RECORD NO. 08-6570

In The
United States Court of Appeals
For The Fourth Circuit

MARVIN SUMNER,

Petitioner – Appellant,

v.

KEITH DAVIS, Warden,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2254. The judgment that is the basis of this appeal was entered by the United States District Court for the Eastern District of Virginia, Richmond Division, on March 25, 2008. Appellant filed a timely Notice of Appeal on April 11, 2008. The district court had jurisdiction under 28 U.S.C. § 2254. Petitioner-Appellant's petition for writ of habeas corpus under 28 U.S.C. § 2254 challenged the constitutionality of his confinement by the Respondent-Appellee.

STATEMENT OF THE ISSUE

When appellate counsel's procedural error wholly precluded consideration of an issue on direct appeal, is prejudice presumed?

STATEMENT OF THE CASE

This case is on appeal from the March 25, 2008, order of the United States District Court for the Eastern District of Virginia, Richmond Division, dismissing Petitioner-Appellant Marvin Sumner's petition for a writ of habeas corpus. (J.A. 127–34.) In his habeas petition, Mr. Sumner claims that the ineffective assistance of his appellate counsel resulted in the forfeiture of Mr. Sumner's principal claim on appeal from his state convictions. (J.A. 131.) In dismissing the petition, the district court held that Mr. Sumner had failed to show prejudice from his appellate counsel's deficient performance. (J.A. 133.)

Mr. Sumner filed his Notice of Appeal on April 11, 2008. (J.A. 135.) On August 8, 2008, this Court issued a Certificate of Appealability on the issue raised in this brief. (J.A. 136.) Mr. Sumner is currently incarcerated in a Virginia state penitentiary as a result of the convictions in this case.

STATEMENT OF FACTS

Petitioner-Appellant Marvin Sumner was convicted of discharging a firearm and being a felon in possession of a firearm. (J.A. 51.) On appeal from those convictions, Mr. Sumner's principal argument was that the trial court admitted a .45 caliber cartridge into evidence in violation of the Fourth Amendment. (J.A. 58–64.) Mr. Sumner specifically asked his appointed appellate counsel, David L. Jones, to appeal this claim, and counsel argued it extensively in the petition for appeal. (J.A. 58–64.) The petition argued that "the court should have granted [trial counsel's] motion to suppress the .45 caliber cartridge [as unlawfully seized]." (J.A. 59.) Without this crucial piece of evidence, the petition continued, there was insufficient evidence to uphold the convictions. (J.A. 59–64.)

Unfortunately, appellate counsel failed to identify the critical Fourth Amendment claim in the Questions Presented section of the petition, as Virginia rules required. (J.A. 78.) Counsel's Question Presented asked only: "Did the trial court err in finding evidence of possession of a firearm by a convicted felon and discharging a firearm necessary to support a conviction under [state law]?" (J.A.

58.) As a result, the Fourth Amendment claim was forfeited. (J.A. 78.) Appellate counsel's error was so obvious that the Commonwealth did not even address the Fourth Amendment claim in its opposition to the petition. (*See* J.A. 65–76.)

The central defense at trial—and the principal claim on appeal—was that police officers unlawfully searched Mr. Sumner after a pretextual stop in which they recovered the key physical evidence in the case against Mr. Sumner. (J.A. 58–64.) Prior to this pretextual stop, Mr. Sumner had been detained by officers investigating reports of a firearm discharge. (J.A. 52.) A pat down of Mr. Sumner revealed that he had no weapons. (J.A. 52.) The officers released him shortly thereafter. (J.A. 52.)

One officer involved in the initial stop then re-stopped, arrested, and searched Mr. Sumner under the pretext that he threw an open container of alcohol on the ground. (J.A. 52–53.) The officer found a .45 caliber cartridge in Mr. Sumner's pocket and arrested him. (J.A. 52, 56.) The officer did not find a firearm, and no firearm was ever introduced as evidence. (J.A. 52, 57.) At trial, Mr. Sumner filed a motion to suppress the cartridge on the ground that the officer did not have probable cause for the search and seizure in connection with the firearm discharge. (J.A. 50, 52–53.) The judge denied the motion and, following a bench trial, convicted Mr. Sumner of the two firearm charges. (J.A. 50–52.)

