psychologist thinks that Pruitt is "somewhere in between a personality disorder and the Axis 1 schizophrenia." *Id.* at 195a. In other words, testified Dr. Golden, the psychologist is "not suggesting [Pruitt is] actively schizophrenic, but he is expressing his belief that [Pruitt] is capable of easily becoming schizophrenic at some time in the future." *Id.* at 195a–96a.

Dr. Golden then detailed "the symptoms of schizoid personality disorder and its debilitating effects on the patient." *Id.* at 196a. Significantly, he testified that someone "can have psychotic episodes if you're schizoid or schizotypal." *Id.* at 18a. Dr. Golden stated that "clearly . . . [Pruitt], for at least six months if not longer, had been decompensating" and given "the degree of paranoia that he was developing . . . something bad was eventually going to happen . . . ." *Id.* at 19a.

At the conclusion of the penalty phase, the jury found that Pruitt killed Deputy Starnes, a law enforcement officer, in the course of his duties, determined that this sole aggravating circumstance outweighed any and all mitigating circumstances, and recommended a sentence of death. *Id.* at 374a–75a. The trial court followed the jury's recommendation and sentenced Pruitt to death for the murder and to an aggregate term of 115 years for the remaining counts. *Id.* at 5a.

III. Direct Appeal

On direct appeal to the Indiana Supreme Court, Pruitt argued that he was intellectually disabled and ineligible for the death penalty under both Indiana law and the Eighth Amendment. The court affirmed both the murder conviction and death sentence, concluding that the evidence supported the trial court's finding that Pruitt was not intellectually

disabled. *Id.* at 304a, 325a.

With respect to intellectual functioning, the Indiana Supreme Court explained, "[w]hile some of Pruitt's scores suggest significantly subaverage intellectual functioning, others do not." *Id.* at 325a. In addition to Pruitt's IQ scores, "the trial court found that Pruitt was able to fill out applications for employment and to have the capacity, if not the will at all times, to support himself." *Id.* Thus, said the court, "[i]n light of the inconsistent IQ scores and the other evidence cited by the trial court, the trial court's finding that Pruitt did not meet the statutory test is consistent with this record." *Id.*

Critically, the Indiana Supreme Court rejected the argument (adopted by the dissent) that Indiana's intellectual disability statute categorically bars consideration of any IQ tests administered after age twenty-two. *Id.* at 324a, 366a. "Subsequent tests may be of less significance," said the court, "but the overall evaluation including behavior and tests after age twenty-two may be relevant." *Id.* at 324a. If tests given after age twenty-two were categorically excluded, "a defendant older than twenty-two who had never been tested could never be found mentally retarded based on IQ testing." *Id.* "More importantly," held the court, "IQ tests are only evidence; they are not conclusive on either the subject's IQ or the ultimate question of mental retardation." *Id.* at 324a–25a. A trial court may determine intellectual disability based on review of

"IQ scores together with other evidence of mental capacity," including "functioning, work history, school history, and all other evidence presented regarding . . . intellectual functioning." *Id.* at 46a, 325a.

The Indiana Supreme court determined that Pruitt had met the test for adaptive functioning. *Id.* at 333a. Nevertheless, because the record supported the trial court's finding with respect to intellectual functioning, the Indiana Supreme Court affirmed the ultimate finding that Pruitt had failed to show that he was "intellectually disabled." *Id.* at 333a–34a.

IV. State Court Post-Conviction Proceedings

Next, Pruitt filed a petition for post-conviction relief, asserting among other claims that intellectual disability rendered him ineligible for the death penalty and that his trial counsel provided ineffective assistance in investigating and presenting evidence related to his mental illness. *Id.* at 265a, 271a–72a, 302a.

On the intellectual disability claim, Pruitt presented the trial court with testimony from two psychologists: Dr. Denis Keyes and Dr. Olvera. In anticipation of the post-conviction hearing, Dr. Keyes administered to Pruitt a Stanford-Binet (5th ed.) test, and Pruitt scored between 61 and 69 (the Seventh Circuit said more precisely that Pruitt had

a full-scale IQ score of 65). *Id.* at 19a-20a, 95a, 184a, 190a. Although Dr. Keyes said this score placed Pruitt within the range of intellectual disability, he conceded that Pruitt was likely aware while taking the test of the potential ramifications of his score. *Id.* at 20a. Dr. Keyes also concluded that Pruitt's adaptive functioning was significantly impaired. *Id.* at 20a–21a.

Dr. Olvera stated that Pruitt's 2002 score of 76 on the WAIS-III was the "first administration of an appropriate intelligence test," and at the time he administered it, Dr. Olvera had informed Pruitt's trial counsel that Pruitt did not meet the intellectual disability standard. *Id.* at 11a, 190a. However, during the evidentiary hearing, Dr. Olvera explained that his opinion had changed after reading the other experts' reports, and that he now believed Pruitt was in fact intellectually disabled. *Id.* at 191a.

