CASE NO. 19-7447

IN THE

United States Court of Appeals
FOR THE FOURTH CIRCUIT

MARK O'HARA WRIGHT,

Plaintiff - Appellant,

v.

HAROLD CLARKE,
Director, VA. Department of Corr.,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Mark Wright filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the District Court of the Western District of Virginia. The District Court had subject matter jurisdiction under 28 U.S.C. § 2241 and 28 U.S.C. § 2254. On September 19, 2019, the District Court entered a final judgment denying Wright's petition and declined to issue a certificate of appealability. Wright timely filed a notice of appeal on October 3, 2019. *See* Fed. R. App. P. 4(a)(1). This Court granted a certificate of appealability on August 25, 2020, and has jurisdiction under 28 U.S.C. § 2253(c) and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Petitioner's trial attorney acquiesced to a jury instruction on an uncharged crime—grand larceny from the person—under the mistaken belief that it was a lesser-included offense for the charged crime of robbery. Counsel apparently wanted to give the jury the option of a lighter sentence. The Virginia Supreme Court held that counsel was not constitutionally ineffective because of that tactical objective.

The issues presented are: (1) Whether the Virginia Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny; and, (2) whether any part of that claim is procedurally defaulted.[1]

STATEMENT OF THE CASE

This appeal presents the last judicial opportunity to correct a truly disturbing miscarriage of justice. Petitioner Mark O'Hara Wright (Wright) has served nearly ten years in prison, essentially for shoplifting beer and a sandwich from a convenience store. He was charged with robbery, a crime he plainly did not commit, and was acquitted of that charge by the jury. But the jury convicted him of a crime not charged, grand larceny from the person, because Wright's counsel agreed to alternative instructions on that crime. Counsel apparently wanted to give the jury the alternative of a less serious offense. But counsel did so without consulting the governing law or his client. Had counsel conducted a cursory

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[1] This Court's certificate of appealability authorized appeal of a separate issue, framed as "whether the state circuit court lacked jurisdiction to enter a judgment for grand larceny from the person on the grounds that Wright's indictment was constructively amended in violation of the federal constitution." JA 429-30. Appointed counsel does not believe that claim is viable as framed. The trial court's jurisdiction is a question of state law, and the Fifth Amendment's indictment requirement (and hence the constructive amendment doctrine) has not been incorporated against the States. The federal error presented directly by the instruction is instead a violation of due process and the Notice Clause of the Sixth Amendment. Counsel would be happy to brief those issues if the Court chose to expand its certificate of appealability, but there is no reason to do so if the error can be fully remedied through the ineffective-assistance claim.

investigation of the relevant law (or even examined the elements), counsel would have discovered that grand larceny from the person is not a lesser-included offense of robbery, and that the jury could not convict Wright of that offense under Virginia law. The only potentially applicable lesser-included offense was petit larceny, which carries a maximum sentence of twelve months. Because of counsel's egregious failures, Virginia's procedural safeguards were never invoked and Wright was sentenced to ten years on a crime that was not charged and that he had no opportunity to prepare a defense for.

The Virginia Supreme Court, and the district court below, held that counsel was not constitutionally ineffective because he had a tactical reason for agreeing to the alternative instruction. But it is clearly settled law that counsel cannot make a valid tactical choice without investigating the law that frames that choice, and no objectively reasonable counsel would (or could, under the law) have pursued any tactical objective by agreeing to that instruction. The Virginia Supreme Court unreasonably applied clearly established federal law, and Wright's conviction for grand larceny from the person should be vacated. Wright exhausted this ineffective-assistance claim in the Virginia state courts, and no part of it is procedurally defaulted.

In all likelihood, Wright will be nearing his release date by the time this appeal can be resolved. But he should never have been convicted of grand larceny from the person, and that injustice should be corrected.

Statement of the Facts and Procedural History

1. The underlying events and the trial

In the early spring of 2012, Wright and his brother Robert Wright "had been drinking a little bit" and asked Robert's son Nike to drive them to the store. JA 157. The three men drove in a Dodge Caravan to Martin's Grocery, with a brief stop to pick up Robert's stepson. JA 93, 157, 169. Once parked, Wright and Robert walked into the grocery to grab deli sandwiches and two cases of beer. JA 93. Both exited the store without paying for their merchandise. JA 99. Wright went to the driver's side of the minivan while Robert, who held the beer, went to the passenger's side. JA 93-95.

Employee Garrett Atkins followed the brothers into the parking lot. JA 92-93. Atkins approached Robert and asked to see a receipt. JA 93. When Robert failed to produce the receipt, Atkins took the case of beer from his hands. JA 93-95. Robert's stepson, believing Atkins might hurt his stepfather, began to threaten Atkins with warnings like "I'm not afraid to go back." JA 94, 158. All the while, Wright remained on the far side of the vehicle, out of Atkins's line of sight. Robert took the beer back from Atkins, and Atkins heard a voice from the driver's side

urging: "Let's go, let's just go, let's go." JA 93-95. Robert threw his beer into the van and they all drove off. JA 95. Soon after, Atkins called the police to report the van's license plate number and its make and model. *Id*.

Atkins never interacted with Wright, conversing only with Robert and Robert's stepson. Atkins never even noticed what Wright wore that day. JA 101. The Commonwealth nevertheless charged Wright with three crimes: (1) robbing Garrett Atkins of the beer and deli sandwiches by means of violence, JA 62; (2) committing petit larceny for originally taking the sandwiches and beer from the store, JA 67; and (3) contributing to the delinquency of a minor for Robert's stepson's threats to Atkins, JA 66.[2] Wright pleaded not guilty to each of the charges. JA 76.

