No. 19-7447

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK O'HARA WRIGHT,

Petitioner-Appellant,

v.

HAROLD W. CLARKE, Director,
Virginia Department of Corrections,

Respondent- Appellee.

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF OF RESPONDENT-APPELLEE

MARK R. HERRING
Attorney General of Virginia

K. SCOTT MILES
Deputy Attorney General

DONALD E. JEFFREY, III
Senior Assistant Attorney General

VICTORIA JOHNSON
(VSB NO. 68282)
Assistant Attorney General
OagCriminalLitigation@oag.state.va.us
vjohnson@oag.state.va.us

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 – Telephone
(804) 371-0151 – Facsimile

Counsel for Respondent-Appellee

January 4, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-7447 Caption: Mark O'Hara Wright v. Howard W. Clarke, Director, Va. Dep't of Corr.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Howard W. Clarke, Director
(name of party/amicus)

who is Respondent-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Victoria Johnson Date: November 9, 2020

Counsel for: Harold W. Clarke, Director

CERTIFICATE OF SERVICE

****

I certify that on November 9, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Victoria Johnson (signature) November 9, 2020 (date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

STATUTES AND RULE

INTRODUCTION

A Virginia jury convicted Wright of larceny from the person in violation of Virginia law. In state habeas proceedings initiated in the Supreme Court of Virginia, Wright moved to overturn his conviction on the theory that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Wright claimed that his trial counsel should have objected to the jury instruction on larceny from the person on the ground that it is not a lesser-included offense of the charged offense of robbery.

The Supreme Court of Virginia appointed counsel for Wright, remanded the case for an evidentiary hearing, ordered briefing, and heard oral argument on Wright' s claim. It determined that although trial counsel did not know that larceny from the person was not a lesser-included offense of robbery, he did not perform deficiently. Because he was anxious that Wright would be convicted of robbery and exposed to a five-years-to-life prison term, trial counsel wanted the jury to be instructed on the lesser crime — with a substantially more favorable sentencing range — as a means of limiting Wright's sentencing exposure. The Supreme Court of Virginia reasoned that an attorney, who was aware that larceny from the person was not a lesser-included offense of robbery, would have acted reasonably and competently in taking the same course. The Supreme Court of Virginia found trial counsel's performance was not objectively unreasonable in the circumstances.

Wright then brought a federal habeas petition under 28 U.S.C. § 2254 again raising the ineffective assistance claim. Applying the deferential standard of review applicable to such claims under § 2254(d), the district court held that the state court's adjudication was neither unreasonable nor inconsistent with Supreme Court precedent.

The Supreme Court of Virginia unquestionably adjudicated Wright's *Strickland* claim on the merits. Accordingly, a federal court's evaluation of his *Strickland* claim is subject to the strictures of § 2254(d), meaning the question in this case is not whether this Court believes the Supreme Court of Virginia's application of *Strickland* was correct or incorrect, but whether there is any reasonable argument that counsel's performance satisfied *Strickland*. The district court did not err when it concluded that the Supreme Court of Virginia's analysis of Wright's claim fell within the broad range of reasonable applications of *Strickland*'s general rule. This Court should affirm.

ISSUES PRESENTED

I. Whether Wright's trial counsel was ineffective for failing to object to a jury instruction on grand larceny from the person where the offense was not a lesser included offense of the charged offense of robbery.

II. 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.[1]

III. Whether any portions of Wright's claims are procedurally barred.

STATEMENT OF THE CASE

A. The events of March 25, 2012

On March 25, 2012, appellant Mark O. Wright and his brother Robert Wright entered Martin's Grocery in Harrisonburg, Virginia, selected deli sandwiches and two cases of beer, and walked out of the store without paying for

[1] In his opening brief, Wright correctly acknowledged that the state trial court's jurisdiction is a matter of state law, and that the Fifth Amendment's indictment requirement (and the related constructive amendment doctrine) has not been incorporated against the states. Opening Br. at 2, n.1. Wright therefore conceded that the "claim is not viable as framed" and did not brief it. Opening Br. at 2, n.1. The Director agrees that the claim is without merit. It is also procedurally defaulted. *See Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir. 2000); Va. Code Ann. § 8.01-654(A)(2), (B)(2); *Mackall v. Angelone*, 131 F.3d 442, 446 (4th Cir. 1997); *Sparrow v. Director, Dep't of Corrections,* 439 F. Supp. 2d 584, 587-88 (E.D. Va. 2006). Although Wright indicated his willingness to address claims regarding due process and the Notice Clause of the Sixth Amendment instead should the Court expand the certificate of appealability, Wright has not moved to do so. Opening Br. at 2, n.1. The Director opposes expansion of the certificate of appealability.

them. JA 92-94.[2] Garrett Atkins, an asset protection employee, and an unidentified store manager followed them into the parking lot and asked to see their receipt. JA 93-94. Rather than stop, the Wright brothers approached a green Dodge Caravan. JA 93. Atkins identified himself as a store employee and again asked Robert for a receipt. JA 93.

When Robert claimed to have one but made no move to produce it, Atkins took a case of Dos Equis beer from Robert's hands. JA 93-94. C.W., a fifteen-year-old boy, exited the van, "took a fighting stance," and said to Atkins" "I'm going to fuck you up. I'll beat your ass, and I'm not afraid to go back." JA 94. Robert took the beer back from Atkins. JA 94-95. From the other side of the van, where appellant stood, Atkins heard, "Let's go, let's just go, let's go." JA 94. The Wright brothers threw the stolen property they were holding into the van and the brothers and C.W. left in the van. JA 95. The stolen property was worth $50.45. JA 95.

Atkins reported the van's description and license plate number to the police. JA 95. The van's registered owner told Deputy Christopher Greathead that he had sold the van to his brother, Mark Wright, and that he might be found at their aunt's house on Boyers Road in Harrisonburg. JA 105-06. Around 7 p.m. that evening, Deputy Greathead observed the van near the Boyers Road house, parked away

[2] Many of their actions while inside the store were recorded on the store's surveillance system, and the jury viewed the surveillance video at trial. JA 95-100.

from the driveway, near the treeline, and without license plates. JA 106-07. Greathead saw a woman and a teenaged boy walk behind the house, but he saw no one in the backyard when he followed them. JA 107. Likewise, no one answered his repeated knocking and doorbell-ringing at both the front and back doors. JA 107-08.

When Deputy Greathead returned to his car to report back to the police department, a couple pulled into the driveway. JA 108. While the deputy was speaking to that man and woman, another woman came out of the house and claimed she had not heard the knocking. JA 108. The women[3] told Greathead no one should be in the basement, but that Wright sometimes stayed there. JA 109. More police arrived to ensure no one arrived or left, and the women and man went into the house. JA 109-10. In the meantime, Officer Justin Joiner had obtained a search warrant for the house. JA 109, 143.

One of the women returned outside and reported that she heard someone in the basement crying, and that she had told that person to give himself up. JA 110. The other woman and a teenager then exited the house, and someone asked Deputy Greathead if he had "gassed" the house, which he had not. JA 110. One of the women said that something was making them cough, and that their eyes stung.

[3] While Deputy Greathead's testimony could be clearer about which woman said what, this may be explained by the fact that the two women (Wright's mother and aunt) were twins. JA 178.

JA 110-11. Deputy Greathead entered the house, with consent, and immediately smelled chlorine. JA 110-11. The deputy escorted the people back out of the house and re-entered it, again with consent, wearing a gas mask. JA 111.