On appeal, Mr. Sumner's counsel argued that the trial court erroneously denied the motion to suppress the .45 caliber cartridge, and that without this cartridge the remaining evidence was insufficient to uphold the convictions. (J.A. 58–64.) However, since counsel failed to identify the underlying Fourth Amendment claim, on November 23, 2005, a single-judge of the Court of Appeals of Virginia summarily refused to review the claim because counsel's error "bar[ed] . . . consideration of th[e] issue on appeal." (J.A. 78.) On a motion for consideration, a three-judge panel of the Court of Appeals denied the petition for appeal without considering the forfeited claim. (J.A. 82.) Although appellate counsel attempted to insert the Fourth Amendment claim in the Questions Presented section of the petition for appeal to the Supreme Court of Virginia, that court also "refuse[d] the petition for appeal." (J.A. 95, 103.)

While his petition for appeal was pending before the Court of Appeals of Virginia, Mr. Sumner and his appellate counsel communicated regarding whether the failure to identify the Fourth Amendment issue in the Questions Presented section of the petition would result in the court refusing to consider the issue. (J.A. 33.) Appellate counsel essentially advised Mr. Sumner that his error was harmless. (J.A. 33.) Counsel wrote: "I have never had the appellate court to reject [sic] a brief" because of a mistaken Questions Presented.[1] (J.A. 33.) He also erroneously

[1] This letter is hand-dated "10-7-05."

advised Mr. Sumner that it would be "manifest injustice" for the court to refuse to consider his Fourth Amendment claim. (J.A. 33.) And he erroneously concluded that "because of the appellate courts [sic] strict time frames I don't have the ability to change anything." (J.A. 33.)

After appellate counsel's errors foreclosed consideration of his principal claim on appeal, Mr. Sumner filed a pro se state habeas petition arguing that his counsel's fundamentally deficient performance amounted to ineffective assistance of counsel in violation of the Sixth Amendment. (J.A. 109–113.) In support of his state habeas petition, Mr. Sumner swore in an affidavit that "I did inform Mr. Jones of my wish to appeal the trial court's denial of my suppression motion," and that "after mutual discussion we agreed that he would [file the claim]." (J.A. 114.) The fact that Mr. Sumner's appellate counsel argued the claim in the petition for appeal corroborates this agreement. (J.A. 58–64.) In a letter to government attorneys included by the government in its opposition to the state habeas petition, appellate counsel asserted he had intended to frame the question presented "broad enough" to raise all the relevant issues on appeal. (J.A. 123.)

Nonetheless, the Supreme Court of Virginia denied the petition for a writ of habeas corpus, finding that "[t]he selection of issues to address on appeal is left to the discretion of appellate counsel." (J.A. 125–26.) The court also relied on Mr. Sumner's failure to show prejudice, stating that "petitioner does not attempt to

demonstrate that the excluded argument had merit or would have been successful had it been included in the questions presented." (J.A. 126.) Mr. Sumner then filed this action in the district court.

SUMMARY OF ARGUMENT

Appellate counsel's failure to identify the key claim in the Questions Presented section of the petition for appeal, violating Virginia rules of appellate procedure and completely foreclosing appellate review of the claim, amounts to a failure to appeal the claim altogether, or effectively amounts to a failure to appeal at all, and therefore requires this Court to presume prejudice.

Appellate counsel's performance was fundamentally deficient. There is no question that Marvin Sumner sought to raise a critical Fourth Amendment claim on appeal of his convictions, that his appointed appellate counsel agreed to appeal it for him, and that counsel argued the claim extensively in the petition for appeal. (J.A. 33, 58–64, 114.) There is also no question that counsel mistakenly failed to identify the claim in the Questions Presented, barring the state appellate courts from reviewing it, and forfeiting Mr. Sumner's only chance at overturning his convictions. (J.A. 78.) Appellate counsel's performance indisputably was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *cf. United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993).

Appellate counsel's deficient performance prejudiced Mr. Sumner because, with respect to his principal claim on appeal, the mistake totally deprived Mr. Sumner of his Sixth Amendment right to counsel. (J.A. 78.) Counsel's failure to perfect Mr. Sumner's appeal effectively resulted in the forfeiture of all appellate review of Mr. Sumner's central claim. (J.A. 78.) Accordingly, this Court must presume prejudice because of the unreliable outcome that stemmed from counsel's deficient conduct. *Roe v. Flores-Ortega*, 528 U.S. 470, 483–84 (2000); *Frazer v. South Carolina*, 430 F.3d 696, 709 (4th Cir. 2005). Alternatively, appellate counsel's reliance on the forfeited Fourth Amendment claim to support the perfected claim that there was insufficient evidence to support Mr. Sumner's convictions effectively amounted to a forfeiture of Mr. Sumner's entire appeal. *Strickland*, 466 U.S. at 692; *Flores-Ortega*, 528 U.S. at 483–84.

ARGUMENT

STANDARD OF REVIEW

A district court's denial of a petition for a writ of habeas corpus based on a state-court record is reviewed *de novo*. *Bell v. Ozmint*, 332 F.3d 229, 233 (4th Cir. 2003).

I. MR. SUMNER'S APPELLATE COUNSEL PERFORMED DEFICIENTLY UNDER *STRICKLAND v. WASHINGTON*.

As a result of his appellate counsel's failure to identify Mr. Sumner's key Fourth Amendment claim in the Questions Presented section of the petition for

appeal, as required by the Virginia rules of appellate procedure, Mr. Sumner forfeited his only opportunity to have the Virginia courts review the claim. (J.A. 78.) When Mr. Sumner questioned his lawyer about this error, counsel compounded his initial error by assuring Mr. Sumner, "I have never had the appellate court to [sic] reject a brief because of the question presented or the assignment of errors. I believe it would be a manifest injustice in this case for them to do so." (J.A. 33.) This advice was wrong. Appellate counsel also told Mr. Sumner that "because of the appellate court's strict time frames, I don't have the ability to change anything." (J.A. 33.) This advice was also wrong.

As a consequence of his counsel's wholly deficient representation, the Court of Appeals of Virginia and the Supreme Court of Virginia were barred from considering Mr. Sumner's only potentially viable claim on appeal. (*See* J.A. 78, 82, 103.) With respect to the appeal of that claim, Mr. Sumner was effectively denied counsel. Appellate counsel's forfeiture of the Fourth Amendment claim, which he linked to the remaining sufficiency of the evidence claim, also had the effect of denying Mr. Sumner an appeal altogether.

A. Appellate Counsel Performed Deficiently When He Failed to Identify the Central Claim in the Questions Presented Section of the Petition for Appeal as Required by the Virginia Supreme Court Rules.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel . . . ." U.S.

CONST. amend. VI. This right "extends to require such assistance on direct appeal of a criminal conviction." *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000). A claim of ineffective assistance of counsel is analyzed under the framework articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant is entitled to relief if counsel's performance was deficient and the defendant suffered prejudice from the deficient performance. *Id.* at 687.

A counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Reasonableness is measured under prevailing professional norms. *See, e.g., id.* at 688. The reasonableness of counsel's conduct must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct," *id.* at 690, and "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.* at 689. There is a "strong presumption" that counsel's conduct is not deficient; a defendant must overcome the presumption that the challenged conduct was a part of sound litigation strategy. *Id.* In this case, Mr. Sumner's appellate counsel's performance was deficient. It was not the product of any sound litigation strategy.

Attorneys are expected to know the procedural rules of the courts where they practice. *See* VA. R. PROF. COND. 1.1, cmt.5. Indeed, the Court of Appeals of Virginia has stressed that attorneys may not ignore the Virginia Supreme Court

Rules and must carefully read and comply with the plain language of the Rules.[2] *See Johnson v. Commonwealth*, 1 Va. App. 510, 513 (1986). If an attorney is unfamiliar with the Rules, the attorney is expected to be able to find the applicable law using standard research sources. *See* VA. R. PROF. COND. 1.1.

Appellate counsel committed objectively unreasonable error when he ignored Rule 5A:12(c)'s clear directive: "the petition for appeal shall contain the questions presented." VA. SUP. CT. R. 5A:12(c); (*see* J.A. 58). As the Rule makes clear, "[o]nly questions presented in the petition for appeal will be noticed by the Court of Appeals." VA. SUP. CT. R. 5A:12(c). The Court of Appeals of Virginia applies the plain language of Rule 5A:12(c) to bar review of claims not set forth in the Questions Presented section of an appellant's petition for appeal. *See*, *e.g.*, *Perez v. Commonwealth*, 25 Va. App. 137, 139, n.2 (1997). Thus, Rule 5A:12(c) is not a mere technicality or meaningless formality: When an attorney fails to notice a claim to the court by not identifying it as a Question Presented, the claim is forfeited.

Mr. Sumner wanted to raise the Fourth Amendment challenge on appeal and he made this clear to appellate counsel. (J.A. 31.) Appellate counsel agreed with

[2] All further undesignated references to the Rules refer to the Virginia Supreme Court Rules. The Rules are promulgated by the Supreme Court of Virginia and include the rules of procedure that govern direct appeals to the Court of Appeals of Virginia. *See* VA. CODE § 54.1-3909; VA. SUP. CT. R. 5A:1 *et seq*.

Mr. Sumner that the Fourth Amendment issue should—and would—be raised on appeal. (J.A. 31.) Indeed, appellate counsel dedicated much of the argument in the petition for appeal to the issue. (J.A. 58–64.) Thus, there is no doubt that counsel attempted to advance the claim on appeal. But because he did not identify the issue as a Question Presented in the petition for appeal, the court was barred from considering it.[3] (J.A. 78.)

Appellate counsel's procedural error therefore constitutes deficient performance under *Strickland*. *Cf. United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993) (attorney performed deficiently when he failed to file a notice of appeal at the request of his client); *Rivera v. Goode*, 540 F. Supp. 2d 582, 595 (E.D. Pa. 2008) (attorney performed deficiently when he filed his client's brief, but failed to file a statement of issues as requested by the court). Insofar as the error committed by Mr. Sumner's appellate counsel is similar in nature to, and materially indistinguishable from, the errors in both *Peak* and *Rivera*, appellate counsel's performance was objectively unreasonable under prevailing professional norms. Moreover, because the forfeited Fourth Amendment claim and the perfected

[3] Equally egregious was appellate counsel's advice to Mr. Sumner that it would be a "manifest injustice" for the Court to refuse to review the Fourth Amendment claim even though it was not set out in the Questions Presented section of the petition for appeal. (J.A. 33); *see Thompson v. Commonwealth*, 27 Va. App. 620, 622, 626 (1998) (unlike other Rules, Rule 5A:12(c) does not have a catch-all "good cause" or "ends of justice" exception).

sufficiency of the evidence claim were inextricably linked, counsel's deficient performance effectively denied Mr. Sumner an appeal altogether.

B. Appellate Counsel Continued to Perform Deficiently By Failing to Seek to Amend the Defective Petition for Appeal When the Appellant Brought the Error to His Attention.

Even when appellate counsel's procedural error was brought to his attention by Mr. Sumner, (*see* J.A. 33), appellate counsel continued performing deficiently by failing to take action to remedy his initial error.[4] Under Virginia law, an appellant may—before the Court of Appeals acts on a petition for appeal—seek to amend his petition to include a new Question Presented. *Cf. Riner v. Commonwealth*, 40 Va. App. 440, 453 (2003), *aff'd*, 268 Va. 296, 330 (2004); *Aldridge v. Commonwealth*, 44 Va. App. 618, 637–38 (2004). In *Riner*, the Court of Appeals of Virginia initially granted appellant's petition for appeal regarding three questions presented. *Id.* at 452. The appellant subsequently moved to enlarge his appeal to include a fourth issue. *Id.* The court held that notwithstanding the mandate of Rule 5A:12(c), it had the inherent authority to add the new issue. *Id.* at 453 (citation omitted). Here, the Court of Appeals of Virginia had not yet ruled on the defective petition for appeal, so appellate counsel should have requested leave to amend Mr. Sumner's pending petition. That appellate

[4] Though Mr. Sumner's letter is not in the record, its contents may be inferred from appellate counsel's letter (dated October 7, 2005) in response. (J.A. 33); *Jones v. Barnes*, 463 U.S. 745, 747 n.2 (1983).

counsel did not pursue such a remedy was itself deficient performance and objectively unreasonable.[5]

Appellate counsel's failure to include the principal claim on appeal in the Questions Presented was not a tactical or strategic decision. There is no dispute that appellate counsel intended to raise the Fourth Amendment claim on appeal. (J.A. 31, 33.) Nothing in the record even hints that appellate counsel's failure to identify the claim was the result of a reasonable tactical or strategic decision.[6] Rather, appellate counsel erroneously assumed that the one question he presented was broad enough to permit review of the forfeited claim. (J.A. 123–24.) He was wrong. That is ineffective assistance of counsel, not sound strategy. The Supreme Court of Virginia's decision to deny Mr. Sumner's petition for a writ of habeas corpus on the ground that appellate counsel's error was a strategic decision therefore is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

[5] Appellate counsel did not attempt to amend the petition for appeal in Mr. Sumner's motion for consideration by a three-judge panel. (J.A. 80–81.) He subsequently inserted the Fourth Amendment claim in the petition for appeal to the Supreme Court of Virginia, (J.A. 95), but the court did not consider the claim, (*see* J.A. 103).

[6] Appellate counsel's "affidavit," (J.A. 123–24), does not support the conclusion that he made a "tactical decision as to what issue to raise on direct appeal," (J.A. 119).

Moreover, because appellate counsel's deficient performance was not strategic, this case is not controlled by *Jones v. Barnes*, 463 U.S. 745 (1983). In *Jones*, the United States Supreme Court held that an attorney has not performed deficiently even if he has failed to advance every non-frivolous issue on appeal as requested by his client. *Id.* at 751. The Court reasoned that appellate counsel should have the discretion to select "the most promising issues for review." *Id.* at 752. The issue in *Jones* is entirely absent from this case. Here, appellate counsel clearly thought that the issue he forfeited was the "most promising for review;" the entire petition for review rested upon the issue. The Supreme Court of Virginia's sole reliance on *Jones* to support its conclusion that Mr. Sumner's appellate counsel did not perform deficiently under *Strickland*, (J.A. 125–26), is thus contrary to and an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 405, 409 (2000).

In sum, appellate counsel's procedural error was fatal to Mr. Sumner's principal claim on appeal, for it forfeited appellate review of that claim and effectively denied Mr. Sumner an appeal altogether. The failure to preserve a claim on appeal is equivalent to failing to appeal the claim at all, and, in this case, also is equivalent to failing to perfect the entire appeal. *Cf. Peak*, 992 F.2d at 42. Such a fundamental error by an attorney—especially a senior assistant public

defender appointed by the court to represent a prisoner on appeal—is undeniably deficient under *Strickland*.

II. PREJUDICE MUST BE PRESUMED IN THIS CASE BECAUSE MR. SUMNER UNEQUIVOCALLY DEMONSTRATED A DESIRE TO APPEAL AND HIS COUNSEL'S DEFICIENT PERFORMANCE FORFEITED THE CENTRAL CLAIM OF HIS APPEAL.