On the day of his trial, over Wright's objection, the Commonwealth amended the robbery charge to robbery as a principal in the second degree. *See* JA 73-74; JA 68. The prosecution proffered instructions for the robbery charge, which the judge ultimately issued to the jury as Instruction 10. JA 270. Instruction 10 directed the jury to find Wright guilty of robbery if the Commonwealth proved beyond a reasonable doubt:

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[2] The Commonwealth also charged Wright with malicious bodily injury by means of caustic substance, assault on a law enforcement officer, and obstruction of justice based on allegations about events during the brothers' later arrest. JA 60, 64-65, 76-77. The jury convicted Wright of these charges at trial, JA 272, but the Supreme Court of Virginia later overturned these three convictions. JA 296.

(1) That the defendant intended to steal; and

(2) That the defendant took beer; and

(3) That the taking was from Garrett Atkins or in his presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by intimidation of the person or the threat of serious bodily harm. JA 270.

At a charge conference after the close of the evidence, the prosecution proposed an expansion of the instruction to include a supposedly "lesser included charge" of grand larceny from the person, and told the court that "we are in agreement to that." JA 212. Wright's counsel argued for different language in the robbery instruction but offered no objection to the alternative instruction on grand larceny from the person. JA 212-14. As delivered, Instruction 10 told the jury that if the prosecution failed to prove element (5), the jury could convict Wright of the lesser-included offense of grand larceny from the person, instead of robbery. To do so, the jury needed to find that (1) "the taking was accomplished without violence or intimidation of the person" and (2) "the property taken was worth $5 or more." JA 270.

That caveat was improper. In the Commonwealth of Virginia, "an accused cannot be convicted of a crime that has not been charged, unless the crime is a lesser-included offense of the crime charged." *Commonwealth v. Dalton*, 524

S.E.2d 860, 862 (Va. 2000). Grand larceny from the person is not a lesser-included offense for the charge of robbery. *See Commonwealth v. Hudgins,* 611 S.E.2d 362, 365 (Va. 2005). Indeed, the elements of grand larceny from the person plainly reveal that the offense requires proof of an element, the value of the stolen good, that robbery does not. Instead, robbery's lesser-included offense is petit larceny, which carries a maximum penalty of twelve months imprisonment. *See id.* at 365 n.*. Nevertheless, Wright's counsel failed to object to the improper instructions because he was "unaware that larceny from the person [was] not a lesser included offense of robbery." JA 384.

During its deliberations late into the evening the jury sent two notes to the court. The first asked how they should proceed if they could not reach a unanimous verdict. JA 241-42. The second reported that they were not optimistic about reaching a verdict on all charges, and asked whether they could come back the next day to deliberate further. JA 242. Wright's counsel had suggested an *Allen* charge, and the court gave one. JA 242-44. The jury acquitted Wright of robbery but found him guilty of grand larceny from the person, and it recommended a sentence of ten years. JA 266. At the sentencing hearing, Wright's trial counsel moved to set aside the verdict, arguing that there was insufficient evidence to convict Wright of the crime. The trial court denied the motion and imposed the entirety of the recommended ten-year sentence. JA 57-58.

2. Direct appeal

On direct appeal, the Court of Appeals ruled that counsel's failure to object to the instruction waived the issue. JA 289. The Virginia Supreme Court reversed several of Wright's other convictions on appeal but declined to review whether the Court of Appeals should have applied the "good cause" or "ends of justice" exceptions to the state waiver rule because Wright's appellate counsel failed to properly assign error. JA 291. Wright did not argue ineffective assistance of counsel because that claim cannot be raised on direct appeal in Virginia. *See Browning v. Commonwealth*, 452 S.E.2d 360, 362 n.2 (Va. Ct. App. 1994).

3. State habeas proceedings

Wright subsequently filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. JA 300. Among other claims, Wright argued that trial counsel was ineffective for failing to object to Jury Instruction 10 on the ground that grand larceny from the person was not a lesser-included offense of robbery. JA 304. The Supreme Court of Virginia remanded that claim and directed the trial court to "determine what justification, if any, counsel had for agreeing to" Jury Instruction 10. JA 317.

Following an evidentiary hearing, the trial court reported its findings that trial counsel "did not realize that larceny from the person was not a lesser included offense to robbery" and "did not object to the lesser included offense instruction

because it gave the jury the ability to find culpability but not be constrained to impose a sentence beginning at five years," as a robbery conviction would have required. JA 384-85. The trial court ultimately concluded that "there was strategy coupled with lack of knowledge" at work in counsel's decision. JA 385.

Wright argued that trial counsel's "failure to object could not be considered … tactical" if counsel did not know he had a basis upon which to object in the first place. JA 48. The Supreme Court of Virginia disagreed. After adopting the circuit court's findings of fact, the Supreme Court of Virginia analyzed "whether trial counsel's ignorance of the law supersed[ed] his tactical decision." JA 49. Citing language from several federal decisions, the Court reasoned that a habeas petitioner "must establish that *no competent counsel* would have taken the action that his counsel did take." *Id.* (quoting *United States v. Freixas*, 332 F.3d 1314, 1320 (11th Cir. 2003) (emphasis added by Virginia Supreme Court)). It concluded that Wright's counsel wanted "the jury to have the option of perspective and a lighter sentence" and that the grand larceny from the person charge allowed "the jury to impose a sentence that limited incarceration to a term of no more than twenty years, and included the possibility of no incarceration at all." JA 49. For this reason, the Supreme Court of Virginia held that "trial counsel's representation

was not objectively unreasonable" because the choice was an acceptable "matter of trial strategy." JA 49-50.[3]

4. Federal habeas proceedings

After exhausting his claims in the Virginia state courts, Wright filed a 28 U.S.C. § 2254 petition in the District Court for the Western District of Virginia. JA 4. Again, Wright asserted the claim that trial counsel was ineffective for failing to object to Jury Instruction 10 on the ground that grand larceny from the person is not a lesser-included offense of robbery. *Id.*

Wright argued that the Virginia Supreme Court unreasonably applied *Strickland's* deficient performance prong because "counsel's mistaken belief that grand larceny from the person was a lesser-included offense of robbery rendered counsel's stated trial strategy unreasonable." JA 407. The district court agreed with the Virginia Supreme Court that Wright's counsel made a "tactical choice," and reasoned that even though counsel's decision proved "unorthodox and involved outright legal errors" the Supreme Court of Virginia's decision was not contrary to, or an unreasonable application of, *Strickland*. JA 408.

