IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 08-6570

MARVIN SUMNER,

Petitioner-Appellant,

v.

KEITH DAVIS, WARDEN,

Respondent-Appellee.

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

APPELLEE'S RESPONSE BRIEF

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Marvin Sumner filed a habeas corpus petition in the district court pursuant to 28 U.S.C. § 2254. Senior United States District Judge Richard L. Williams denied habeas relief on March 25, 2008. Sumner subsequently filed his Notice of Appeal in the district court on April 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED[1]

I. APPLYING THE APPROPRIATE AEDPA STANDARD, WAS APPELLATE COUNSEL'S PERFORMANCE DEFICIENT, AND MUST SUMNER DEMONSTRATE STRICKLAND PREJUDICE WHERE COUNSEL'S ALLEGED PROCEDURAL ERROR PRECLUDED CONSIDERATION OF A SINGLE ISSUE ON DIRECT APPEAL?

HISTORY OF CASE

Trial and Direct Appeal Proceeding

Petitioner was convicted in the Circuit Court for the City of Chesapeake on November 9, 2004, of discharging a weapon in public in violation of Virginia Code § 18.2-280, and possession of a firearm by a convicted felon in violation of Virginia Code § 18.2-108.2. He was sentenced to serve 6 months, all suspended, and to the mandatory 5 years in prison on the respective offenses. (Record Nos. CR04-3309 and CR04-3693).

Petitioner appealed to the Court of Appeals of Virginia. As stated in his petition, (App. 50), and by the Court of Appeals in its November 23, 2005 order (App. 77), the petitioner contended that:

[1] Whether petitioner must prove prejudice in order to make out his claim, or whether prejudice is presumed was stated by the Court and raised for the first time in this case in the Court's August 8, 2008 letter to opposing counsel.

> [T]he evidence was insufficient to support convictions for possession of a firearm by a convicted felon and for discharging a firearm in public.

(App. 77). As stated by the Court of Appeals of Virginia, the evidence, viewed in the light most favorable to the Commonwealth, revealed that:

> On July 11, 2004, between 8:30 and 9:00 p.m., Kerri Cole and Carlton Outland saw Sumner standing in a parking lot outside an apartment complex in the city of Chesapeake. The parking lot and apartment complex were well-lit, it was not completely dark outside, and the only obstacle between [Sumner] and the witnesses was a chain link fence. Prior to that night, Cole had seen [Sumner] on more than ten occasions.
>
> Cole and Outland [saw Sumner] coming out of his apartment, raise a gun, and fire it three times. When [Sumner] saw Cole. . . [Sumner] lowered his arm, went to turn and walk in between two apartments, and [Cole] saw him raise his hand, and [Cole] saw the fourth shot, and then [Sumner] went behind the building . . . [after which] Cole and Outlaw then heard two more shots.
>
> Cole and Outland gave descriptions of [Sumner]'s physical appearance and clothing to Officer Cintron. . . . Based on this description, police detained [Sumner]. . . . When police drove Cole and Outland to that location, each identified [Sumner] as the person they saw firing the gun. There were some discrepancies between their descriptions of [Sumner's clothing: his] jersey was black, not blue, and his jersey contained number 71, not 11.
>
> When Cintron returned to the scene of the shooting, he recovered two .45 caliber shell casings where [Sumner] had been standing. While he was retrieving the evidence, another officer released [Sumner] by mistake. Cintron later saw [him] walking down a street drinking from a beer bottle. When [Sumner] saw Cintron, [he] threw the beer bottle onto the ground. Cintron then arrested [him] for littering and drinking in public. After the arrest, Cintron searched [Sumner] and found a .45 caliber shell casing in [his] pants pocket. [Sumner] admitted he was a convicted felon; a fact that Cintron confirmed after he conducted a

> background check. [Sumner] was then arrested for possession of a firearm by a convicted felon and discharging a firearm in a public place.

(App. 77-78). The Court of Appeals of Virginia further stated in a footnote:

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

(App. 78).

