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

REPLY BRIEF OF APPELLANT

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The Virginia Supreme Court's decision rests upon an erroneous finding of fact and, consequently, applies the wrong law. In dismissing Mr. Sumner's Petition for a Writ of Habeas Corpus, the Virginia Supreme Court held:

> The selection of issues to address on appeal is left to the discretion of appellate counsel, and counsel need not address every possible issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983). Furthermore, petitioner does not attempt to demonstrate that the excluded issue had merit or would have been successful had it been included in the question presented. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

(J.A. 126.)

The Virginia Supreme Court's implicit finding that appellate counsel made a conscious decision not to pursue Mr. Sumner's Fourth Amendment claim is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As a result of that error, the court's decision to dismiss Mr. Sumner's state habeas petition is also "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States . . . ." *Id.* Respondent-Appellee Davis (hereinafter "Respondent") merely repeats the state court's errors in his Response Brief. Based upon the evidence before the Virginia Supreme

Court and the applicable federal law, Mr. Sumner is entitled to a writ of habeas corpus.

I. MR. SUMNER'S APPELLATE COUNSEL MADE AN ERROR, NOT A TACTICAL CHOICE, AND THE VIRGINIA SUPREME COURT'S FINDING TO THE CONTRARY IS AN UNREASONABLE DETERMINATION OF FACT IN LIGHT OF THE EVIDENCE BEFORE THAT COURT.

The Virginia Supreme Court implicitly found that Mr. Sumner's appellate counsel made a conscious decision to "exclude" the Fourth Amendment claim that he and Mr. Sumner previously had agreed to pursue on appeal. (*See* J.A. 126–27.) That finding is unreasonable "in light of the evidence presented in the State Court proceeding." 28 U.S.C. § 2254(d).

The evidence that Mr. Sumner presented to the Virginia Supreme Court conclusively demonstrates that the reason the Court of Appeals of Virginia refused to consider Mr. Sumner's Fourth Amendment claim was not because his appellate counsel decided, in the exercise of professional judgment, to exclude the issue, but because his appellate counsel failed to include the issue in the Questions Presented section of the Petition for Appeal, in violation of a basic rule of Virginia appellate procedure. (Pet'r Br. at 10–14.) Not only did the Court of Appeals of Virginia explicitly find this to be the case, (J.A. 78), the Virginia Supreme Court also acknowledged it to be the case: "Counsel's failure to include [the Fourth Amendment claim] prevented the Court of Appeals from considering th[e]

argument raised in the petition for appeal," (J.A. 125). In light of this finding, it is difficult to understand the Virginia Supreme Court's conclusion that appellate counsel excluded the Fourth Amendment claim in an exercise of professional discretion.

The evidence before the Virginia Supreme Court when it dismissed Mr. Sumner's state habeas petition was unequivocal that appellate counsel intended to appeal the Fourth Amendment claim. First, as the Court of Appeals of Virginia noted:

> Appellant argues in his petition that the trial court erred in denying his motion to suppress the .45 caliber shell casing found during the search incident to appellant's arrest. However, appellant failed to include the Fourth Amendment issues in his question presented. Rules 5A:12(c) and 5A:20(c) thus bar our consideration of this issue on appeal.

(J.A. 78.)

Second, a review of the Petition for Appeal that appellate counsel filed in the Court of Appeals of Virginia not only confirms that appellate counsel intended to pursue the Fourth Amendment issue on appeal, it also reveals that the issue was the centerpiece of the entire petition. (*See* J.A. 47–64.) At the outset of the Argument, appellate counsel wrote: "Defendant contends there was insufficient evidence that he possessed a firearm and that the court should have granted his motion to suppress the .45 caliber cartridge that was found on him." (J.A. 59.) Appellate counsel devoted four of the five pages of his substantive argument to the Fourth

Amendment issue and only a single page to the sufficiency of the evidence issue. (J.A. 59–63.) Moreover, the sufficiency of the evidence argument was predicated implicitly upon the court suppressing the .45 caliber cartridge evidence. As appellate counsel wrote, "The only circumstances the Commonwealth can rely upon to prove possession of a firearm after a felony conviction and discharging a firearm is that of two witnesses [sic] testimony that do not corroborate each other, especially given the witnesses [sic] juxtaposition to each other." (J.A. 63.)