[3] The Supreme Court of Virginia also rejected Wright's distinct claim that the trial court lacked subject-matter jurisdiction to convict him of the grand larceny offense because it was not charged, reasoning that Va. Code § 17.1-513 gave the circuit courts jurisdiction to try all felony charges as a matter of state law. JA 52-53.

Both in the district court and the state courts, Wright's Claim One was that counsel had been ineffective for failing to object to Instruction 10 on the ground that grand larceny from the person is not a lesser-included offense of robbery. *See* JA 304 ("Any reasonably competent attorney would have known it was incumbent upon him to object to the jury being instructed on a claim that his client was not charged with."); JA 18 (same). The district court nonetheless bifurcated Claim One for purposes of its analysis into new purported claims "1(a)" and "1(b)." 1(a) was the claim that Wright actually presented; 1(b) was a distinct claim hypothesizing that trial counsel also was constitutionally ineffective for failing to affirmatively request an instruction on petit larceny. The district court ruled that its hypothesized claim 1(b) was procedurally defaulted because Wright "did not present a reason he failed to raise [it] in the state habeas proceeding." JA 400.[4]

The District Court denied relief on all claims and denied a certificate of appealability. Wright filed a timely notice of appeal, JA 417, and argued that this Court should grant a certificate of appealability. This Court directed that counsel be appointed, and upon issuing the certificate, asked the parties to address the following questions:

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[4] The district court also rejected Wright's distinct claim that the trial court never activated its jurisdiction by serving proper notice of the grand larceny charge, reasoning that "the Supreme Court of Virginia held [the Virginia code] confer[red] subject-matter jurisdiction" on the trial court as a matter of state law, a conclusion not reviewable in federal court. *See* JA 415.

- (1) Whether Wright's trial counsel was ineffective for failing to object to a jury instruction on grand larceny from the person where this offense was not a lesser included offense of the charged offense of robbery;

- (2) Whether the state circuit court lacked jurisdiction to enter a judgment for grand larceny from the person on the grounds that Wright's indictment was constructively amended in violation of the federal constitution; and

- (3) Whether any part of either claim may be procedurally barred.

JA 429-30.

SUMMARY OF ARGUMENT

Wright's trial counsel failed to investigate and mistakenly believed that grand larceny from the person is a lesser-included offense of robbery, and as a consequence failed to object to instructions on a crime his client was not charged with. As a consequence, Wright has served a lengthy sentence for a crime that Virginia law says he cannot be convicted of. None of this is disputed. Nonetheless, the Supreme Court of Virginia held that counsel was not ineffective because he had a tactical reason for wanting to give the jury an option less serious than robbery.

This Court reviews Wright's ineffective assistance of counsel claim through "the dual lens of the AEDPA and *Strickland* standards[.]" *Richardson v. Branker*, 668 F.3d 128, 144 (4th Cir. 2012). Each lens requires deference from this Court. But the Virginia Supreme Court's holding is an unreasonable application of clearly established federal law however one looks at it. Counsel cannot effectively serve

his role in the adversarial process while ignorant of which crimes his client can and cannot be convicted of, and a purportedly "tactical" decision made in ignorance of that fundamental issue is entitled to no deference at all. Furthermore, no reasonable counsel could have made a tactical decision to accept this instruction. Virginia law *forbade* conviction for this crime under the circumstances. Any appropriately informed lawyer sufficiently concerned about the tactical issue that counsel perceived would have chosen the only—and far superior—option the law actually permitted, and requested an instruction for petit larceny instead. In all likelihood Mark Wright will serve nine additional years in prison because counsel did not bother to look at the basic elements of the crime before agreeing to these instructions.

It is too late to avoid this injustice, substantively. It is not too late to vindicate the rule of law and to clarify that the Sixth Amendment's guarantee of effective assistance of counsel means, at least, that counsel may not agree to conviction of a crime that was not charged, in the service of a purportedly "tactical" objective that competent counsel could have achieved just as well without consigning his client to nine additional years in prison.

ARGUMENT

I. WRIGHT'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO AN UNLAWFUL JURY INSTRUCTION ON AN UNCHARGED CRIME, CAUSING HIM EXTREME PREJUDICE

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Petitioners must show (1) that counsel's performance fell "below an objective standard of reasonableness" (the deficiency prong) and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (the prejudice prong). *Id*. at 687-88, 694.

Wright's trial counsel clearly fell below minimum constitutional standards for effective representation. Supreme Court precedent makes clear that his failure to conduct an appropriate investigation of the governing law precludes any deference to his purportedly "tactical" decisions. Counsel's decision also was not objectively reasonable. These errors clearly prejudiced Wright's defense. Indeed, they directly produced an unlawful conviction on an uncharged crime.

A. Counsel's Failure To Investigate The Law Fell Far Below Constitutional Standards And Precludes Any Deference To Counsel's "Tactical" Instincts

Because "[t]here are countless ways to provide effective assistance in any given case[,]" a petitioner must ordinarily overcome the "strong presumption" that

"under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). But that presumption is inapplicable when defense counsel's strategic choices are uninformed by relevant law. In the same breath that *Strickland* articulated the presumption of sound trial strategy, it noted its inapplicability to situations like this one. While "strategic choices made after [a] thorough investigation of law and facts relevant to [the] plausible options are virtually unchallengeable," strategic choices made after "less than complete investigation" are reasonable only if counsel makes "a reasonable decision" that a "particular investigation[] is unnecessary." *Strickland*, 466 U.S. at 690-91.

Counsel cannot make "a reasonable decision" to ignore a point of law fundamental to the case. Ignorance of "a point of law that is fundamental to [the] case" is a "quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Counsel have a "duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments." *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017). This duty follows from the fact that the "testing process" safeguarded by the Sixth Amendment "generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies[.]" *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). And it has been

reinforced by "myriad controlling opinions standing for the proposition that acts or omissions made by counsel under a mistaken belief or an ignorance of law are rarely—if ever—'reasonable' in light of prevailing professional norms." *Thompson v. Gansler*, 734 F. App'x 846, 855 (4th Cir. 2018) (collecting cases).

