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.)

REPLY BRIEF OF PETITIONER-APPELLANT

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Jerome Gordon received ineffective assistance of counsel when his trial attorney failed to file an appeal on his behalf. This is so regardless of whether the issue is framed as one involving a direct request for an appeal or counsel's duty to consult regarding an appeal.

The Commonwealth's brief rests upon three premises that it asserts bar relief in this case: (1) that the state habeas court acted properly when it ignored Gordon's pleadings and requests for an evidentiary hearing on his direct-request claim; (2) that Gordon's duty-to-consult claim is not before the court; and (3) that in any event, the duty-to-consult claim lacks merit. The Commonwealth is wrong on all three counts.

First, the record is clear that the state habeas court unreasonably denied Gordon the opportunity to develop the factual predicate for his direct-request claim. The Commonwealth's contention that the court actually credited Gordon's allegations completely misconstrues the record of the state court proceedings. On remand, Gordon is entitled to an evidentiary hearing.

Second, Gordon's *pro se* state habeas petition and subsequent appeal to the Supreme Court of Virginia were sufficient to fairly present

his duty-to-consult claim to the Commonwealth's highest court. Gordon's pleadings and filings made the constitutional substance of his duty-to-consult claim evident, and there is no merit to the Commonwealth's argument to the contrary.

Third, notwithstanding the litany of reasons put forth by the Commonwealth why an appeal may not have been successful, the Commonwealth has done nothing to rebut Gordon's contention that he evinced an *interest* in appealing—which is all that he must do in order to prevail on his claim that counsel should have consulted with him regarding an appeal.

ARGUMENT

A. Gordon Is Entitled To An Evidentiary Hearing On His Claim That He Was Denied A Requested Appeal.

Because the state habeas court failed to adjudicate Gordon's direct-request claim "on the merits," *see* 28 U.S.C. § 2254(d), this Court should remand this case to the district court for consideration of Gordon's direct-request claim, with instructions to conduct an evidentiary hearing and review the state court's judgment *de novo*. *See* Opening Br. 15–28.

The Commonwealth's primary argument is that an evidentiary hearing and *de novo* review are unnecessary because "the state habeas court actually 'credited' Gordon's sworn version of events regarding the content of his alleged statements to counsel." Response Br. 17. The Commonwealth is technically correct, but its argument misses the point. The state habeas court's error lies in the fact that it failed to give any credence to Gordon's pleadings, instead placing undue weight on documents that Gordon, a lay person, marked as "affidavits." In doing so, it engaged in precisely the sort of incomplete review contemplated by this Court in *Winston v. Kelly*, 592 F.3d 535, 555 (4th Cir. 2010) (*Winston I*), and *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012) *Winston II*). The state habeas court's judgment should not have been given deference by the district court.

First, by looking only at Gordon's "affidavits," the state habeas court unreasonably elevated form over substance to the detriment of Gordon, a *pro se* habeas petitioner unschooled in law and unfamiliar with procedural intricacies of the courts of the Commonwealth. Treating Gordon's incomplete affidavits as though they had been filed by counsel is simply inconsistent with Virginia practice. "In habeas

corpus proceedings [Virginia courts] do not expect or require high standards of legal draftsmanship of petitioners filing petitions pro se." *Strickland v. Dunn*, 244 S.E.2d 764, 767 (Va. 1978); *see also Walker v. Young*, 2014 WL 1858702 (Va. Cir. Ct. 2004) ("A pro se prisoner's pleadings must be liberally construed, and, where a motion to dismiss has been filed, the prisoner, as the non-moving party, must be given the benefit of all inferences.") (footnote omitted).[1]

Here, the state habeas court erred when it expected Gordon to recognize the legal significance of indicating that one document is an "affidavit" while the other is merely a "pleading." The nuances between the two, which are apparent to bench and bar, are likely lost on a prisoner, such as Gordon, with no legal training who acted without the assistance of counsel. Certainly, had Gordon understood that he was dooming his claim in state court by failing to describe his direct request

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[1] The Commonwealth suggests (Response Br. 20) that Gordon is improperly attempting to raise an error in state post-conviction proceedings as a basis for habeas relief. This is incorrect. Rather, Gordon is pointing to the obvious errors in his state post-conviction proceeding as a basis for his argument that the district court should have applied a less deferential standard of review to the state court's adjudication of his claims. *See Winston II*, 683 F.3d at 496 (*de novo* review is appropriate "when a state court unreasonably refuses to permit further development of the facts of a claim").

for an appeal in his affidavits, he likely would have proceeded differently.

Second, it was also unreasonable for the state habeas court to fail to consider the materials contained in Gordon's pleadings. Gordon repeatedly and unambiguously maintained in his habeas pleadings that he explicitly asked trial counsel for an appeal. *See* Opening Br. 6–7; JA 71, 81. For reasons explained in Gordon's opening brief (at 23–24), it was manifestly erroneous (as a matter of Virginia law) for the state habeas court to ignore those allegations.

In response, the Commonwealth asserts that there are no "fixed rules" regarding when a habeas court must hold an evidentiary hearing. Response Br. 20 (citing *Friedline v. Commonwealth*, 576 F.3d 491, 494 (Va. 2003)). The Commonwealth's reliance on *Friedline*, however, is misplaced. The *Friedline* court was merely observing that

> where a trial record provides a sufficient basis to determine the merits of a habeas corpus petition, a circuit court may refuse either party's request for an evidentiary hearing. Because each trial record is different, such determinations are not subject to fixed rules but must proceed on a case-by-case basis.

Id. at 493–94. *Friedline* is inapplicable because here, the trial record is clearly insufficient to resolve the merits of the habeas petition. The

issue in this case concerns a factual dispute between a defendant and his attorney regarding whether to file an appeal. Such a dispute cannot possibly be resolved on the basis of the trial record, because the dispute is not a part of the trial record.

Moreover, nothing in *Friedline* (or any case cited by the Commonwealth) rebuts Gordon's contention that it is error, under Virginia law, to ignore well-pleaded allegations when resolving a habeas petition. Because the state habeas court ignored Gordon's well-pleaded allegations, it "unreasonably refuse[d] to permit 'further development of the facts' of [Gordon's] claim." *Winston II*, 683 F.3d at 496 (quoting *Winston I*, 592 F.3d at 555). In short, the Commonwealth's contention that "the state court gave Gordon the benefit of the doubt," (Response Br. 20) strains credulity.

For the same reason, the Commonwealth is wrong (Response Br. 18) to attempt to distinguish *Winston I* on the basis that the evidence Gordon would have adduced at an evidentiary hearing related to his own statements. The Commonwealth's argument is, in essence, that Gordon was not diligent because he did not include his *allegations* regarding his explicit requests for an appeal in the documents he styled

as "affidavits." This is, in substance, an attempt to fault Gordon, a *pro se* litigant, for what amounts to a legal drafting error. Had he been granted an evidentiary hearing, Gordon would have testified that he wrote to Said, asking for an appeal. By not giving Gordon the opportunity to explain the apparent ambiguity concerning his filings, the court foreclosed the chance to develop the facts of his claim further. *Winston I* is therefore directly applicable to this case.

Because the state habeas court unreasonably foreclosed Gordon's ability to develop facts that, if true,[2] would entitle him to relief, it did not adjudicate Gordon's claim "on the merits" as that term is used in § 2254(d). The district court was therefore wrong to apply § 2254(d)'s "highly deferential" standard of review when it dismissed Gordon's claims. *See* JA 190–201. Accordingly, this Court should vacate the district court's judgment and remand with instructions to hold an evidentiary hearing on Gordon's direct-request claim.

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[2] The Commonwealth apparently does not contest that the facts alleged by Gordon, if true, would entitle him to a delayed appeal. *See* Opening Br. 16 n.5.

B. Gordon Received Ineffective Assistance Of Counsel When His Attorney Failed To Consult With Him Regarding An Appeal.

Gordon is entitled to relief on the basis of his claim that he directly requested an appeal. Should this Court disagree, however, the Court should nevertheless vacate the district court's judgment and remand with instructions to grant the writ on Gordon's claim that his trial counsel was ineffective for failing to consult with Gordon regarding an appeal.

Although Gordon raised a duty-to-consult claim in the district court, the Commonwealth did not invoke the exhaustion defense, as it does for the first time before this Court. The defense is therefore waived, and this Court should not revive it.[3] In any event, however, Gordon did fairly present his duty-to-consult claim before the highest

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[3] The parties have interchangeably referred to the Commonwealth's asserted defense as "procedural default" and "exhaustion." It seems clear, though, that the Commonwealth is raising an exhaustion defense. The state habeas court did not "clearly and expressly base[] its dismissal of [Gordon's] claim on a state procedural rule," *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998), and procedural-default is therefore inapplicable. Rather, the Commonwealth maintains that Gordon did not raise his duty-to-consult claim before the Supreme Court of Virginia (Response Br. 9), thereby implicating an exhaustion defense. *See Jones v. Sussex I State Prison*, 591 F.3d 707, 712 (4th Cir. 2010) ("The Commonwealth maintains that Jones failed to present (and so exhaust) his double jeopardy claim . . . .").

court of the Commonwealth. There is accordingly no merit to the Commonwealth's exhaustion defense.

This Court should therefore reach the merits of Gordon's duty-to-consult claim, and hold that the state habeas court's adjudication of Gordon's claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Gordon demonstrated an interest in appealing, which should have triggered the duty to consult. And Gordon's persistence in seeking a delayed appeal is sufficient to demonstrate prejudice.

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

In his opening brief (at 28–36), Gordon established that he presented a duty-to-consult claim before the Supreme Court of Virginia by developing the constitutional substance of that claim in his petition for appeal. In response, the Commonwealth asserts that because Gordon's *pro se* brief invoked his direct request for an appeal, he has failed to develop any claim other than a direct-request claim. Response Br. 9–12.[4] The Commonwealth has waived this defense. In any event,

[4] The Commonwealth initially argues that Gordon's failure to identify a duty-to-consult claim in his assignments of error to the

as this Court's cases make clear, the standard for exhaustion is not whether Gordon described with precision the contours of what the Commonwealth itself concedes are "related" claims (*id.* at 8). *See Jones v. Sussex I State Prison*, 591 F.3d 707, 713 (4th Cir. 2010) (for purposes of exhaustion, "it is not necessary to cite book and verse on the federal constitution"). Rather, the standard, as articulated in *Jones*, is whether Gordon has presented "both the operative facts and controlling legal principles" to the court. *Id.* This, Gordon has done.

a. Gordon unequivocally indicated in the district court that counsel was ineffective both for failing to note a requested appeal and for failing to consult with Gordon regarding whether to appeal. JA 183. He stated "1. [Gordon's] attorney had a duty to consult under [*Roe v.*] *Flores-Ortega*[, 528 U.S. 470 (2000)]. 2. [Gordon's] attorney failed to fulfill his consultation obligations." *Id.* He later observed that "in the absence of a consultation, the question becomes whether the 'failure to consult with the defendant itself constitutes deficient performance.'" *Id.*

Supreme Court of Virginia is fatal to preservation of his claim (Response Br. 9), only to later retreat from that position, indicating its agreement with Gordon's argument that "notwithstanding the contents of the assignments of error" a claim may be fairly presented in the arguments section of a brief. *See* Response Br. 10 n.3 (*citing* Opening Br. 35).

The Commonwealth's principal argument—that "those statements do not demonstrate that Gordon intended to raise a 'duty to consult claim' in district court" (Response Br. 14)—is simply incorrect. The Commonwealth was given notice of Gordon's consultation claim and an opportunity to respond, which it did not do.

Should this Court find the exhaustion defense waived, it should decline the Commonwealth's invitation to forgive the waiver and invoke the defense. *See* Response Br. 15 n.7. Even assuming that the Commonwealth's failure to raise exhaustion was unintentional, the Commonwealth has identified no "overriding interests of comity and judicial efficiency that transcend the interests of the parties" so as to justify this Court's excuse of the Commonwealth's wavier. *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999). For reasons explained below, any failure to exhaust in this case is certainly not "obvious," *Royal v. Taylor*, 188 F.3d 239, 247 (4th Cir. 1999), and the clarity with which Gordon presented this claim militates against finding the wavier excused.

b. The Commonwealth's entire exhaustion argument is premised upon the faulty notion that duty-to-consult and direct-request claims

are so distinct from one another that Gordon's description of his interactions with his lawyer and use of the word "request" cannot possibly have put the Supreme Court of Virginia on notice as to both claims. The Commonwealth, however, cites no authority whatsoever to justify analyzing Gordon's appellate brief with such a high degree of granularity. To the contrary, both the duty to consult regarding an appeal and the duty to prosecute an appeal on request arise out of counsel's obligations under *Strickland v. Washington*, in the specific context of the defendant's authority to make the "fundamental decision" of whether to appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). The right-to-appeal claims are so closely related that Gordon's description of the facts of his case, combined with his citation to highly relevant authority, are sufficient to "fairly present" the claim.

Indeed, before a court even considers a duty-to-consult claim, it typically must determine that counsel did not receive a direct request. *See, e.g.*, *Frazer v. South Carolina*, 430 F.3d 696, 707–08 (4th Cir. 2005) (describing the question of whether the defendant specifically requested an appeal as a "threshold consideration" and noting that "where . . . the defendant has not specifically requested an appeal, counsel is under a

professional obligation to consult with the defendant regarding that fundamental decision"); *United States v. Matthews*, 384 F. App'x 214, 218 (4th Cir. 2010) ("When the defendant fails to give his attorney a clear instruction to appeal, the Supreme Court had held that a reviewing court must decide whether counsel nevertheless had a duty to consult with his client regarding an appeal.").

As both the U.S. Supreme Court and the Supreme Court of Virginia have recognized, the duty to consult and the duty to file a requested appeal fall along a "spectrum" related to the defendant's right to appeal. *See Flores-Ortega*, 528 U.S. at 477; *Miles v. Sheriff*, 581 S.E.2d 191, 193 (Va. 2003). *Miles* itself observed that the U.S. Supreme Court has "fram[ed]" the duty-to-consult question by reference to the duty to appeal on request. *See Miles*, 581 S.E.2d at 114.

When Gordon's two arguments are properly understood as two species of the same ineffective-assistance claim, there is simply no merit to the Commonwealth's exhaustion argument. Beneath the heading "Denial of Right of Appeal," Gordon explained to the court that he "ask[ed] Mr. Said about challenging, his conviction(s) or sentence" immediately after his sentencing. JA 149. As explained *infra*, that

conversation evinced a subjective interest in pursuing an appeal. He therefore presented the "operative facts" of a duty-to-consult claim. *See Jones*, 591 F.3d at 713. Gordon also cited *Miles* and *United States v. Poindexter*, 492 F.3d 263 (2007),[5] both of which discuss, at length, the duty to consult. In doing so, Gordon presented to the court the "controlling legal principles" of his duty-to-consult claim. *See Jones*, 591 F.3d at 713.[6] In short, the claims were fairly presented.

There is, in addition, no merit to the Commonwealth's suggestion (Response Br. 10) that by indicating to the Supreme Court of Virginia that he directly requested an appeal, Gordon somehow disavowed a duty-to-consult argument. As he has done throughout this litigation, Gordon described both his initial interaction with his attorney, Mufeed

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[5] As explained in his opening brief (at 30 n.8), Gordon misidentified the case as *Poindexter v. United States*, but provided the correct citation to the Federal Reporter.

[6] The standard for presenting "controlling legal principles" is not a demanding one. As Gordon explained (Opening Br. 35), without response from the Commonwealth, this Court has found a duty-to-consult claim to have been fairly presented when the defendant merely described the operative facts of his claim and cited to *Strickland v. Washington*. *Frazer*, 430 F.3d at 707; *cf. Baldwin v. Reese*, 541 U.S. 27, 32 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds.").

Said, following his sentencing (thereby implicating his duty-to-consult claim) and his later correspondence with Said in which he directly requested an appeal. *See* JA 149.

2. Counsel was ineffective for failing to consult with Gordon regarding an appeal.

a. To establish ineffective assistance in the failure-to-consult context, Gordon must first show that "his attorney's performance was objectively unreasonable." *Bostick v. Stevenson*, 589 F.3d 160, 166 (4th Cir. 2009). Counsel's failure to consult is unreasonable when "there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *United States v. Cooper*, 617 F.3d 307, 313 (4th Cir. 2010) (citing *Flores-Ortega*, 528 U.S. at 480). "In the vast majority of cases," reviewing courts should find "that counsel had a duty to consult with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 481.[7]

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[7] The Commonwealth does not contend that counsel actually did consult with Gordon regarding an appeal. Nor could it. Counsel's act of shaking his head "indicating no," JA 154, in response to Gordon's question regarding whether anything else could be done, is not meaningful consultation. *See Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007) ("Simply asserting the view that an appeal

The Commonwealth devotes a substantial portion of its brief to explaining why a rational defendant in Gordon's position might not want to appeal. Response Br. 22–26. That analysis, though, is completely irrelevant to the issues Gordon actually raises. As the Commonwealth itself acknowledges (*id.* at 22 n.11), Gordon's claim rests on the *subjective* prong of *Flores-Ortega*: whether *this particular* defendant reasonably demonstrated to counsel that he was interested in appealing. 528 U.S. at 480; *see also Bostick*, 589 F.3d at 167 (holding that "Bostick . . . clearly demonstrated his interest in filing an appeal in open court, *which was sufficient, in and of itself*, to implicate his attorney's duty to consult") (emphasis added); *Hudson v. Hunt*, 235 F.3d 892, 896 (4th Cir. 2000) ("[A] defendant may establish deficient performance by demonstrating that he had an interest in appealing (thereby triggering a duty to consult)[.]"); *United States v. Witherspoon*, 231 F.3d 923, 927 (4th Cir. 2000) ("If it is indeed true that Witherspoon expressed his intention to appeal if his objections were overruled and counsel decided not to file an appeal without having discussed the

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would not be successful does not constitute 'consultation' in any meaningful sense").

matter further with Witherspoon after he was sentenced, counsel's performance clearly was constitutionally deficient.").

Assuming, *arguendo*, that Gordon made no direct request for an appeal, *but see supra* pp. 2–8, he unquestionably indicated to trial counsel that he was interested in an appeal. Immediately after sentencing, Gordon met with his attorney, expressed dissatisfaction with his sentence, and asked "is there anything else we can do from this point." JA 111. Gordon's family also contacted counsel, apparently indicating some interest in having counsel file an appeal on Gordon's behalf.[8] There is no merit to the Commonwealth's argument that because Gordon's question to counsel "did not focus on appellate remedies," he did not evince an interest in appealing. Response Br. 26.

This Court has found criminal defendants to have expressed interest in an appeal despite doing far less than Gordon did to communicate that desire. In *Frazer*, for example, the defendant "expressed his surprise and discontent" after he received consecutive

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[8] Gordon's family's communications with Said are not in the record. Said later averred that "I indicated to [Gordon's family] very clearly that I had not been retained to do post conviction motions or appeals." JA 95. It stands to reason that, at the very least, Gordon's family expressed to Said an interest in having an appeal filed on Gordon's behalf. *See* Opening Br. 22.

sentences. 430 F.3d at 702. He asked his attorney to "see about having time run together." *Id.* On these facts, this Court found that Frazer "meets the initial requirement" of showing an interest in appeal. *Id.* at 712.

More to the point, though, to the extent that Gordon's communications with his attorney were ambiguous regarding his appellate wishes, that ambiguity should be construed in Gordon's favor. Counsel has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution." *Strickland*, 466 U.S. at 688. "The decision to appeal is one such decision." *Flores-Ortega*, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part). Had counsel simply abided by his basic duty to assist his client, he would have consulted with Gordon regarding an appeal, and ascertained Gordon's wishes clearly and directly. Allowing an ambiguity in Gordon's appellate wishes to defeat his duty-to-consult claim would, in these circumstances, be a profoundly unfair result.

b. Having established that he expressed interest in taking an appeal, Gordon has satisfied the first prong of *Flores-Ortega*. *See Bostick*, 589 F.3d at 167. The record further reflects that Gordon was

prejudiced by counsel's unreasonable performance. "Evidence that there were nonfrivolous grounds for appeal or that the defendant in question *promptly expressed a desire to appeal* will often be highly relevant in making [the prejudice] determination." *Flores-Ortega*, 528 U.S. at 485 (emphasis added). "In demonstrating prejudice, the defendant is under no obligation to demonstrate that his hypothetical appeal might have had merit." *Poindexter*, 492 F.3d at 269 (internal quotation marks omitted). "Attempting to demonstrate prejudice based on a reasonably obvious interest in pursuing an appeal, however, necessitates an additional showing that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Frazer*, 430 F.3d at 708.

By consistently and doggedly pursuing his appellate rights, Gordon has demonstrated that he would, after proper consultation, have instructed counsel to appeal. *See id.* at 712 (observing that Frazer's interest in an appeal was "unwavering and ongoing," thus "reflect[ing] both his interest in an appeal and an intent to pursue [an appeal] at all costs"); *see also id.* (the defendant's "tenacity in pursuing habeas relief only bolsters [the] conclusion" that he would have

appealed); *Bostick*, 589 F.3d at 168 (same). Gordon has done the same, and therefore meets the standard for prejudice.

