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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mark O'Hara Wright has served a decade in prison for a crime that was not properly charged, and that the jury could not lawfully consider. His counsel's decision to accept proposed instructions on that crime was based on the mistaken belief that grand larceny from the person was a lesser-included offense of robbery, and that agreeing to that charge was the only way to give the jury a less serious alternative. A minimal investigation of the governing law would have revealed those mistakes, prompted counsel to object, and saved Mr. Wright the better part of a decade in prison.

The Virginia Supreme Court's conclusion that Wright failed to prove deficient perfomance by counsel rests on an unreasonable application of clearly established federal law, and the Commonwealth's brief mounts no persuasive argument to the contrary. The Commonwealth argues that competent and informed counsel *could have* made a reasonable strategic judgment to acquiesce in these instructions in order to avoid an "all-or-nothing gamble" on the robbery charge. Response 32. Like the Virginia Supreme Court, however, the Commonwealth never acknowledges the fact that informed counsel would not have perceived such a dilemma. Counsel could have objected to the prosecution's improper grand larceny proposal and (if desired) still given the jury a less serious alternative to robbery in the form of petit larceny instructions. And, like the Virginia Supreme

Court, the Commonwealth's brief never truly accepts that counsel's indefensible failure to investigate the governing law precludes any deference to his supposed "strategic" choices, under well-established law.

The Commonwealth cannot deny that a timely objection to the grand larceny instructions would have been granted. It speculates that the prosecutor might then have sought leave to amend the indictment after the close of the evidence. But that procedure is complicated and discretionary, and the prosecutor testified in this case that he regards it as "unusual." JA 374. It is far more likely that the jury would then have been instructed on the correct petit larceny alternative that carries at most a twelve-month sentence. The prejudice prong of *Strickland v. Washington* requires only a reasonable probability of a different result, "sufficient to undermine confidence in the outcome." 466 U.S. 668, 694 (1984). That standard is plainly satisfied here.

ARGUMENT

I. THE COMMONWEALTH'S BRIEF FAILS TO JUSTIFY THE VIRGINIA SUPREME COURT'S UNREASONABLE APPLICATION OF *STRICKLAND*'S DEFICIENCY PRONG

A. The Commonwealth Relies On A Meritless Procedural Default Argument To Justify Ignoring Or Misstating The Actual Strategic Situation Facing Trial Counsel

The Commonwealth never addresses the true context and nature of the decision facing Wright's trial counsel. The Commonwealth's brief argues that

"[t]rial 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." Response 32. The Commonwealth even suggests that "the prosecutor's erroneous inclusion of the instruction on [grand larceny] [w]as a windfall benefiting his client," and that "the only difference" an appropriate investigation of the law would have made "is that a fully informed attorney would have known he was not legally entitled to" that supposedly beneficial instruction. Response 35.

Like the Virginia Supreme Court, however, the Commonwealth completely ignores the fact that there is a lesser-included offense of robbery: petit larceny, which carries a maximum sentence of twelve months. If counsel had done a minimal investigation, he would have known that the grand larceny instruction was not a "windfall" to Mr. Wright, but a serious overstatement of the lesser-included offense actually available to the jury. If counsel had thought it important to give the jury an alternative to robbery, petit larceny was a far superior alternative. Counsel was

familiar with that crime[1] and entitled to request that instruction.[2] No competent and informed counsel therefore could have acted on the false premise that the only available strategic choices were an "all-or-nothing gamble on a life sentence," Response 32, or accepting an unlawful grand larceny instruction that carried a potential 20-year sentence.

The Commonwealth's failure to acknowledge or engage with that reality is unexplained until the very end of its brief, when it argues that Wright procedurally forfeited any claim "that counsel was ineffective for failing to ask for a petit larceny instruction." Response 47. The syllogism apparently goes: (1) Wright has never pressed a distinct claim arguing that failing to request a petit larceny instruction constituted ineffective assistance of counsel; (2) any such claim is procedurally barred; therefore (3) Wright cannot point to the possibility of a petit larceny instruction as part of any argument that a competent and informed lawyer would have objected to the charge of grand larceny.