In *Williams v. Taylor*, for example, counsel failed to investigate potential mitigation evidence "because they incorrectly thought that state law barred access to such records." 529 U.S. 362, 395 (2000). The Supreme Court acknowledged that "not all of the additional evidence was favorable to" the defendant, but held that trial counsel were ineffective because they "did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id*. at 396.

In *Hinton*, defense counsel was found constitutionally deficient for neglecting to investigate the amount of state funding available for defense experts. The Supreme Court considered it an "inexcusable mistake of law" to fail to "understand the resources that state law made available to him[.]" 571 U.S. at 275. "We wish to be clear," the Court explained, "that the inadequate assistance of counsel we find in this case does not consist of hiring an expert who, though qualified, was not qualified enough." *Id*. at 274-75. The Court held that it would not "launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* at 275. Rather, "[t]he only inadequate assistance of counsel here was the inexcusable mistake of law—the

unreasonable failure to understand the resources that state law made available to him . . . ." *Id*. The tactical intentions of Hinton's attorney, and his "extensive search for a well-regarded expert" who would work within his budget, did not excuse his "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point," which the Court held to be "a quintessential example of unreasonable performance." *Id*. at 268, 274.

In *Kimmelman v. Morrison*, defense counsel was found deficient for failing to file a suppression motion against a damaging piece of evidence because counsel was unaware of the State's intention to introduce it. 477 U.S. 365 (1986). The attorney would have discovered the State's intention upon conducting pretrial discovery, but the attorney decided to forego discovery under the (mistaken) belief that the State was obligated to turn over all of its inculpatory evidence to the defense. The Supreme Court held that counsel's failure to request discovery could not be said to be "based on 'strategy,'" because it was in fact based "on counsel's mistaken beliefs" about the law. *Id*. at 385. The government sought to minimize counsel's deficiency by minimizing the importance of the evidence. *Id*. The Court found that issue irrelevant to whether counsel's performance fell below minimum standards. While it might have been "pertinent to the determination whether respondent was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery." *Id*. at 387.

This Court has repeatedly recognized these same principles. In *United States v. Carthorne*, for example, defendant's counsel was ignorant of the standards governing what crimes count as crimes of violence for purposes of the career offender enhancement. 878 F.3d at 468-69. This Court held that the deference ordinarily accorded counsel's trial strategy was "defeated" by counsel's failure "to do basic legal research" and because "lack of preparation and research cannot be considered the result of deliberate, informed . . . strategy." *Id*. (quoting *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987)). Similarly, in *Ramirez v. United States*, defendant's counsel failed to object to an error in the court's Guidelines calculations. 799 F.3d 845, 855 (4th Cir. 2015). That failure was owed no deference because at the time the trial attorney mistakenly believed the defendant had the requisite convictions for career offender status. *See id*.

The performance of Wright's counsel was plainly deficient under those standards. Wright's trial counsel failed to perform even a minimal investigation of the law before consenting to give the jury the option to convict his client for a crime that was not charged, and which carried a potential sentence of twenty years in prison. If he had bothered to look, he would have discovered that grand larceny from the person is not a lesser-included offense of robbery, and that the appropriate lesser-included offense—petit larceny—carried a sentence of no more than twelve months. Counsel's failure to object to the erroneous jury instruction was not the

kind of error that should receive the presumption of sound trial strategy because it was not the result of "complete investigation" into the relevant law. *Strickland*, 466 U.S. at 691. And counsel could not make "a reasonable decision" that it was unnecessary to investigate whether grand larceny from the person is actually a lesser-included offense for robbery. *Id*. Counsel had an affirmative "duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments." *Carthorne*, 878 F.3d at 466.

The attorney performance scrutinized in *Williams*, *Hinton,* and *Kimmelman* dealt with ignorance about points of law much less central, and tactical choices much less consequential, to those cases. The "tactical" choices made by the attorneys in those cases were condemned as constitutionally deficient because the attorneys were operating under a misconception about the resources available to them for developing the best possible evidentiary case for their clients. Here, counsel's total failure to investigate led him to consent to a jury instruction on a crime that was not even charged and for which he had not prepared a defense—ultimately consigning his client to nearly a decade in prison on a proposed charge that would have been immediately stricken if a proper objection had been made. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a

criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). As with the mistake of law in *Kimmelman*, the mistake of Wright's trial counsel "put[] at risk both the defendant's right to 'an ample opportunity to meet the case of the prosecution' and the reliability of the adversarial testing process." *Id*. at 385 (quoting *Strickland*, 466 U.S. at 685). Indeed, counsel's mistake of law facilitated a conviction prohibited by Virginia law.

Minimal norms of the legal profession assure criminal defendants counsel competent to challenge attempts to punish them beyond what the law requires or allows. In *Strickland*, the Court pointed to the "[p]revailing norms of practices as reflected in the American Bar Association standards" as one "guide[] to determining what is reasonable." *Strickland*, 466 U.S. at 688; *see also, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (relying on the ABA standards for investigation). Unsurprisingly, the ABA Guidelines are crystal clear that "[d]efense counsel's investigative efforts . . . should explore . . . potential dispositions and penalties." ABA Criminal Justice Standards for the Defense Function 4-4.1(c) (4th ed. 2017), https://bit.ly/31VzONX. Wright's trial counsel failed to meet that most basic expectation.

Nor was this a complex or difficult point of law. This Court has deemed attorneys constitutionally ineffective for failing to research and identify far more ambiguous questions. In *Carthorne*, for example, this Court recognized that it "had

not directly addressed the question whether Virginia assault and battery qualified as a crime of violence . . . at the time of [defendant's] sentencing" but nonetheless held "[c]ounsel should have known that … precedent raised serious questions whether [assault and battery] qualified as a crime of violence under the Guidelines, and that he had a duty to object to [defendant's] designation as a career offender on those grounds." 878 F.3d at 468-69. If counsel must raise credible arguments "even in the absence of decisive precedent," it obviously falls short of adequate representation to miss an objection on a point this critical when the precedent is crystal clear. *Id*. at 465-66 (distinguishing *Strickland* standard from "plain error" standard).