> The Court of Appeals stated in its opinion:
>
> [Sumner] argues that the distance between the eyewitnesses and [Sumner], and the fact that it was nighttime, combined with the discrepancies between the witnesses' descriptions of [Sumner's] clothing and what [he] actually wore, created[d] a reasonable doubt whether [Sumner] was correctly identified. [The Court of Appeals held, however, that] such minor discrepancies [went] to the weight of the evidence. . . .
>
> [The trial court held that t]wo eyewitnesses positively identified [Sumner]. The shell casings found at the scene and on [Sumner's] person corroborated the identification. Thus, both direct and corroborating circumstantial evidence was sufficient to prove possession of a firearm and discharging a firearm in public beyond a reasonable doubt.

(App. 78-79). The petitioner filed a demand for consideration by a three-judge panel of the Court of Appeals stating:

> Sumner argued in his petition for appeal that he should not have been convicted . . . because of the lack of sufficiency of the evidence. Sumner argued that at the time the officer seized him and did the subsequent search of his person, the officer did not have probable

> cause to do so, and [the] officer did not have sufficient specific articulable facts. In McGee v. Commonwealth, 25 Va. App. 193, 197-198, 487 S.E.2d 259, 261 (1997) [the Court held that] "ultimate questions of reasonable suspicion and probable cause . . . are reviewed d[e] novo on appeal." Sumner also argued that a full custodial arrest of him was not justified under the facts in the case [and] Code § 19.2-74 required the police to issue a summons and release [Sumner]. . . . Sumner also challenges the sufficiency of the evidence as the only testimony against him to prove possession is two witnesses that do not corroborate each other. The[ir] description[s] w[ere] inconsistent.

(App. 80-81). Sumner's convictions were subsequently affirmed by a three-judge panel of the Court of Appeals of Virginia on January 18, 2006. (App. 80-82). Sumner petitioned for appeal to the Virginia Supreme Court claiming

> The Court of Appeals erred in refusing to suppress the evidence and refusing to reverse the circuit trial court's finding of evidence of possession of a firearm by a convicted felon and discharging a firearm necessary to support a conviction under §§ 18.2-308.2 and 18.2-280. . . .

(App. 87). The petition was refused on June 30, 2006. (App. 103).

State Habeas Proceedings

On August 3, 2006, petitioner filed a habeas petition in the Supreme Court of Virginia in which he attacked his convictions by claiming:

> [Appellate] counsel render[ed] ineffective assistance when counsel failed to follow [the] Court of Appeals' Rules.

In his attached memorandum, Sumner further stated that he specifically requested that appellate counsel challenge the trial court's denial of his suppression motion, a Fourth Amendment claim based upon his alleged illegal search after being arrested

for littering and drinking in public when a police officer observed him throw the beer bottle onto the ground. The search of Sumner's pants pocket incident to his arrest revealed a .45 caliber shell casing. (App. 78, 106, 108-110). Petitioner complained that appellate counsel failed to follow Rule of Court 5A:12(c), (App. 110), resulting in the Court of Appeals's refusal to consider this argument. (App. 78).

The petition was dismissed by the Virginia Supreme Court on January 10, 2007. (App. 125). The court held:

> [P]etitioner alleges he was denied the effective assistance of counsel because appellate counsel failed to include, as a question presented, petitioner's argument that the trial court erred in denying his motion to suppress. Counsel's failure to include such a question prevented the Court of Appeals from considering this argument raised in the petition for appeal.
>
> The Court holds that [this claim] satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). 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, 751-52 (1983). Furthermore, 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. 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.

(App. 125-126).