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[1] Wright was charged with petit larceny in this very case, for the original act of taking the sandwiches and beer from the store, and pled guilty to that charge. *See* JA 67, JA 364-65. Competent counsel would have understood (or discovered) that the allegations about the later taking from Garrett Atkins could have been charged under that same provision.

[2] *See, e.g.,* Ronald J. Bacigal & Corinna Barrett Lain, *Va. Prac. Crim. Proc.* § 18:2 (2020-2021 ed.) ("If the evidence would support a conviction of a lesser included offense, the court must, upon request of counsel, instruct the jury as to the lesser included offense." (footnotes omitted)).

Nonsense. Of course it is true that Wright has never pressed a distinct claim that failing to request a petit larceny instruction satisfies the *Strickland* standard for ineffective assistance. But that does not mean that Wright is somehow estopped from explaining the actual strategic context that informs how competent and informed counsel would have approached the decision that Wright *has* consistently challenged—counsel's decision not to object to the grand larceny charge. The Commonwealth's entire argument (and the basis of the Virginia Supreme Court's holding) is that fully informed counsel reasonably might have chosen to withhold a meritorious objection to the proposed grand larceny instructions, in order to take advantage of a "windfall" opportunity to secure an otherwise-unavailable lesser alternative for the jury. In reality, competent and informed counsel would have understood that the strategic dilemma posited by the Commonwealth (and the Virginia Supreme Court) did not exist at all. There was no need or reason for counsel to agree to an unlawful instruction on an uncharged and very serious crime. Competent counsel would have objected to the proposed grand larceny instruction *even if* he agreed with the premise that the trial court's rulings and the state of the evidence made an "all-or-nothing gamble" on the robbery charge undesirable at that juncture.

Put another way, nothing about Wright's argument depends on the logical premise that competent and informed counsel necessarily would have requested a

petit larceny instruction. It is perfectly possible to be agnostic on that question, while maintaining that competent and informed counsel would, regardless, have objected to the improper grand larceny instruction. Counsel faced at least three alternatives: (1) the "all-or-nothing gamble" on robbery, (2) objecting to the prosecution's improper grand larceny proposal and then accepting or proposing a petit larceny instruction, and (3) acquiescing in the grand larceny instruction. Wright has argued, consistently and for years, that option (3) was outside the range of professionally reasonable choices. To make out that claim, he is not required to establish that option (1) also would have been a *Strickland* violation, and/or that competent and informed counsel necessarily would have chosen option (2). Perhaps counsel reasonably might have chosen (1) or (2). Perhaps the prosecution would have taken option (1) away by insisting, itself, on a petit larceny instruction. The point that actually matters for this case is that (3) was not a professionally appropriate choice, under all the circumstances. A reasonable and fully informed attorney would not have made the choice to accept a jury instruction for a crime never charged, when doing so exposed his client to 20 years in prison and counsel's strategic objective could have been achieved in a way that would have risked, at most, twelve months.

While touting the need for a fully objective review of counsel's performance, the Commonwealth's brief actually analyzes only the situation that trial counsel subjectively, and incorrectly, perceived. The Commonwealth apparently is not

comfortable advancing an argument that professionally reasonable and fully informed counsel would have *preferred* grand larceny instructions to petit larceny instructions in this situation. It is hard to imagine that argument being persuasive, and it would have required the Commonwealth to abandon the actual basis of the Virginia Supreme Court's decision and counsel's own testimony about what he thought he was doing. But at least that argument would have engaged with the issues actually presented. As it is, the Commonwealth's entire brief is little more than an elaborate attack on a straw man.