The Supreme Court of Virginia's holding that Mr. Sumner had to demonstrate prejudice, (J.A. 126), is contrary to and involves an unreasonable application of clearly established federal law. Under *Roe v. Flores-Ortega*, appellate counsel's deficient performance must be presumed to have prejudiced Mr. Sumner. 528 U.S. 470, 483–84 (2000).

A defendant must satisfy two conditions for a court to presume prejudice. *Flores-Ortega*, 528 U.S. at 484–85. First, the defendant must demonstrate that he wanted to appeal and conveyed this desire to counsel. *Id.* at 484. Second, the lawyer's failure to perfect the appeal must have forfeited the defendant's right to appellate review. *Id.* at 484.

Mr. Sumner satisfied both requirements. Mr. Sumner sought appellate review of the trial court's denial of the motion to suppress key evidence against him, (J.A. 31), and he would have obtained the review but for appellate counsel's constitutionally deficient performance, (*see* J.A. 78). And, because appellate counsel's procedural error resulted in the complete forfeiture of Mr. Sumner's

central claim on appeal, indeed the claim upon which the entire appeal rested, this Court must presume counsel's conduct prejudiced Mr. Sumner. *Flores-Ortega*, 528 U.S. at 483; *Strickland*, 466 U.S. at 692.

A. Mr. Sumner Expressed a Desire to Appeal and Would Have Appealed But For His Counsel's Deficient Performance.

This Court has broadly interpreted *Flores-Ortega*, holding that when counsel fails to perfect an appeal, the result is presumed prejudicial if the defendant demonstrates he had an adequate interest in pursuing the appeal. *Frazer v. South Carolina*, 430 F.3d 696, 709 (4th Cir. 2005). A defendant meets this burden by showing he expressed to counsel a desire to appeal and the discussion "galvanized that interest into a desire to go forward, rather than dissuading him." *Id.* at 712. The defendant in *Frazer* indicated a desire to appeal when he asked his attorney to "see about" having his consecutive sentences run concurrently, and by writing his attorney about an appeal after the deadline for filing a notice of appeal passed. *Id.* at 702, 712. Those actions fulfilled *Flores-Ortega*'s standard for a presumption of prejudice because the defendant was required merely to "demonstrate an interest in appealing . . . ." *Frazer*, 430 F.3d at 712. The defendant's "tenacity in pursuing habeas relief" in *Frazer* further strengthened this Court's conclusion that prejudice should be presumed. *Id.*

Mr. Sumner's unwavering efforts to appeal his Fourth Amendment claim far surpass the defendant's efforts in *Frazer*. Mr. Sumner asked appellate counsel to

appeal the Fourth Amendment claim, (J.A. 31), and his counsel not only agreed to appeal the claim, (J.A. 31), he made it the centerpiece of Mr. Sumner's petition for appeal, (J.A. 58–64). When Mr. Sumner discovered the flaw in the defective petition, he appealed to counsel, seeking to rectify the mistake. (J.A. 33.) Mr. Sumner demonstrated an unyielding desire for review of his Fourth Amendment claim. But for his counsel's errors, Mr. Sumner would have obtained appellate review of that claim. Therefore, under *Frazer*, Mr. Sumner has demonstrated an unequivocal desire to appeal. 430 F.3d at 709, 712; *see also Flores-Ortega*, 528 U.S. at 484.