Third, after the Petition for Appeal was filed, but before the Virginia Court of Appeals ruled on the petition, Mr. Sumner wrote a letter to his appellate counsel to express concern over the scope of his appeal. (*See* J.A. 33.)[1] Specifically, Mr. Sumner was concerned that the Fourth Amendment claim would be barred from appellate review because the claim was not included in the Questions Presented section of the petition for appeal. (*See id*.) Appellate counsel wrote back to Mr. Sumner assuring him that it was very unlikely the claim would be barred for that reason. (*See id*.) This letter demonstrates that appellate counsel intended to raise the Fourth Amendment claim on appeal and expected the Court of Appeals of Virginia to consider the claim on its merits. Indeed, appellate counsel believed that

[1] This letter was attached as "Exhibit C" to Mr. Sumner's Petition for a Writ of Habeas Corpus to the Virginia Supreme Court, but was only included in the Joint Appendix, at page 33, as an attachment to Mr. Sumner's Petition for a Writ of Habeas Corpus to the Eastern District of Virginia. For the benefit of the Court, this was done to avoid including multiple copies of the same document in the Joint Appendix.

it would be a "manifest injustice" for the court not to consider it. (*Id.*) This statement is further evidence that the Fourth Amendment claim was the centerpiece of Mr. Sumner's appeal and that appellate counsel misunderstood Virginia Supreme Court Rules 5A:12(c) and 5A:20(c).

Fourth, after the Court of Appeals of Virginia refused to consider the Fourth Amendment claim because it was not identified in the Question Presented, appellate counsel tried to correct his error in the Petition for Review he filed in the Virginia Supreme Court. There, he identified the issue on appeal as whether "[t]he Court of Appeals erred in refusing to suppress the evidence and refusing to reverse the Circuit trial court's finding of evidence of a firearm crime by a convicted felon and discharging a firearm necessary to support [Mr. Sumner's conviction of those charges]." (J.A. 87.) Except for recasting the issue presented, the argument that appellate counsel made in the petition he filed in the Virginia Supreme Court was an almost verbatim copy of the argument he made in the petition to the Court of Appeals of Virginia. (J.A. 95–101.)

Finally, the "affidavit" of Mr. Sumner's appellate counsel that Respondent filed in the Virginia Supreme Court in opposition to Mr. Sumner's state habeas petition also makes clear that appellate counsel did not intend to exclude the Fourth Amendment claim from the Petition for Appeal. (J.A. 123–24.) Rather, it shows he mistakenly believed he had "framed the language of the question presented

broad enough and sufficient enough to state the issue regards to Sumner's case given the information that was in the transcript." (J.A. 123.) Moreover, he explained, "[t]he argument from Sumner's trial counsel . . . focused not just towards the bullet that was found with Sumner at the time of his arrest, but [trial counsel] argued also he believed the evidence was the flawed identity of the Commonwealth's witnesses regarding Sumner's appearance." (J.A. 123.) But, as the Virginia Supreme Court noted in dismissing the state habeas petition, "[c]ounsel's failure to include [the Fourth Amendment] question prevented the Court of Appeals from considering this argument raised in the petition for appeal." (J.A. 125.)

In sum, it is beyond question that the Virginia appellate courts did not consider Mr. Sumner's Fourth Amendment claim because his appellate counsel mistakenly failed to include it in the Question Presented section of the Petition for Appeal, as required by Virginia Supreme Court Rules 5A:12(c) and 5A:20(c), and not because appellate counsel decided to exclude the issue. Accordingly, the Virginia Supreme Court's finding that appellate counsel consciously "excluded" the argument from the Petition for Appeal is unreasonable "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

II. BECAUSE THE VIRGINIA SUPREME COURT RELIED UPON THE WRONG LAW, ITS DECISION IS CONTRARY TO, OR INVOLVES AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW.

The Sixth Amendment right to counsel on direct appeal is recognition of the "superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf.'" *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). The primary function of appellate counsel is to "winnow[] out weaker arguments on appeal and focus[] on one central issue, if possible, or at most on a few key issues." *Jones*, 463 U.S. at 751–52. In this case, as a result of Mr. Sumner's appellate counsel's failure to comply with unambiguous rules of the Virginia Supreme Court, Mr. Sumner forfeited review of the central issue his appellate counsel intended to raise on appeal "in accord with counsel's professional evaluation." *Id.* at 751. The result is that Mr. Sumner was denied entirely the assistance of appellate counsel that the Supreme Court contemplated when it recognized the right to counsel on direct appeal. *Id.* at 751–52*; Douglas*, 372 U.S. at 358.

A. The Virginia Supreme Court Erroneously Relied Upon *Jones v. Barnes* to Find That Mr. Sumner's Appellate Counsel's Performance Was Not Deficient Under *Strickland v. Washington*.