B. Like The Virginia Supreme Court, The Commonwealth's Brief Inappropriately Defers To A Tactical Judgment That Was Not Grounded In A Professionally Reasonable Investigation

The Commonwealth's brief also pervasively fails to accept the legal consequences of counsel's deficient failure to investigate the law, argues for deference that is inconsistent with Supreme Court precedent in these circumstances, and gives the Virginia Supreme Court credit for analysis that that court simply did not undertake.

The Commonwealth defends the "no competent counsel" standard the Supreme Court of Virginia applied, by arguing that it "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." Response 42 & n.13. As Wright previously explained (*see*

Opening Br. 32-35), however, that formulation distorts what *Strickland* actually demands, particularly when counsel's unjustifiable ignorance negates any presumption of reasonableness. *See Hooper v. Mullin*, 314 F.3d 1162, 1170 & n.3 (10th Cir. 2002) ("*Strickland*'s objectively reasonable standard is the clearly established Supreme Court precedent for ineffective assistance claims, not the 'no-competent-counsel' standard.").

The Supreme Court did say in *Premo v. Moore* that "the relevant question under *Strickland*" was whether "no competent attorney would think a motion to suppress would have failed." 562 U.S. 115, 124 (2011). But in *Premo* (and the cases it cites for that proposition), there was no suggestion that counsel unreasonably failed to investigate the governing law, so counsel's decisions were entitled to the usual "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 121-22 (quoting *Strickland*, 466 U.S. at 689). *Cullen v. Pinholster* is inapposite for the same reason. 563 U.S. 170 (2011). Decisions made in unjustifiable ignorance of the law are not entitled to that deference, as the Commonwealth concedes. Response 33-34; *Strickland*, 466 U.S. at 690-91 (explaining that while choices made after "thorough investigation of the law and facts" receive great deference, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *United States v.*

Carthorne, 878 F.3d 458, 468-69 (4th Cir. 2017) (explaining that the deference normally accorded counsel's trial strategy was "defeated" by his failure "to do basic legal research").

The Commonwealth's repeated assertion that this action "*could have been* taken by fully informed counsel," Response 40 (emphasis added), is an attempt to sneak deference to counsel's professional judgment back into the analysis. Wright's trial counsel could not have formulated such a strategy, because he did not know the facts essential to it. As in *Kimmelman*, the Commonwealth attempts to "minimize the seriousness of counsel's errors" through a hindsight effort to justify the decision by reference to facts that counsel "did not—and, because he did not ask, could not—know." *Kimmelman v. Morrison*, 477 U.S. 365, 385, 387 (1986). Courts may not indulge "*post hoc* rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

Of course fully informed counsel *could have made* an extremely wide range of decisions and received deference under *Strickland*'s "strong presumption" of sound trial strategy. 466 U.S. at 689. But Wright's counsel was "not in a position to make an informed strategic choice.'" *Thompson v. Gansler*, 734 F. App'x 846, 856 (4th Cir. 2018) (quoting *Gray v. Branker*, 529 F.3d 220, 231 (4th Cir. 2008)). As in cases like *Kimmelman*, *Hinton v. Alabama*, 571 U.S. 263 (2014), and

Williams v. Taylor, 529 U.S. 362 (2000), Wright's counsel was deficient because he failed to conduct the investigation that was essential to understand his client's situation and make appropriately informed judgments. Whether a professionally appropriate investigation of the law would have led a different, fully informed attorney to make the same decision about the grand larceny instruction goes to the issue of prejudice, not deficiency, and is reviewed without the deference accorded to informed trial strategies under the performance prong of *Strickland*. *See Hinton*, 571 U.S. at 274-75; *see also Wiggins*, 539 U.S. at 522-23; *see generally* Opening Br. § I(A).

The Commonwealth's brief never fully grapples with that point. Instead, it tries to distinguish cases like *Hinton*, *Kimmelman*, and *Williams* by suggesting that here, unlike in those cases, "there was a significant potential 'downside' to an objection from Wright's counsel." Response 42-45. But that entirely misses the point. Here, as in those cases, there was no "downside" to conducting appropriate research that would have supported an informed choice. Counsel's failure to do so was the deficiency.