B. Appellate Counsel's Procedural Error Forfeited Mr. Sumner's Right to Appellate Review of His Central Claim.

Prejudice must therefore be presumed in this case because appellate counsel's deficient petition and subsequent erroneous advice resulted in the complete forfeiture of direct appellate review for Mr. Sumner's Fourth Amendment claim. *Flores-Ortega*, 528 U.S. at 483. The consequence of counsel's errors in this case is the equivalent of counsel's failure to file a notice of appeal in *Flores-Ortega*. *Id.* When a counsel's deficient conduct completely deprives a defendant of appellate review, the judicial proceeding is considered unreliable and inherently prejudicial to the defendant. *Flores-Ortega*, 528 U.S. at 483; *Strickland*, 466 U.S. at 692. This utter lack of counsel renders the entire proceeding "presumptively unreliable or entirely nonexistent," and automatically

prejudices the defendant. *Id.* at 483–84. The Court held in *Flores-Ortega* that the presumption of prejudice is necessary under such circumstances because the failure to perfect an appeal does not merely result in "a judicial proceeding of disputed reliability, but rather . . . the forfeiture of a proceeding itself." *Id.* at 483. Thus, when an attorney fails to file a notice of appeal, it is not simply the attorney's deficient conduct that requires courts to presume prejudice; rather, it is the unjust result that triggers the presumption of prejudice. *Id.*

Technically, Mr. Sumner's counsel filed a petition for appeal; but he failed to comply with Rule 5A:12(c) by not properly identifying the Fourth Amendment claim as a Question Presented. (J.A. 78.) That error resulted in a forfeiture of the entire claim, the centerpiece of the entire appeal. (J.A. 78.) Counsel's later actions only compounded this blunder. When Mr. Sumner brought the mistake to his attorney's attention, appellate counsel erroneously responded it "would be a manifest injustice" for the court not to consider the issue. (J.A. 33.) Counsel then incorrectly stated he could not amend the flawed petition, (J.A. 33), even though Virginia common law apparently permitted him to do so. *Riner*, 40 Va. App. at 453. Counsel's botched petition and erroneous legal advice, (J.A. 33), foreclosed any possibility of appellate review of Mr. Sumner's central claim, which appellate counsel had extensively argued in the petition, (J.A. 58–64). The result of appellate counsel's deficient conduct was that Mr. Sumner lost the ability to appeal

his Fourth Amendment claim. (J.A. 78.) Regarding the principal claim on appeal, appellate counsel's repeated mistakes effectively deprived Mr. Sumner "of the appellate proceeding altogether." *Flores-Ortega*, 528 U.S. at 483. Thus, prejudice must be presumed.

In *United States v. Peak*, this Court presumed prejudice when appellate counsel's failure to file a notice of appeal deprived the defendant "of the assistance of counsel on direct appeal altogether." 992 F.2d 39, 42 (4th Cir. 1993). That procedural error left the defendant "unable to attempt to demonstrate that his conviction was unlawful through the appellate process." *Id.* (quoting *Becton v. Barnett*, 920 F.2d 1190, 1195 (4th Cir. 1990)). In this case, appellate counsel's mistakes similarly prevented Mr. Sumner from demonstrating his conviction was unlawful because of an alleged unconstitutional search of appellant's person and seizure of key evidence. The outcome of counsel's numerous mistakes was that Mr. Sumner effectively had no counsel at all for his Fourth Amendment claim, the centerpiece of the defective petition for appeal.

No case in the Fourth Circuit appears to consider directly the issue raised by the unique facts of Mr. Sumner's case. However, other courts have presumed prejudice on similar facts—when the outcome of an attorney's deficient conduct results in the denial of a defendant's opportunity for full appellate review. For example, the consequences of appellate counsel's errors in this case are

substantially identical to the result of the attorneys' deficient performance in *Rivera v. Goode*, 540 F. Supp. 2d 582, 596–97 (E.D. Pa. 2008). In *Rivera*, appellate counsel failed to file a statement of issues as requested by the appellate court on direct appeal. *Id.* at 582. As a result, the appellate court held the defendant had forfeited his appellate claims. *Id.* at 587. The district court held the attorneys' deficient conduct presumptively prejudiced the defendant because "perfecting petitioner's direct appeal required doing more than filing a notice of appeal." *Id.* at 597. Examining the merits of the forfeited claims in *Rivera* was unnecessary because "[w]here an attorney fails to perfect a direct appeal . . . prejudice is presumed to exist." *Id.* at 595–96.