Throughout his Response, Respondent inaccurately characterizes appellate counsel's omission of the Fourth Amendment claim from the Questions Presented

section of the petition for appeal as a tactical or strategic decision. (*See* Resp't Opp'n Br. at 15–18.) As demonstrated, however, the record clearly indicates that counsel intended to raise on appeal, and actually argued at length, the Fourth Amendment claim; indeed, the entire appeal was based upon that claim. (J.A. at 59–61.)

Respondent does not—and cannot—point to anything in the record even hinting that appellate counsel's mistake was tactical. As already noted, the record unequivocally demonstrates that: (1) Mr. Sumner's appellate counsel intended to raise and actually argued the Fourth Amendment claim, (J.A. 31, 33, 58–64; Pet'r Br. at 13); (2) this central claim was barred from appellate review because appellate counsel failed to comply with Virginia Supreme Court Rule 5A:12(c), (J.A. 78, 82, 103, 123–24; Pet'r Br. at 8–11, 13 n.6); and (3) appellate counsel continued to perform deficiently by failing to seek to amend the defective petition for appeal when Mr. Sumner alerted him to the error, (J.A. 33; Pet'r Br. at 12–13).

Respondent's reliance on *Jones*—like the Virginia Supreme Court's reliance on that case—is therefore misguided. *Jones* established that attorneys have latitude in deciding which claims to bring on appeal; attorneys need not raise every non-frivolous issue identified by their clients. 463 U.S. at 751. The Court in *Jones* was concerned with the danger of appellate courts, with the benefit of hindsight,

second-guessing the many difficult tactical decisions that counsel must make in the course of litigation. *Id.* at 751–54. That dander is not present in this case.

Here, Mr. Sumner's appellate counsel did not decide that the Fourth Amendment claim should be excluded on appeal; rather, he explicitly argued it as the central claim of the Petition for Appeal. As a consequence, his performance should have been judged under *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993). *See also Rivera v. Goode*, 540 F. Supp. 2d 582, 595 (E.D. Pa. 2008); (Pet'r Br. at 11). The Virginia Supreme Court's failure even to cite *Peak*, coupled with its improper reliance on *Jones*, is thus contrary to and involves an unreasonable application of federal law.

For the same reason that *Jones* is not applicable, *Smith v. Robbins*, 528 U.S. 259 (2000) is not relevant to this case. In *Robbins*, the attorney made a judgment not to file an appeal that he determined lacked merit. *Id.* at 267, 284. The Supreme Court's concern in *Robbins*, as it was in *Jones*, was to ensure that attorneys would not be found to have performed deficiently simply because they did not advance all of the claims requested by their clients. *See Robbins*, 528 U.S. at 287–88. This concern is not implicated here. The question in this case is whether an appellate attorney's failure to abide by a basic procedural rule that barred the Virginia appellate courts from reviewing his client's central claim, coupled with his subsequent erroneous advice that prevented his client from

rectifying that initial error, is objectively unreasonable under prevailing professional norms. Under *Peak* and *Rivera*, the answer is yes. (Pet'r Br. at 11.) Respondent's reliance on *Robbins* is thus contrary to and involves an unreasonable application of clearly established federal law.[2]

B. Federal Law, As Determined By the Supreme Court, Clearly Establishes that Prejudice Should be Presumed In This Case.

Respondent argues that Mr. Sumner's Fourth Amendment claim was subject to "meaningful adversarial testing" merely because appellate counsel filed a petition for appeal and the Virginia Court of Appeals conducted some kind of review, *although not of the central issue that appellate counsel intended to raise*. (Resp't Opp'n Br. at 20.). Such an application of *Strickland v. Washington*, 466 U.S. 668 (1984), would eviscerate, in all but form, the right to counsel on direct appeal.

Appellate counsel's deficient conduct meets *Strickland*'s standard for the presumption of prejudice. His flawed statement of the Question Presented in the Petition for Appeal and his subsequent erroneous legal advice to Mr. Sumner completely deprived Mr. Sumner of appellate review of the central Fourth Amendment issue his counsel intended to pursue on appeal. (Pet'r Br. at 17–20.)

[2] Even assuming, for the sake of argument, that *Robbins* does apply here, the presumption of effective assistance of counsel under *Robbins* is nevertheless defeated. This is because the Fourth Amendment claim was centerpiece of Mr. Sumner's appeal—that is, without it, Mr. Sumner's appeal lacked any substantive content. (*See* J.A. 58–64; Pet'r Br. at 16, 18–19.)