In another effort to dodge the legal consequences of counsel's ignorance, the Commonwealth selectively cites the Supreme Court of Virginia's opinion to suggest that it found counsel's decision to be based on strategic judgment *rather than* a misunderstanding of the law. Response 27-28, 45. This is just word play.

The opinion acknowledged that "[t]here was strategy coupled with lack of knowledge." JA 49. That is, of course, another way of saying that counsel made what he thought was a strategic decision, but did so in ignorance of the considerations that would have informed any proper decision.

The Commonwealth suggests that the strain of a fast-paced, high-pressured trial justifies counsel's failure to investigate the governing law. Response 28 n.6. It paints a grim but limited picture: "[B]y 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." Response 31.[3] But the opposite conclusion should be drawn. The stakes of this trial made it all the more critical that Wright's trial counsel perform his basic adversarial function by coming to trial equipped to make *informed* decisions respecting fundamental issues like what range of jury instructions to support. *Cf. Carthorne*, 878 F.3d at 466 (Counsel have a "duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments."). There was ample time to perform that

[3] The Commonwealth tells a lengthy story about caustic substances and obstruction of justice when Mr. Wright was taken into custody. Response 4-7, 8-9. As the Commonwealth concedes (Response 13), the Supreme Court of Virginia held that the evidence was insufficient to support conviction on these allegations. *See Wright v. Commonwealth*, 789 S.E.2d 611, 615-18 (Va. 2016). Regardless, those alleged events happened well after the alleged robbery/larceny and are irrelevant to the charges at issue here.

function before trial and during the recess in which the jury instructions were negotiated. *See* JA 202-03. In any event, properly informing himself about the relevant law would not have taken extensive research. A minimally thoughtful review of the prosecution's proposed instructions would have revealed that grand larceny from the person requires proof of an element that robbery does not. *See* Opening Br. 21-22. Instead the trial transcript makes clear that counsel paid no attention whatever to the jury instructions. In addition to missing the fact that grand larceny from the person is not a lesser-included offense of robbery, defense counsel acceded to the prosecutor's request that a twelve-month sentencing option be stricken from the instructions—a mistake that the trial court later had to correct. *See* JA 262-63. He also acquiesced to the prosecutor's request for instructions on accessory in the first degree, when in fact Wright was charged as an accessory in the second degree—an error that the trial court caught too late, and was unable to correct. *See* JA 263-64 ("The jury has done it and I think that's potentially something we'll have to take up later."). The record makes clear that counsel was not performing his adversarial role and making strategic judgments; he was just accepting whatever the prosecutor asked for. *See* JA 260 ("COURT: Mr. Graves, have you had an opportunity to look at [the prosecutor's proposed grand larceny instruction]? MR. GRAVES: Judge, I think so, but without the Model Jury

Instructions it's hard for me to—again I'll take his recommendation to the Court. I'll accept his proffer.")

Of course Wright is not "suggest[ing] that if an attorney admits to an imperfect understanding of the law, his performance is constitutionally deficient *per se*." Response 36. Lawyers never have a perfect understanding of the law, and strategic decisions to limit research or investigation are often reasonable under the circumstances. But that plainly is not true here. In reality, it is the Commonwealth that implicitly argues for a *per se* rule inconsistent with Supreme Court precedent. Like the Virginia Supreme Court, the Commonwealth refuses to accept that a failure to investigate the law or the facts can be, on its own, deficient performance. The Commonwealth believes that deficient performance must always be located in some specific and objectively indefensible trial decision *produced by* the earlier failure to investigate. The Supreme Court has rejected that view of the law clearly and repeatedly.