Deputy Greathead heard "coughing and commotion" in the basement, but no one answered when the deputy identified himself and called down the stairs. JA 111. When the deputy reached the bottom of the stairs, a man said, "What are you doing here? Get out." JA 112. Deputy Greathead took several turns as he went further into the basement, eventually finding Robert Wright in a room containing a water heater. JA 112-13. In the dark, as Deputy Greathead trained a gun and light on him, Robert raised his hands and then placed a Dos Equis bottle on the water heater. JA 113-14, 131-32. A red-orange, burning cloud appeared from behind the water heater, which burned Deputy Greathead more than various chemical agents to which he had been exposed during his training as a certified chemical agent instructor. JA 114-17. The deputy left the house, got a new gas mask, and tried to re-enter with Officer Joiner, but the fumes were so strong that they had to leave the house and wait for a fan to clear it. JA 115-16, 138.

The house ultimately was surrounded by police, who attempted to negotiate with its occupants. JA 118. Eventually, around 10 p.m., SWAT officers, including Deputy Greathead, forced entry into the basement. JA 118, 145. The Wright brothers were physically removed from the house because they were "fully

disobedient" to all police commands. JA 124, 140. No one else was in the house, and no one other than police had entered or left it once it was secured. JA 117-18. The police found Dos Equis beer bottles, Icehouse beer cans, sandwich wrappers with Martin's labels indicating the sandwiches were made that day, additional sandwiches and beer in the refrigerator, and canisters of chemical defense and bear deterrent sprays. JA 119-21, 129-30, 133-34. Despite Deputy Greathead's being treated in a decontamination tent, his skin was still irritated the next day. JA 125-26.

After the Wright brothers were removed from the basement, but while they were still at the Boyers Road house, Atkins identified them and C.W as the individuals he encountered earlier in the day at Martin's. JA 96. When interviewed, C.W. told Officer Joiner that the incident at Martin's was "not really robbery, more like a shoplifting." JA 146.

B. Pertinent trial proceedings

In June 2012, a Virginia grand jury returned indictments charging Wright with robbery, contributing to the delinquency of a minor, petit larceny, malicious bodily injury by means of a caustic substance, assault on a law enforcement officer, and obstruction of justice. JA 60, 62, 64-67.[4] On the day of trial, and over

[4] The grand jury returned two other felony indictments, which were later dismissed by nolle prosequi. JA 61, 63, 72.

Wright's objection, the robbery charge was amended to robbery as a principal in the second degree. JA 68, 73-76.

At trial, multiple family members testified on appellant's behalf. Appellant's brother, Robert Wright, testified that his son Nike, was driving him and appellant and that they had picked up C.W. before going to Martin's. JA 157. Robert admitted that they stole beer and sandwiches from Martin's, but claimed it was "beyond [their] better judgment" and that they stole only a single twelve-pack of beer and a single bologna sandwich after finding themselves short of money. JA 157, 159. Robert claimed that C.W. did not know they had shoplifted when Atkins approached, so C.W. "jumped off his bicycle" and threatened Atkins, who never tried to take the beer back. JA 158. Robert also claimed that appellant was on the other side of the van "completely out of view" during the confrontation with Atkins. JA 158.

Robert testified that C.W. had accidentally set off "a bottle of pepper spray" at the Boyer Road house, which Robert then used to spray Deputy Greathead while appellant was in the other room. JA 159-61. Robert testified that when they saw the police response, appellant called 911 to have an "impartial" witness for their surrender. JA 162. Robert also claimed that they were trying to surrender when the police tear-gassed them and attacked them while they were unarmed and cooperative. JA 162-63.

Nike Wright testified that he drove his uncle and father to Martin's, and he saw no confrontation other than C.W. "getting out and threatening Mr. Atkins." JA 169. Nike claimed he said, "Let's go," and that appellant was "too intoxicated" to speak. JA 170-71. Nike claimed that he removed the license plates from the van because it was uninsured. JA 172.

Appellant's daughter, Veronica Wright, claimed that her father told her that he wanted to surrender but was afraid he would be shot when he left the house. JA 173-75. His daughter's mother, Peggy Kesner, testified that she, too, spoke to appellant while he was in the basement, and he was afraid the police would shoot them. JA 191-92. Appellant's mother, Margaret Wright and his aunt, Betty Lou Stoneburner, who owned the Boyer Road house, corroborated much of Deputy Greathead's testimony and added that they believed that the brothers were killing themselves when they smelled the gas. JA 177-191.

In rebuttal, Officer Joiner testified that after the Wright brothers were taken into custody, Nike Wright appeared, on a bicycle, and said he had just gotten off work and received a call that something was wrong with his father. JA 195. Deputy Greathead disputed Wright's mother and aunt's description of certain events. JA 197-98. He did not hear anyone say that she thought the brothers were trying to kill themselves. JA 198.

Wright moved for a judgment of acquittal both at the conclusion of the Commonwealth's case-in-chief and at the conclusion of all evidence. JA 149, 199-200. Wright argued that the evidence of robbery was insufficient to submit to the jury because the Commonwealth had not shown that the taking was accomplished by any fear or threat of violence and the Commonwealth had not proved Wright's involvement in the crime. JA 150-51, 200. The trial court denied both motions. JA 155, 202.

At the conclusion of trial, the parties proposed jury instructions on the offense of robbery ("Jury Instruction 10"). In proposing the instruction, the prosecutor said:

> I have included a lesser[-]included charge later in the body of this describing that if the jury finds that the taking was accomplished without violence or intimidation or the threat of bodily harm and that the property taken was worth $5.00 or more, then there's a lesser included charge of grand larceny from the person and I think we are in agreement to that.

JA 212. Although Wright objected to Jury Instruction 10 on other grounds, JA 212-13, he did not object that the offense of grand larceny from the person is not a lesser-included offense of robbery.

The court ultimately instructed the jury that:

> The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (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.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery . . . .

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four above elements of the crime as charged, but that the taking was accomplished without violence or intimidation of the person or the threat of serious bodily harm and that the property taken was worth $5 or more, then you shall find the defendant guilty of grand larceny from the person . . . .

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above crimes, then you shall find the defendant not guilty.

JA 270.

C. The jury's verdict and the motion to set aside the verdict

During deliberations, the jury asked for a transcript of some of the trial testimony and asked how they should proceed if they could not reach a unanimous verdict. JA 241-24. The trial court told the jury that no transcript was available and that they must return a unanimous verdict. JA 242. The jury later informed the court that it was having difficulty reaching a verdict on some of the charges, and, after

consultation with the parties, the trial court gave an *Allen* charge. JA 243-45. The jury found Wright guilty of grand larceny from the person as well as the other five charges. JA 245-46. Wright later moved to set aside the jury's verdict, arguing that there was no evidence that he had taken anything from any person. The trial court denied the motion and imposed the sentence fixed by the jury. JA 46.

D. Direct Appeal

In his petition for appeal to the Court of Appeals of Virginia, Wright argued, among other things, that his conviction for grand larceny from the person violated his due process right, because his indictment for robbery did not provide him with notice of the nature and character of the offense. Petition for Appeal, Court of Appeals of Virginia, No. 0585-13-3 at 12-18. The Court of Appeals concluded Wright had procedurally defaulted this argument under Virginia's contemporaneous objection rule, Virginia Supreme Court Rule 5A:18, and denied that part of Wright's petition. *Wright v. Commonwealth*, Record No. 0585-13-3 (Va. Ct. App., December 6, 2013) (per curiam); *see also Wright v. Commonwealth*, Record No. 0585-13-3 (Va. Ct. App. February 20, 2014) (unpublished order declining to apply "ends of justice" exception).