In some circumstances, a court may presume prejudice when counsel's errors constructively deny a defendant the right to counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *United States v. Cronic*, 466 U.S. 648, 659 (1984). But a court *must* presume prejudice when counsel's deficient performance altogether deprives his client "of the appellate proceeding" rendering the outcome "presumptively unreliable." *Flores-Ortega*, 528 U.S. at 483. That is the case here.

This Court must presume prejudice for two reasons. First, appellate counsel's deficient performance deprived Mr. Sumner of the appellate proceeding with respect to the central that his counsel tried to pursue, rendering the appeal presumptively unreliable. Second, appellate counsel's errors presumptively prejudiced Mr. Sumner because the Fourth Amendment claim was the centerpiece of the entire appeal, (Pet'r Br. at 21), and appellate counsel's deficient conduct effectively foreclosed altogether meaningful appellate review of Mr. Sumner's conviction. By forfeiting the Fourth Amendment claim, appellate counsel also prevented review of the insufficiency of the evidence claim that he attempted to raise, as opposed to what was left of that claim after he forfeited the Fourth Amendment claim. (Pet'r Br. at 21–22.)

It is a distortion of plain meaning to call the Court of Appeals of Virginia's order dismissing Mr. Sumner's petition for appeal a "reliable result" under *Strickland* when the court refused to consider Mr. Sumner's central claim, upon

which his entire petition hinged. In such a circumstance, *Flores-Ortega* and *Peak*, require the Court to presume prejudice. (Pet'r Br. at 17–21.)

Finally, Respondent's reliance upon both *Robbins*, (Resp't Opp'n Br. at 20–21), and *Strong v. Johnson*, 495 F.3d 134 (4th Cir. 2007), (Resp't Opp'n Br. at 21–22), are also inappropriate for the same reason the Virginia Supreme Court's reliance upon *Jones v. Barnes*, (J.A. 126), was inappropriate. In these cases, the alleged ineffective appellate lawyers, in the exercise of their professional judgment, decided to forgo appellate review of weak claims. *Robbins*, 528 U.S. at 284–87; *Strong*, 495 F.3d at 137–38. In contrast, Mr. Sumner's counsel fully intended to appeal the Fourth Amendment claim, but failed to do so only because of his objectively deficient formulation of the Question Presented in Mr. Sumner's Petition for Appeal.

The Court in *Robbins* held that when counsel exercises professional judgment—even if it is flawed—a presumption of reliability applies to the prior judicial proceedings and a defendant must demonstrate prejudice. *Robbins*, 528 U.S. at 285–86. In *Robbins*, the Court's analysis of *Strickland*'s prejudice standard differentiated cases in which counsel exercises professional judgment, such as in *Jones*, from cases in which counsel's deficient conduct denies his client the benefit of his professional judgment. *Id.* at 287–88.

Mr. Sumner's case falls in the latter category and is not controlled by either *Jones* or *Robbins*. The foreclosure of Mr. Sumner's central appellate claim, (J.A. 78), stemmed from appellate counsel's objectively unreasonable errors, not the exercise of professional judgment. Additionally, appellate counsel's subsequent erroneous legal advice mislead Mr. Sumner into believing that his ineffective counsel did "not have the ability to change anything," (J.A. 33), resulting in a complete default of the claim.[3] Further compounding his deficient performance is the fact that the Fourth Amendment claim he intended to appeal was the centerpiece of Mr. Sumner's entire appeal. (Pet'r Br. at 21–22.) Thus, counsel's errors infected the entire appeal and led to an unreliable review by the Court of Appeals of Virginia. Such a total default by appellate counsel is presumed prejudicial. *Flores-Ortega*, 528 U.S at 483; *Strickland*, 466 U.S. at 692. And, thus the Supreme Court of Virginia should have evaluated the issue of prejudice under the standards articulated by the Supreme Court in *Flores-Ortega*, as this Court did in *Peak* and as the district court did in *Rivera*. (Pet'r Br. at 17–20.)

[3] Another difference between *Robbins* and Mr. Sumner's case is that *Robbins* involved a *Wende* brief, which implicitly signifies that counsel believes an appeal would be frivolous. *Robbins*, 528 U.S. at 265. With a *Wende* brief, a defendant is aware of counsel's judgment before the brief is filed and the defendant can file a supplemental brief. Here, in contrast, Mr. Sumner relied entirely upon counsel for representation and because of this reliance; he was not afforded the protection typically offered to a *Wende* appellant.

Respondent quotes *Strong* for the proposition that an attorney's "failure to raise a specific issue on appeal" is not conduct qualifying for the presumption of prejudice. This point is irrelevant to Mr. Sumner's case.