Even if counsel's failure to understand and research the governing law were disregarded and the deficiency analysis focused entirely on counsel's failure to object to the instructions, the Commonwealth's argument that Wright's counsel acted in an "objectively reasonable" manner ignores much of the relevant context and is shot through with improper appeals to deference. *See, e.g.,* Response 32 ("decisions regarding which objections to make and what jury instructions to

request are generally strategic in nature"); *id.* ("Attorneys are offered particular leeway where a potential strategy carries 'double-edged' consequences"). Like the Supreme Court of Virginia's supposedly objective consideration of "all the circumstances of the case," *see* Response at 34, the Commonwealth's argument in fact consists of little more than reciting counsel's subjective and incorrect perception of the tactical situation. *See* Opening Br. 35-36.

The Commonwealth argues that the situation was sufficiently desperate that any chance to present the jury with a "compromise opportunity" was a "windfall," and leaping at that opportunity was professionally reasonable. Response 31-35. But that claim is only tenable on a blinkered view of the facts, and it significantly understates the obligations of counsel. Professionally reasonable representation requires counsel to investigate how the client's interests will be *best* served—not just to jump at any proposal by the prosecution that superficially appears to be better than nothing. A stressful setting, as trials often are, does not justify acquiescence to instructions on an uncharged crime without consideration of its legality or the potential alternatives. The Commonwealth studiously ignores the point that informed and competent counsel would have understood the petit larceny alternative, and therefore would not have viewed an objection as setting up an all-or-nothing gamble on the robbery charge.

Finally, the Commonwealth's argument proceeds on the unexamined assumption that quietly acquiescing in an unlawful instruction is an appropriate strategic choice for counsel to make. Judge Ellis found the fact that such instructions are "legally impermissible" dispositive in *Spivey v. United States*, 2007 WL 2327591, *4 n.8 (E.D. Va. Aug. 10, 2007). The Commonwealth argues that inviting instructions on an uncharged but lesser crime "is not an unknown tactic in Virginia trial courts," and cites cases declining to reverse such convictions on invited error grounds. *See* Response 35 & n.10.[4] Notably, those decisions did not deny that it was error to give the instructions in question, as they would if the Commonwealth were correct that "the effect of an agreed instruction on a lesser (but not lesser-included) crime is to waive indictment." Response 35. The cited decisions acknowledged error but simply declined to grant relief, either because the error was invited or because there was no grave injustice requiring a new trial.[5]

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[4] In *Rowe v. Commonwealth*, the defendant asked for an assault charge as an alternative to the indicted crime of attempted murder. 675 S.E.2d 161, 164 (Va. 2009). In *Commonwealth v. Dalton*, the defendant requested and was denied an instruction on accessory after the fact of murder when he was charged with murder. 524 S.E.2d 860, 862 (Va. 2000). And in *Talley v. Commonwealth*, the defendant acquiesced to an incorrect instruction on lawful wounding when he was charged with murder. No. 0647-05-2, 2006 WL 1888697, at *1-*2 (Va. Ct. App. July 11, 2006).

[5] The decision the Commonwealth cites for the proposition that the effect of an agreed instruction on an uncharged crime is to waive indictment in fact just holds that the defendant "acquiesced to jury instructions conforming to the Commonwealth's evidence" and thus is "procedurally barred unless we can reach it through the ends of justice exception." *Commonwealth v. Bass*, 786 S.E.2d 165,

Indeed, the *Dalton* court explained that "neither the Commonwealth *nor an accused* is entitled to a jury instruction on an offense not charged, unless the offense is a lesser-included offense of the charged offense," and held that the defendant was not entitled to instructions that he had requested, but that the trial court had refused to give. 524 S.E.2d at 862 (emphasis added).