With respect to his ineffective-assistance claim, Pruitt presented evidence from Drs. Philip Coons, David Price, and James Ballenger, all of whom diagnosed Pruitt with "schizophrenia" and testified that he met two statutory mitigating factors. *Id.* at 60a-61a, 196a–97a. Dr. Coons conceded that, before he had schizophrenia, Pruitt had "schizotypal personality disorder," which includes all the symptoms of schizophrenia. *Id.* at 196a. Dr. Price diagnosed Pruitt with both schizophrenia and schizotypal personality disorder, testifying that Dr. Golden's diagnosis of "a decompensated psychotic

state of somebody with a schizotypal personality . . . [was] only a hair different from what I would have said." *Id.* at 197a. And Dr. Ballenger concluded that "Dr. Golden saw the same thing that I did, Dr. Coons, Dr. Price. He saw really the same thing, he just slightly used a different terminology, but he said there was psychosis." *Id.*

Pruitt's trial counsel William Van Der Pol, who had primary responsible for Pruitt's mitigation case, testified that Dr. Schmedlen had opined that Pruitt did not have schizophrenia, and stated that in 2003, Dr. Golden concluded that no additional neuropsychological testing of Pruitt was necessary or appropriate. *Id.* at 29a. Van Der Pol described the defense's mitigation strategy as threefold: "number one" was to show that Pruitt was intellectually disabled, "which would entitle him to great mitigating weight"; "number two" that Pruitt "was suffering a serious mental illness at or around the time of the crime"; and "[f]inally" that Pruitt "had serious brain damage, brain injury [or] brain dysfunction." *Id.* at 28a–29a (internal quotation marks omitted).

The same judge who presided over the pre-trial *Atkins* hearing and trial denied Pruitt's intellectual disability claim on post-conviction, concluding that it was barred by *res judicata* because it had been "thoroughly raised, argued, and adjudicated on direct appeal." *Id.* at 71a, 81a–82a, 302a. In any event, the "additional evidence . . . presented at the

post-conviction hearing was largely cumulative of the evidence developed before and [during] trial and is entirely unpersuasive." *Id.* at 7a, 302a.

With respect to the ineffective assistance of counsel claim, the trial court stated that it did "not find the expert testimony offered at post-conviction more credible or more deserving of weight than the testimony offered on mental health issues at trial." *Id.* at 181a, 271a–72a. Comparing the evidence of "schizotypal personality disorder" adduced at trial with that of "paranoid schizophrenia" presented on post-conviction, the trial court found that the difference was "more in degree of severity than of character" and it concluded that the different diagnosis "does not show that trial counsel were deficient." *Id.* at 31a, 198a, 282a (quotation omitted). Moreover, "the Court does not find that the quality of evidence presented at post-conviction was more credible or persuasive than that presented at trial, and therefore does not support a reasonable probability of a different sentence." *Id.* at 282a.

The Indiana Supreme Court affirmed, concluding that "Pruitt has offered no evidence undermining the correctness of the trial court's and this Court's findings that he is not mentally retarded." *Id.* at 239a. Nor could it reach "a conclusion opposite the conclusion reached by the PC court" with respect to Pruitt's ineffective-assistance claim. *Id.* at 194a. "Here," said the court, "trial counsel made a deliberate strategic decision to concentrate the jury's

attention on Pruitt's claim of mental retardation. We agree that this strategy might well have been undermined by greater emphasis on the much weaker mental illness evidence." *Id.* at 201a.

V. District Court Habeas Ruling

Pruitt then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. As relevant here, he argued that intellectual disability rendered him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), and that his trial counsel were ineffective for failing to investigate and present mitigation evidence of his paranoid schizophrenia at the penalty phase. *Id.* at 72a.

The district court denied the petition, concluding, "[u]nder any view, Mr. Pruitt is borderline—either a high functioning mentally retarded individual, or an individual with very low average intelligence." *Id.* at 67a. Specifically, observed the court, "[w]ithin a fifteen-month span, Mr. Pruitt's IQ scores ranged from 76 (April 2002) to 52 (July 2003) on the same test (WAIS-III)." *Id.* at 95a. And, said the court, the record supported the state courts' conclusions about Pruitt's abilities to fill out employment applications and support himself. *Id.* at 98a.

The district court also denied the ineffective-assistance claim, observing that "Mr. Pruitt's trial counsel not only investigated his mental illness,

they presented evidence of his mental condition at trial" through the testimony of Dr. Golden. *Id.* at 133a. The court concluded that "Mr. Pruitt's trial counsel employed a reasonable trial strategy of focusing more heavily on Mr. Pruitt's mental retardation than Mr. Pruitt's mental illness" and that "[t]he Indiana Supreme Court's determination that trial counsel were not ineffective in their presentation of evidence of mental illness withstands AEDPA scrutiny." *Id.* at 134a.