The central issue considered in *Strong* was "whether Strong continued to request that [counsel] file an appeal or whether Strong instead agreed ultimately that no appeal would be taken." 495 F.3d at 138. This Court concluded that the record supported the state court's conclusion that Strong abandoned his appeal; this Court did not hold, as Respondent suggests, that a presumption of prejudice was appropriate only in cases involving counsel's failure to file a notice of appeal. It is undisputed in this case that appellate counsel and Mr. Sumner agreed to appeal the trial court's denial of Mr. Sumner's motion to suppress under the Fourth Amendment. (J.A. 59) Unlike *Strong*, appellate counsel in this case attempted to appeal the claim; (J.A. 59–61) his deficient performance, not his professional judgment, foreclosed appellate review of the claim. (J.A. 33, 78.) These errors effectively denied Mr. Sumner the assistance of appellate counsel except in empty form.

This Court held in *Strong*, as it did in *Peak*, that a court must presume prejudice when counsel's errors constructively deny a client the right to counsel. *Strong*, 495 F.3d at 138. Here, appellate counsel's error, like the deficient conduct in *Peak*, is precisely the type of mistake that calls for the presumption of prejudice

since it completely foreclosed Mr. Sumner's ability to appeal his central Fourth Amendment claim, or the insufficiency of the evidence claim as it was framed in the Petition for Appeal. *Flores-Ortega*, 528 U.S. at 482–83; *Peak*, 992 F.2d at 42.

III. MR. SUMNER EXHAUSTED HIS CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Mr. Sumner exhausted his claim of ineffective assistance of appellate counsel in the petition for a writ of habeas corpus that he filed in the Virginia Supreme Court. (J.A. 110–11.) Respondent's argument to the contrary misses the point.

Respondent asserts that Mr. Sumner "argues for the first time in federal court that counsel's failure to include the Fourth Amendment issue in the Question Presented was a 'mistake,' not a tactical decision." (Resp't Opp'n Br. at 17 n.2.) The record refutes this. Mr. Sumner petitioned to the Virginia Supreme Court on the ground of "ineffective assistance [of] counsel," (J.A. 109), and explicitly argued that his appellate counsel made an "error" in failing to follow appellate procedure that was "not due to strategic considerations." (J.A. 110, 114.)

Respondent also erroneously contends that Mr. Sumner's argument that prejudice should be presumed in this case was not exhausted since "this claim is raised for the first time in this Court." (Resp't Opp'n Br. at 18.) First, this confuses a *claim*—which must be exhausted—with an *argument*, for which exhaustion is not required. Exhaustion requires that a petitioner "fairly present[ed]

his *claim* to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (emphasis added). The cases cited by Respondent, (Resp't Opp'n Br. at 18), all involving exhaustion of *claims*, are irrelevant. *See Schlump v. Delo*, 513 U.S. 298, 326–27 (1995); *Clagett v. Angelone*, 209 F.3d 370, 378 (4th Cir. 2000); *Mackall v. Angelone*, 131 F.3d 442, 450 (4th Cir. 1997).

Second, Mr. Sumner fairly presented the presumption of prejudice argument to the Virginia Supreme Court. He argued that under *Strickland* appellate counsel's mistaken default of his Fourth Amendment claim required the state court to grant habeas relief and to order the appointment of counsel for a new appeal of the claim. (J.A. 113.) Mr. Sumner did not attempt to show prejudice precisely because prejudice was to be presumed under *Strickland*. The only reason the Virginia Supreme Court did not apply the correct law to determine prejudice was because it erroneously found Mr. Sumner's appellate counsel had decided as a matter of professional judgment to exclude the claim.

In sum, Mr. Sumner has not advanced any new claims in this appeal and, as the district court held below, he properly exhausted his Sixth Amendment claim of ineffective assistance of appellate counsel. (J.A. 131.)

CONCLUSION

For the foregoing reasons, and the reasons set forth in his opening brief, Mr. Sumner respectfully requests that this Court GRANT his petition for a writ of habeas corpus, and REMAND the case with instructions that Respondent 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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Dated: December 29, 2008

/s/ James E. Coleman, Jr.
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of December, 2008, I caused this Reply 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 29th day of December, 2008, I caused the required number of bound copies of the Reply Brief of Appellant to be hand-filed with the Clerk of the Court, and one bound copy of said brief to be served, via U.S. Mail, postage prepaid, to Counsel for Appellee at the above-listed address.

/s/ James E. Coleman, Jr.
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