CASE NO. 22-6272

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

DONALD HERRINGTON,

Plaintiff - Appellant,

v.

HAROLD CLARKE,
Director of the Department of Corrections,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

OPENING BRIEF OF APPELLANT

J. Scott Ballenger
Catherine E. Stetson
Madeline Killen (Third Year Law Student)
Nikolai Morse (Third Year Law Student)
Appellate Litigation Clinic
UNIVERSITY OF
VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF RELATED CASES 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

Factual Background and Proceedings Below 5

A. Trial Proceedings 5

B. Direct Appeal 15

C. Proceedings on Collateral Review 17

i. State collateral review 17

ii. Federal habeas proceedings 17

SUMMARY OF ARGUMENT 20

STANDARD OF REVIEW 22

ARGUMENT 22

I. THE TRIAL COURT ERRED IN ALLOWING HERRINGTON TO PROCEED PRO SE 22

A. The Trial Court Impermissibly Forced Herrington to Choose Between His Fifth and Sixth Amendment Rights 23

B. The Trial Court Did Not Obtain A Knowing, Voluntary, Clear and Unequivocal Waiver from Herrington.....30

C. Herrington Should Not Have Been Permitted to Represent Himself Without An Adequate Explanation of the Nature of the Charges Against Him 37

D. Herrington's Claims Based On Invalid Waiver of Counsel Are Not Procedurally Defaulted 41

II. HERRINGTON'S APPELLATE COUNSEL WAS INEFFECTIVE.....42

A. Appellate Counsel Clearly Fell Below Constitutional Standards.....43

B. Herrington Was Prejudiced By These Errors.....48

C. This Court Is The Proper Forum To Grant Herrington Relief On His Ineffective Assistance Claims Relating To The 2009 Tax Charge.....49

CONCLUSION.....50

CERTIFICATE OF COMPLIANCE.....52

TABLE OF AUTHORITIES

Cases

Bell v. Jarvis,
236 F.3d 149 (4th Cir. 2000) (en banc) 42, 47

Brewer v. Williams,
430 U.S. 387 (1977) 25, 31

Burket v. Angelone,
208 F.3d 172 (4th Cir. 2000) 47

Coleman v. Alabama,
399 U.S. 1 (1970) 25

Cone v. Bell,
556 U.S. 449 (2009) 22

Dretke v. Haley,
541 U.S. 386 (2004) 50

Elmore v. Ozmint,
661 F.3d 783 (4th Cir. 2011) 46

Evitts v. Lucey,
469 U.S. 387 (1985) 42, 43

Faretta v. California,
422 U.S. 806 (1975) 23, 49

Fields v. Murray,
49 F.3d 1024 (4th Cir. 1995) (en banc) .....passim

Hamilton v. Alabama,
368 U.S. 52 (1961) 25

Harrington v. Richter,
562 U.S. 86 (2011) 46

Herrington v. Clarke,
699 F.App'x 158 (4th Cir. 2017) 2

Herrington v. Clarke,
856 F.App'x 475 (4th Cir. 2021) 2

Hinton v. Alabama,
571 U.S. 263 (2014) 46

Jones v. Barnes,
463 U.S. 745 (1983) 46

Koon v. Rushton,
364 F.App'x 22 (4th Cir. 2010) 31, 32

Lord v. United States,
412 F.2d 499 (4th Cir. 1969) 4, 20, 37, 39

Martinez v. Ryan,
566 U.S. 1 (2012) 41

Massiah v. United States,
377 U.S. 201 (1964) 25

Mayo v. Henderson,
13 F.3d 528 (2d Cir. 1994) 47

Minh Duy Du v. Commonwealth,
292 Va. 555 (2016) 48

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 43

Simmons v. United States,
390 U.S. 377 (1968) 28

Slayton v. Parrigan,
205 S.E.2d 680 (Va. 1974) ..... passim

Strickland v. Washington,
466 U.S. 668 (1984) 42, 43, 46, 48, 49

Taylor v. Commonwealth,
77 Va. App. 149 (2023).....47

United States v. Anderson,
567 F.2d 839 (8th Cir. 1977).....27, 29

United States v. Bernard,
708 F.3d 583 (4th Cir. 2013).....24

United States v. Carthorne,
878 F.3d 458 (4th Cir. 2017).....46

United States v. Davis,
958 F.2d 47 (4th Cir. 1992).....3, 26, 27

United States v. Ductan,
800 F.3d 642 (4th Cir. 2015) .....passim

United States v. Edwards,
535 F.App'x 285 (4th Cir. 2013) 31, 32, 34, 35

United States v. Frazier-El,
204 F.3d 553 (4th Cir. 2000) 31, 32, 35

United States v. Gallop,
838 F.2d 105 (4th Cir. 1988) 40

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 23

United States v. Gravatt,
868 F.2d 585 (3d Cir. 1989) 27, 29

United States v. King,
582 F.2d 888 (4th Cir. 1978) 37, 39

United States v. Midgett,
342 F.3d 321 (2003) 28

United States v. Moore,
671 F.2d 139 (5th Cir. 1982).....28, 29

United States v. Nabaya,
765 F.App'x. 895 (4th Cir. 2019).....36

United States v. Parker,
576 F.App'x. 157 (4th Cir. 2014).....36

United States v. Pavelko,
992 F.2d 32 (3d Cir. 1993).....28

United States v. Pena,
314 F.3d 1152 (9th Cir. 2003).....41

United States v. Roof,
10 F.4th 314 (4th Cir. 2021) 31, 35

United States v. Sarsoun,
834 F.2d 1358 (7th Cir. 1987).....26

United States v. Singleton,
107 F.3d 1091 (4th Cir. 1997) 23, 41

United States v. Witherspoon,
231 F.3d 923 (4th Cir. 2000).....43

Von Moltke v. Gillies,
332 U.S. 708 (1948) 4, 37

Statutes

28 U.S.C. § 1291 1
28 U.S.C. § 2241 1
28 U.S.C. § 2253 1
28 U.S.C. § 2254 ..... 1, 22, 43
Va. Code § 19.2-286 37
Va. Code § 18.20 47
Va. Code § 18.2-11 47
Va. Code § 18.2-26 47
Va. Code § 18.2-178 47
Va. Code §18.2-434 47
Va. Code § 19.2-161 47
Va. Code § 19.2-295.2 39
Va. Code § 58.1-348 ..... 47, 48

STATEMENT OF JURISDICTION

This appeal follows the district court's dismissal of Petitioner-Appellant Donald Herrington's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241, 2254. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253. This Court granted a certificate of appealability limited to the issues described below.

STATEMENT OF THE ISSUES

1. Did the trial court violate Herrington's right to counsel by failing to provide a way to apply for appointed counsel that did not pose a self-incrimination danger?
2. Did the trial court improperly interfere with Herrington's right to counsel by allowing him to proceed pro se in the face of obvious reluctance?
3. Did the trial court violate Herrington's right to counsel by failing to fully inform him of the nature of the charges he faced?
4. Was appellate counsel constitutionally ineffective for failing to raise those issues, as well as Herrington's legal and factual innocence of the crime of failing to file a tax return in 2009, on direct appeal?

STATEMENT OF RELATED CASES

This case has previously been before this Court twice. On August 17, 2017, a panel of this Court held that (1) the Virginia Supreme Court's invocation of a

procedural default under *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), is not an adequate basis for decision because Virginia courts do not ordinarily apply that rule to jurisdictional defects like denial of the right to counsel; (2) the Supreme Court of Virginia appeared to have overlooked certain ineffective assistance of counsel claims; and (3) the district court had not engaged in sufficient examination of the record to support its dismissal of those claims. *Herrington v. Clarke*, 699 F.App'x 158, 160, 161 (4th Cir. 2017). This Court remanded for further consideration in light of its opinion. *Id*.

On August 20, 2021 this Court again remanded for the district court to consider a claim the court had overlooked. *Herrington v. Clarke*, 856 F.App'x 475, 476 (4th Cir. 2021).

INTRODUCTION

Appellant Donald Herrington was forced to represent himself at a complex felony trial because he was unable to sign a financial disclosure affidavit for appointment of counsel without incriminating himself. Herrington was facing five perjury charges specifically for omitting income and assets from a prior application for appointed counsel. He told the court that concerns about self-incrimination were "absolutely" why he was reluctant to apply for counsel. The court knew that Herrington was unemployed and that his assets had been seized, that he was actively looking for a lawyer, and that he was unable to afford one. Herrington repeatedly

expressed that he did not feel capable of representing himself, and was doing so only because he felt he had no other viable choice. Despite all of that, the court accepted his waiver of his right to counsel without adequately probing the situation, and without offering Herrington a solution to his dilemma.

This Court's precedents make clear that Herrington's Sixth Amendment rights were violated. Under settled law, a waiver of the right to counsel must be "clear and unequivocal," and trial courts must appoint counsel absent an "unmistakable expression" by the defendant that he insists on representing himself. *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc). And when a tax evasion defendant faces a significant danger of self-incrimination, precedent from this Court and other circuits dictates that trial courts cannot insist on the usual financial affidavits but must instead give the defendant a chance to disclose assets in a way that cannot be used against him. *See, e.g.*, *United States v. Davis*, 958 F.2d 47, 49 n.4 (4th Cir. 1992) (collecting authorities).

That error was compounded when the trial court failed to meaningfully inform Herrington about the charges he was facing. Herrington faced several felony counts of obtaining money by false pretenses, and understandably planned his defense around the fact that he did not obtain the money. But the court failed to communicate that under Virginia law juries can convict a defendant of *attempting* to commit any crime in the indictment. Herrington did not learn that crucial information until the

jury instruction conference—when it was too late to put on any defense to attempt. A self-represented defendant must be told at least "the nature of the charges, *the statutory offenses included within them*, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Lord v. United States*, 412 F.2d 499, 502-03 (4th Cir. 1969) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 721-24 (1948)) (emphasis added). Herrington was never told of "the statutory offenses included within" the completed crime charged in the indictment, until it was too late.

Herrington also received ineffective assistance of counsel on direct appeal. Appellate counsel ignored Herrington's letters, spoke with him only once, and raised a single challenge—to the reasonableness of Herrington's sentence—that even counsel thought lacked merit. He failed to research or present the meritorious Sixth Amendment issues. He also completely missed serious defects in the charge of failing to file a tax return in 2009, which was wrongly predicated on including unemployment benefits in Herrington's income. The Commonwealth has conceded that Herrington's jury was mis-instructed and that counsel's failure to appeal this issue "fell below an objective standard of reasonableness." Fourth Cir. Dkt 27, Informal Response Brief of Harold Clarke, at 37-38.

This Court should remand with instructions that the writ be granted.

STATEMENT OF THE CASE

Factual Background and Proceedings Below

Herrington's conflict with the Commonwealth began years before this case. In 2008, he was charged with several minor drug crimes. *See* JA222. During those earlier proceedings, Herrington completed indigency affidavits to be appointed counsel. At trial, an attorney represented him, and a jury acquitted him on every count. JA222.

A. Trial proceedings

In December 2011, a grand jury returned indictments against Herrington alleging five counts of perjury, three counts of obtaining money by false pretenses, three counts of filing false or fraudulent income tax returns, two counts of failure to file an income tax return, one count of possession of a schedule I drug, and one count of possession of a schedule II drug. JA205-219. All five of the perjury charges were for failure to disclose certain assets and income on the indigency affidavits Herrington completed to obtain counsel in 2008. JA330-332. One of the failure-to-file charges was for 2009, when Herrington had $9,543 in rental income and $16,736 in unemployment benefits. JA335. The filing threshold was $11,250. As the Commonwealth conceded in its response to Herrington's pro se informal brief, the trial court erred by failing to tell the jury that unemployment benefits do not count. Properly excluding those benefits, his income was below the filing threshold and

Herrington is innocent of that offense. *See* Fourth Cir. Dkt 27, Informal Response Brief of Harold Clarke, at 37-38; Va. Code § 58.1-321.

Herrington's arraignment was continued for six weeks while he sought counsel. JA232. The transcripts of his colloquy with the state trial court are reproduced in the appendix (JA246-260) and in the district court's opinion (JA429-447), and we trust that the Court will review them in their entirety. Herrington did confirm to the trial court on several occasions that he intended to proceed pro se and understood the risks. But those statements must be understood against the backdrop of his prior dialogue with the court. Herrington made clear that he actually did not want to represent himself, and that he was doing so only because he could not presently afford to retain counsel and was reluctant to sign a financial disclosure form because of self-incrimination concerns.

Herrington first mentioned his self-incrimination concerns at a hearing in December 2011, telling the judge, "[A]ll those perjuries are from getting a Public Defender, and I'm too scared to fill out that form for the fact that she's going to give me a perjury charge." JA226. Though he indicated willingness to proceed pro se until he could "get the funds together" to hire a lawyer, JA226, the judge continued the case for several weeks to give him time to find an attorney. JA227-228.

At the next hearing in early February 2012, Herrington told the court he had been trying to hire an attorney but was unable to afford one.

COURT: What we need to talk about is your attorney and arraignment. So have you hired an attorney?

HERRINGTON: I have not hired an attorney, Your Honor, but I just—the Commonwealth, when they raided my house, they took a number of items—

COURT: (interjecting) Mr. Herrington, have you hired an attorney?

HERRINGTON: No.

COURT: Do you intend to hire an attorney?

HERRINGTON: I do.

COURT: When are you planning on doing that?

HERRINGTON: When I have the funds to do so.

COURT: Well, you're out of time, Mr. Herrington.

HERRINGTON: Okay, that's fine.

COURT: Your case was indicted on December 5th, you had a previous arraignment date of December 20th, and the Court continued your case until today giving you six weeks to hire an attorney. Have you made any efforts toward hiring an attorney?

HERRINGTON: I have, Your Honor.

COURT: Have you met with attorneys?

HERRINGTON: I have, Your Honor.

COURT: All right. And you have not retained any attorneys to date?

HERRINGTON: I have not.

COURT: Have you previously filled out a request for Court-appointed counsel, Mr. Herrington?

> HERRINGTON: I will not be doing that, Your Honor. I would rather represent myself.
>
> COURT: Well—
>
> HERRINGTON: (interjecting) I am prepared to represent myself, not to hold up the Court, Your Honor.

JA230-233.

Almost immediately, Herrington made clear that he did not feel competent to represent himself in a serious criminal trial.

> COURT: All right. Well, let's talk about it because, Mr. Herrington, you have a number of felony charges. . . . Now, do you understand that if you want to represent yourself on these charges that the same rules would apply to you as would apply to an attorney?
>
> HERRINGTON: Yes.
>
> COURT: Do you have any training in the rules of evidence?
>
> HERRINGTON: No.
>
> COURT: Do you have any training in the law?
>
> HERRINGTON: No.
>
> COURT: What's the last grade in school that you completed, Mr. Herrington?
>
> HERRINGTON: I had twelfth.
>
> COURT: All right. Do you think that you are qualified to represent yourself in these cases?
>
> HERRINGTON: Probably not to the fullest extent, but I'm gonna give it my best shot.

JA233-235. In response to Herrington's acknowledgement that he was unqualified, the court asked why he did not want to hire counsel. Herrington again indicated that he wanted a lawyer but could not afford one.

> COURT: Do you understand that the Court will give you an opportunity and has given you an opportunity to hire counsel?
>
> HERRINGTON: Yes.
>
> COURT: But you're indicating that you don't want to do that?
>
> HERRINGTON: Well, I just—like I was trying to say, I just haven't had the money to do it. And I am filing my tax returns and I do expect to get about five-thousand-dollars back real soon. Also, the Commonwealth, when they raided my home, do have some titles and things that they're holding in their possession, which I'm hoping that, you know, since the warrant was invalid that those items are going to be returned very shortly to me.

JA235-236. The trial court did not ask why Herrington, though he was struggling to afford an attorney, remained unwilling to seek court-appointed counsel. JA235-36. Ultimately, the court granted him another thirty days to find a lawyer. JA237.

At a hearing several weeks later, however, Herrington admitted defeat and stated his intention to represent himself.

> HERRINGTON: I'm willing to waive my right to an attorney. After talking to attorneys, I think there's a high probability that I will be representing myself on this case as it's just really document heavy.
>
> COURT: Okay. Well, Mr. Herrington, the time to make that decision is now.
>
> HERRINGTON: Okay.
>
> COURT: Because I'm not going to continue this case for two months to give you time to hire you an attorney if you have no intention of hiring an attorney

> and if, in fact, what you intend to do is waive your right to an attorney and represent yourself. So I think the time to decide that I thought was a month ago, but I guess now, it's now.

JA245-246. In a subsequent exchange, Herrington stated he had been unable to find counsel he could afford and would rather proceed pro se than suffer further delay.

> COURT: This case had an initial court hearing, it looks like, in February, and the Court has continued it for you to hire an attorney. Do you intend to hire an attorney?
>
> HERRINGTON: I have talked to attorneys, and . . . no one really wants to take this case. It's too document-heavy, and I haven't found counsel that's really willing to take this case. It's turning into a problem for me. I am prepared to represent myself and all the consequences that go with it.
>
> COURT: Well, the issue really, Mr. Herrington, isn't whether you're prepared. It's whether that's what you are asking the Court to do, to allow you to waive your right to counsel because you want to represent yourself on these felony charges. Is that what you want to do?
>
> HERRINGTON: Yes, it is.
>
> COURT: Or do you want me to keep this case on the docket for March 26th to—
>
> HERRINGTON: (interjecting) I'd like to rep—
>
> COURT: —give you some additional time?
>
> HERRINGTON: I'm sorry. I would like to represent myself, Your Honor. I'm waiving my right.

JA248-249. Herrington went on to clarify that he was unable to afford an attorney because the Commonwealth had seized most of his property and he could not leave the state to work for the Maryland union he belonged to.

> COURT: Do you feel qualified to represent yourself in a court of law on these serious felony charges?
>
> HERRINGTON: No.
>
> COURT: Well, then why would you give up your right to an attorney and proceed without an attorney?
>
> HERRINGTON: I just—it seems like there's—it's becoming a conflict with, you know, my right to a speedy trial and finding representation, having the money to represent an attorney, having my house raided, everything of value taken from me so I can't really sell anything to get an attorney because the Commonwealth has it. I can't really get a job because I can't leave the State of Virginia which I belong to a union that's in Maryland. So I've really been restricted in my abilities to get money, raise money, and hire an attorney.
>
> COURT: All right.

JA252-253. The court then interrupted to ask why Herrington was not seeking court-appointed counsel. Herrington again explained that he was reluctant to complete the financial disclosure form because the five felony perjury charges he faced all related to omitting rental income from his prior application for appointed counsel.

> COURT: . . . Let's talk about this because you have an absolute right to be represented by counsel. You also have an absolute right to represent yourself in these proceedings. But if you cannot afford an attorney and you meet the standards of indigency as set by the Supreme Court, an attorney will be appointed to represent you. Now, you haven't asked to be considered for Court-appointed counsel, is that right?
>
> HERRINGTON: I'm not going to meet the standard, Your Honor, with the—
>
> COURT: (interjecting) Did you not just tell me that you're not working?
>
> HERRINGTON: I'm getting unemployment.

> COURT: So in the last—let's say since the first of this year, January 1st of 2012, Mr. Herrington, what has your income been in the last—since January 1st, 2012?
>
> HERRINGTON: I don't really know. It's—I get three hundred and twenty-five dollars a week in unemployment, and then I have some rental income that I do receive. I don't receive a lot in rental income, but—so that's what all these perjuries are for is that I did not consider that in my last time for obtaining an attorney. All the perjuries are basically for obtaining an attorney.
>
> COURT: So these charges are arising out of prior applications that you made?
>
> HERRINGTON: For attorneys, yes, they are.
>
> COURT: And that is why you are declining to fill out an application—
>
> HERRINGTON: (interjecting) Absolutely.
>
> COURT: —for Court-appointed counsel here?
>
> HERRINGTON: Absolutely.

JA253-255. Herrington then repeated that he hoped the pending motions, on which he planned to proceed pro se, would allow him to work or recover assets so he could afford a lawyer.

> COURT: All right. I understand that. So that leaves us with two options and that is either for you to hire an attorney or for you to go forward and represent yourself. Now, in December—or back in January when we first talked about this, Mr. Herrington, you indicated that while you were prepared to represent yourself, that you wanted some additional time to seek an attorney, to seek counsel.
>
> HERRINGTON: I did not ask for additional time, Your Honor.
>
> COURT: Okay. Well, Mr. Herrington, I recall asking you specifically whether you were withdrawing your motion to represent yourself, and you said yes.

> HERRINGTON: I did not ask for additional time. I said I was willing to go forward. You asked if I wanted to hire an attorney. I said I would like to hire an attorney. You said I'm going to give you time to do that.
>
> COURT: But you have no intention of doing that?
>
> HERRINGTON: I have tried, Your Honor. Don't get me wrong; I have spoken with attorneys. But if I could—these motions that I have selected could go through, it would change my bond situation, I would be able to obtain employment in either Maryland or D.C. is one of my bond motions. The search on my home, there was no warrant for the search is one of my motions today. I would be able to obtain all the things the Commonwealth stole out of my house, basically. They came to my house without a warrant, kicked doors down which shows there was no consent, and took items from my home. So if I could do these motions today, I think that would help in my ability to get an attorney.

JA255-256. The court responded by explaining that "we're not going to do it in a split way," and that if Herrington proceeded to argue those motions pro se then the court would not reopen them if he later obtained counsel. JA256-260. Ultimately, the trial court allowed Herrington to waive his right to counsel and present his motions pro se. JA260-310.

Herrington was subsequently arrested on a different charge, and the judge in that case appointed him counsel. In June, Herrington had the following exchange with the trial court:

> COURT: You still want to go forward without an attorney?
>
> HERRINGTON: Uh-huh, I do.
>
> COURT: Now, clearly, you qualified for court-appointed counsel on the new charge.

> HERRINGTON: I did not.
>
> COURT: Well, the Judge appointed you an attorney.
>
> HERRINGTON: As a means to an end.
>
> COURT: So there must be some reason for that. So I would have to think that there is at least a chance that you would qualify, or that this Court would appoint counsel if you want it on these charges, but you do not want that?
>
> HERRINGTON: No.

JA318-319. Thereafter, Herrington confirmed to the court several more times that he intended to represent himself, and that he understood the risks. *E.g.,* JA321-322; JA325.

In July and August 2012, Herrington represented himself at trial and presented his case to a jury. When hearing the proposed jury instructions after the close of the evidence, Herrington was surprised to learn that he could be found guilty of *attempt* to obtain money by false pretenses.

> COURT: [T]he finding instruction includes an option for finding that it was an attempted possession of funds by false pretenses. Do you want to be heard on that issue, Mr. Herrington?
>
> HERRINGTON: On the attempted?
>
> COURT: Uh-huh.
>
> HERRINGTON: Are you saying that they could find me guilty of attempted?

JA344-345. Because Herrington's prepared defense to those charges hinged on a contention that he had not actually obtained any money from the allegedly faulty tax

returns, this revelation left him with no defense and no time to prepare a new one. JA341-342.

The jury returned guilty verdicts to all the charges except for the two possession charges and one perjury charge. JA426. The jury also convicted Herrington of three counts of attempt to obtain money by false pretenses. JA348-349. He was sentenced to a total of twelve years, with four running concurrently. JA350-355.

B. Direct appeal

After his conviction, Herrington received appointed counsel on appeal. JA220. Herrington alleged that, over the course of two months, he sent his counsel at least four letters outlining many potential grounds of appeal. *See* JA142-144. Receiving no response, Herrington sent more letters, asking his counsel to "please . . . let me know when we can go over these errores." JA94. Concerned at the lack of communication, Herrington asked "[a]m I realy only suposed to write you? I cant call?" JA94. Two weeks later Herrington wrote another letter, saying "I dont no what to do . . . this is my third letter and I have made call's. Can you please meet with me and . . . go over what you have found along with what I have found wrong with my trial." JA95.

In his letters, Herrington repeatedly emphasized that he wanted to read his appeal before it was filed. JA94-95. Despite Herrington's pleas, counsel did not

respond to any of the letters and spoke to Herrington only once for approximately eight minutes. JA87; JA142.

Ultimately, counsel raised only one issue: that the trial court had abused its discretion in sentencing Herrington. JA104. Concurrently, counsel filed an *Anders* brief, asking to withdraw and stating that he had reviewed the record and found no meritorious issues. JA114-115. In a letter to Herrington the following week, his attorney wrote, "I found no meritorious issues which could be raised . . . I do not think that the sentence you received nor the proceedings against you were necessarily fair, but 'fairness' isn't an appealable standard." JA116. There is no evidence in the record that appellate counsel reviewed the transcripts in which Herrington waived his right to counsel or investigated the fatal defects in the 2009 failure-to-file conviction.

Herrington filed a pro se supplement, and urged the court to disregard his lawyer's determination that there were no meritorious issues to be raised on appeal. JA122-123. In his supplement, Herrington identified all the issues currently before this Court. JA124-132; JA124 ("I declined [the indigency] form because of fear of more charges," and Judge said "I can't pick which motions to file"); JA129 ("[The judge] said I wanted to represent my self . . . I just wanted counsel to do motion and we needed more time"); JA125-126 ("I asked the Judge I can be convicted of a lesser charge she totally ignores my question. I didn't make a defense for a lesser charge it

was not fair to give the [jury] that option"); JA130 ("[The prosecutor] and the judge keep avoiding 2009 I was well below the threshold as you don't count unemployment on state tax. I did not work at all hardly that year").

The Court of Appeals of Virginia denied Herrington's petition for appeal and for rehearing, and granted counsel's motion to withdraw. JA117-120. The following year, the Supreme Court of Virginia denied Herrington's pro se petition for appeal and petition for rehearing. JA134.

C. Proceedings On Collateral Review

i. State collateral review

Herrington filed a petition for a writ of habeas corpus with the Supreme Court of Virginia in July 2015. He raised a number of issues that his court-appointed counsel had neglected to raise on direct appeal, including the issues before this Court now. JA45.

The Supreme Court of Virginia dismissed the petition. JA166-173. The court held that nearly all of Herrington's claims were barred by the rule in *Slayton*, 205 S.E.2d 680, that issues not raised at trial and on direct appeal are forfeited.

ii. Federal habeas proceedings

Herrington filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia in Alexandria. JA8. The district court dismissed Herrington's petition and denied a certificate of appealability,

relying on the state-law procedural default identified by the Supreme Court of Virginia. JA179-185.

This Court vacated and remanded for reconsideration. This Court recognized that as a matter of Virginia law the *Slayton* rule applies only to non-jurisdictional errors, and reasoned that "'[i]f the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.'" JA200 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). Therefore "the adequacy of *Slayton* as applied [to this claim] is debatable." JA200. This Court also held that the Virginia Supreme Court had overlooked Herrington's claim that appellate counsel was ineffective for failing to raise specific issues, and directed the district court to address that claim. JA202.

On remand, the district court denied Herrington's petition on the merits. JA425. The district court held that Herrington's waiver of his right to counsel was "knowing, intelligent, and voluntary." JA429. The court questioned the veracity of Herrington's concerns about self-incrimination given his successful application for counsel on appeal; held that he "could easily have averted the possibility of later perjury charges simply by being honest and thorough in his responses"; and expressed doubt that Herrington was actually indigent. JA441-442. The district court also interpreted the trial court's statement that "I would have to think that there is at

least a chance . . . that this Court would appoint counsel if you want it on these charges" as an offer to appoint counsel without regard to indigency or a financial affidavit. JA443-444. The court rejected Herrington's argument that he should have been informed of the possibility of a lesser-included attempt conviction, reasoning that this Court's "precedent simply does not require such searching and specific colloquies" and that criminal defendants who represent themselves need not have "the knowledge and ability of a licensed attorney." JA445-446.