VI. The Decision Below

The Seventh Circuit reversed, concluding that the Indiana Supreme Court's decision that Pruitt had not shown that he was "intellectually disabled" rested on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2). *Id.* at 51a. Furthermore, it held that the Indiana Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when it determined that Pruitt's trial counsel were not ineffective for failing to investigate and present mitigating evidence of mental illness and that this failure prejudiced Pruitt. *Id.* at 64a–65a.

With respect to intellectual functioning, the court of appeals held that "the Indiana Supreme Court's determination that Pruitt failed to demonstrate significantly subaverage intellectual functioning based on inconsistent test scores was objectively unreasonable and ignored the clear and convincing weight of the evidence." *Id.* at 44a. The court

reasoned that "[a]lthough some of Pruitt's test scores may appear inconsistent, the reliable IQ scores were consistently within the range of significantly subaverage intellectual functioning." *Id.* at 40a. It further held that "[t]he Indiana Supreme Court made an unreasonable determination of fact in concluding that Pruitt's work history, school history, and other evidence supported the finding that Pruitt failed to establish significantly subaverage intellectual functioning." *Id.* at 49a. "Rather," declared the court, "the clear and convincing weight of the evidence establishes that Pruitt suffers from significantly subaverage intellectual functioning." *Id.*

Ultimately, the court of appeals concluded that "Pruitt has demonstrated with clear and convincing evidence that he is intellectually disabled" making him "categorically and constitutionally ineligible" for the death penalty. *Id.* at 51a.

The court of appeals also determined that Pruitt's trial counsel were ineffective. On the deficient performance question, the court compared trial counsel's failure to contact "an expert in psychosis" with counsel's shortcomings in *Rompilla v. Beard,* 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003). *Id.* at 55a–57a. It said that the Indiana Supreme Court "overstated the evidence" that trial counsel made a strategic decision to focus on evidence of intellectual disability over mental illness—observing that

nothing suggested that these diagnoses "were mutually exclusive." *Id.* at 57a–58a. And even if the decision were strategic, declared the court, the evidence of mental illness was weaker than the intellectual disability evidence "only because counsel failed to investigate more fully Pruitt's mental health." *Id.* at 58a.

With respect to the prejudice inquiry, the court of appeals conducted *de novo* review, concluding that the Indiana Supreme Court did not assess whether Pruitt could satisfy that test. *Id.* at 59a. Relying on the testimony of Drs. Coons, Ballenger, and Price that Pruitt met two statutory mitigating factors, the court inferred "there is a reasonable probability that this evidence might have affected the judge's and jury's assessment of Pruitt's moral culpability, and that they might have concluded that death was not warranted." *Id.* at 61a. Accordingly, the court of appeals "revers[ed] the district court's judgment and remand[ed] with instructions to grant a conditional writ vacating Pruitt's death sentence and remanding to the State for a new penalty-phase proceeding." *Id.* at 65a.

REASONS FOR GRANTING THE PETITION

Certiorari, and perhaps summary reversal, is warranted because the decision below conflicts both with the Court's precedents concerning the limits of federal-court inquiry under § 2254(d) and with the holding of *Atkins* that States, not federal courts, are

to define what it means to be "intellectually disabled." Review is also warranted to address whether the Indiana Supreme Court reasonably applied *Strickland* when holding that trial counsel rendered constitutionally effective assistance in presenting evidence of Pruitt's "schizotypal personality disorder" during the penalty phase.

I. Review—Perhaps Summary Reversal—Is Warranted Because Reweighing Evidence Is Expressly Forbidden Under § 2254(d)(2)

In *Wood v. Allen*, the Court held that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." 558 U.S. 290, 301 (2010). That evidence "may plausibly be read as inconsistent" with the state-court finding does not suffice to make it unreasonable, said the Court. *Id.* Indeed, "even if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)) (alterations in original).

An unreasonable factual determination may arise in three general situations: (1) where the state court materially misstates the record, *Wiggins v. Smith*, 539 U.S. 510, 528–29 (2003); (2) where the lower court ignores evidence that is "too powerful to

conclude anything but [the petitioner's factual claim]," *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005); and, (3) where a request for an *Atkins* hearing is denied as categorically precluded, *Brumfield v. Cain*, 135 S. Ct. 2269, 2277–78 (2015). None of these errors arose here, however, where Pruitt was given an evidentiary hearing to contest his intellectual capacity, and the state courts' findings were based on the record.

A. In violation of *Wood v. Allen,* the court of appeals' § 2254(d)(2) holding is premised on mere disagreement with two state-court factual findings

The court of appeals improperly reweighed evidence concerning Pruitt's IQ scores and "other evidence of mental capacity" (such as Pruitt's work history). It deemed its own view of whether Pruitt possesses significantly subaverage intellectual functioning to be *more* reasonable than the state courts'. Certiorari is warranted because § 2254(d)(2) precludes federal courts from substituting their judgment upon reweighing the same evidence considered by state courts.

1. The court of appeals reweighed evidence by explicitly disagreeing with the determination that Pruitt's IQ scores were "inconsistent"

The court of appeals insisted that Pruitt's "reliable IQ scores were consistently within the range of significantly subaverage intellectual functioning." Pet. App. 40a, 44a. To reach this conclusion, the court of appeals had to *reweigh* three categories of contrary evidence relied upon by the state courts; namely, Pruitt's IQ scores, his academic achievement results, and the expert opinions of Drs. Schmedlen and Groff.

Beginning with IQ tests, the court of appeals discounted Pruitt's score of 76 on the 2002 WAIS-III by citing the testimony of Drs. Olvera and Hudson that Pruitt had been taking antipsychotic medication at the time of the test, which "may have produced a higher score than he would have obtained without the medication." *Id.* at 41a–42a. But this conclusion rejects contrary evidence supporting the state-courts' determination: Dr. Hudson stated that Pruitt's WAIS-III score was an accurate reflection of his IQ at the time, and that the medication simply created a better testing environment. *Id.* at 322a. And the trial court specifically found that there was "insufficient evidence . . . as to what, if any, effect this medication may have had on Mr. Pruitt's testing results." *Id.* at 322a, 384a. Even if Pruitt's score were adjusted by three to six points as Dr. Hudson

suggested, *id.* at 322a, it would *still* yield a score at or above the cutoff for intellectual functioning.

The court of appeals also discounted Pruitt's score of 93 on the Revised Beta intelligence test based on the testimony of defense experts Drs. Golden, Hudson, and Keyes. *Id.* at 42a–43a. But again, this conclusion ignores contrary evidence: even Dr. Golden's suggestion to subtract 20 to 30 points from the Revised Beta test would still yield an adjusted score within the borderline range of 63 to 73. *Id.* at 10a–11a. And Dr. Schmedlen testified that the score placed Pruitt within the average intellectual functioning range. *Id.* at 10a.

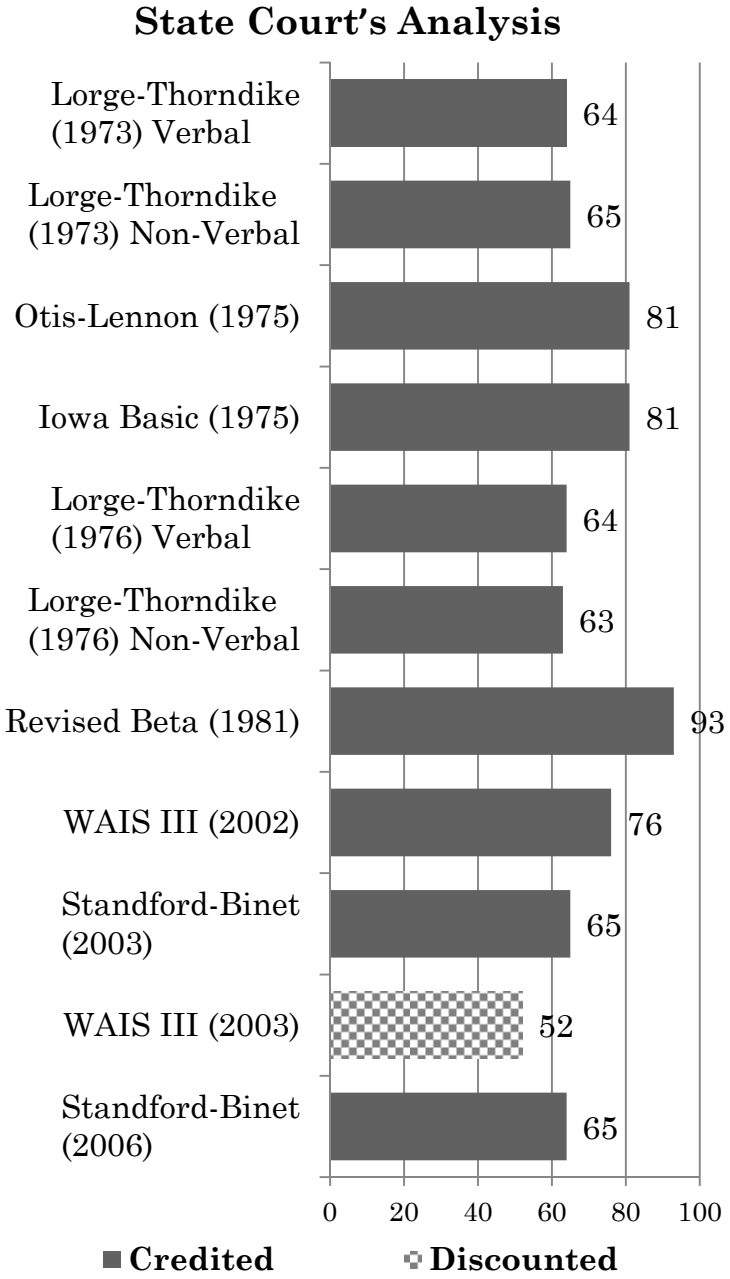
The court of appeals discounted the Otis-Lennon as a test for intelligence, declaring that Dr. Schmedlen's testimony to the contrary was "not well-informed." *Id.* at 43a. But there is academic disagreement on whether Otis-Lennon is an intelligence test, *id.* at 320a–21a, and more importantly, Dr. Schmedlen did not rely exclusively on the Otis-Lennon when rendering his opinion.

The court of appeals discounted Pruitt's performance on the Iowa Basic, an academic achievement test, because of testimony that such exams do not test for intelligence. *Id.* at 43a. But at least one defense expert acknowledged disagreement in this area and stated that while academic achievement tests cannot substitute for IQ tests, they can be used for corroboration. *Id.* at 320a. And no matter how the Otis-Lennon and Iowa Basic tests

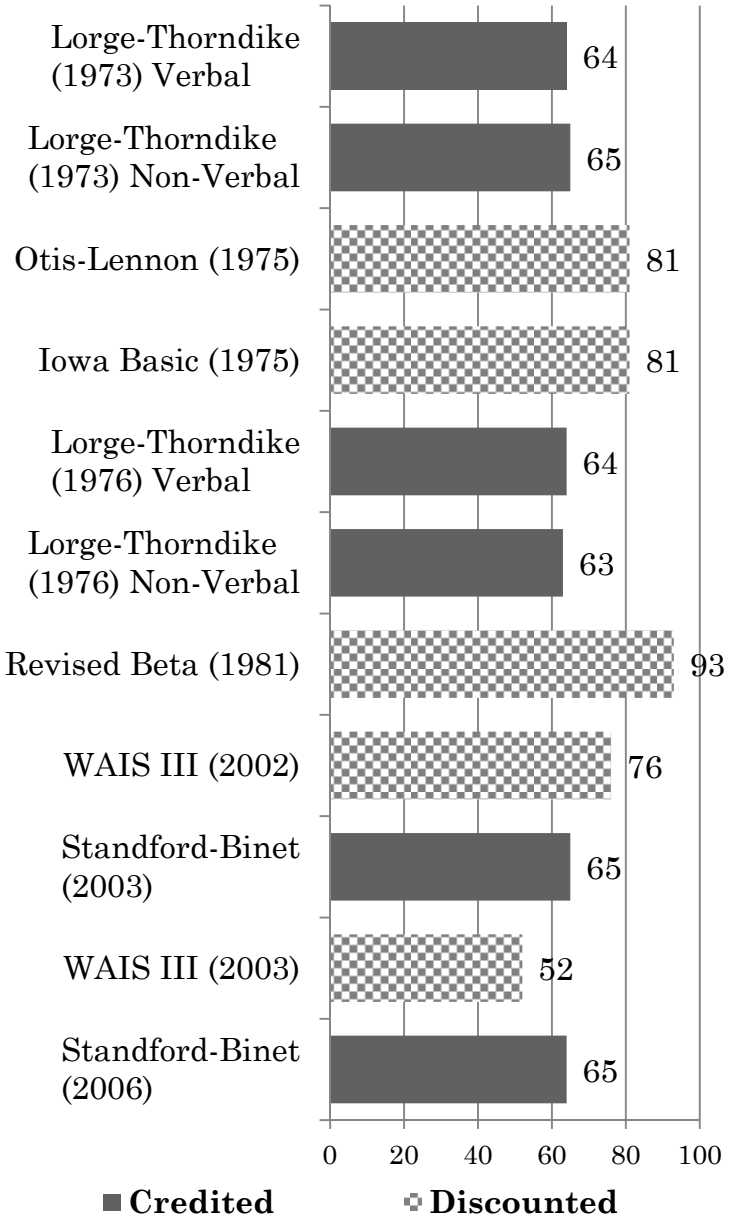
are characterized, Dr. Schmedlen testified that Pruitt's scores each were inconsistent with intellectual disability. *Id.*

Next, the court of appeals reevaluated the state courts' reliance on the opinions of Drs. Schmedlen and Groff. It did so not because the state courts misstated their findings, *see generally Wiggins*, 539 U.S. at 528–29, or because Pruitt was denied the opportunity to present contrary expert testimony. *See Brumfield*, 135 S. Ct. at 2277–78. Rather, the court of appeals explicitly disagreed with the *weight* the state courts assigned to them, concluding such "reliance . . . went against the clear and convincing *weight of the evidence*." Pet. App. 44a (emphasis added). Yet, the court of appeals relied on Dr. Schmedlen's testimony when it tended to favor a finding of intellectual disability. *See, e.g.*, *id.* at 50a (relying on Dr. Schmedlen's assessment of Pruitt's adaptive behavior).

In sum, the *only* score the court of appeals was entitled to discount was Pruitt's performance on the 2003 WAIS-III because on that test alone the trial court (as well as all the experts) found that Pruitt "was, in fact, malingering." Pet. App. 12a, 385a. Yet the charts on pages 28 and 29 make one thing abundantly clear: The court of appeals discounted *all* scores placing Pruitt above the cutoff for subaverage intellectual functioning.


State Court's Analysis
Lorge-Thorndike (1973) Verbal
64
Lorge-Thorndike (1973) Non-Verbal
65
Otis-Lennon (1975)
81
Iowa Basic (1975)
81
Lorge-Thorndike (1976) Verbal
64
Lorge-Thorndike (1976) Non-Verbal
63
Revised Beta (1981)
93
WAIS III (2002)
76
Standford-Binet (2003)
65
WAIS III (2003)
52
Standford-Binet (2006)
65
0
20
40
60
80
100
Credited
Discounted

Seventh Circuit's Analysis



2. The court of appeals also reweighed evidence of Pruitt's work history, deeming its inferences *more* reasonable than those drawn by the state courts

The trial court inferred that Pruitt had failed to show significantly subaverage intellectual functioning based not only on his IQ test results, but also his work history, school history, and all other evidence presented regarding his intellectual functioning. Pet. App. 388a. It was "particularly impressed with Mr. Pruitt's ability to fill out applications for employment . . . and his ability to pass the Indiana CDL test . . . ." *Id.* at 387a. The Indiana Supreme Court agreed, concluding that "[i]n light of [Pruitt's] inconsistent IQ scores and the other evidence cited by the trial court, the trial court's finding that Pruitt did not meet the statutory test is consistent with this record." *Id.* at 325a.

The court of appeals reached the opposite conclusion, declaring, based on its view of the record, that Pruitt's jobs—dishwasher, truck driver, carpenter, and laborer—"did not require high intellectual functioning." *Id.* at 46a–47a.

The holding in *Wood* precludes a federal court from doing precisely what the court of appeals did here: concluding that the state courts' factual findings about Pruitt's work history were unreasonable merely because it "would have reached a different conclusion in the first instance." 558 U.S.

at 301. Certiorari is warranted to maintain the controlling force of the Court's decision in *Wood*, not to mention the plain meaning of § 2254(d)(2).

B. The decision below conflicts with *Atkins v. Virginia* by encroaching upon, and restricting, the States' discretion to define "intellectual disability"

As a consequence of reweighing evidence, the decision below impinges upon and restricts the States' discretion to implement appropriate ways for determining when someone is "intellectually disabled"—a task this Court left to the States. *Atkins*, 536 U.S. at 317; *accord Bobby v. Bies*, 556 U.S. 825, 831 (2009) (reaffirming that *Atkins* did not provide "definitive procedural or substantive guides" for determining when someone is constitutionally ineligible for the death penalty).

Indiana's statutory definition, which "generally conform[s] to the clinical definitions" referenced in *Atkins*, 536 U.S. at 314, 317 n.22, requires proof of both significantly subaverage intellectual functioning and substantial impairment of adaptive behavior manifested before age twenty-two. Ind. Code § 35-36-9-2. Consistent with the Court's observation in *Hall v. Florida* "that an individual's intellectual functioning cannot be reduced to a single numerical score," 134 S. Ct. 1986, 1995 (2014), the Indiana Supreme Court held that because IQ tests "are not conclusive," courts can consider "IQ scores

together with other evidence of mental capacity." Pet. App. 45a, 324a–25a.

Far from a "rigid rule" limiting courts from considering evidence beyond IQ scores, *see Hall*, 134 S. Ct. at 2001, Indiana's approach permits courts to consider factors such as "work history, school history, and life functioning" in addition to such scores. *State v. McManus*, 868 N.E.2d 778, 785 (Ind. 2007). This approach resembles the Court's observation in *Hall* that there is other evidence the medical community accepts as "probative of intellectual disability," like "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, 134 S. Ct. at 1994–95. It also generally aligns with the DSM-5, which advocates moving away from the objective standard of IQ scores to a more subjective standard with emphasis on adaptive functioning. Jill V. Feluren, *Moving the Focus Away From the IQ Score Towards the Subjective Assessment of Adaptive Functioning: The Effect of the DSM-5 on the Post-Atkins Categorical Exemption of Offenders with Intellectual Disability from the Death Penalty*, 38 Nova L. Rev. 323, 324–25 (2014).

Perhaps recognizing the validity of Indiana's approach, the court of appeals acknowledged in this case—as it has in others, *see, e.g.*, *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015)—that nothing in *Atkins* or *Hall* precludes a state from using evidence

of mental capacity other than IQ scores to find that a petitioner does not have significantly subaverage intellectual functioning. Pet. App. 45a. But its analysis nonetheless yields something far different.