Federal Habeas Proceedings

On February 28, 2007, petitioner filed his federal habeas petition in the district court raising the following claims:

1. Whether petitioner was entitled to effective assistance of counsel on direct appeal.

2. Counsel was ineffective for failing to follow the Virginia Rules of appellate procedure.

3. The state violated petitioner's due process rights by imposing sanction (counsel's error) on petitioner.

4. The state violated petitioner's 4th Amendment right against illegal search and seizure.

The federal district court held that only claim 2 was properly before the Court. Regarding claim 2 the court stated:

> [A]ppellate counsel is not obligated to assert all nonfrivolous issues on appeal, as there can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. Additionally, counsel is presumed to have selected the issues that were most likely to afford appellate relief. Thus, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.
>
> Here in regards to Claim Two, Petitioner has failed to demonstrate that a challenge to the Circuit Court's denial of the motion to suppress was likely to succeed on appeal. Moreover, in light of the ample eyewitness testimony of Petitioner's guilt, he has failed to demonstrate that his conviction would have been reversed even if he had persuaded the appellate courts that the Circuit Court erred in denying the motion to suppress with respect to the shell casing. In light of such circumstances, Petitioner has failed to demonstrate that appellate counsel was deficient or that he was prejudiced by the

> omission of an appellate challenge to the Circuit Court's denial of the motion to suppress.

(App. 132-133).

SUMMARY OF ARGUMENT

Under § 2254(d)(2) the Virginia Supreme Court's decision is entitled to deference by this Court. The Virginia Supreme Court held that pursuant to the holding in Jones v. Barnes, 463 U.S. 745, 751 (1983), petitioner had failed to demonstrate deficient performance or prejudice under the demanding Strickland test. In addition to defaulting much of his argument, the petitioner has failed to present "clear and convincing evidence" that the state court's finding was objectively unreasonable either legally or factually. Pursuant to § 2254(e)(1), the state court's decision should not be disturbed.

Further, the issue identified by this Court when granting the appeal, whether in order to obtain habeas relief the petitioner must prove he was prejudiced by appellate counsel's alleged error pursuant to the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), or whether prejudice is presumed, was not raised or decided in the state or federal district court habeas proceedings. Since the Virginia Supreme Court was not afforded an opportunity to review this claim, it is exhausted but defaulted. Thus, the issue cannot be reviewed on the merits or serve as a basis for overturning the state court's judgment.

In any event, petitioner must prove prejudice but he cannot as his suppression claim was without merit. Moreover, even if he had convinced the trial court that suppression was appropriate, the exclusion of this evidence would not have altered the outcome of trial; the remaining evidence was sufficient to support the convictions.

STANDARD OF REVIEW

In order to obtain habeas relief, an inmate must demonstrate that his rights under the Constitution, laws, or treaties of the United States were violated. Barbe v. McBride, 521 F.3d 443, 450-453 (4th Cir. 2008) (citing Estelle v. McGuire, 502 U.S. 62, 68 (1991)).

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), specifically 28 U.S.C. §§ 2254(d) and 2254(e)(1), the scope of federal review is "highly constrained." Lawrence v. Branker, 517 F.3d 700, 707 (4th Cir. 2008). This Court may grant relief with respect to a claim adjudicated on the merits in state court *only if* the state-court decision was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C.A. § 2254(d)(1). Id.

A decision of a state court is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the

Supreme] Court has on a set of materially indistinguishable facts." Id. (citing Williams v. Taylor, 529 U.S. 362, 413 (2000)). A state-court adjudication is an unreasonable application of federal law when the state court "correctly identifies the governing legal rule [from the Supreme Court's cases] but applies it unreasonably to the facts of a particular . . . case," id. at 407-08, or "applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable [or] fails to apply the principle of a precedent in a context where such failure is unreasonable," Lawrence v. Branker, 517 F.3d at 708 (citing Robinson v. Polk, 438 F.3d 350, 355 (4th Cir. 2006)); see also Lenz v. Washington, 444 F.3d 295, 300 (4th Cir. 2006).

The state court's application of clearly established federal law must be "objectively unreasonable," for a "federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Lawrence v. Branker, 517 F.3d at 708 (citing Williams v. Taylor, 529 U.S. at 409, 411). The phrase "clearly established federal law" refers "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Id. at 708 (citing Williams v. Taylor, 529 U.S. at 412).

In deciding whether a petitioner has demonstrated the deficiency of the state-court adjudication, § 2254(e)(1) instructs that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." See Lawrence v. Branker, 517 F.3d at 708; 28 U.S.C.A. § 2254(e)(1).

In applying these standards when reviewing a state decision under § 2254(d), the question, therefore, is not "whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." Schriro v. Landrigan, 550 U.S. ___, ___, 127 S. Ct. 1933, 1939 (2007) (citing Williams v. Taylor, 529 U.S. at 410); see also Yarbrough v. Johnson, 520 F.3d 329, 335-336 (4th Cir. 2008); Strong v. Johnson, 495 F.3d 134, 140 (4th Cir. 2007).

Apart from the substantial restrictions on federal habeas review in § 2254(d), the scope of the federal habeas remedy for federal constitutional violations remains significantly limited by Teague v. Lane, 489 U.S. 288 (1989). Teague's doctrine continues to apply as demonstrated in Breard v. Greene, 523 U.S. 371 (1998) (per curiam), where the Supreme Court dismissed a claim in an AEDPA case as procedurally defaulted and as lacking under Teague. See also Horn v. Banks, 536 U.S. 266 (2002).

The law pertaining to claims of ineffective assistance of counsel is well-established. To show that counsel rendered ineffective assistance, a defendant must satisfy the two-pronged standard set forth in Strickland. First, the defendant must show that his counsel's performance "fell below an objective standard of reasonableness" in light of the prevailing professional norms. Strickland, 466 U.S. at 688. Second, the defendant must show that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. However, "in certain Sixth Amendment contexts, prejudice is presumed." Id. at 692. One such context includes the '[a]ctual or constructive denial of the assistance of counsel altogether." Id.; Smith v. Robbins, 528 U.S. 259, 286 (2000).

ARGUMENT

COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND PETITIONER MUST DEMONSTRATE PREJUDICE; PREJUDICE IS NOT PRESUMED.

Sumner contends that appellate counsel's performance was "indisputably constitutionally deficient" because he "mistakenly" failed to identify petitioner's "central claim," a Fourth Amendment unlawful arrest/search and seizure issue, in his questions presented, which caused the state appellate courts to refuse to review that claim on the merits. Sumner complains that counsel's error was particularly egregious inasmuch as Sumner *directed* counsel to raise the claim and counsel

agreed to do so. Sumner concludes that counsel's "mistake" effectively denied Sumner his right to appeal altogether. Sumner also argues that he is not required to show Strickland prejudice in order to obtain relief. Under the AEDPA standard, the only question before this Court — nothing more, nothing less — is whether the Supreme Court of Virginia unreasonably applied Strickland when finding counsel's performance was sufficient and that Sumner was not prejudiced. Properly viewed, Sumner's claims are with out merit.

Keenly aware of the difficulties inherent in evaluating counsel's performance, the Supreme Court has admonished that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; see also id. (directing that "[j]udicial scrutiny of counsel's performance must be highly deferential"). Given this strong presumption of reasonable performance, this Court has stated that the showing required under Strickland's first prong is a "difficult" one to make. James v. Harrison, 389 F.3d 450, 457 (4th Cir. 2004).

In the context of this case, two additional principles are relevant to the inquiry into the reasonableness of counsel's conduct. First, an accused has the ultimate authority to make certain fundamental decisions regarding his case: whether to plead guilty, waive a jury, testify in his or her own behalf, or *take* an appeal. In addition, the Supreme Court has held that, with some limitations, a

defendant may elect to act as his or her own advocate. Jones v. Barnes, 463 U.S. at 751. *All* other decisions fall within the professional responsibility of counsel. Id.

Second, for certain fundamental rights, the defendant must personally make an informed waiver. See Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938) (right to counsel); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has — and must have — full authority to manage the conduct of the trial." Taylor v. Illinois, 484 U.S. 400, 417-418 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is "'deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."' Link v. Wabash R. Co., 370 U.S. 626, 634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880)).

Thus, decisions by counsel are generally given effect as to what arguments to pursue, see Jones v. Barnes, 463 U.S. at 751, what evidentiary objections to raise, see Henry v. Mississippi, 379 U.S. 443, 451 (1965), and what agreements to conclude regarding the admission of evidence, see United States v. McGill, 11 F.3d 223, 226-227 (1st Cir. 1993). Absent a demonstration of ineffectiveness,

counsel's word on such matters is the last." Ibid.; Gonzalez v. United States, 553 U.S. ___ 0611612 (2008).

Regarding appellate counsel, it is a well established principle that counsel decides which issues to pursue on appeal, see Jones v. Barnes, 463 U.S. at 751-52, and there is no duty to raise every possible claim. See id. at 751. An exercise of professional judgment is required. Indeed, the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. at 751). And regarding the choice to press or omit an issue, lawyers cannot be held to a standard which requires perfection. The Supreme Court has long recognized that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Murray v. Carrier, 477 U.S. 478, 486 (1986). "Law is an art, not a science, and many questions that attorneys must decide are questions of judgment and degree. Among the most difficult are decisions as to what issues to press on appeal." Simmons v. Lockhart, 915 F.2d 372, 375 (8th Cir. 1990).

Applying this standard, it is not inappropriate for counsel, to choose *not* to follow the explicit instructions of a client regarding which issues to bring on

appeal. Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1996). "Generally, *only* when ignored issues are *clearly stronger* than those presented, will the presumption of effective assistance of counsel be overcome." Smith v. Robbins, 528 U.S. 259, 288 (2000); Lawrence v. Branker, 517 F.3d at 709-709.

When Sumner raised his current claim in the state habeas proceeding the Virginia Supreme Court held:

> [Sumner's claim] satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). 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. 745 751-52 (1983). Furthermore, [Sumner] does not attempt to demonstrate that the excluded argument had merit or would have been successful had it been included in the questions presented. Thus, [he] 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.

(App. 125-126).

Sumner did "not attempt to demonstrate in the state habeas proceeding that the excluded Fourth Amendment claim had merit or would have been successful had it been included in the questions presented." (App. 125-126). *A fortiori*, Sumner failed to demonstrate that the excluded claim was *clearly stronger* than the sufficiency claim counsel raised on appeal. Smith v. Robbins, 528 U.S. at 288; Lawrence v. Branker, 517 F.3d at 709-709. His failure to do so is fatal to a merits

review of his Strickland defective performance claim by this Court under § 2254(d).

Sumner did not exhaust his state court remedies regarding this argument.[2] The exhaustion requirement dictates that a federal court may not overturn a state court conviction "without the state courts having had an opportunity to correct the constitutional violation in the first instance." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Pursuant to Code § 2254(b), State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. *And this opportunity must be given by fairly presenting to the state court "both the operative facts and the controlling legal principles" associated with each claim*. Baker v. Corcoran, 220 F.3d 276, 289 (4th Cir. 2000) (emphasis added; citing Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) (internal quotation marks omitted). Mallory v. Smith, 27 F.3d 991, 995 (4th Cir. 1994) (in other words, the ground must "be presented face-up and squarely.").

As the state court held, it is for appellate counsel to decide which issues to pursue on appeal. Jones v. Barnes, 463 U.S. at 751. Sumner's claim, as presented

[2] Sumner also argues for the first time in federal court that counsel's failure to identify the claim was a "mistake," not a tactical decision. He did not make this and related arguments in the state court. He is not entitled to make them or present new evidence to support his claim in this Court. Strong v. Johnson, 495 F.3d 135, 139 (4th Cir. 2007); § 2254(d)(2).

in state court, failed to demonstrate that the ignored issue was "clearly stronger" than the sufficiency claim that was raised and decided on the merits. Thus, the presumption of effective assistance of counsel has not been overcome. Lawrence v. Branker, 517 F.3d at 709-709.

Under the AEDPA, the state court's determination that appellate counsel's performance was not deficient was not "objectively unreasonable." Accordingly, Sumner's attack on appellate counsel's performance must fail.

Sumner also argues that appellate counsel's failure to properly raise the suppression issue as a separate claim effectively denied him his right to appeal altogether and thus obviates the need for him to prove Strickland prejudice. This claim is likewise without merit.

It is worth noting that this claim is raised for the first time in this Court. As earlier argued, a habeas petitioner in state custody generally must exhaust state court remedies, see 28 U.S.C. § 2254(b), and a federal habeas court may not review unexhausted claims that would be treated as procedurally barred by state courts — absent cause and prejudice or a fundamental miscarriage of justice. Sumner has not attempted to meet this burden. See Schlump v. Delo, 513 U.S. 298, 326-327 (1995); Clagett v. Angelone, 209 F.3d 370, 378 (4th Cir. 2000); Mackall v. Angelone, 131 F.3d 442, 445 (4th Cir. 1997) (en banc). The current claim is simultaneously exhausted and defaulted.

In any event, this Court should reject Sumner's invitation to hold that this is a case where the Supreme Court's precedents dictate that Strickland prejudice is presumed. In Strickland v. Washington, 466 U.S. at 668, the Supreme Court stated that a showing of prejudice requires proof that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

Strickland and its companion case, United States v. Cronic, 466 U.S. 648 (1984), gave more specific instructions on finding prejudice. The Court stated that only in certain limited contexts, "prejudice is presumed." Strickland, 466 U.S. at 692. In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, per se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). A finding of per se prejudice under any of these three prongs is "an extremely high showing

for a criminal defendant to make." Glover v. Miro, 262 F.3d 268, 274-275 (4th Cir. 2001) (citing Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998)).

Sumner's attempt to characterize his appeal as one similar to cases where a petitioner was in fact or constructively denied his right to appeal at all is like trying to force a square peg into a round hole. Such a wholesale denial of an appeal happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659. The record of this case shows that appellate counsel perfected an appeal and filed a 14-page brief arguing insufficiency of the circumstantial evidence—primarily eyewitness testimony—to support the conviction. (App. 47-64). The Court of Appeals of Virginia issued a three-page denial order addressing this claim on the merits. (App. 77-79). In no sense can this case be equated to those where counsel failed to properly perfect the appeal or made no argument on petitioner's behalf thus thwarting a defendant's right to appeal altogether. Accordingly, this is not a case where Strickland prejudice is presumed.

To the contrary, "[t]he applicability of Strickland's actual-prejudice prong to [Sumner's] claim of ineffective assistance follows from Penson [v. Ohio, 488 U.S. 75 (1988)], *where [this Court] distinguished denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of*

counsel on appeal, which does not." Smith v. Robbins, 528 U.S. at 285-286 (Emphasis added).

> *It is no harder for a court to apply Strickland in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim. It will likely be easier to do so. In Jones v. Barnes, 463 U.S. 745 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.* See, e.g., Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. In both cases, however, the prejudice analysis will be the same.
>
> In sum, Robbins must satisfy *both* prongs of the Strickland test in order to prevail on his claim of ineffective assistance of appellate counsel.[3]

Smith v. Robbins, 528 U.S. at 288-289 (Emphasis added).

Counsel's failure to raise a specific issue on appeal is not the kind of attorney error that warrants application of a prejudice per se standard. Sumner's reliance on

[3] Additionally, this Court held in Griffin v. Akin, 775 F2d 1226, 1235-1236 (4th Cir. 1985), "to the extent that the record does not indicate whether appellate counsel deliberately chose not to present on appeal [the claim the petitioner complains should have been raised] we address and reject this claim . . . [u]nder the test of ineffective assistance of counsel as stated in Strickland v. Washington. . . ."

United States v. Peak, 992 F.2d 39 (4th Cir. 1993), Rivera v. Goode, 540 F. Supp. 2d 582 (E.D. Pa. 2008) and other similar cases is misplaced. "[F]ailure to file a requested appeal is per se ineffective assistance of counsel, irrespective of the possibility of success on the merits." Strong v. Johnson, 495 F.3d 135, 138 (4th Cir. 2007). It was appropriate to presume prejudice in those cases, but not in the present case.

Regarding the prejudice issue, as the respondent argued in the state habeas proceedings, (App. 120-121), Sumner's suppression claim is without merit. The record shows that prior to trial, defense counsel filed a motion to suppress the bullet seized from Sumner's pocket as the product of an illegal search. (Tr. 4-5). The Commonwealth's evidence proved the police responded to the area as a result of a citizen complaint, they encountered the petitioner drinking out of a beer bottle and he discarded the bottle upon seeing the officers. (Tr. 11). He was arrested for littering, a misdemeanor committed in the officer's presence. (Tr. 12). The defendant admitted throwing down a paper bag containing a bottle of beer, that he was arrested and then told to remove the contents of his pockets. (Tr. 19-20). Petitioner provided the officer with his identification card, and advised him that he was a convicted felon. (Tr. 21). Petitioner was arrested and convicted of littering and drinking in public. (Tr. 21). The .45 caliber bullet cartridge was seized from his pocket. (Tr. 13). After being identified by Cole and Outland, he was also

charged with discharging a weapon and felon in possession of a firearm. The defense argued that the officers stop of petitioner was "a classic case of pretext. . . ." (Tr. 22). He argued the officers arrested petitioner for drinking in public and littering in order to search him on the firearm offense. (Tr. 22-23). The court overruled the motion to suppress. (Tr. 24).

In Atwater v. City of Lago Vista, 532 U.S. 318 (2001), the United States Supreme Court held that, when "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Id. at 354. "Under long-standing precedent, an arrest is reasonable if supported by probable cause." See Horne v. Commonwealth, 230 Va. 512, 517, 339 S.E.2d 186, 190 (1986) (citing Gerstein v. Pugh, 420 U.S. 103 (1975); Carroll v. United States, 267 U.S. 132 (1925)). The bona fide arrest, supported by probable cause for the two misdemeanors committed in the officer's presence, entitled the officer to search petitioner incident to arrest. See Horne, 230 Va. at 517, 339 S.E.2d at 190. Since the warrantless arrest was lawful, the warrantless search of the defendant's person incident to that arrest was lawful, whether the object of the search was weapons or evidence. Chimel v. California, 395 U.S. 752, 763 (1969); Draper v. United States, 358 U.S. 307, 314 (1959). See Virginia v. Moore, 553 U.S. ___, 128 S. Ct. 1598

(2008). Petitioner's claim that appellate counsel was ineffective for failing to raise the suppression issue on appeal fails to demonstrate Strickland prejudice.

Finally, as the district court held, petitioner also cannot demonstrate prejudice because "in light of the ample eyewitness testimony of [p]etitioner's guilt, he has failed to demonstrate that his conviction would have been reversed even if he had persuaded the appellate courts that the [c]ircuit [c]ourt erred in denying the motion to suppress with respect to the shell casing." (App. 133).

This is not a case where Strickland prejudice is presumed. Smith v. Robbins, 528 U.S. at 285-286. Upon application of clearly established Supreme Court law to the facts of this case, the state court's determination that petitioner had failed to demonstrate Strickland prejudice was not "objectively unreasonable." For these reasons, Sumner's attack on appellate counsel's performance must fail.

CONCLUSION

The Virginia Supreme Court's factual determination was neither unreasonable nor contrary to or an unreasonable application of Strickland v. Washington. This Court should defer to the state court's decision. See 28 U.S.C. § 2254(d).

The district court did not err in holding that the Virginia Supreme Court's decision was not objectively unreasonable in light of the facts and evidence before it. Accordingly, the judgment of the district court should be affirmed.

REQUEST FOR ORAL ARGUMENT

The respondent does not believe oral argument is necessary in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 12, 2008, a copy of this formal brief was mailed to James E. Coleman, Duke University Law School, Science Drive and Towerview Road, Room 3180, Durham, N.C. 27708, counsel for the Petitioner-Appellant.

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