The Court of Appeals granted other parts of Wright's petition for appeal and affirmed his convictions. *Wright v. Commonwealth*, Record No. 0585-13-3, 2014 Va. App. LEXIS 376, *2-3 (Va. Ct. App. Nov. 18, 2014). Regarding his grand

larceny from a person conviction, Wright argued that there was insufficient evidence "to demonstrate that he took property from the security officer's person or was aware of the security officer's presence in the parking lot." *Wright*, 2014 Va. App. LEXIS 376, at *2-3. The Court of Appeals concluded that the evidence proved Wright acted as a principal in the second degree to the crime of grand larceny from the person and affirmed the conviction. *Id.* at *4-7.

Wright also argued, for the first time on appeal, that the evidence was insufficient to prove that the beer taken from Atkins was worth more than $5.00. *Id.* at *3, n.1. The Court of Appeals declined to address the value argument on the merits because Wright had not included it as an assignment of error in his Petition for Appeal as required by Virginia Supreme Court Rule 5A:12. *Id.* At oral argument, Wright urged the Court of Appeals to consider the value argument under the "ends of justice" exception but the court rejected Wright's argument because Rule 5A:12 "contains no 'good cause' or 'ends of justice' exceptions." *Id.*

In August 2016, the Supreme Court of Virginia reversed Wright's convictions for malicious bodily injury by means of a caustic substance, assault on a law enforcement officer, and obstruction of justice. *Wright v. Commonwealth*, 789 S.E.2d 611 (Va. 2016). The court, however, affirmed Wright's conviction for grand larceny from a person. *Id.* at 615.

E. State habeas proceedings

Wright timely filed a petition for writ of habeas corpus in the Supreme Court of Virginia. Wright raised seven claims, the first of which alleged that he was denied the effective assistance of counsel when trial counsel failed to object to a grand larceny from the person instruction on the ground that grand larceny from the person is not a lesser-included offense of robbery.[5] JA 304-06. Respondent moved to dismiss Wright's petition. The Supreme Court of Virginia remanded the habeas matter to the trial court for a determination of facts. JA 317.

The trial court conducted the evidentiary hearing on January 4, 2018. JA 319-80. At the hearing, trial counsel explained that, in preparing for trial, he did not believe that the "robbery charge had a leg to stand on," as, in trial counsel's view, the evidence established only Wright's mere presence at the alleged robbery;

---

[5] The Supreme Court of Virginia had previously held that larceny from the person was not a lesser-included offense of robbery. *Commonwealth v. Hudgins*, 611 S.E.2d 362 (Va. 2005).

> Code § 18.2-58 prescribes the punishment for robbery but does not define the offense. Robbery is defined at the common law as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, *by violence or intimidation*." *Johnson v. Commonwealth*, 209 Va. 291, 293, 163 S.E. 2d 570, 572-73 (1968). (Emphasis added). Under Code § 18.2-95, "any person who . . . commits larceny from the person of another of money or other thing *of value of $ 5 or more* . . . shall be guilty of grand larceny."

Id. at 366. (emphasis and alteration in original).

Wright's brother actually took the items from Atkins while Wright stood on the other side of the car. JA 328, 331, 342-44. When the prosecutor successfully amended the robbery indictment at trial to allege Wright committed robbery as a principal in the second degree, counsel recognized that his client had more exposure to the robbery charge, and recognized that he had to adjust his trial strategy accordingly. JA 343-44. Counsel admitted that he could not remember whether, at the time of trial, he knew that larceny from the person was not a lesser-included offense of robbery. JA 332-33.

Counsel described his preparation for the trial as "extensive[e]," involving significant factual investigation and as well as negotiations with the prosecution regarding the possibility of a plea agreement. JA 342, 354-55. While counsel had prepared to defend Wright on the robbery charge, counsel testified that he was familiar with the elements of both robbery and grand larceny from the person and was able to defend against both charges. JA 342, 328, 331.

Trial counsel further explained that, at the stage of trial when the parties were finalizing jury instructions, the trial court had denied both of trial counsel's motions to strike – which trial counsel found "more than surpris[ing]" – and counsel knew that "we were having a robbery with a five to life sentencing range going to a jury, and zero to twenty looks a whole lot better than five to life." JA 334. Counsel testified that his client's sentencing exposure was his primary

concern at that stage of the proceeding. JA 334, 346. Trial counsel testified at the evidentiary hearing that, even had he known that grand larceny from the person was not a lesser included offense of robbery, he would have made the same tactical decision to allow the jury to be instructed on the lesser crime. JA 346.

In its report, the trial court found that counsel "was unaware that larceny from the person is not a lesser included offense of robbery," but that he "did not object to" the jury instruction "because it gave the jury the ability to find culpability but not be constrained to impose a sentence beginning at five years in the penitentiary." JA 384-85. Trial counsel "wanted the jury to have the option of perspective and a lighter sentence." JA 385. Thus, the trial court found, "[t]here was strategy coupled with a lack of knowledge." JA 385.

Following briefing by the parties and oral argument, the Supreme Court of Virginia entered an order dismissing Wright's state habeas petition. JA 45-54, 388. The court determined the record supported the trial court's factual findings and noted that sentencing range upon a conviction for robbery is a term of imprisonment from five years to life, while the "range upon conviction of the grand larceny offense is confinement in jail for not more than twelve months, or imprisonment for a term of between one and twenty years." JA 49. It then addressed the legal question of "whether trial counsel's ignorance of the law supersedes his tactical decision," and concluded it did not. JA 49-50.

The Supreme Court of Virginia determined that "[a]n attorney's legal error may, but does not necessarily, render his or her performance constitutionally deficient," and considered the question of trial counsel's performance in "the totality of the circumstances to determine" if his performance was "objectively unreasonable." JA 49-50. Here, the court explained, trial counsel was "anxious that Wright would be convicted and exposed to the possibility of a life sentence," 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. In these circumstances, the Supreme Court of Virginia concluded, "Wright . . . has not met his burden to prove the deficient performance prong of the *Strickland* test on this claim." JA 50.

F. Federal Habeas Proceedings

Wright timely filed a petition for federal habeas relief under 28 U.S.C. § 2254 in the United States District Court for the Western District of Virginia. In his federal habeas petition, Wright broadened his claim of ineffective assistance of counsel to allege:

> Counsel rendered ineffective assistance of counsel by allowing the jury to be instructed on grand larceny from a person which is not [a] lesser included offense of second degree robbery [sic] rather than asking for an instruction for accessory to petty [sic] larceny which was a lesser included offense of second degree robbery [sic].

JA 13-14. The district court concluded that the first portion of Wright's claim was exhausted, but that the second portion, contending counsel was ineffective for failing to ask for an instruction on petit larceny, was "unexhausted" but procedurally defaulted, as Wright would be precluded from presenting his new claim in state court by Virginia's habeas statute of limitations and successive petition bar, both of which are adequate and independent state procedural rules. JA 400 (citing Va. Code Ann. §§ 8.01-654(A)(2), 8.01-654(B)(2); *Bassette v. Thompson*, 915 F.2d 392, 937 (4th Cir. 1990); and *Sparrow v. Dir., Dep't of Corr.*, 439 F. Supp. 2d 584, 587 (E.D. Va. 2006)).

The district court addressed the merits of the Supreme Court of Virginia's disposition of the non-defaulted portion of the claim, concluded that the state adjudication of the claim "was not contrary to, or an unreasonable application of, federal law and was not based on an unreasonable determination of the facts in the light of the evidence presented," and dismissed the federal petition. JA 409, 416.

This Court granted Wright's Application for a Certificate of Appealability on the following issues:

> (1) whether Wright's trial counsel was ineffective for failing to object to a jury instruction on grand larceny from the person where the 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

Under the doubly deferential AEDPA standard, the district court correctly held that the state court's decision rejecting Wright's claim of ineffective assistance of counsel was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, and was not based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding. In addition, Wright has not established *Strickland* prejudice on this record. The district court did not err, and the Director asks this Court to affirm the judgment below.

Wright was facing a life sentence for robbery when the prosecutor presented a jury instruction that contained an instruction for a lesser, albeit not lesser-included, offense that carried a substantially more favorable sentencing range. The Supreme Court of Virginia found that, while trial counsel was unaware that the instructed offense was not a lesser-included of the charged offense, his actions were nonetheless an objectively reasonable means of limiting Wright's sentencing exposure. The Supreme Court of Virginia reasoned that another attorney who was completely versed in the law, in the same circumstances Wright's attorney was in at the time, would have acted competently and reasonably had he or she taken the same actions as Wright's attorney. The Supreme Court of

Virginia's adjudication of this claim fell well within the range of reasonable applications of *Strickland*'s general rule.

Wright has not established a reasonable probability that, but for his attorney's alleged unprofessional errors, the result of the proceeding would have been different. Virginia law provides liberally for the amendment of indictments in order to cure variances between an indictment and the evidence presented at trial. Had counsel objected to the jury instruction, the indictment could have been amended and the jury still would have considered the larceny from the person charge.

STANDARDS OF REVIEW

A. General merits standard of review

This Court reviews "the district court's legal conclusions *de novo* and its findings of fact for clear error." *Walker v. Kelly*, 589 F.3d 127, 140 (4th Cir. 2009). This inquiry is guided, however, by the strict constraints of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013).

Under AEDPA, federal courts may not grant habeas relief in a § 2254 action unless the underlying state-court adjudication:

> (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 facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law only if it is "substantially different" from the relevant Supreme Court precedent; it is "an unreasonable application of" clearly established federal law only if it is "objectively unreasonable." *Williams (Terry) v. Taylor*, 529 U.S. 362, 405, 409 (2000). The phrase "clearly established law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of" decisions of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."); *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may

not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly."); *see also Shinn v. Kayer*, No. 18-1302, 2020 U.S. LEXIS 6092 at *10-11 (U.S. Dec. 14, 2020) (per curiam) (explaining circuit court's decision to grant relief was "fundamentally inconsistent with AEDPA" when it "treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review") (internal quotation marks and citation omitted).

To obtain federal habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. *Richter*, 562 U.S. at 102. "If this standard is difficult to meet, that is because it was meant to be." *Id.* Section 2254(d) codifies the view that habeas corpus is a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.*

at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Furthermore, AEDPA provides two "independent requirements" for federal court review of state court factual findings in habeas petitions. *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Under § 2254(d)(2), a federal court may not grant a state prisoner's application for a writ of habeas corpus based on a claim already adjudicated on the merits in a state court unless that adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." And, under § 2254(e)(1), "a determination on a factual issue made by a State court shall be presumed correct," unless the petitioner satisfies his "burden of rebutting the presumption of correctness by clear and convincing evidence."

The two provisions require that "[t]o secure habeas relief, petitioner must demonstrate that a state court's finding . . . was incorrect by clear and convincing evidence, and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. at 348: *Green v. Johnson*, 515 F.3d 290, 299 (4th Cir. 2008). As with the state court's legal conclusions, "[a] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

B. Ineffective assistance of counsel standard of review and applicable law.

Strickland v. Washington, 466 U.S. 668 (1984), provides a highly demanding standard for claims of ineffective assistance of counsel. Under *Strickland*, Wright has the burden to show that his attorney's performance was deficient *and* that he was prejudiced as a result. *See Strickland*, 466 U.S. at 687.

"The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Thus, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105.

"[T]o avoid the 'distorting effect of hindsight,'" reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Valentino v. Clarke*, 972 F.3d 560, 580 (4th Cir. 2020) (quoting *Yarbrough v. Johnson*, 520 F.3d 329, 337 (4th Cir. 2008)). "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 698. *Strickland* demands an objective evaluation of counsel's conduct. *Id.*

at 690; *Richter*, 562 U.S. at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

"*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Richter*, 562 U.S. at 110. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Strickland*, 466 U.S. at 687*; see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, "deficient performance[] requires [] showing 'that counsel's representation fell below an objective standard of reasonableness,' as measured by 'prevailing professional norms' and in light of 'all the circumstances 'of the representation.'" *Owens v. Stirling*, 967 F.3d 396, 412 (4th Cir. 2020) (quoting *Strickland*, 466 U.S. at 688)).

To satisfy *Strickland*'s prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *Lovitt v. True*, 403 F.3d 171, 181 (4th Cir. 2005). The relevant

question "is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different." *Richter*, 562 U.S. at 111-12 (internal citations omitted). A petitioner is not required to show "that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' The likelihood of a different result must be substantial, not just conceivable." *Id.*

An ineffective counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." *Spencer v. Murray*, 18 F.3d 229, 232-33 (4th Cir. 1994); *see also Strickland*, 466 U.S. at 697.

Finally, "[f]ederal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). 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.

"And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that

standard." *Mirzayance*, 556 U.S. at 123. Consequently, the appropriate federal review of state courts judgments adjudicating *Strickland* claims is "doubly deferential." *Id.* That is, the reviewing court "take[s] a 'highly deferential' look at counsel's performance, through the 'deferential lens of § 2254(d).'" *Cullen v. Pinholster*, 563 U.S. 170, 172 (2011); *see also Premo v. Moore*, 562 U.S. 115, 123 (2011) ("The Court of Appeals was wrong to accord scant deference to counsel's judgment, and *doubly wrong* to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes.") (emphasis added).

ARGUMENT

I. The Supreme Court of Virginia's rejection of Wright's claim that trial counsel was ineffective when he did not object to Jury Instruction 10 on the ground that larceny from the person is not a lesser-included offense of robbery was not contrary to or an unreasonable application of clearly established federal law, nor based on an unreasonable determination of the facts.

A. The Supreme Court of Virginia's determination that trial counsel's performance was not deficient is consistent with the objective nature of the deficient performance inquiry and faithfully applied the United States Supreme Court's *Strickland* precedent.

The Supreme Court of Virginia found that Wright's trial counsel made a tactical decision to agree to Jury Instruction 10. JA 49. The state court recognized that trial counsel did not know, at the relevant time, that larceny from the person was not a lesser-included offense of robbery under Virginia law. The state court then

conducted an evaluation of the totality of the circumstances that existed at the time trial counsel agreed to the instruction and concluded that trial counsel's agreement to Jury Instruction 10 was objectively reasonable in the circumstances. JA 49-50. In so doing, the Supreme Court of Virginia's determination faithfully applied *Strickland*'s direction to decide the ineffectiveness claim by "judg[ing] the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

The state court's legal and factual findings are significant. Essentially, while it found that counsel was unaware of law which would have allowed him to object to the instruction, it ultimately found that counsel's failure to object was not "*based on* a misunderstanding of the law;" instead, he consciously refrained from objecting based on "a strategic decision to for[]go one defense [an "all-or-nothing" defense] in favor of [a defense allowing the jury to find Wright guilty of a less serious offense]." *Crace v. Herzog*, 798 F.3d 840, 852 (9th Cir. 2015) (applying this principle in context of lawyer who did not request a lesser-included offense instruction) (internal quotation marks and citation omitted) (emphasis added).[6] Both counsel's decision

[6] In fact, a more accurate description of counsel's supposed "mistake" of law would be that he simply did not see any need to seek leave to conduct additional research midtrial to support an objection to an instruction he though benefitted his client.

and the state court's decision rejecting Wright's ineffective assistance of counsel claim were reasonable.

1. Trial counsel's agreement to the jury instruction was objectively reasonable.

Going into trial, Wright faced three serious felony charges, one of which (robbery) was a violent felony with a sentencing range that started at five years and ended at life imprisonment. *See* Va. Code Ann. § 18.2-58. Wright's other felony charges, malicious bodily injury by use of a caustic substance and felony assault of a police officer, carried sentences of five-to-thirty years and one-to-five years, respectively. *See* Va. Code Ann. §§ 18.2-52, 18.2-57(C), 18.2-10(f).

Immediately before trial, the trial court granted the prosecutor's motion to amend the robbery indictment to allege that Wright acted as a principal in the second degree, thus exposing Wright to criminal liability not only for acts that he directly performed but also those that he might have aided, abetted, or encouraged.[7] JA 68, 73-76, 343. During trial, the jury heard evidence that what had started out as a shoplifting incident escalated first into a day-time confrontation in a store parking lot

[7] Under Virginia law, "[a] principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance." *Brown v. Commonwealth*, 107 S.E. 809, 810 (Va. 1921). "When the alleged accomplice is actually present, but performs no overt act, he is nonetheless a principal in the second degree if he has previously communicated to the perpetrator that he shares the perpetrator's criminal purpose." R. Groot, *Criminal Offenses and Defenses in Virginia* 183 (1984). The communication of shared intent makes the perpetrator more likely to act. *Id.*

and then into a three-hour standoff in a residential neighborhood that ended only when a SWAT team forcibly entered the house and removed Wright and his brother. JA 124, 140. Counsel also was taken aback by the trial court's denials of his motions to strike the robbery charge. JA 155, 202, 343, 346. Counsel's theory of defense, that Wright did not participate in the taking and the taking was not accomplished by force or threat of violence were imperiled. Counsel was anxious that Wright, who had a prior criminal record, would be convicted of robbery and exposed to the possibility of a life sentence.[8] JA 248, 334, 346.

At that point, trial counsel's primary concern shifted to Wright's sentencing exposure. JA 49, 334, 346, 384-85. Trial counsel explained that he agreed to the jury instruction because it would allow the jury to impose a sentence that limited incarceration to a term of no more than twenty years, and it also allowed the possibility of no incarceration at all. JA 334, 346. Trial counsel confirmed that even if he had known that grand larceny from the person was not a lesser-included offense of robbery, he still would have agreed to the jury instruction to provide the jury with an alternative to the robbery charge. JA 346. While trial counsel hoped that the jury

[8] At the time of Wright's trial, Virginia Code § 19.2-295.1 provided:

> In cases of trial by jury, upon a finding that the defendant is guilty of a felony . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury. At such proceeding, the Commonwealth . . . shall present the defendant's prior criminal history . . . .

would acquit Wright or even that the jury would nullify the robbery charge, he realized that the jury had before it "a very serious charge of robbery against" Wright. JA 346. Trial counsel testified that he would like for a jury to have the lesser charge to consider "any day of the week." JA 346.

Thus, by the time the parties were discussing the instructions, the trial court had made several legal rulings adverse to Wright. Moreover, the evidence was in, and it was bleak. It was reasonable for trial counsel to accept the possibility that Wright's acquittal was becoming less likely. *See Waters v. Thomas*, 46 F.3d 1506, 1522 (11th Cir. 1995) (discussing variety of intangible factors that inform trial counsel's strategic decisions, including "counsel's knowledge of local attitudes," "evaluation of the particular jury," and counsel's "sense of the chemistry of the courtroom").

Trial counsel was called upon to decide how to proceed in this case and determined in his professional judgment that an instruction on a drop-down charge could provide Wright with a significant benefit. *Cf. Schmuck v. United States*, 489 U.S. 705, 717 n.9 (1989) (recognizing the danger "that where the jury suspects that the defendant is plainly guilty of *some* offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser offense instruction," it is "likely" that the jury will "resolv[e] its doubts in favor of conviction," thus "fail[ing] to give full effect to the reasonable-doubt standard . . . . The availability

of a lesser-included offense instruction protects the defendant from such improper conviction.") (citing *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)). Trial counsel's decision to present the jury with a compromise opportunity, rather than taking an all-or-nothing gamble on a life sentence, was reasonable under the circumstances and the state court's finding to that effect was a reasonable application of the *Strickland* standard.

Trial counsel's decisions regarding which objections to make and what jury instructions to request are generally strategic in nature. *See Gonzalez v. United States*, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make . . . depend not only upon what is permissible of the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial."); *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006) (decision to request instruction on lesser-included offense "dwells in the region of tactics and strategy"). Attorneys are afforded particular leeway where a potential strategy carries "double-edged" consequences. *See St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006); *Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cr. 1991) ("The failure to put on [certain mitigation evidence at sentencing], or the presentation of evidence which backfires, may equally expose counsel to collateral charges of ineffectiveness."). This "double-edged" principle extends to decisions to request or forego a lesser-included offense

instruction as well, because "'giving the instruction may decrease the chance that the jury will convict for the greater offense, but it also may decrease the chance of an outright acquittal.'" *United States v. Estrada-Fernandez*, 150 F.3d 491, 496 (5th Cir. 1998) (quoting *United States v. Dingle*, 114 F.3d 307, 313 (D.C. Cir. 1997)). An attorney's informed strategic choices are "virtually unchallengeable." *Strickland*, 466 at 690.

When, however, as here, an attorney's decisions are made on an imperfect understanding of the law, they are no longer "virtually unchallengeable," but must be "assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691 (examining claim counsel unreasonably limited investigation into mitigating evidence and explaining decision to limit investigation must be viewed in light of "reasonable professional judgment"); *Kimmelman*, 477 at 385-86 (concluding challenged conduct was not result of strategy then reviewing conduct for objective reasonableness); *Lee v. Clarke*, 781 F.3d 114, 123-24 (4th Cir. 2015) (finding deficient performance when there was no strategic reason for counsel to fail to request a jury instruction and the record established that a "competent attorney would have requested the instruction" based on the evidence at trial).

"Even where an attorney's ignorance of relevant law and facts precludes a court from characterizing certain actions as strategic (and therefore presumptively

reasonable) . . . the pertinent question under the first prong of *Strickland* remains whether, after considering all the circumstances of the case, the attorney's representation was objectively unreasonable." *Bullock v. Carver*, 297 F.3d 1036, 1050-51 (10th Cir. 2002); *Samples v. Ballard*, No. 2:14-cv-15413, 2016 U.S. Dist. LEXIS 43704 *17 (S.D. W. Va, March 31, 2016) ("Thus, although it is generally presumed that an attorney's conduct might be part of a legitimate trial strategy, that presumption is heightened where the attorney can show that his act or omission was actually a strategic choice made upon reasonable investigation.") (citations omitted). [A]n attorney's performance is never per se constitutionally deficient even when he takes an action as a result of an incomplete (or inadequate) investigation." *United States v. Mitchell*, No. 05-cv-823, 2007 U.S. Dist. LEXIS 37865, *29 (E.D. Pa. May 24, 2007) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2003) ("[W]e have consistently declined to impose mechanical rules on counsel — even when those rules might lead to better representation . . . .").

Here, as the Supreme Court of Virginia found, a competent, fully informed attorney who was aware that grand larceny from the person was *not* a lesser-included offense of robbery could have reasonably made the same decision to avoid drawing attention to a prosecutor's action that could be beneficial to his client. *Cf. Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (en banc) ("It is well established that failure to object to inadmissible or objectionable material

for tactical reasons can constitute objectively reasonable trial strategy under *Strickland*.") (collecting cases). The only difference is that a fully informed attorney would have known that he was not legally entitled to the instruction. *Cf. Commonwealth v. Dalton*, 524 S.E.2d 860, 862 (Va. 2000) (holding defendant was not entitled to the instruction he requested on the crime of being an accessory after the fact because it was not a lesser-included offense of second-degree murder). He still reasonably could have viewed the prosecutor's erroneous inclusion of the instruction on the lesser charge as a windfall benefitting his client.

While the effect of an agreed instruction on a lesser (but not lesser-included) crime is to waive indictment, *see Commonwealth v. Bass*, 786 S.E.2d 165, 170 (Va. 2016),[9] when a trial court allows such an instruction, the defense receives the potential benefit of a compromise verdict to which it otherwise would not have legally been entitled.[10] This is exactly what happened in Wright's case, as he

[9] In contrast to the right to indictment by a grand jury guaranteed to federal defendants by the Fifth Amendment, Virginia's grand jury right "is subject to waiver, procedural rather than jurisdictional in nature, and is purely a statutory requirement . . . not predicated upon any guarantee or provision found in the Constitution of Virginia") (internal quotation marks and citations omitted). *Brown v. Commonwealth*, 813 S.E.2d 557, 569 (Va. Ct. App. 2018).

[10] Urging conviction on a lesser offense, even when it is not a lesser-included offense, is not an unknown tactic in Virginia trial courts. *See, e.g.*, *Rowe v. Commonwealth*, 675 S.E.2d 161, 164 (Va. 2009) (defendant, in bench trial, "advanced the assault charge – the charge of which he was never indicted but eventually convicted – as a more lenient alternative to the attempted murder charge he was then facing and maintained it was a lesser-included offense); *Dalton*, 524

avoided a conviction for robbery – a violent felony – and the possibility of life imprisonment. Counsel's decision did not amount to incompetence under prevailing professional norms under Virginia law, and the Supreme Court of Virginia's finding to that effect is not an unreasonable application of *Strickland*.

2. The Supreme Court of Virginia's conclusion that trial counsel's subjective ignorance of the law did not render his performance objectively unreasonable did not rest on an unreasonable application of Supreme Court precedent.

Wright maintains that counsel's alleged failure to adequately research the law prior to trial strips away any deference and renders his agreement to the jury instruction unreasonable. Opening Br. 14-24. In this respect, Wright appears to suggest that if an attorney admits to an imperfect understanding of the law, his performance is constitutionally deficient *per se*.[11]

S.E.2d at 861 (defendant charged with murder requested jury instruction on crime of being an accessory after the fact of murder although it was not a lesser-included offense); *Talley v. Commonwealth*, No. 0647-05-2, 2006 Va. App. LEXIS 310 at *4-5, 2006 WL 1888697 (Va. Ct. App. 2006) (defendant, in a bench trial, did not object to prosecutor's incorrect assertion that unlawful wounding was lesser-included offense of attempted murder).

[11] The "presumption of competence," however, "must be disproved by a petitioner. Petitioner continually bears the burden of persuasion on the constitutional issue of competence and further, (adding the prejudice element) on the issue of ineffective assistance of counsel. . . . Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner." *Chandler*, 218 F.3d at 1314 (comparing the *Strickland* presumption of competence to "the presumption of innocence in a criminal trial").

That position is inconsistent with *Strickland*. To the contrary, the United States Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). In other words, the test is objective: the question "is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Thus, while an error of law can render an attorney's performance deficient, it will not always do so. *See Bullock*, 297 F.3d at 1049-51, *Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (en banc); *Samples*, 2016 U.S. Dist. LEXIS 43704, *23-26. Instead, the proper inquiry remains whether counsel's actions were objectively reasonable. *Roe*, 528 U.S. at 481.

For this reason, the Supreme Court of Virginia properly evaluated not only trial counsel's ignorance, but also examined his overall strategy (limiting Wright's sentencing exposure) and asked whether his action was one that an attorney reasonably could have taken under the same circumstances. *See Kimmelman*, 477 U.S. at 384-85 (instructing, even when attorney errs, "it will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance"). If it were

otherwise, a defendant whose attorney confessed post-trial that his conduct was the result of oversight or ignorance would be better off than the defendant whose attorney engaged in the same conduct deliberately for strategic reasons.

Wright relies on a series of United States Supreme Court cases involving attorneys who failed in their duty to conduct an adequate (or in some cases any) pre-trial investigation. None is on point.[12]

In *Kimmelman*, trial counsel failed to conduct *any* pre-trial discovery, based on his mistaken belief that the government "was obliged to take the initiative and turn over all of its inculpatory evidence to the defense . . . ." 477 U.S. at 385. As a result, trial counsel was unaware that the government intended to introduce certain evidence of guilt and failed to timely move to suppress it. *Id.* at 384. The Supreme Court rejected the suggestion that any strategy supported counsel's failure to seek suppression of the evidence and, "applying a heavy measure of deference" to

[12] Of course, this case does not fit within the failure-to-investigate framework because the claimed counsel error is not really a failure to conduct factual investigation and prepare for trial. It is a failure to object. The difference is significant, because the decision of whether to object frequently occurs during trial, without the luxury of time, and while counsel is evaluating any number of competing priorities. *See Gonzalez*, 553 U.S. at 249 (describing whether to object at trial as a "tactical decision of the moment"). That said, even viewed under the failure-to-investigate framework, Wright's claim would fail. His counsel's decision to offer the jury a less severe sentencing option was eminently reasonable. Thus counsel made "a reasonable decision that ma[de] [investigation regarding the propriety of the grand larceny from the person instruction] unnecessary." *Strickland*, 466 U.S. at 691.

counsel's "judgment," concluded that counsel's failure to conduct any pretrial investigation was objectively unreasonable in the circumstances. *Id.* at 385.

The Court found deficient performance in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000), for similar reasons. There, counsel did not prepare for the sentencing phase in a death penalty case "until a week before trial." *Id.* at 395. Counsel simply "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood," that would have provided valuable mitigation evidence at sentencing "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.*

In *Hinton v. Alabama*, 571 U.S. 263 (2014), another death penalty case, the Court found deficient performance when trial counsel failed "to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all [of the funding] he could get under Alabama law." 571 U.S. at 274. Had Hinton's attorney made "even [a] cursory investigation of the state statute providing for defense funding for indigent defendants" he would have known "that he could receive reimbursement not just for $1,000 but for 'any expense reasonably incurred.'" *Id.* On these facts, the Court stated that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a

quintessential example of unreasonable performance under *Strickland*." *Id.* (citing *Williams*, 529 U.S. at 395 and *Kimmelman*, 477 at 385). The Court concluded that the "inadequate assistance of counsel was the inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him – that caused counsel to employ an expert that *he himself* deemed inadequate." *Id.* at 275.

Regardless of how the issue is framed, the state court's adjudication of Wright's claim was not inconsistent with *Strickland*, *Kimmelman*, *Williams*, or *Hinton*. The Supreme Court of Virginia recognized that trial counsel did not know, at the time of trial, that grand larceny was not a lesser-included offense of robbery, but counsel's actions were nevertheless objectively reasonable. JA 49. Unlike that of the attorneys in *Kimmelman*, *Williams*, and *Hinton*, trial counsel's legal mistake in this case did not lead him to an act or omission that could only damage his client, like failing to move to suppress evidence he did not know existed, failing to seek mitigation evidence, or failing to replace an expert that he recognized was unqualified. Instead, in this case, despite any error of law, trial counsel's agreement to the jury instruction was objectively reasonable because, in the circumstances counsel faced at the time, that decision was potentially to Wright's advantage, and could have been taken by fully informed counsel. JA 50.

The Supreme Court of Virginia's determination in this regard was a reasonable application of the general *Strickland* standard. A contrary conclusion, that counsel performs deficiently when he takes a strategic action at trial that is not based on a complete understanding of the law (whether based on a backwards-looking evaluation of counsel's pretrial research skills or counsel's momentary lapse while standing in the courtroom), would run close to transforming *Strickland*'s objective inquiry into counsel's performance into a subjective test of counsel's knowledge. *See Strickland*, 466 U.S. at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance."). Instead, reviewing courts "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. Reviewing courts are required not only "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of possible "reasons [counsel] may have had for proceeding as they did[.]" *Pinholster*, 563 U.S. at 196.

Wright further argues that the state court's use of the phrase "no competent counsel" expresses a standard different from *Strickland*'s objectively reasonable standard, and that it conflates the performance and prejudice prongs. However, the Supreme Court of the United States use of the same terminology in *Premo v. Moore* seems to defeat Wright's argument. 562 U.S. 115, 124 (2011) (explaining

that "the relevant inquiry under" *Strickland*'s performance inquiry is whether "no competent attorney" would take undertake counsel's same course of conduct) (citing *Kimmelman*, 477 U.S. at 382; *Richter*, 562 U.S. at 89). Indeed, the phrase has been consistently used as the Supreme Court of Virginia used it: to describe, not replace, *Strickland*'s requirement that counsel's performance must not fall below an objective standard of reasonableness.[13]

Wright further relies on cases from federal circuit and district courts to argue that the Supreme Court of Virginia's adjudication was wrong on the merits. Opening Br. at 18-24. His argument is unavailing, not least because it is insufficient to claim that a state court's decision is merely incorrect. *See Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (explaining "a federal court may . . . grant habeas relief only if it determines that the state court decision is contrary to, or an unreasonable application of, Supreme Court jurisprudence, and not circuit court precedent"). The cited cases also are distinguishable from the facts in Wright's case. *See also Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (explaining "circuit precedent does not constitute clearly established Federal law, as

[13] *See*, *e.g.*, *Rivera v. Thompson*, 879 F.3d 7, 12 (1st Cir. 2018) (stating standard); *United States v. Freixas*, 332 F.3d 1314, 1320 (11th Cir. 2003) (same); *Bullock*, 297 F.3d at 1049 (collecting cases); *Chandler*, 218 F.3d 1305, 1315-1316 (11th Cir. 2000) (en banc) (collecting cases). It is also consistent with the Supreme Court's admonition in *Pinholster* that a habeas court must consider the range of reasons counsel "may have had" for taking certain actions. 563 U.S. at 196.

determined by the Supreme Court . . . . It therefore cannot form the basis for habeas relief under AEDPA.") (internal quotation marks and citations omitted); *Renico v. Lett*, 559 U.S. 766, 778-90 (2010) (same).

In *Thompson v. Gansler*, 734 Fed. Appx. 846 (2018) (unpublished), this Court, conducting a de novo review, concluded that counsel performed deficiently when she failed to object to the defendant's "legally inconsistent verdicts, on account of her admitted ignorance of the law . . . ."[14] *Id.* at 854. Nine months before the petitioner's trial, the Court of Appeals of Maryland issued a decision abrogating long-standing Maryland common law and holding that, "upon objection by a defendant, legally inconsistent jury verdicts in criminal cases 'shall no longer be allowed.'" *Id.* at 850 (quoting *Price v. State*, 949 A.2d 619, 640 (2008)). At the hearing on state post-conviction relief, "trial counsel testified that she would have objected to the verdicts returned" at trial had she been aware of the law. *Id.* at 850.

This Court concluded that the district court's deficient performance analysis "r[an] counter to the myriad controlling opinions standing for the proposition that acts or omissions made by counsel under a mistaken belief or ignorance of law are rarely — if ever — 'reasonable' in light of prevailing professional norms." *Id.* at

[14] In *Gansler*, a § 2254 case, the state post-conviction court decided the performance prong in the petitioner's favor, while the federal district court decided otherwise. *Id.* at 851. Accordingly, this court considered the performance prong *de novo*.

855 (collecting cases). This Court further concluded that counsel, who was unaware that there was a legal basis to object to the inconsistent verdicts, was "'not in a position to make an informed strategic choice' about whether to object to the jury's verdicts." *Id.* (quoting *Gray v. Branker*, 529 F.3d 220, 231 (4th Cir. 2008)).

Importantly, as this Court emphasized, "there was no downside to trial counsel raising" an objection because "had the jury deliberated and thereafter convicted Petitioner of an attempted armed robbery count, that count simply would have 'merged' into the armed robbery count." *Id.* at 856 (citations omitted). On the other hand "there was a 'tremendous upside' to a timely objection:" the possibility that, upon re-deliberations, the jury may have acquitted the petitioner of armed robbery and felony murder. *Id.* at 857. This Court agreed with the state court that, under the circumstances, Thompson's attorney performed deficiently. *Id.*

In *United States v. Carthorne*, 878 F.3d 458 (4th Cir 2017), decided under § 2255, this Court concluded counsel's failure to object to the career offender sentencing enhancement was not entitled to the "'strong presumption that the alleged errors were actually part of a sound trial strategy'" because counsel failed "'to do basic research.'" *Id.* at 469 (quoting *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987) and *Gordon v. United States*, 518 F.3d 1291, 1300-02 (11th Cir. 2008)). Thus, counsel's failure "to demonstrate a grasp of the relevant legal standards, to conduct basic legal research relating to those standards, and to object

to [a] sentencing enhancement (even though there was a strong basis for such an objection), taken collectively, constituted deficient performance." *Id.* at 469. Similarly, in *Dodson v. Ballard*, 800 Fed. Appx. 171 (4th Cir. 2020) (unpublished), this Court granted habeas relief on a §2254 petition when counsel's ignorance and misadvice regarding the elements of the charged offense caused petitioner to refuse a favorable plea agreement. *Id.* at 180.

Wright's case differs from *Thompson, Carthorne*, and *Dodson* in important ways. Wright's attorney did not base his actions on ignorance of the law; instead, his decision was based on the legitimate trial strategy of limiting Wright's sentencing exposure. JA 346. The Supreme Court of Virginia credited that testimony and concluded Wright's decision to refrain from objecting was objectively reasonable in the circumstances. JA 50. Moreover, unlike in *Thompson* and *Carthorne*, there was a significant potential "downside" to an objection from Wright's counsel: gambling that the jury still would acquit on robbery, despite the strong evidence presented at trial. *Dodson* is inapposite. Trial counsel did not misadvise Wright concerning the elements of the offense with which he was charged, causing him to lose out on an opportunity to plead guilty and receive a lower sentence.

Wright also relies on *Spivey v. United States*, No. 1:01cr484, 2007 U.S. Dist. LEXIS 58591 (E.D. Va. Aug. 10, 2007), to argue that trial counsel performed

deficiently by failing to object to the jury instruction. Opening Br. at 23-25, 36-37. That decision, of course, is not controlling here. In any event, it is also clearly distinguishable.

In *Spivey*, the district court concluded that a defense attorney acted incompetently when he requested **and** acquiesced in a jury instruction on a crime that was not a lesser-included offense of the charged crime, and that the attorney's actions prejudiced the defendant because they "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 U.S. Dist. LEXIS 58591 at *14-15. *Spivey* involved a federal prosecution and was before the district court on a motion to vacate under 28 U.S.C. § 2255(a), not deferential review of a state habeas determination under § 2254(d).

Unlike the attorney in *Spivey*, trial counsel in this case did not request the disputed jury instruction, but instead agreed to the prosecutor's proposed instruction. Moreover, while the reasoning of the Eastern District and the Supreme Court of Virginia differ here, the *Spivey* decision was simply a collateral review of the conviction, not an AEDPA limited review of a state's court's independent habeas decision. *Spivey* demonstrates only that reasonable jurists could differ, not that the Supreme Court of Virginia's ruling is contrary to, or an

unreasonable application of, settled Supreme Court precedent. It therefore does not undermine the deference owed to the state court decision under AEDPA.

3. Wright's argument that counsel was ineffective for failing to request a jury instruction for the lesser-included offense of petit larceny is procedurally defaulted and otherwise without merit.

Wright argues that no objectively reasonable trial attorney would have agreed to the larceny-from-the-person instruction when an instruction on the lesser-included offense of petit larceny would have better served the strategy of providing the jury with an option of a lower sentence. Opening Br. 26. Petit larceny is a misdemeanor punishable by up to 12 months in jail. Va. Code Ann. § 18.2-96.

The district court correctly concluded Wright's allegation that counsel was ineffective for failing to ask for a petit larceny instruction was procedurally defaulted because it was not pleaded in his state habeas petition. JA 400. To the extent this argument expands the claim Wright brought on state habeas, this Court should come to the same conclusion. As the district court held, the state court did not have an opportunity to adjudicate this claim, and Wright would now be precluded by state law from bringing it.[15] *See Baker v. Corcoran*, 220 F.3d 276,

[15] Wright has not articulated any cause for this default. JA 399. Wright has not presented any new evidence showing actual innocence, *see Murray v. Carrier*, 477 U.S. 478, 496 (1986), and the defaulted claim is not "substantial" under *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) because "[c]ounsel is not ineffective merely because he overlooks one strategy while vigilantly pursuing another." *Williams v.*

288 (4th Cir. 2000); Va. Code §§ 8.01-654(A)(2), 8.01-654(B)(2); *Bassette v. Thompson*, 915 F.2d 392, 937 (4th Cir. 1990); and *Sparrow v. Dir., Dep't of Corr.*, 439 F.Supp. 2d 584, 587 (E.D. Va. 2006)).

B. Wright has not established *Strickland* prejudice.[16]

Wright has not borne his burden to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In assessing *Strickland* prejudice, reviewing courts "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland*, 466 U.S. at 695.

Kelly, 816 F2d 939, 950 (4th Cir. 1987); *see also Strickland*, 466 U.S. at 589 ("Even the best criminal defense attorneys would not defend a particular client in the same way."). Moreover, Wright cannot show a reasonable probability that instruction for petit larceny would yield a different result as the jury sentenced Wright to ten years for grand larceny.

[16] In denying Wright's ineffective assistance claim, the Supreme Court of Virginia did not reach the element of *Strickland* prejudice. *See Spencer v. Murray*, 18 F.3d 229, 232-33 (4th Cir. 1994) (explaining deficient performance and prejudice are two separate and distinct elements of an ineffective assistance claim); Should this Court determine that the state court's judgment finding no deficient performance was the result of an unreasonable application of clearly established federal law or of an unreasonable finding of fact, it then addresses the question of whether Wright was prejudiced by any deficient performance *de novo*. *See Rompilla v. Beard*, 545 U.S. 374, 387-89 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Wright claims that, given a proper objection, the trial court would have been constrained to refuse to instruct on grand larceny from the person and he therefore could not have been convicted of the crime, or, failing that, his conviction would have been reversed on appeal.[17] Opening Br. 26-27.

Wright has not established the reasonable probability of a different result, sufficient to undermine confidence in the outcome of the trial. Had Wright objected, the prosecutor could have simply moved to amend the indictment under Virginia Code § 19.2-231. *See Martin v. Warden, Virginia State Penitentiary*, 341 S.E.2d 202, 207 (Va. Ct. App. 1986) ("The Supreme Court of Virginia has determined that the policy of the legislature is to try criminal cases on their merits as far as possible, and to ignore mere formal defects. This is demonstrated by the liberal provisions for amendment provided by the statute.") (citing *Livingston* v. *Commonwealth*, 184 36 S.E.2d 561, 564 (Va. 1946)); *see also Bass*, 786 S.E.2d 165, 172 n.6 (2016) (describing Va. Code Ann. § 19.2-231 as "a well-established mechanism for remedying any confusion or surprise that might occur due to a variance between an indictment and the evidence presented").

[17] The federal appellate courts have split about whether the prejudice analysis should be confined to trial outcome or whether it should include an analysis of outcome on appeal. *See Ngo v. Holloway*, 551 Fed. Appx. 713, 718 (4th Cir. 2014). The Court need not resolve this issue because, as addressed above, Wright cannot show a reasonable probability of a different result at either stage.

The statute provides, in part:

> If . . . there shall be any variance between the allegations [in the indictment] and the evidence offered in proof thereof, the court may permit amendment of such indictment . . . at any time before the jury returns a verdict . . . provided the amendment does not change the nature or character of the offense charged.

Va. Code Ann. § 19.2-231.[18]

On the other hand, upon objection, the prosecutor could have withdrawn the instruction, or the trial court could have rejected it, leaving Wright without the option of a compromise verdict. Given the evidence against Wright, he cannot establish a substantial likelihood that a properly instructed jury would have acquitted him of robbery in the absence of the grand larceny from the person instruction. The evidence at trial established that Wright committed robbery based

---

[18] "The purpose of an indictment is to give the defendant notice of the nature and character of the charged offense so he can make his defense." *Pulliam v. Commonwealth*, 688 S.E.2d 910, 912 (Va. Ct. App. 2010). Thus, "[t]he limitation on amendment to indictments in Code § 19.2-231 to amendments that do not change the nature or character of the offense is clearly intended to protect the defendant from being deprived of [that] notice . . . ." *Id.* at 912 (quoting *Rawls v. Commonwealth*, 634 S.E.2d 697, 702 (Va. 2006)).

Under Virginia law, the "nature and character inquiry" turns on the underlying conduct of the appellant, rather than the elements of the offense. *Pulliam v. Commonwealth*, 688 S.E.2d 910, 913 (Va. Ct. App. 2010) (same). Thus, while robbery and grand larceny from the person have distinct elements, the Commonwealth continually premised its case against Wright on the same operative facts throughout the prosecution of both offenses: that Mark Wright acted as a principal in the second degree to the taking when he encouraged his brother and nephew to flee. *See Charles v. Commonwealth*, 756 S.E.2d 917 (Va. Ct. App. 2014).

on his participation in the crime when C.W. made threatening statements to Atkins, Robert grabbed the beer back from Atkins, and Wright then encouraged his brother and C.W. to flee. *Strickland*, 466 U.S. at 694-95. Accordingly, Wright has not established *Strickland* prejudice.

Wright's argument regarding a different result on appeal fares no better. Had Wright objected to the jury instruction, it is reasonably probable that trial court would have sustained the objection and remedied the jury instruction, or that the prosecutor would have taken corrective action described above. Either course would have deprived Wright of the issue on appeal.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS,

By: /s/
Victoria Johnson (VSB No. 68282)
Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773 – Telephone
(804) 371-0200 – Facsimile
OagCriminalLitigation@oag.state.va.us
vjohnson@oag.state.va.us

Counsel for Respondent-Appellee

STATEMENT REGARDING ORAL ARGUMENT

In compliance with Federal Rule of Appellate Procedure 34(a)(1), the Director suggests oral argument in this case would aid the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 12,578 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/
Victoria Johnson

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2020, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/
Victoria Johnson