Rather than permit the state courts to apply this standard to consider "other evidence" of intellectual functioning, the court of appeals imposed upon the State its own, more restrictive standard. It declared, "[t]he problem arises where, as here, the state court relies on inaccurate assumptions and select pieces of the evidence in making its factual determination." *Id.* at 46a. The court of appeals admonished the state courts for relying on Pruitt's academic achievement tests, observing that "[s]ome of the test scores upon which the state courts relied *were not IQ scores*; other scores were unreliable." *Id.* at 44a (emphasis added). And with respect to Pruitt's work history, the court declared that "it is illogical and irreconcilable for the state court to find that [Pruitt's] work history outweighs his IQ scores when all experts expressing an opinion on the issue agree that he is substantially impaired in this area of adaptive functioning." *Id.* at 48-49a.

Certiorari is warranted because the decision below undermines the paradigm announced in *Atkins* where states, not federal courts, have "the task of developing appropriate ways to enforce" the constitutional restriction against executing intellectually disabled offenders. *Atkins*, 536 U.S. at 317. And to the extent it *restricts* the scope of "other

evidence" to be considered for that purpose, the court of appeals' decision also undercuts *Hall*'s rationale and that of the DSM-5.

C. Summary reversal may be appropriate because the decision below flouts both the holding in *Wood v. Allen* and the rationale for AEDPA deference

The court of appeals' grant of habeas relief in this case is impossible to reconcile with AEDPA—and the Court's decisions construing it—which emphasize comity, finality, and federalism. S*ee Williams v. Taylor*, 529 U.S. 420, 436 (2000). It also illustrates the ancillary problems that arise when a federal court is allowed to use "habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). Given the importance of these interests, the absence of a circuit split has not deterred this Court from granting certiorari (and reversing) in numerous cases in which the federal appellate courts have ignored the restrictions of § 2254. *See, e.g.*, *Felkner v. Jackson*, 562 U.S. 594, 594 (2011) (per curiam); *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013).

Indeed, the Court may wish to consider summary reversal here, where the court of appeals may be deliberately flouting the holding in *Wood*. Both pre-trial and on direct appeal, and again on both post-conviction review and post-conviction appeal, the state courts scrutinized the evidence and came to the

conclusion that Pruitt was not "intellectually disabled." A federal district court agreed. Then, eleven-and-one-half years after the trial court sentenced Pruitt to death, the court of appeals reversed—not because the state courts had misstated the record, overlooked pertinent evidence, or denied Pruitt an opportunity to present his claim altogether. It reversed based on a view of competing evidence it deemed *more* reasonable.

It is precisely this sort of decision that "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotation omitted). Here, in granting Pruitt habeas relief based on intellectual disability, the court of appeals foreclosed not only resentencing him to death, but also resentencing him to life without parole. *See Atkins v. Virginia*, 536 U.S. 304, 315 n.12 (2002); Ind. Code § 35-50-2-3(b) (prohibiting life without parole for intellectually disabled offenders). Accordingly, absent this Court's review, Pruitt, for the crime of murdering a police officer in the line of duty, could be sentenced only to a term of 45 to 65 years' imprisonment. Ind. Code § 35-50-2-3(a). While any federal habeas resentencing order is an intrusion on state sovereignty, the order issued here, because it circumscribes the punishment the State

may impose on resentencing, adds a layer of disruption independently worthy of review.

II. In Light of *Harrington v. Richter* and *Premo v. Moore*, Certiorari and Reversal Are Also Warranted on Pruitt's Ineffective-Assistance Claim

1. With respect to Pruitt's ineffective-assistance claim, *Harrington v. Richter*, 562 U.S. 86, 105 (2011) and *Premo v. Moore*, 562 U.S. 115, 126 (2011), control this case. In *Richter*, the Court explained that unreasonableness under *Strickland v. Washington*, 466 U.S. 668 (1984), and unreasonableness under § 2254(d) are analytically distinct: "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. Simply put, the standard is "doubly deferential": the court must "take a highly deferential look at counsel's performance . . . through the deferential lens of § 2254(d)." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (internal citations and quotation marks omitted). Because trial counsel not only investigated but *actually presented* mitigating evidence of Pruitt's mental health at trial, and because the trial court found that additional mental health evidence elicited on post-conviction review was deserving of no more weight, the proper result should be denial of the writ.

The Court in *Richter* held that the state courts did not unreasonably apply *Strickland* where petitioner's trial counsel did not consult blood evidence experts in developing a strategy because it was "at least arguable" that reasonable counsel would not make such an inquiry. *Richter*, 562 U.S. at 106. The same result obtained in *Premo* where trial counsel advised his client to take a felony-murder plea, even though the State had not yet decided on charges and counsel had not moved to suppress one of the defendant's confessions. *Premo*, 562 U.S. at 126.