Even if proposing unlawful instructions could be regarded as a professionally reasonable tactic in those cases, it would not have been here—when Wright's counsel would have had another lawful and even more favorable option. *See, e.g., Vinson v. True*, 436 F.3d 412, 419 (4th Cir. 2006) (noting that a supposed "tactical" decision is entitled to no deference "if it made no sense or was unreasonable 'under prevailing professional norms'" (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003))). The record also establishes that counsel failed to consult with Mr. Wright about this issue, at the instructions phase or even in preparation for post-trial motions. *See* JA 360-61. The Virginia Code permits defendants to waive indictment, but only in a writing filed with the court. *See* Va. Code Ann. § 19.2-217. It also permits prosecutors to seek an amendment of the indictment to conform the charges to the proof "at any time before the jury returns a verdict," but only with the court's approval and only if the defendant is re-

170 (Va. 2016); *see also, e.g., Rowe*, 675 S.E.2d at 164-65 ("Rowe cannot now complain of the trial court's adoption of the legal theory he introduced and repeatedly urged the trial court to adopt.").

arraigned and given an opportunity to re-plead and a reasonable continuance to redress any surprise. Va. Code Ann. § 19.2-231. Virginia law does not contemplate an option for counsel to make a unilateral decision to hazard conviction on an uncharged crime, even for an informed strategic reason.

The deficiency of Wright's counsel is not genuinely debatable on these facts, and the Virginia Supreme Court's decision reflects an unreasonable application of clearly established federal law.

II. WRIGHT HAS ESTABLISHED PREJUDICE UNDER *STRICKLAND*

To obtain relief, *Strickland* requires Wright to demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. This Court reviews the issue *de novo*, and prejudice is plain. Instruction 10 was unlawful, and if counsel had objected there is *at least* a reasonable probability that he would not have been convicted of a crime not charged.

The Commonwealth cannot deny the point that Judge Ellis found dispositive in *Spivey*. This instruction was, beyond question, "legally impermissible," so an objection to it would have been granted. 2007 WL 2327591, at *4 n.8; *see also Dalton*, 524 S.E.2d at 862 ("It is firmly established . . . that 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."). At that point, the prosecutor would have

had a few options. He could have corrected his own error and done what he set out to do: propose instructions on a proper lesser-included offense of robbery, which would have been petit larceny. *See* JA 212 (proposing that the court instruct the jury on a "lesser included charge"). If Wright had been convicted of that charge, he would have served the maximum sentence years ago.

The prosecutor also might have withdrawn his proposal altogether and pursued only the robbery charge—a charge on which the jury properly acquitted. *See* Opening Br. 27. The Commonwealth argues that there is not even 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." Response 50. That suggestion is not credible. The jury found Mr. Wright innocent of robbery, and he plainly was—since the trial evidence showed that he was on the other side of the car and encouraging his brother to leave rather than somehow participating in the others' interaction with Atkins. *See* Opening Br. 4-5. The prosecution obviously had its own strategic reasons for its last-minute decision to suggest grand larceny from the person instructions, after its star witness failed to testify to any real intimidation or threat of serious bodily harm. The most Atkins would say is that he felt "uncomfortable with the situation." JA 97. Even the trial court expressed doubt that Wright had intimidated or threatened Atkins. *See* JA 213 ("I don't think there was a direct threat to him, but that is a jury question.). Mr.

Wright cannot be denied relief on the premise that the jury would have found the facts differently if not given the grand larceny alternative.

The Commonwealth therefore hangs its argument against prejudice almost entirely on a third possibility—that the prosecutor might have "simply moved to amend the indictment under Virginia Code § 19.2-231." Response 49. Perhaps. But that suggestion, and that process, is not as "simpl[e]" as the Commonwealth implies. *Id.* The prosecutor testified at the evidentiary hearing that such motions are "unusual," and there is no reason to believe he would have pursued one in this case. JA 374. Even if he had, the statute provides that a trial court "may permit" such an amendment in its discretion, and only if it "does not change the nature or character of the offense charged." Va. Code Ann. § 19.2-231. The trial court (now alerted to the reality that grand larceny from the person is not, as the prosecution had represented, a lesser-included offense of robbery) likely would have exercised its discretion to reject the prosecution's hypothetical last-minute motion in favor of the more appropriate, and far easier, path of instructing the jury on an actual lesser-included offense (petit larceny) instead. The court may even have concluded that it lacked any discretion, or that the risk of appellate reversal made an amendment unwise, because by adding a new element to the charged offenses the amendment arguably would have changed "the nature or character of the offense" for purposes of § 19.2-231. *See, e.g.*, *Bottonfield v. Commonwealth*, 487 S.E.2d 883, 890 (Va.