The Commonwealth argues, though, that a reasonable attorney would have advised Gordon that appealing from his conviction and sentence might be considered a breach of his plea agreement. Response Br. 25. Conspicuously absent from the Commonwealth's analysis, however, is any mention of the terms of that agreement.

The plea agreement (JA 11–12) is a page and a half long. It does not contain a waiver of appellate rights, nor does it indicate that by appealing, Gordon would be in breach of the agreement. The plea agreement, in fact, is entirely silent on the subject of appeals. The agreement is limited to a promise by Gordon to plead no contest to two offenses, and a reciprocal agreement by the Commonwealth to nolle prosequi the three remaining offenses. Gordon made no promise not to appeal, nor did he explicitly or implicitly waive his appellate rights.

Moreover, the Commonwealth has identified no Virginia law dictating that an appeal following a plea bargain is a breach of the plea bargain *per se*. The only Virginia case cited by the Commonwealth, *Peterson v. Commonwealth*, 363 S.E.2d 440 (Va. Ct. App. 1987), is

inapposite. In that case, after being indicted for felony possession with intent to distribute marijuana, the defendant entered an agreement that she would plead guilty to a misdemeanor and receive a sentence of twelve months in jail and a $400 fine in exchange. 363 S.E.2d at 393. Nevertheless, after judgment was entered on her plea agreement, she appealed to the circuit court. [9] *Id.* The Commonwealth reinstated the felony charges and the defendant was ultimately convicted. The Court of Appeals of Virginia upheld the conviction, reasoning that "[w]here a defendant pleads guilty pursuant to a plea agreement *and receives the agreed upon sentence*, an implied term of the agreement is that the defendant will not appeal what he has bargained for and received." *Id.* at 447.

In this case, unlike *Peterson*, Gordon received no assurances in his plea agreement as to a sentence. Because the agreement is silent as to appeals, the Commonwealth cannot argue that it is deprived of the benefit of its plea bargain. While it may be true that, as a matter of Virginia law, a guilty plea limits the amount of issues that can be

[9] In Virginia, the circuit court is a trial court that has original jurisdiction over some matters, and has appellate jurisdiction over certain matters that originated in general district court.

pursued on appeal, there is no basis in the record for this Court to infer that Gordon explicitly waived his appellate rights. *See* JA 27 (informing Gordon that by pleading no contest, he *may* waive his appellate rights).

But even if the Commonwealth is correct (though it is not) that appealing would be a breach of the plea agreement, the authority cited by the Commonwealth demonstrates that the decision to proceed rests with Gordon, not his attorney. *See* Response Br. 26 (quoting *Poindexter*, 492 F.3d at 273 ("In this case, although there is a real possibility that Poindexter will face a higher sentence or even [additional] charges . . . if he decides to appeal, his right to appeal cannot be thwarted by attorney error.")). And while a reasonable attorney would caution Gordon of the risks of proceeding, Gordon's unwavering resolve to appeal in this case demonstrates that he was prejudiced by counsel's failure to consult.

Finally, the state court's conclusion that Gordon is not entitled to relief is an "unreasonable application" of *Strickland v. Washington*. *See* 28 U.S.C. § 2254(d). The state court ruling at issue in this case is identical to that at issue in *Frazer*, where this Court concluded that the state court's resolution of the duty-to-consult issue was not just erroneous, but unreasonable as well. *See Frazer*, 430 F.3d at 706–07;

see also Opening Br. 41–42. Gordon explained in his opening brief that the state trial court's ruling was an unreasonable one, and the Commonwealth makes no effort to rebut that contention.

CONCLUSION

For the reasons explained herein, this Court should vacate and remand with instructions to the district court to grant an evidentiary hearing concerning Gordon's claim that he directly requested counsel file an appeal on his behalf and that counsel failed to do so. In the alternative, this Court should vacate the district court's judgment and remand with instructions to grant the writ on the basis that Gordon's trial counsel was under a duty to consult with him regarding an appeal, and failed to do so.

Dated: October 9, 2014

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

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(s) Christopher R. Ford

Attorney for Petitioner-Appellant Jerome Gordon

Dated: October 9, 2014

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I certify that on this 9th day of October, 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