Here, too, trial counsel developed a reasonable strategy given Dr. Schmedlen's opinion that Pruitt did not have schizophrenia and Dr. Golden's conclusion that no additional neuropsychological testing of Pruitt was necessary or appropriate. Pet. App. 29a. As summarized by the Indiana Supreme Court, counsel's "first priority" was to prove that Pruitt was intellectually disabled and the "second priority was to prove that Pruitt was suffering from a serious mental illness at or around the time of the crime by presenting Indiana [Department of Correction] records, Federal [Bureau of Prisons] records, Pruitt's bizarre behavior before the crime, and the facts and circumstances surrounding the crime." *Id.* at 201a (quotation omitted). The state supreme court resolved that "trial counsel made a deliberate strategic decision to concentrate the jury's attention on Pruitt's claim of mental retardation." *Id.* "We agree," reasoned the court, "that this

strategy might well have been undermined by greater emphasis on the much weaker mental illness evidence." *Id.*

While counsel has an "obligation to conduct a thorough investigation of the defendant's background" for mitigation evidence, *Williams v. Taylor*, 529 U.S. 362, 396 (2000), trial counsel is not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. An attorney may, for example, avoid investigations that appear "distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam). As in *Richter*, where counsel did not consult blood evidence experts in developing a defense strategy, here, "Counsel w[ere] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. That strategy led trial counsel to focus the jury's attention primarily on mitigating evidence of Pruitt's intellectual disability.

2. In any event, Pruitt's trial counsel cannot be faulted with somehow failing to investigate and present evidence of "paranoid schizophrenia" when they *actually presented* evidence of "schizotypal personality disorder" at trial. During the penalty phase, Dr. Golden testified that the federal Bureau of Prisons had diagnosed Mr. Pruitt with

"schizotypal personality disorder . . . an Axis 2 mental illness" in 1996 while he was imprisoned for another crime. Pet. App. 195a. Dr. Golden explained that Pruitt had been diagnosed with "schizophrenia, chronic undifferentiated type compensated residual" while in prison for killing Officer Starnes, which "means that the psychologist 'thinks that at one time that he [Pruitt] was actually schizophrenic . . . but that right now most of those serious symptoms are not showing and . . . he's somewhere now in between a personality disorder and the Axis 1 schizophrenia.'" *Id.* And Dr. Golden discussed "the symptoms of schizoid personality disorder and its debilitating effects on the patient," noting that someone "can have psychotic episodes if you're schizoid or schizotypal." *Id.* at 18a, 196a.

3. Under *any* standard of review—much less the "doubly deferential" one required by AEDPA—Pruitt has not shown prejudice. The experts who testified on post-conviction review agreed with Dr. Golden's penalty phase testimony. Dr. Coons conceded, for example, that before he had schizophrenia, Pruitt had "schizotypal personality disorder," which includes all the symptoms of schizophrenia. Pet. App. 196a. Dr. Price opined that Dr. Golden's diagnosis, "a decompensated psychotic state of somebody with a schizotypal personality . . . is only a hair different from what [he] would have said." *Id.* at 129a. Dr. Ballenger concluded that "Dr. Golden saw the same thing that I did, . . . he just slightly used a different terminology, but he said there was

psychosis." *Id.* at 197a (internal quotation marks omitted).

Accordingly, on post-conviction review, the same judge who presided over the pre-trial *Atkins* hearing and the trial concluded that "the Court does not find that the quality of evidence presented at post-conviction was more credible or persuasive than that presented at trial, and therefore does not support a reasonable probability of a different sentence." *Id.* at 282a. Said the court, "trial counsel presented evidence of a schizotypal personality disorder, a diagnosis different more in degree of severity than of character, than the one advanced by experts Petitioner was able to present over three years later in post-conviction proceedings." *Id.* at 282a. As the district court concluded, a mere shift in lingo "would barely have altered the sentencing profile," much less persuaded the jury. *Id.* at 135a (quoting *Strickland*, 466 U.S. at 700); *see also Overstreet v. Wilson*, 686 F.3d 404, 408 (7th Cir. 2012) (reasoning that the defendant failed to show prejudice because whether a condition is labeled "schizotypal personality disorder" or "schizophrenia plus depression" does not change the mitigating strategy). These findings negate any showing of prejudice.

The court of appeals wrongfully ignored the decision of the state post-conviction court, which specifically addressed (and rejected) the possibility that Pruitt could have been prejudiced by counsel's performance. Pet. App. 282a. *See Ylst v.*

Nunnemaker, 501 U.S. 797, 801 & 806 (1991) (requiring federal habeas courts to "look through" state court decisions that do not address the merits of a federal claim to identify and review the last state court decision to have decided the issue). Notably, after reviewing the record, the Indiana Supreme Court determined that it could not reach "a conclusion opposite the conclusion reached by the PC court." *Id.* at 198a. That the court of appeals was able to do so eight years after the post-conviction hearing demonstrates that it essentially applied *de novo* review, or at least something far less deferential than § 2254(d) requires. *See Richter*, 562 U.S. at 98, 100 (even where a state court provides no specific reasoning, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief"). This, too, justifies granting the petition.

CONCLUSION

The Court should grant the petition, reverse the judgment below, and reinstate Pruitt's death sentence.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel, Appeals
HEATHER H. MCVEIGH
ANDREW A. KOBE
GRAHAM T. YOUNGS
Deputy Attorneys General

Counsel for Petitioner

Dated: October 26, 2015