Here, appellate counsel's deficient petition, (J.A. 58, 78), and his subsequent erroneous legal advice, (J.A. 33), resulted in the forfeiture of Mr. Sumner's Fourth Amendment claim on appeal. (J.A. 78.) As in *Rivera*, the final outcome of counsel's incompetent performance was the complete preclusion of Mr. Sumner's central appellate claim. In such a circumstance, prejudice must be presumed. *See also Hayes v. Morgan*, 58 F. Supp. 2d 817, 830–31 (N.D. Ohio 1999) (court presumed prejudice when counsel failed to identify the correct case number on a notice for appeal, which resulted in his client's "complete preclusion" from the appellate process); *c.f. Hernandez v. United States*, 202 F.3d 486, 488 (2d Cir. 2000) (finding counsel's "unexcused failure to bring a direct appeal from a

criminal conviction upon the defendant's direction to do so" required court to presume prejudice).

C. Appellate Counsel's Forfeiture of Mr. Sumner's Central Claim Resulted in an Unreliable Review of His Entire Petition for Appeal.

This Court also must presume appellate counsel's error prejudiced Mr. Sumner because the sufficiency of the evidence issue reviewed by the appellate court hinged on consideration of Mr. Sumner's forfeited Fourth Amendment claim.

On appeal, appellate counsel argued the trial court erroneously denied the motion to suppress the .45 caliber cartridge, and that the remaining evidence was insufficient to uphold Mr. Sumner's convictions. (JA. 58–64.) Counsel dedicated a significant portion of the petition to the Fourth Amendment issue. (J.A. 59–61.) Clearly, appellate counsel believed that the sufficiency of the evidence claim pivoted on suppression of the .45 caliber bullet. Evidence of this is demonstrated in his revision of the Question Presented on appeal to the Supreme Court of Virginia, in which he attempted to raise the Fourth Amendment claim in connection with the sufficiency issue. (J.A. 95.) Furthermore, counsel implied that the two issues were linked when he stated he thought the original Question Presented was "broad enough" to raise all of Mr. Sumner's claims. (J.A. 123.)

As a result, the appellate court's review of Mr. Sumner's sufficiency of the evidence claim was fundamentally unreliable and incomplete because that claim assumed suppression of the .45 caliber bullet, an issue the court never reached due

to appellate counsel's error. *Flores-Ortega*, 528 U.S. at 483; (J.A. 58-64.) Counsel's flawed Question Presented infected Mr. Sumner's entire petition for appeal, effectively denying his right to counsel on appeal. In such a circumstance, prejudice must be presumed. *Flores-Ortega*, 528 U.S. 483–84; *Peak*, 992 F.2d at 42 (quoting *Becton*, 920 F.2d at 1195)).

CONCLUSION

For the foregoing reasons, Mr. Sumner was denied effective assistance of appellate counsel under *Strickland*. Accordingly, Mr. Sumner respectfully requests that this Court GRANT his petition for a writ of habeas corpus, and REMAND the case with instructions that Respondent-Appellee Davis release Mr. Sumner from custody unless the Court of Appeals of Virginia allows Mr. Sumner to present his Fourth Amendment claim in a petition for appeal.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 34(a), Mr. Sumner respectfully requests an opportunity to present oral argument. Mr. Sumner respectfully submits that oral argument will assist the Court in deciding the case, which raises important questions concerning ineffective assistance of counsel.

Respectfully submitted,

/s/ James E. Coleman, Jr.
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Dated: November 17, 2008

/s/ James E. Coleman, Jr.
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I hereby certify that on this 17th day of November, 2008, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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I further certify that on this 17th day of November, 2008, I caused the required number of bound copies of the Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of the Court, and one bound copy of said brief and appendix to be served, via UPS Ground, to Counsel for Appellee at the above listed address.

/s/ James E. Coleman, Jr.
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