Ct. App. 1997) (acknowledging that amendments "add[ing] elements to the charges" may "jeopardize appellant's opportunity to adequately defend himself"); *Thompson v. Commonwealth*, 656 S.E.2d 409, 415 (Va. Ct. App. 2008) (suggesting that it may be inappropriate to allow an amendment that "alter[ed] the elements the Commonwealth would have to prove"), *rev'd on other grounds*, 673 S.E.2d 469 (Va. 2009).

Even if the court ultimately decided to grant such a request, Wright would have been entitled to be arraigned again and given an opportunity to "plead anew" after the indictment was amended. Va. Code Ann. § 19.2-231. The record does not reveal how Wright would have pled to a proposed charge of grand larceny from the person. But the necessary conversations might well have produced a renewed round of plea bargaining. Counsel testified that the defense and the prosecution were close to a deal before trial—"[t]here was a lot of negotiation back and forth going on," and he was "very confident that [they] were going to have a plea agreement the day before trial." *See* JA 354-55.

The statute also provides that if the amendment to an indictment "operates as a surprise to the accused, he shall be entitled, upon request, to a continuance of the case for a reasonable time." Va. Code Ann. § 19.2-231; *Crawford v. Commonwealth*, 479 S.E.2d 84, 87 (Va. Ct. App. 1996) (concluding that the term "shall" in § 19.2-231 is "mandatory"). The addition of a new element regarding the

value of the stolen good would have surprised Wright, because he had not previously prepared a defense with respect to value. Indeed, Wright has argued from the beginning that the evidence at trial was insufficient to support the jury's verdict on that element. If the trial court had been confronted with a focused argument for a brief continuance on the ground that Wright wanted to prepare a defense on that element, that request likely would (and should) have granted—with consequences that are, at this point, unknowable. At a minimum, directing the jury's attention to the value of the stolen goods would have brought home that this was little more than a shoplifting case and could have influenced the jury's enormous sentencing discretion.

But the most likely outcome is that the trial court, when confronted with the need to jump through all of these hoops, would simply have denied the motion in its discretion and instructed the jury on petit larceny instead. The prosecutor testified that he probably considered grand larceny from the person as a charging option before trial. JA 373-74. Why would the trial court have been inclined to delay and complicate this case by permitting the prosecution to amend its indictment, after the close of the evidence, in order to add a new charge that the prosecution had made a strategic decision not to include at the outset?

The Commonwealth thus asks this Court to disregard obvious and tangible prejudice to Mr. Wright—a decade in prison on a charge that would have been

immediately stricken upon objection—by indulging a counterfactual possibility that piles speculation upon speculation. What *Strickland* requires is a "reasonable probability" of a different result "sufficient to undermine confidence in the outcome." 466 U.S. at 694. Wright has satisfied that burden here. Judge Ellis was right to hold in *Spivey* that a defendant is "obviously prejudiced" where defense counsel's error results "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 & n.8. *Strickland* does not invite the federal courts to bend over backwards speculating about whether the prosecution might have engineered a last-minute amendment to the indictment—particularly when the prosecutor in question actually testified that he regards that procedure as "unusual" and did not testify that he would have pursued it in this case.

CONCLUSION

The district court's decision should be vacated and remanded with instructions that the writ should be granted, and Mr. Wright released.

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 Reply Brief of Appellant contains 5,230 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: January 25, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger