No. 13-7040

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEROME GORDON,
Petitioner-Appellant,

v.

DANIEL BRAXTON, Warden,
Respondent-Appellee,

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
in Case No. 1:12-cv-00834-LO-TRJ (O'Grady, J.)

BRIEF OF PETITIONER-APPELLANT

Christopher R. Ford*
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorney for Petitioner-Appellant

**Admitted in Virginia only; practicing under supervision pursuant to D.C. App. Rule 49(c)(8)*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

INTRODUCTION

Jerome Gordon pled no contest in Virginia court to two charges related to the solicitation of the creation of child pornography. The state court imposed a 27-year sentence on the two offenses. Gordon was represented by counsel during both his plea and his sentencing proceeding.

Immediately after he was sentenced, Gordon asked counsel whether there was anything that could be done about the punishment. Counsel's only response was to shake his head, indicating "no." A few weeks later, Gordon wrote to counsel and asked explicitly for counsel to file an appeal on his behalf. Despite his request, no timely appeal was ever filed.

Gordon sought post-conviction relief from the state trial court, raising a variety of issues related to his conviction and sentence. As relevant to this appeal, Gordon claimed that he requested an appeal from his attorney, who nevertheless failed to file one. In response, the Commonwealth adduced evidence, in the form of a declaration from Gordon's trial counsel, in which counsel baldly stated that Gordon had never asked for an appeal. In a counter-affidavit, Gordon reiterated his

contention that he had spoken with counsel and asked whether there was anything more that could be done about his sentence.

The state post-conviction court issued an order disposing of all of Gordon's claims, including his failure-to-appeal claim. In less than a page of analysis the court concluded that the "evidence," which in the court's view consisted only of the two affidavits, was not conflicting and indicated that Gordon had not sought an appeal. On appeal, the Supreme Court of Virginia summarily denied Gordon relief.

Gordon then filed this federal habeas petition in the district court, asserting, again, that trial counsel failed to file a requested appeal. With little analysis, the district court adopted the state post-conviction court's reasoning and conclusion, and denied Gordon's petition.

This Court should reverse the district court's judgment, and remand this case for an evidentiary hearing on Gordon's failure-to-appeal claim. Gordon adequately alleged facts that, if true, entitle him to a delayed appeal of his conviction and sentence. Because the state court failed to develop a factual record on the failure-to-appeal claim, its decision was not one "on the merits" for purposes of federal habeas

review, and therefore not entitled to the heightened standard of review contained in 28 U.S.C. § 2254(d).

In the alternative, the state habeas court's decision was an unreasonable application of clearly established federal law, *i.e.*, *Strickland v. Washington*, 466 U.S. 668 (1984). Even if Gordon did not expressly request an appeal, Gordon's trial attorney had a duty to inquire further whether Gordon wanted an appeal filed on his behalf. Gordon indicated that he was interested in an appeal by asking whether there was anything more that counsel could do, and it was ineffective assistance for counsel not to inquire further.

JURISDICTIONAL STATEMENT

Petitioner-appellant Jerome Steven Gordon is a Virginia inmate housed at the Lawrenceville Correctional Center in Brunswick County, Virginia.

On July 26, 2012, pursuant to 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254(a), which confer subject-matter jurisdiction on the district courts, Gordon, proceeding *pro se*, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. JA 133–50. Gordon alleged that he was in custody in violation of his

constitutional right to effective assistance of counsel. On May 14, 2013, the district court issued a final order dismissing Gordon's habeas petition in its entirety. JA 186–87.

Gordon noted a timely appeal of the district court's judgment on June 7, 2013. JA 203–04. On February 7, 2014, this Court granted Gordon a partial certificate of appealability. This Court has jurisdiction pursuant to 28 U.S.C. § 2253(a).

STATEMENT OF THE ISSUE

This Court granted a certificate of appealability as to the following issue: "[W]hether, in light of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *United States v. Cooper*, 617 F.3d 307 (4th Cir. 2010), counsel was ineffective for not filing a notice of appeal."

STATEMENT OF THE CASE

A. The Guilty Plea And Sentencing

On January 20, 2009, Jerome Steven Gordon was indicted by a Virginia grand jury on one count of solicitation for the production of child pornography, second or subsequent offense, in violation of Va. Code § 18.2-374.1 ("Count 1"), one count of carnal knowledge in violation of Va. Code § 18.2-361 ("Count 2"), and three related charges

("Counts 3-5"). JA 5–6. Gordon retained Mufeed W. Said, Esq., as defense counsel.

Prior to trial, Gordon entered into a plea agreement with the Commonwealth wherein he agreed to plead no contest to Count 1 and Count 2 in exchange for the Commonwealth's agreement to nolle prosequi Counts 3-5. JA 11–12. Although the plea agreement required Gordon to agree not to ask the trial court to modify his sentence, as would otherwise be his right pursuant to Va. Code § 19.2-303, the plea agreement contained no waiver of appellate or post-conviction rights. *See id.*

The trial court accepted Gordon's no-contest plea as to Counts 1 and 2, and ultimately imposed a sentence on those charges totaling 27 years' imprisonment. JA 61–62. Gordon's sentence was significantly above the Virginia sentencing guidelines range for his offenses of conviction, but was within the statutory sentencing range for each offense.

Almost immediately after he was sentenced, Gordon met briefly with Said and expressed dissatisfaction with his lengthy term of incarceration. Gordon asked Said whether "there is anything else we

can do from this point." JA 111. Said "shook his head indicating 'no.'" JA 154. Some two weeks after his sentencing, Gordon wrote to Said, again expressing unhappiness with his prison sentence, and specifically requesting that Said file an appeal on Gordon's behalf. JA 71.[1] Gordon received no response from Said, and no appeal from his judgment of conviction was timely filed.[2]

B. The Petition For Post-Conviction Relief In State Court

On October 1, 2010, Gordon, proceeding *pro se*, petitioned the Virginia trial court for a writ of habeas corpus, raising various claims that Said rendered constitutionally ineffective assistance prior to and during Gordon's sentencing hearing. JA 64–70. On November 8, 2010, Gordon amended his habeas petition, alleging that Said "fail[ed] to file an appeal for Defendant, when ask[ed] to do so." JA 71. Specifically, Gordon referenced his correspondence with Said, in which he "wrote to Mr. Said *asking for an appeal*, but never got any response." *Id.* (emphasis added). Gordon also averred that members of his family had

---

[1] Gordon acknowledges that Said disputes this factual contention. *See* JA 92.

[2] Gordon did, however, seek leave from the Court of Appeals of Virginia to file an appeal out of time. JA 63. The Court denied Gordon's request. *Id.*

contacted Said, asking him to file an appeal on Gordon's behalf, and that Said had failed to do so. *Id.* In addition, Gordon requested that the state habeas court conduct an evidentiary hearing on his claims.

In documents filed with the state court in the following weeks and months, Gordon repeatedly insisted that he had requested that Said file an appeal on his behalf. Gordon stated, for example, that Said was "instructed to" file an appeal, and that his family "did contact Mr. Said about doing something about . . . the conviction." JA 81. Gordon also unsuccessfully requested that counsel be appointed on his behalf. JA 75, 77.

The Commonwealth moved to dismiss Gordon's habeas petition. In support of its motion to dismiss, the Commonwealth obtained and filed an affidavit from Said regarding the alleged failure to appeal. As relevant to this appeal, Said stated that "Mr. Gordon alleges that he requested that I perfect an appeal on his behalf shortly after sentencing. This is untrue." JA 92. The affidavit also incorporated correspondence from Said to the Virginia State Bar in response to an attorney misconduct complaint filed by Gordon. In that letter, Said asserted:

> After sentencing, Mr. Gordon and his family contacted me regarding post-conviction motions. I indicated to them very clearly that I had not been retained to do post conviction motions or appeals. In fact, his sister called me several times, and even indicated that they were going to hire the attorney that did Mr. Gordon's last sexually related case to handle any post conviction motion or appeals.
>
> Furthermore, I received and responded to correspondence from Gordon dated November 6 and November 30, 2009, none of which indicated any thing whatsoever about an appeal.

JA 95.

In response to the Commonwealth's motion to dismiss, Gordon again insisted that "I talk[ed] with my lawyer . . . about a possible appeal or what I can do from this point, about the conviction [or] sentence I just receive[d]. Mr. Said told me there wasn't anything he could do." JA 106. Gordon also repeated his contention that "my family did contact Mr. Said about doing something about, the conviction [or] the time I receive[d]." *Id.*

In a separate filing with the state court, dated May 31, 2011, Gordon again stated that shortly after his sentencing, he had asked Said "if there was anything else that could be done," and "wrote Mr. Said, requesting that he wanted to have an appeal filed concerning his

case." JA 108–09. Gordon attached an affidavit to this filing indicating that

> I asked Said is there anything else we can do from this point and Said just simply shook his head in a no position. About two weeks later I wrote to Mr. Said explaining the discomfort in the [sentence] I receive[d] and asking him are you sure there isn't anything that you can do and if you want more money, I will pay you.

JA 111.

In a written order dated January 26, 2012, the state trial court denied Gordon's habeas petition in its entirety. With respect to Gordon's claim that counsel failed to file an appeal as requested, the court reasoned that Gordon made no such request:

> Petitioner claims that the affidavits of counsel and himself are conflicting. However, the evidence indicates otherwise. Petitioner's own affidavit indicates that he merely "asked [counsel] is there anything else we can do from this point. . . ." An affidavit submitted by counsel indicates that he spoke with Petitioner and indicated that he had not been retained for post-conviction motions, and that Petitioner's family informed him that they were going to hire another attorney to handle these matters. These two affidavits are not conflicting – neither shows nor suggests that Petitioner ever instructed Counsel to file an appeal.

JA 126. In resolving Gordon's claim that Said failed to file a requested appeal, the court also quoted from the transcript of Gordon's plea

colloquy, in which Gordon answered in the affirmative when asked whether Said has "done everything you have asked him to do." *Id.*[3]

Gordon timely sought review of the trial court's judgment in the Supreme Court of Virginia. JA 129.[4] On June 28, 2012, that court summarily refused Gordon's petition for appeal. JA 132.

C. The Habeas Corpus Petition In Federal Court

Gordon, still *pro se*, then timely filed this petition for a writ of habeas corpus in the district court, again alleging that his trial counsel rendered ineffective assistance at the sentencing phase, and again alleging that Said did not file a requested appeal on his behalf. JA 133–50. Once again, Gordon alleged that, shortly after his sentencing, he asked Said whether anything could be done about his sentence, and that he specifically requested an appeal from Said in written correspondence.

The Commonwealth moved to dismiss Gordon's federal habeas petition, JA 162–74, and the district court ultimately granted the

---

[3] However, Gordon's plea colloquy took place on July 23, 2009—some three months *before* he was sentenced and first asked Said to file an appeal. JA 13–31.

[4] Appeals from judgments involving a petition for a writ of habeas corpus lie directly with the Supreme Court of Virginia. *See* Va. Code § 17.1-406(B).

motion, JA 176–87. With respect to Gordon's claim that Said failed to file the appeal that Gordon requested, the district court tersely explained that "for reasons which were amply explained by the state court, [Gordon's] current allegation that he instructed counsel to file a direct appeal finds no support in the record." JA 199.

Gordon noted a timely appeal of the district court's adverse judgment. JA 203. This Court granted a certificate of appealability limited to the issue of "whether, in light of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *United States v. Cooper*, 617 F.3d 307 (4th Cir. 2010), counsel was ineffective for not filing a notice of appeal." This Court also appointed the undersigned as counsel to represent Gordon in this appeal.

SUMMARY OF ARGUMENT

Gordon repeatedly alleged that he asked his trial counsel to note an appeal on his behalf. Troublingly, the state habeas court disposed of this claim without holding an evidentiary hearing. Because the state court's decision was made on a substantially incomplete record, and because the state court chose to forego the opportunity to develop a record, Gordon's failure-to-appeal claim was not "adjudicated on the

merits," and therefore is not subject to the stringent standard of review contained in 28 U.S.C. § 2254(d).

Because Gordon adequately alleged facts that, if true, entitle him to habeas relief, this Court should remand Gordon's failure-to-appeal claim to the district court to supplement the record with an evidentiary hearing. The district court should also be instructed to review the state habeas court's decision *de novo*.

In the alternative, the record is adequate for this Court to conclude that Gordon's trial counsel rendered ineffective assistance of counsel by failing to consult with Gordon regarding an appeal. Gordon indicated an interest in an appeal and counsel was obliged to ascertain whether he wanted an appeal filed on his behalf. Gordon has doggedly pursued his appellate rights and has demonstrated that, if properly consulted about an appeal, he would have instructed Said to file an appeal on his behalf. The state court's determination to the contrary was an unreasonable application of federal law, and this Court should remand this case to the district court with instructions to grant the writ.

STANDARD OF REVIEW

This Court "review[s] the district court's denial of habeas relief *de novo*." *DeCastro v. Branker*, 642 F.3d 442, 449 (4th Cir. 2011).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "governs federal courts' consideration of a state prisoner's petition for a writ of habeas corpus." *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012). When a claim has been "adjudicated on the merits in State court proceedings," the writ shall not be granted unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Harrington v. Richter*, 131 S. Ct. 770, 783–84 (2011). Under AEDPA, the relevant question for the federal reviewing court "is not whether [the] court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

"The only limitation on § 2254(d)'s application is that the claims submitted must have been 'adjudicated on the merits' in state court. When a claim has not been adjudicated on the merits by the state court, a federal court reviews the claim *de novo*." *Winston v. Kelly*, 592 F.3d 535, 554–55 (4th Cir. 2010) (*Winston I*).

ARGUMENT

GORDON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO FILE AN APPEAL

Gordon is entitled to relief on two alternative theories, both grounded in counsel's constitutional duty to file an appeal upon request. Gordon put forth more than sufficient allegations to justify an evidentiary hearing in state court, and the state court's adjudication of his claim therefore was not "on the merits" as that term is used in 28 U.S.C. § 2254. Accordingly, he is entitled to a remand to the district court, with instructions to review the state court's judgment *de novo* with the benefit of an evidentiary hearing.

In the alternative, the state court had an adequate record before it to conclude that Gordon said enough to his attorney to demonstrate that he had an interest in appealing. Because counsel violated his duty to

inquire further into Gordon's desire to file an appeal, the state court's conclusion that counsel did not provide ineffective assistance was an unreasonable application of *Strickland*, and Gordon thus is entitled to issuance of the writ.

A. Trial Counsel Was Ineffective In Failing To File The Appeal Requested By Gordon

Gordon has adequately alleged facts that, if true, entitle him to relief, *i.e.*, a delayed appeal of his conviction and sentence. The state court's determination to the contrary is not entitled to deference, and the district court erred in so deferring. The district court's decision should therefore be reversed and the case remanded, so that the district court can apply the proper standard of review and grant Gordon an evidentiary hearing at which he can have the opportunity to prove his entitlement to relief.

1. Counsel's failure to file the requested appeal is *per se* ineffective assistance

This Court's analysis of Gordon's ineffective-assistance-of-counsel claim is guided by the familiar *Strickland* framework. To prevail on an ineffective-assistance claim, a criminal defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness," 466 U.S. at 688, and (2) the defendant was prejudiced,

id. at 694. An attorney who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). And "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken," the defendant has established prejudice and "made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484.[5]

Had the district court applied the proper standard of review, Gordon would have received an evidentiary hearing on his failure-to-appeal claim and would have adduced material evidence in support of that claim, *i.e.*, that he specifically requested that Said file an appeal on his behalf.

2. The district court erred in failing to review Gordon's claim *de novo*

In rejecting Gordon's failure-to-appeal claim, the state habeas court improperly limited its review of the claim to facts cherry-picked

---

[5] The point need not be belabored. The Commonwealth conceded before the district court that if Gordon's factual assertions regarding his request to Said are true, Gordon is entitled to issuance of the writ. JA 172 n.5.

from the record and failed to credit the allegations in Gordon's habeas petition, as is required by Virginia law. The state court compounded its error by denying Gordon's repeated requests for an evidentiary hearing, thus depriving Gordon of a full and fair hearing on the merits of his ineffective-assistance claim.

Notwithstanding these errors, the district court applied § 2254(d)'s "highly deferential" standard of review to Gordon's claims. *See* JA 190–201. And with minimal analysis, the district court blessed the flawed proceedings of the state habeas court, depriving Gordon of the constitutional safeguards provided by the Great Writ. This was error.

a. By its own terms, the rigorous review described in § 2254(d) is required only when a claim is "adjudicated on the merits" by the state court. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011). "The requirement that § 2254(d) be applied only to claims 'adjudicated on the merits' exists because comity, finality, and federalism counsel deference to the judgments of state courts when they are made on a complete record." *Winston I*, 592 F.3d at 555. Those interests, however, are not implicated "when a state court unreasonably refuses to permit 'further

development of the facts' of a claim." *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) (*Winston II*) (quoting *Winston I*, 592 F.3d at 555).

This is so, this Court has explained, because of the complex interplay between AEDPA's exhaustion requirement, 28 U.S.C. § 2254(b)(1), and the "adjudicated on the merits" requirement of § 2254(d). *See Winston I*, 592 F.3d at 555.

> [W]hen a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures. If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d). New, material evidence, introduced for the first time during federal habeas proceedings, may therefore require a *de novo* review of petitioner's claim.

Id. at 555–56 (citations omitted). Thus, "when a claim has not been adjudicated on the merits by the state court, a federal court reviews the claim *de novo*." *Id.* at 553–54. For the reasons explained below, Gordon's claim was not adjudicated on the merits, and the district court should have engaged in *de novo* review.

b. "Whether a claim has been adjudicated on the merits is a case-specific inquiry." *Winston II*, 683 F.3d at 496. When *Winston I*'s standards are applied to the facts of this case, it is clear that the state

court "unreasonably refuse[d] to permit 'further development of the facts'" of Gordon's failure-to-appeal claim, *id.*, thus depriving him of an adjudication on the merits.

The state court did not adjudicate Gordon's failure-to-appeal claim on the merits because it denied his repeated requests for an evidentiary hearing. *Winston I* is again instructive on this issue. In that case, Winston filed a habeas petition in the Supreme Court of Virginia, challenging his death sentence on the basis that his execution was barred by *Atkins v. Virginia*, 536 U.S. 304 (2002). *Winston I*, 592 F.3d at 542. The Supreme Court of Virginia "denied all relief without allowing [a requested] evidentiary hearing." *Id.* Winston then sought habeas relief in federal district court, and as a result of discovery ordered by the federal court, tendered favorable evidence in the form of earlier-administered I.Q. tests tending to show that he was mentally retarded. *Id.* at 548. The district court, however, refused to consider the newly discovered evidence, reasoning that because it had not been considered by the state habeas court, it could not be considered on federal collateral review. *Id.*

On appeal, this Court found error in the district court's determination that it could not consider the newly discovered I.Q. evidence. *Winston I*, 592 F.3d at 549. Notably, the *Winston I* court placed great weight on the fact that the proffered evidence was both material and *could have been considered* by the state court, had the court not foreclosed discovery and an evidentiary hearing. *See id.* at 555 ("When, however, the petitioner offers, for the first time in federal habeas proceedings, new, material evidence that the state court could have considered had it permitted further development of the facts, an assessment under § 2254(d) may be inappropriate.").

Like the petitioner in *Winston I*, Gordon sought an evidentiary hearing in the state habeas court. *See* JA 71. And like the *Winston I* petitioner, it is abundantly clear that the evidence Gordon seeks to introduce is highly material. Indeed, Gordon repeatedly asserted in the pleadings at all levels of his collateral review that he had specifically asked Said to file an appeal. As the Commonwealth itself acknowledges, this fact alone, if true, entitles Gordon to relief. *See* JA 172 n.5. Had the state court allowed Gordon to develop the facts of his

claim, he would have adduced material evidence in support of his appeal-request claim.

Furthermore, the state habeas court's decision to deny discovery and an evidentiary hearing to Gordon was an unreasonable one. Gordon has consistently and repeatedly maintained that shortly after he was sentenced, he wrote trial counsel and requested an appeal. The *only* evidence the Commonwealth introduced to the contrary is counsel's bald statement that Gordon's allegations were untrue. *See* JA 92. Under these circumstances, it is simply unfathomable that the state habeas court would not hold a hearing to resolve the dispute between Gordon's allegations and Said's statements, or permit Gordon to develop the facts of his claim.

c. The state court, however, concluded that no evidentiary hearing was warranted because the affidavits submitted by Gordon and Said were "not conflicting," in that Gordon's affidavit only described asking Said "is there anything else we can do from this point," JA 126, and did not reference the correspondence in which Gordon specifically requested an appeal. The state court's conclusion, however, is both incorrect as a matter of fact and flawed as a matter of Virginia law.

First, the court's factual conclusion was inconsistent with the evidence tendered by the parties. Notwithstanding the state court's assertion to the contrary, Said's affidavit does not resolve the question whether he was asked to file an appeal on Gordon's behalf. Said averred that "Gordon and his family contacted me regarding post-conviction motions. I indicated to them very clearly that I had not been retained to do post conviction motions or appeals." JA 95. Said's statement that "I indicated to them very clearly that I had not been retained to do post conviction motions or appeals" raises more questions than it resolves. Said did not disclose the specific contents of the communications between himself and Gordon or Gordon's family, except that they "regard[ed] post-conviction motions" and "appeals." If these communications were not requests for an appeal, the question arises why Said advised that he "had not been retained to do . . . appeals." In any event, Said's short affidavit raises serious concerns that, contrary to his assertions, Gordon requested an appeal.[6]

---

[6] The state court's reliance upon the transcript of Gordon's plea colloquy, JA 126, underscores that the court fundamentally misapprehended the facts presented in the record. The plea colloquy, in which Gordon told the trial court that Said had done all that was asked of him, took place three months *before* Gordon was sentenced, and

Second, even if the court was correct, as a factual matter, that the affidavits resolved the appeal-request issue, the court was wrong as a matter of Virginia law to cabin its review merely to the affidavits. Although Virginia law affords habeas courts discretion to consider affidavits submitted by the parties, *see Yeatts v. Murray*, 455 S.E.2d 18, 20 (Va. 1995) (citing Va. Code § 8.01-660),[7] Virginia law does not permit a habeas court to simply ignore well pleaded factual allegations in the habeas petition when deciding whether to hold an evidentiary hearing. On the contrary, before a Virginia court can dismiss a habeas petition without an evidentiary hearing, it "should *fully consider* the following: *the factual allegations set out in a petition for writ of habeas corpus and all reasonable inferences which flow therefrom*; the record of the underlying criminal proceedings; and any affidavits submitted by the parties." *Curtis v. Coffeewood Corr. Ctr.*, 72 Va. Cir. 309, 2006 WL 3775930, at *1 (Va. Cir. Ct. 2006) (emphasis added); *see also Bonhom v. Angelone*, 58 Va. Cir. 358, 2002 WL 922902, at *7 (Va. Cir. Ct. 2002)

---

subsequently asked for an appeal. That Gordon was satisfied with Said's representation months beforehand is entirely irrelevant to the failure-to-appeal issue presented to the state court.

[7] There does not appear to be any requirement of Virginia law that parties *must* submit affidavits to resolve a habeas petition.

(same); *cf. Shambaugh v. Johnson*, 72 Va. Cir. 409, 2007 WL 6002102, at *3 (Va. Cir. Ct. 2007) (same, in the context of review of a prison disciplinary hearing). Indeed, if "nonfrivolous cognizable claims are asserted about factual matters outside the record, the [habeas] court should conduct an evidentiary hearing." *Garrett v. Angelone*, 43 Va. Cir. 314, 1997 WL 1070417, at *1 (Va. Cir. Ct. 1997).

Because the state court's decision to deny Gordon's requests for an evidentiary hearing was both factually suspect and flatly inconsistent with Virginia law, it was unreasonable. *See Winston I*, 592 F.3d at 553 (stressing that the state court "had its opportunity to consider a more complete record, but chose to deny Winston's request for an evidentiary hearing"). And because it was an unreasonable denial of an evidentiary hearing, Gordon's direct-request claim was not adjudicated on the merits. The district court therefore erred in failing to apply *de novo* review.

3. On remand, Gordon is entitled to an evidentiary hearing

a. In addition to remanding this case to the district court to conduct a *de novo* review of the state court's judgment, this Court should instruct the district court to hold an evidentiary hearing on

Gordon's direct-request claim. Gordon has satisfied AEDPA's requirements for an evidentiary hearing, and such a hearing would conclusively resolve the direct-request issues.

As this Court noted in *Winston I*, AEDPA requires that petitioners develop the factual basis of their claims in state court before they are entitled to an evidentiary hearing in federal court. *See Winston I*, 592 F.3d at 551; 28 U.S.C. § 2254(e)(2). Section 2254(e)(2) provides that

> [i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Supreme Court has explained that under the opening clause of § 2254(e)(2), "a failure to develop the factual basis of a claim is not

established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). "If the petitioner was diligent in pursuing the claim in state court, he cannot have 'failed to develop' the claim and § 2254(e)(2) does not bar an evidentiary hearing." *Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009).

Here, the record is clear that that Gordon diligently pursued the factual basis for his claim. Gordon presented factual allegations that, if true, would entitle him to relief. His efforts were stymied, not by any lack of diligence on his part, but rather by the state court's failure to hold an evidentiary hearing to develop the factual predicate for his claim. In similar circumstances, this Court has held that § 2254(e)(2) is not a barrier to an evidentiary hearing on a petitioner's claim. *See Conway v. Polk*, 453 F.3d 567, 589 (4th Cir. 2006) (concluding that § 2254(e)(2) did not bar an evidentiary hearing because petitioner was prevented from developing the pertinent facts supporting his claim by "external causes," such as the state court's denial of petitioner's request for an evidentiary hearing).

b. The district court's decision to withhold an evidentiary hearing in the first instance based on the Supreme Court's decision in *Pinholster*, *see* JA 202, was error. In *Pinholster*, the Court held that federal review under § 2254(d) of a state post-conviction court's judgment "is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. The court reasoned that where a state post-conviction court has adjudicated a post-conviction claim "on the merits," it would be "contrary to [the] purpose [of § 2254(d)] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Id.* at 1398–99.

This Court has squarely addressed the applicability of *Pinholster* to cases, like this one, where the petitioner was denied adjudication on the merits in state court, and concluded that the "decision in *Winston I* . . . endures." *Winston II*, 683 F.3d at 499. This is so because in *Pinholster* "the Court phrased its holding as applying only to claims that had been adjudicated on the merits in state court." *Id.* at 501. The *Pinholster* decision did not "'decide where to draw the line between new

claims and claims adjudicated on the merits,'" *id.* (quoting *Pinholster*, 131 S. Ct. at 1401 n.10), and therefore neither overrules nor casts doubt upon this Court's holding in *Winston I*.

Pinholster, therefore, does not foreclose an evidentiary hearing in this case, and the district court was wrong to hold otherwise.

B. Counsel Rendered Constitutionally Ineffective Assistance By Failing To Consult With Gordon Regarding An Appeal

As just explained, Gordon asked his attorney for an appeal, and it was ineffective assistance for counsel to fail to file an appeal on his behalf. In the alternative, should this Court agree with the state habeas court that Gordon never explicitly asked for an appeal, the undisputed facts in the record are sufficient to compel a holding that Said "'had a duty to consult'" Gordon regarding an appeal. *United States v. Cooper*, 617 F.3d 307, 312 (4th Cir. 2010) (quoting *Flores-Ortega*, 528 U.S. at 481).

1. Gordon's duty-to-consult claim is properly before the Court

At the outset, Gordon anticipates that the Commonwealth might argue that this issue has been procedurally defaulted. *See* Commonwealth's Informal Resp. Br. at 8, *Gordon v. Braxton*, No. 13-

7040 (4th Cir. Mar. 21, 2014), ECF No. 20. The Commonwealth, however, would be incorrect. Gordon's claim is properly before the Court.

a. The Commonwealth's procedural-default defense has been waived

As an initial matter, by failing to raise the procedural-default defense in its motion to dismiss Gordon's federal habeas petition, the Commonwealth has waived that defense.

"Absent cause and prejudice or a miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule." *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999). But the procedural-default bar is "not a jurisdictional one." *Id.* at 260–61. Thus, "a federal habeas court . . . possesses the jurisdiction to consider a petitioner's constitutional claims that have been procedurally defaulted." *Id.* at 261. "[P]rocedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest v. Cain*, 522 U.S. 87, 89 (1997) (alterations and internal quotation marks omitted).

Here, despite Gordon's raising his duty-to-consult claim in the district court, the Commonwealth failed to argue that it had been procedurally defaulted. In his federal habeas petition, Gordon alleged that he "indicated his intent to appeal by writing his lawyer and telling his lawyer, he wanted to appeal." JA 149 (alterations omitted). He then cited *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007), a duty-to-consult case. *Id.*[8] Gordon was even more explicit in his response to the Commonwealth's motion to dismiss, framing the issue as one concerning Said's "failure to consult with the defendant [regarding an appeal]." JA 183. Yet despite the express invocation of counsel's duty to consult, the Commonwealth did not raise procedural default as an affirmative defense in its motion to dismiss and did not file a reply brief in response to Gordon's response papers. In these circumstances, "the failure of the Commonwealth to raise the issue of [Gordon's] procedural default . . . waived its right to pursue the issue before this [C]ourt." *Yeatts*, 166 F.3d at 261.

[8] Gordon miscited the case as "*Poindexter v. United States*," JA 149, but did provide the correct citation to the Federal Reporter.

b. Gordon's duty-to-consult claim has not been defaulted

Even if the Commonwealth has not waived the procedural-default defense (which it has), Gordon has not procedurally defaulted on his duty-to-consult claim.

Procedural default occurs "when a habeas petitioner fails to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (internal quotation marks omitted). "[A] federal habeas court may consider only those issues which have been fairly presented to the state's highest court." *Hendrick v. True*, 443 F.3d 342, 364 (4th Cir. 2006). A petitioner has fairly presented his claim to the state's highest court if "the constitutional substance of the claim is evident, such that both the operative facts and the controlling legal principles" are presented. *Jones v. Sussex I State Prison*, 591 F.3d 707, 713 (4th Cir. 2010) (citations and internal quotation marks omitted).

As *Jones* makes clear, the requirement that a claim be fairly presented to a state's highest court is not an overwhelming burden for

the state petitioner. While the petitioner "must do more than scatter some makeshift needles in the haystack of the state court record . . . it is not necessary to cite book and verse on the federal constitution so long as the constitutional substance of the claim is evident." *Jones,* 591 F.3d at 713 (internal quotation marks omitted).

Jones is highly instructive to this issue. That case addressed the Commonwealth's contention that the petitioner had procedurally defaulted on his double-jeopardy claim. This Court rejected the Commonwealth's position and concluded that the claim had not been defaulted (although the Court ultimately held that the claim lacked merit). Important to the Court's conclusion that Jones had exhausted his double-jeopardy claim in state court was the fact that he "presented a fact pattern . . . that Virginia courts ha[d] regularly considered appropriate for double jeopardy analysis." *Jones*, 591 F.3d at 714. Under that standard, Gordon has fairly presented his duty-to-consult claim to the Virginia courts.

Gordon consistently presented the same fact pattern to the Virginia courts: that shortly after he was sentenced he met with Said and asked whether there was anything more that Said could do

regarding his lengthy prison sentence. The Supreme Court of Virginia confronted this issue in *Miles v. Sheriff*, 581 S.E.2d 191 (Va. 2003). There, the court analyzed, and ultimately granted relief based upon, the petitioner's *Strickland*-based claim that counsel should have filed a requested appeal. Although the court concluded that the petitioner in that case had made a direct request, it did so only after examining, at length, the Supreme Court's holding in *Flores-Ortega* concerning the duty to consult. *See id.* at 194 (describing, in detail, the duty to consult, only to conclude that "it is not necessary in the present case to address these subsidiary questions because Miles' claim falls squarely at the end of the spectrum where an attorney disregards a defendant's instructions to file a notice of appeal").

Although the Supreme Court of Virginia chose to award relief to the petitioner in *Miles* on an alternate basis, it is clear from the *Miles* decision that the court understands the factual predicate for a duty-to-consult claim arising under the Sixth Amendment. Gordon presented a fact pattern to the Virginia courts that signaled he was raising a Sixth Amendment claim regarding his counsel's failure to consult about an appeal. This is sufficient to "fairly present" the claim to the courts of

the Commonwealth. *See Jones*, 591 F.3d at 713 ("If the courts of the state in question have themselves previously treated that fact pattern as appropriate for constitutional analysis, it would be unreasonable to suppose they are not alert to the constitutional considerations.") (alterations and internal quotation marks omitted).

In addition, this Court has previously granted habeas relief to a petitioner who presented the factual basis for a failure-to-consult claim to the state habeas court, notwithstanding the petitioner's failure to utter the magic words "duty to consult." In *Frazer v. South Carolina*, 430 F.3d 696 (4th Cir. 2005), this Court found unreasonable the South Carolina habeas court's denial of relief on an ineffective-assistance claim similar to the one presented to the Virginia habeas court in this case. Frazer argued before the South Carolina post-conviction court that his attorney was ineffective in failing to file an appeal on his behalf. *Id.* at 702. The South Carolina court rejected his claim on the basis that "there was nothing in the record . . . to indicate that [Frazer] conveyed to his trial attorney a desire to appeal until it was too late." *Id.* (internal quotation marks omitted). This Court ultimately found the state court's disposition an unreasonable application of *Strickland*,

holding that "[t]he [state] court's failure to assess the extent of [counsel's] duty to consult under the circumstances, despite having identified *Strickland* as the relevant paradigm in which to assess Frazer's claim, demonstrates an unreasonable application of that paradigm." *Id.* at 707.

It was sufficient, in other words, for Frazer to present the facts of his claim and assert *Strickland* as the governing legal rule in order for his claim to be preserved. Gordon has done the same in this case, and there would be no merit to any suggestion by the Commonwealth that his claims have been waived.

There would also be no merit to an assertion by the Commonwealth that Gordon's failure to invoke the term "duty to consult" in one of his assignments of error to the Supreme Court of Virginia is itself a default. A claim may be deemed raised in the Supreme Court of Virginia when it is "fairly presented by the argument section" of a petitioner's appellate brief, notwithstanding the contents of the assignments of error. *Jones*, 591 F.3d at 714. As one district court observed, this Court "has rejected the argument that a claim must be included in a petitioner's assignments of errors to be exhausted." *Hash*

v. Johnson, 845 F. Supp. 2d 711, 734 (W.D. Va. 2012) (citing *Jones*, 591 F.3d at 714).

2. Counsel's failure to consult Gordon regarding an appeal constitutes deficient performance

When the state habeas court denied relief to Gordon, its adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "The two-part test of *Strickland* that defendants must satisfy in order to prevail on an ineffective assistance of counsel claim unquestionably qualifies as 'clearly established' federal law under § 2254(d)." *Frazer*, 430 F.3d at 703.

a. The Supreme Court analyzes failure-to-appeal claims on a spectrum. *See Flores-Ortega*, 528 U.S. at 477. On one end are the clear cases where a criminal defendant has expressly instructed counsel to file an appeal, and counsel fails to do so. *See id.* (citing *Peguero v. United States*, 526 U.S. 23, 28 (1999)). On the other end of the spectrum are the cases in which a defendant instructs counsel *not* to file an appeal. A defendant who so instructs counsel "cannot later complain that, by following his instructions, his counsel performed deficiently."

Id. (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). There is no contention in this case that Gordon instructed counsel *not* to file an appeal. Assuming, *arguendo*, that Gordon did not instruct counsel to file an appeal, *but see supra* pp. 15–28, this case falls somewhere in the middle of the spectrum, where a court must first ask "whether counsel in fact consulted with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 478.

Pursuant to *Strickland*, "counsel [must] consult with the defendant in deciding whether to go forward. Significantly, this duty applies even if the defendant has pled guilty. Although there may be fewer issues to appeal under such circumstances, so long as the defendant retains an appeal of right, counsel's obligation remains the same." *Frazer*, 430 F.3d at 708 (internal citation omitted). Where, as here, counsel fails to consult with his client regarding an appeal of right, the reviewing court must ask "whether counsel's failure to consult with the defendant itself constitutes deficient performance." *Id.*

Counsel must consult with the defendant about an appeal when counsel has a reason to believe "(1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for

appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* Where the defendant subjectively indicates his interest in appealing, the reviewing court need not engage in the objective analysis of whether a hypothetical defendant would want an appeal. *See Cooper*, 617 F.3d at 313.

b. The record is clear that Gordon "reasonably demonstrated to counsel that he was interested in appealing," and the state habeas court's contrary decision was objectively unreasonable. *Frazer* is again instructive. After Frazer received consecutive sentences on drug charges in a South Carolina court, he "immediately expressed his surprise and discontent. After the judge announced Frazer's sentence, Frazer asked [counsel] to see 'about having time run together.'" *Frazer*, 430 F.3d at 701–02. Counsel made a motion for reconsideration, which was denied. *Id.* at 701. Counsel did not consult further with Frazer regarding an appeal. *Id.*

Under those circumstances, this Court held that Frazer had done enough to demonstrate that he was "interested" in taking an appeal. "It was in fact Frazer's indication of dissatisfaction that prompted [counsel]

to make his oral motion for reconsideration. Given that Frazer need only demonstrate an *interest* in appealing, Frazer meets the initial requirement for demonstrating prejudice in this manner." *Frazer*, 430 F.3d at 712 (internal quotation marks omitted).

When Gordon demonstrated an interest in an appeal, Said was under a constitutional obligation to consult with Gordon regarding that appeal. To prove prejudice from Said's failure, Gordon must show that the "resulting consultation would have galvanized that interest into a desire to go forward, rather than dissuading him." *Frazer*, 430 F.3d at 712. The *Frazer* court analyzed this issue by looking to Frazer's conduct following his sentencing:

> Frazer was clearly dissatisfied that the district court refused to reconsider its sentencing decisions, and expressed his dissatisfaction both as the sentencing hearing concluded and in subsequent communications with [counsel]. Because Frazer's interest in an appeal was unwavering and ongoing, we find it adequately reflects both his interest in an appeal and an intent to pursue them at all costs. Frazer's tenacity in pursuing habeas relief only bolsters this conclusion.

Id.

Likewise here, Gordon expressed dissatisfaction with his sentence immediately following his conviction. JA 111. He wrote to Said, requesting an appeal. JA 71. He even sought a delayed appeal (albeit

unsuccessfully) from the Court of Appeals of Virginia. JA 63. Gordon has doggedly pursued his post-conviction remedies by filing both state and federal petitions for a writ of habeas corpus, consistently asserting that he wanted to appeal his conviction and sentence. Gordon's interest in an appeal is "unwavering and ongoing," *Frazer*, 430 F.3d at 712, and he has amply demonstrated prejudice.

Nor has Gordon waived his appellate rights. It is immaterial that the trial court advised Gordon that he was *potentially* waiving his appellate rights by pleading no contest. The plea agreement itself contains no waiver of appellate review. More to the point, however, "[w]hen counsel fails to file a requested appeal, a defendant is entitled to . . . [a new] appeal without showing that his appeal would likely have had merit." *Peguero*, 526 U.S. at 28. This Court has squarely rejected the notion that an appeal waiver absolves counsel of the obligation to file an appeal on his client's request. *See Poindexter*, 492 F.3d at 271 ("[A]n attorney in an appeal waiver case still owes important duties to the defendant. First and foremost, the attorney, as recognized in *Flores-Ortega*, has the duty to respect the appellate wishes of his client

by filing a timely notice of appeal if he is unequivocally instructed to do so.").

Finally, the state habeas court's decision denying Gordon relief on this issue was not merely erroneous, but constituted an unreasonable application of clearly established federal law. "[A] state-court decision . . . involves an unreasonable application of [Supreme Court] precedent if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Here, the state court apparently applied *Strickland* to Gordon's claim, *see* JA 122 (inquiring whether "counsel's performance fell below an objective standard of reasonableness"), but did so in an unreasonable manner. *Frazer* is directly applicable to this issue as well:

> The [state post-conviction] court denied habeas relief without considering whether [counsel] had a duty to consult with Frazer regarding an appeal that was distinct from the generic obligation to apprise Frazer of that right. The PCR court's failure to assess the extent of [counsel's] duty to consult under the circumstances, despite having identified *Strickland* as the relevant paradigm in which to assess Frazer's claim, demonstrates an unreasonable application of that paradigm.

430 F.3d at 706–07; *see also id.* at 718 (Motz, J., concurring) ("Frazer's counsel utterly failed to consult with his client about an extremely important decision-whether to file an appeal in light of the unexpected and illegal sentence imposed by the trial court. Since the [post-conviction] court denied relief despite finding that counsel 'never discussed a direct appeal with' Frazer . . . the [post-conviction] court's application of *Strickland* was unreasonable.") (emphasis omitted).

Accordingly, under the clear precedent established by *Frazer*, the state habeas court's decision to deny relief to Gordon on his failure-to-appeal claim stemmed from an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d). Gordon, therefore, is entitled to issuance of the writ.

REQUEST FOR ORAL ARGUMENT

Oral argument is warranted in this case to assist the Court in resolving complex issues of law and fact. Gordon respectfully submits that oral argument would materially aid the decisional process, and respectfully requests that oral argument be granted in this case. *See* Fed. R. App. P. 34(a)(2)(C).

CONCLUSION

For the foregoing reasons, Gordon respectfully requests that this Court reverse the judgment of the district court and remand the case to that court with instructions (1) to conduct an evidentiary hearing on Gordon's direct-appeal claim, or in the alternative (2) to grant the writ on Gordon's claim that counsel was under a duty to inquire regarding an appeal and failed to do so.

Dated: August 5, 2014

Respectfully submitted,

/s/ *Christopher R. Ford*
Christopher R. Ford*
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Attorney for Petitioner-Appellant

**Admitted in Virginia only; practicing under supervision pursuant to D.C. App. Rule 49(c)(8)*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-7040 Caption: Jerome Gordon v. Daniel Braxton

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

   ☒ this brief contains 8,408 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [*identify word processing program*] in 14-point Century Schoolbook [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced spaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) Christopher R. Ford

Attorney for Petitioner-Appellant Jerome Gordon

Dated: August 5, 2014

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Christopher R. Ford*
Christopher R. Ford

Attorney for Petitioner-Appellant