In *Ramirez*, trial counsel sought to excuse his ignorance by complaining that he would have had to subpoena records from the Texas county where the defendant's past convictions occurred, and that this "would have been extremely difficult to do and time consuming." 799 F.3d at 855. This Court was unimpressed, concluding: "The lack of desire to uncover the truth was deficient." *Id*. (citing *Wilson v. Mazzuca*, 570 F.3d 490, 502 (2d Cir. 2009) (concluding that deficient performance includes errors arising from "oversight, carelessness, ineptitude, or laziness.")). Here, by contrast, even the most minimal investigation of Virginia caselaw would have revealed that grand larceny from the person is not a lesser-included offense of robbery. *Cf. United States v. Williamson*, 183 F.3d 458, 463

n.7 (5th Cir. 1999) ("[F]ailure to raise a discrete, purely legal issue, where the precedent could not be more pellucid and applicable, denies adequate representation."). Indeed, a quick glance at the elements of the crime would have revealed that grand larceny from the person is not a lesser-included offense of robbery, because it requires proof of an element (the value of the goods stolen) that robbery does not. *See e.g.*, *Ali v. Commonwealth*, 701 S.E.2d 64, 67 (Va. 2010); *Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000).

The fact that counsel failed to investigate the basic parameters of this critical choice makes it irrelevant that he may have had a "tactical" aim. Because the adversarial process protected by the Sixth Amendment is not adequately safeguarded by uninformed strategies, counsel's purportedly tactical choices are entitled to no deference when they are based on an unreasonable failure to investigate and understand the legal landscape. Just as the attorney's extensive search for a well-regarded expert in *Hinton* did not excuse his failure to actually investigate the amount of funding available for defense experts, Wright's trial counsel's tactical intentions were defeated by his failure to fulfill the "duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments." *Carthorne*, 878 F.3d at 466. He could not, consistent with that duty, make "a reasonable decision" to acquiesce to an instruction on grand larceny from the person without researching whether that was in fact a

lesser-included offense, and whether the penalties it carried were the best available for Wright. Failure "to do basic legal research" can never "be considered the result of deliberate, informed . . . strategy." *Carthorne*, 878 F.3d at 468-69 (quoting *Hyman*, 824 F.2d at 1416).

Spivey v. United States presented Judge Ellis with a case nearly identical to this one. 2007 WL 2327591 (E.D. Va. Aug. 10, 2007). The defendant was indicted for assault with intent to commit murder. *See id*. at *1. Doubtless hoping to give the jury the option of convicting for a less serious offense, defense counsel proposed a jury instruction for assault with a dangerous weapon with intent to do bodily harm. *Id*. at *2. "Throughout the proceeding, both parties proceeded under the assumption that the less serious assault offenses set forth . . . were lesser included offenses [of the crime charged]." *Id*. The jury ultimately found the defendant not guilty of the crime charged, but guilty of the less serious crime of assault with a dangerous weapon with intent to do bodily harm. *Id*. at *3. Noting that "it is pellucidly clear . . . that the offense for which petitioner was convicted and sentenced is not, in fact, a lesser *included* offense of the offense charged," Judge Ellis granted relief to the petitioner and held that "petitioner's counsel's initial request and ultimate acquiescence in the submission of a non-included lesser offense to the jury 'fell below an objective standard of reasonableness.'" *Id*. at * 4 (quoting *Strickland*, 466 U.S. at 688).

Finally, counsel's inattention to the legal significance of the grand larceny instruction is further evidenced by his failure to consult with his client. One of the "certain basic duties" of defense counsel articulated by the Court in *Strickland* is the duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution." 466 U.S. at 688. Counsel did not consult with Mr. Wright on this issue, before or after agreeing to the grand larceny from the person instruction. *See* JA 384. Surely the same principles that impose "a clear obligation to fully inform her client of the available options" in the plea-bargaining process, *see Smith v. United States*, 348 F.3d 545, 552-53 (6th Cir. 2003), similarly require counsel to consult and explain the alternatives before agreeing post-trial to instructions on a crime not charged or tried. *See Dodson v. Ballard*, 800 F. App'x 171, 180 (4th Cir. 2020) (finding deficiency where counsel "misunderstood or misrepresented the elements of the lesser-included felony offense of daytime burglary and improperly advised [defendant] not to accept the state's offer.").

B. The Decision That Wright's Counsel Made Here Was Objectively Unreasonable

Counsel's deficient investigation led him to a decision that was not objectively reasonable.

"On habeas review, a federal court generally credits 'plausible strategic judgments in the trial of a state case.'" *Vinson v. True*, 436 F.3d 412, 419 (4th Cir.

2006) (quoting *Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991)). But a "tactical" decision is entitled to no deference if it is the product of a deficient investigation, or "if it made no sense or was unreasonable 'under prevailing professional norms.'" *Id*. (quoting *Wiggins*, 539 U.S. at 521). Virginia law did not even *permit* a grand larceny from the person instruction in this case. Objectively reasonable counsel could not consent to instructions that the law *forbids*. In *Spivey*, the government argued that counsel's decision to accept instructions on an uncharged crime may have benefited the defendant by "'reduc[ing] the odds that the jury would convict [the defendant] of a crime punishable by up to twenty years imprisonment.'" 2007 WL 2327591, at *4 n.8. Judge Ellis correctly noted that this argument "completely ignores the fact that allowing the jury to deliberate and reach a verdict on an offense that was not, in fact, a lesser included offense of the charged offense *was legally impermissible.*" *Id.* (emphasis added).

Even if that minor issue were set aside, no appropriately informed and objectively reasonable attorney would have found "tactical" advantage in acquiescing to an instruction on grand larceny from the person in this case. The lesser-included offense actually permitted by the governing law, petit larceny, would have been a vastly better solution to counsel's "tactical" objective. The Virginia Supreme Court reasoned that counsel accepted the grand larceny from the person instruction because that charge "would allow the jury to impose a sentence

that limited incarceration to a term of no more than twenty years, and included the possibility of no incarceration at all." JA 50. A petit larceny instruction would have achieved the same objectives, with a maximum sentence of twelve months. *Compare* Va. Code Ann. § 18.2-96, *with* § 18.2-95. Counsel's concern was that the robbery charge carried a minimum five-year sentence. It was not objectively reasonable to solve that perceived strategic problem by agreeing to an unlawful instruction that exposed his client to a potential twenty-year prison term, when the lawful and correct lesser-included offense instruction would have carried a maximum twelve-month term.

C. Counsel's Ineffective Performance Clearly Prejudiced Wright's Defense

The prejudice prong of *Strickland* should not detain the Court long in this case. *Strickland* requires only "a probability" of a different result "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Here a different result would have been essentially certain. Firmly established Virginia law prohibited the trial court from instructing the jury on any crime that was not charged or a lesser-included offense of crimes charged. If counsel had objected to the proposed grand larceny from the person instruction, the instruction would have been rejected immediately, or the resulting conviction would have been vacated on appeal. As Judge Ellis explained in *Spivey*, "petitioner was obviously prejudiced by counsel's performance in this regard, as the error resulted in a criminal conviction

and lengthy sentence for an offense that should not have been submitted to the jury in the first place." 2007 WL 2327591, at *4.

It would not be appropriate for a reviewing court to speculate that the jury might have convicted Wright of robbery if it had not been given the grand larceny alternative. The jury found that the prosecution failed to prove the elements of robbery, and we must presume that it did its job. (The jury's verdict is also transparently correct, since there was no evidence of any taking through physical intimidation or threat of serious bodily harm). And, again, such speculation "completely ignores the fact that allowing the jury to deliberate and reach a verdict on an offense that was not, in fact, a lesser included offense of the charged offense was legally impermissible." *Spivey*, 2007 WL 2327591, at *4 n.8.

If counsel's performance had met minimum constitutional standards, the jury might have been instructed on petit larceny, and might have convicted Wright of that crime. But if so, he would have completed the maximum sentence many years ago. Every day he has spent in prison since then is undeniable, and severe, prejudice as a consequence of his counsel's failures.

II. THE VIRGINIA SUPREME COURT'S REASONING REFLECTS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

AEDPA confined federal habeas relief to state prisoners who are imprisoned following state adjudication "contrary to . . . clearly established Federal law, as

determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d). To satisfy AEDPA, a state court's adjudication of federal claims must be more than merely erroneous, but "objectively unreasonable." *Wiggins*, 539 U.S. at 520-21. (2003). Accordingly, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). But if a "petitioner shows that the state court's adjudication of a claim is dependent on . . . an unreasonable application of federal law, [this Court] do[es] not defer to the state court's decision but instead review[s] the claim de novo." *Dodson v. Ballard*, 800 F. App'x 171, 177 (4th Cir. 2020).

The Virginia Supreme Court's reasoning in rejecting Wright's claim is not a model of clarity. The court appears to have embraced the Warden's argument "that Wright's counsel decided not to object for tactical reasons" and that to obtain relief a habeas petitioner "'must establish that *no competent counsel* would have taken the action that his counsel did take.'" JA 48-49 (citation omitted). The Virginia Supreme Court apparently agreed and held that, "considering the totality of the circumstances," counsel's representation "was not objectively unreasonable" because counsel was concerned about a potential life sentence on the robbery charge and "agreed to Jury Instruction 10 because a conviction on the grand

larceny offense would allow the jury to impose a sentence that limited incarceration to a term of no more than twenty years, and included the possibility of no incarceration at all." JA 50. That reasoning reflects an unreasonable application of clearly established federal law, and satisfies the AEDPA standard for reversal on federal habeas review.[5]

A. The Supreme Court Has Clearly Established That Decisions Of Defense Counsel That Are Uninformed By The Relevant Law And Facts Do Not Benefit From the Presumption Of Sound Trial Strategy

The Virginia Supreme Court committed a plain error of clearly established federal law by deferring to a "tactical" decision made after an insufficient investigation, on the reasoning that a competent and informed lawyer might have made the same choice. The Supreme Court and this Court have held numerous times that strategic choices must be informed by an adequate investigation of the law and the facts, and that decisions made after a constitutionally insufficient investigation are entitled to no deference, even if counsel arrived (by luck or accident) at a decision that appropriately informed counsel might have made.

[5] Finding the deficiency prong unsatisfied, the Virginia Supreme Court did not make any finding as to prejudice. As such, this Court makes a prejudice determination *de novo*. *See Wiggins*, 539 U.S. at 534 ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

That principle is apparent from *Strickland* itself, which held that choices made after "less than complete investigation" are entitled to deference only to the extent that counsel makes "a reasonable decision" that a "particular investigation[] [is] unnecessary." *Strickland*, 466 U.S. at 691. As the Court stated in *Wiggins v. Smith*, "our principal concern in deciding whether [an attorney] exercised 'reasonable professional judgment' is not whether counsel should have [made a particular decision]. Rather, we focus on whether the investigation supporting counsel's decision . . . *was itself reasonable*." 539 U.S. at 522-23 (quoting *Strickland*, 466 U.S. at 691). Thus "a reviewing court must consider the reasonableness of the investigation said to support [a trial] strategy." *Id.* at 527. In *Hinton*, for example, the Supreme Court went out of its way "to be clear that the inadequate assistance of counsel we find in this case [did] not consist of hiring an expert who, though qualified, was not qualified enough." 571 U.S. at 274-75. It was entirely possible that an objectively reasonable and fully informed lawyer might have hired the expert witness that counsel hired in *Hinton.* The Supreme Court explained that it would not "launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* at 275. Rather, "[t]he only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him[.]" *Id.*

When counsel's purportedly "tactical" decision was the product of an unreasonable and deficient failure to understand the governing law, the objective merits of that decision are ordinarily evaluated as a *prejudice* issue, and without the great deference accorded to informed trial strategies under the performance prong of *Strickland.* The defendant is entitled to relief if there is a "probability," "sufficient to undermine confidence in the outcome," that appropriately informed counsel would have made a different decision and obtained a different result. *Strickland*, 466 U.S. at 694. After finding deficient performance in *Hinton* on the basis of the attorney's ignorance about available funding, for example, the Supreme Court turned to the State's argument "that Hinton could not have been prejudiced by his attorney's use of Payne rather than a more qualified expert because Payne said all that Hinton could have hoped for from a toolmark expert." *Hinton*, 571 U.S. at 275. The Court explained that Hinton would be entitled to relief on remand if there was a "reasonable probability" that fully informed counsel would have hired a more persuasive expert. *Id.* at 276. Similarly in *Kimmelman*, the Supreme Court explained that whether a discovery request would have revealed anything useful was "pertinent to the determination whether respondent was prejudiced by his attorney's incompetence," but "sheds no light on the reasonableness of counsel's decision not to request any discovery." *Kimmelman*, 477 U.S. at 387.

The Virginia Supreme Court was misled by quotations from several federal courts of appeal to the effect that attorney performance is constitutionally ineffective only if '*no competent counsel* would have taken the action that [he] did take" or "only where, given the facts known at the time, counsel's choice was so patently unreasonable that *no competent attorney* would have made it." JA 49-50 (citing *United States v. Freixas*, 332 F.3d 1314, 1320 (11th Cir. 2003); *Rivera v. Thompson*, 879 F.3d 7, 12 (1st Cir. 2018); and *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir. 2002)). None of those decisions genuinely support the Virginia Supreme Court's approach here.

In *Freixas*, the petitioner complained that her defense attorney had inadequately investigated the underlying facts of the case. Rather than considering whether counsel's trial choices were nevertheless reasonable (*i.e.*, whether a fully informed attorney could have made them), the Eleventh Circuit analyzed whether counsel made a reasonable decision to limit the investigation—and concluded that he had. *See e.g.*, *Freixas*, 332 F.3d at 1320 ("Although [counsel] interviewed only appellant and Ravelo, the only other witnesses in the case were law enforcement officers and coconspirators, who [counsel] believed were unlikely to be helpful. Although the wisdom of these decisions is not beyond question, Freixas has not established that they were objectively reasonable under *Strickland*.").

In *Rivera*, the First Circuit held that counsel was ineffective for failing to bring a suppression motion against evidence that arguably was gathered in violation of *Miranda*. There was no suggestion in the case that counsel failed to understand the facts or the law. The First Circuit framed the question as whether "any 'competent attorney'" could have concluded (as she apparently did) that a suppression motion would have been futile, and concluded that the answer was no. 879 F.3d at 13 (citation omitted). Of course the First Circuit could conclude that counsel was ineffective when she made a final decision that, objectively, no reasonable counsel could have made. That does not imply the opposite—*i.e.*, that any decision that a competent lawyer could have made is insulated from scrutiny, even if it was the product of a deficient investigation.

The Tenth Circuit explained in *Bullock* that, in a prior decision, it had held that "where counsel's representation is objectively reasonable under all the circumstances of a case and ensured that the defendant received a fair trial overall, it makes no difference that certain decisions may have been unreasonable or made without a full recognition of the consequences." *Bullock*, 297 F.3d at 1049 (quoting *United States v. Smith*, 10 F.3d 724, 729 (10th Cir. 1993) (per curiam)). The Tenth Circuit acknowledged in both *Smith* and *Bullock* that this approach is "'at first blush'" inconsistent with the language of *Strickland* itself, *see id.* at 1049 n.6, and neither decision has been widely cited outside of that circuit. If *Bullock* were

understood to hold that a deficient investigation is irrelevant unless no competent counsel could have made the decision that counsel made, that holding would be inconsistent with the Supreme Court (and Fourth Circuit) precedent discussed above.

That is not, however, the correct reading of the Tenth Circuit cases. These same Tenth Circuit precedents recognize that only an "adequately informed strategic choice" is entitled to the presumption of reasonableness that *Strickland* accords to counsel's tactical decisions, and simply hold that a reviewing court "might still conclude that counsel performed in an objectively reasonable manner" "under all the circumstances of a case," such that counsel's performance nonetheless "ensured that the defendant received a fair trial overall." *Bullock*, 297 F.3d at 1046, 1049 (quoting *Smith*, 10 F.3d at 729). If conducted without deference and a focus on whether counsel's overall performance ensured a fair trial, that approach looks a great deal like the correct one. Later Tenth Circuit precedent clarifies that the language in *Bullock* appearing to require a decision that "no competent counsel" could have made "clearly is dicta." *Hooper v. Mullin*, 314 F.3d 1162, 1170 n. 3 (10th Cir. 2002). In *Hooper*, defense counsel claimed to have acted strategically in deciding to focus on evidence that his client's brain damage caused his criminal conduct. That strategy was not credited by the Tenth Circuit because "the mere incantation of 'strategy' does not insulate attorney behavior from

review" and "defense counsel deliberately pursued this strategy without conducting a thorough investigation." *Id*. at 1170 (citing *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002) ("A decision not to investigate cannot be deemed reasonable if it is uninformed.")); *see also Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (holding defense counsel's failure to investigate rendered any resulting strategy unreasonable). *Hooper* is crystal clear that for AEDPA purposes "*Strickland*'s objectively reasonable standard"—requiring reasonableness under prevailing professional norms, including legal research sufficient to support informed legal judgments—"is the clearly established Supreme Court precedent for ineffective assistance claims, not the 'no-competent-counsel' standard." 314 F.3d at 1170 n. 3.

The Tenth Circuit precedents accordingly do not support what the Virginia Supreme Court did here. Despite a cursory reference to "the totality of the circumstances," the Virginia Supreme Court did not genuinely analyze, without deference, whether counsel's overall representation was objectively reasonable in a manner that guaranteed a fair trial despite his ignorance of the law. JA 50. The court simply recited counsel's testimony about his tactical motivation for making the uninformed decision he made: "[Counsel] explained that he agreed to Jury Instruction 10 because a conviction on the grand larceny offense would allow the jury to impose a sentence that limited incarceration to a term of no more than

twenty years, and included the possibility of no incarceration at all." *Id.* The Virginia Supreme Court offered not a single word about whether that decision was objectively reasonable, whether Wright received a fair trial, or why. Counsel articulated a tactical objective, therefore Wright "has not met his burden to prove the deficient performance prong of the *Strickland* test on this claim." *Id.* That is the sum total of the Virginia Supreme Court's reasoning. The Virginia Supreme Court actually committed exactly the error the Tenth Circuit has been careful to warn against: deferring to an uninformed decision based on a "mere incantation of 'strategy.'" *Hooper*, 314 F.3d at 1169.

B. In Any Event, Counsel's Decision To Acquiesce To The Instruction For Grand Larceny From The Person Was Objectively Unreasonable

Finally, no reasonable jurist could conclude that counsel's decision here was objectively reasonable—for all of the reasons explained above, *supra* § I(B). As Judge Ellis explained in *Spivey*, objectively reasonable counsel do not (and indeed cannot) decide to acquiesce in instructions that the law does not permit and that denied his client the rudimentary due process requirements of prior notice of the charges and an opportunity to prepare a defense. 2007 WL 2327591, at *4. And no reasonable lawyer would choose to pursue the "tactical" objective that Wright's counsel articulated by agreeing to instructions on a crime that was not charged, for which counsel had not prepared a defense, and which carried a potential twenty-

year prison term—when that objective could have been achieved just as well by proposing an instruction on the *actual* lesser-included offense for robbery, which carried, at most, a twelve-month sentence. The Virginia Supreme Court's contrary conclusion is essentially unreasoned, and it is an unreasonable application of clearly established federal law.

III. NO PART OF WRIGHT'S CLAIM IS PROCEDURALLY BARRED

No relevant portion of Wright's ineffective-assistance claim is procedurally defaulted. The district court's holding that Wright failed to exhaust a distinct "Claim 1(b)" reflects a simple misunderstanding of Wright's federal habeas petition, and it certainly does not create any procedural obstacle to relief on the claim that Wright has consistently presented.

What the district court called "Claim 1(a)" is the ineffective-assistance claim that Wright has consistently pressed for years now: his contention that trial counsel was ineffective for failing to object to Instruction 10, because grand larceny from the person is not a lesser-included offense of robbery. Respondent conceded below that Wright properly exhausted that claim in the state courts, and the district court agreed. *See* JA 399 ("respondent argues that Wright properly exhausted Claim (1)(a)"); JA 399-400 (district court accepting this argument).

The district court apparently read Wright's habeas petition as pressing a second claim, which the court referred to as "Claim 1(b)," contending that trial

counsel separately was ineffective because he "fail[ed] to request an instruction for accessory to petit larceny." JA 397. That misunderstanding appears to have been based on a single line in Wright's federal habeas petition, which argued that counsel was ineffective for "allowing the jury to be instructed on grand larceny from a person which is not [a] lesser included offense of second degree robbery rather than asking for an instruction for accessory to petty larceny which was a lesser included offense of second degree robbery." JA 13-14. Wright's point (as in §§ I(B) and II(B) of this brief) was that counsel's supposedly "tactical" motivation for failing to object to Instruction 10 makes no sense, because that tactical objective could have been achieved in a better way. He did not mean to press a new and distinct claim that effective assistance required counsel to propose a petit larceny instruction, and the rest of his federal petition consistently frames his claim in the way (the "Claim 1(a)" way) that was concededly exhausted in state court.[6]

The district court did not suggest that notional "Claim 1(b)" is logically entangled with Wright's actual claim in some way that would require Wright to

[6] *See, e.g.,* JA 16 ("Ineffective assistance of counsel for failing to object to the instruction."); JA 18 ("ineffective for not objecting to the jury instruction in which an instruction was given for a crime that was not charged and is not a lesser included offense to any crime"); JA 18 ("Any reasonably competent attorney would have known it was incumbent on him to object to the jury being instructed on a crime that this client was not charged with."); JA 20 ("defense counsel's performance fell below an objective standard of reasonableness," because of "[t]he instruction" for " a crime not charged").

press and win both in order to obtain relief. Indeed there is no necessary connection between the two claims. Fully informed counsel might have made a tactical choice to request a petit larceny instruction. But it also is entirely possible that informed and constitutionally adequate counsel might have made a defensible tactical choice just to take his (or, rather Wright's) chances on the robbery charge, win or lose. The possibility that counsel might reasonably have gone either way on that question takes nothing away from the obvious reality that counsel could not reasonably do what he actually did. Wright was not required to press a different, and highly debatable, ineffective-assistance claim in order to obtain relief on the meritorious claim that he has, consistently, asserted.

CONCLUSION

"Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Evitts v. Lucey*, 469 U.S. 387, 395 (1985). Wright's trial counsel lacked the legal knowledge necessary to safeguard Wright's entitlement to Virginia's procedural rules of fair process, and agreed to an instruction that the law did not permit and that competent counsel would not have agreed to. As a result, Mark Wright was convicted of a crime not charged, and he is now serving over ten years for stealing a case of beer and a sandwich. The Virginia Supreme Court's decision to treat

those egregious failures as an acceptable "tactical" choice was an unreasonable application of clearly established federal law. Mark Wright is entitled to relief.

REQUEST FOR ORAL ARGUMENT

Wright respectfully believes that oral argument would assist the Court's consideration of these important issues.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 9,431 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

Dated: November 3, 2020

/s/ J. Scott Ballenger
J. Scott Ballenger