The district court also rejected Herrington's appellate ineffective assistance claims, concluding that he suffered no prejudice because none of his arguments would have succeeded. The court reiterated its view that Herrington's right to counsel arguments were meritless. JA455. It also held that his challenge to the 2009 filing charge was forfeited at trial and meritless because Herrington in 2009 "had several tenants each paying him hundreds of dollars in cash or money orders each month." JA452-453.

After a second remand from this Court about a claim the court overlooked, the district court finally dismissed Herrington's petition and denied a certificate of appealability. JA477.

This Court granted a certificate of appealability limited to Herrington's claims (1) that his waiver of the right to counsel at trial was invalid, and (2) that his appellate

counsel was ineffective for failing to raise both that issue and the deficiencies in the 2009 failure-to-file conviction.

SUMMARY OF ARGUMENT

Herrington's waiver of his Sixth Amendment right to counsel was invalid for three reasons. First, Herrington told the court that his reluctance to apply for appointed counsel was "absolutely" because of concerns about self-incrimination. Those concerns obviously were well-founded. When the usual financial affidavits would force a defendant to choose between his Fifth and Sixth Amendment rights, trial courts must provide some way of proving indigency that would not be used against him at trial. Herrington was never given that opportunity.

Second, the trial court did not heed this Court's requirement that waivers must be clear and unequivocal, and that doubts should be resolved in favor of appointing counsel. Herrington did repeatedly state that he was waiving his right to counsel. But his prior communications to the court made clear that he wanted counsel and was only representing himself because he was having trouble finding counsel he could afford and felt he had no other alternative. The court should not have accepted Herrington's waiver under these circumstances without probing more deeply.

Third, Herrington was not fully informed of the charges he faced, including "the statutory offenses included within" the charges in the indictment. *Lord*, 412 F.2d at 502-03. Herrington was surprised to learn from the jury instructions that the

jury could find him guilty of *attempt* to obtain money by false pretenses, even though the indictment charged only the completed crime. Of course, a person who represents himself will not know everything a practicing lawyer might. But a knowing and voluntary waiver of the right to counsel requires *at least* knowledge of which crimes one might be convicted of, the potential penalties, and the broad contours of what is—and is not—a viable defense. The court failed to ensure Herrington's "appreciation of the charges against him and their potential penalties." *United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015).

Herrington also received ineffective assistance of counsel on direct appeal, which is both an independent constitutional violation and an answer to any state law procedural default. Appellate counsel did not adequately investigate or consult with his client, and missed at least two strong appellate arguments: the inadequacy of Herrington's waiver of counsel, and his innocence of the 2009 tax filing charge. Counsel's performance fell far below the constitutional minimum, and prejudiced Herrington.

Finally, the Commonwealth has suggested that the appropriate remedy for the 2009 tax conviction would be an extraordinary motion in the Virginia Supreme Court. Not so. Herrington has demonstrated a violation of his constitutional rights, his claim was not forfeited in state court, and he is entitled to the writ.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may review a petitioner's habeas corpus claim if "he is in custody in violation of the Constitution or laws or treaties of the United States" and "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(a); *Id*. § 2254(b)(1)(A). If the constitutional claim was "adjudicated on the merits," *Id.* § 2254(d), the court shall not grant habeas relief unless the 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." *Id*. If a claim was not adjudicated on the merits in state court, this Court reviews questions of law and mixed questions of law and fact de novo. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING HERRINGTON TO PROCEED PRO SE

Herrington made clear that he could not complete the indigency affidavits to request appointed counsel because of well-founded concerns about self-incrimination. Still, he repeatedly stated that he wanted an attorney but could not afford one. The trial court should not have accepted a waiver in these circumstances

without clearly offering Herrington a way to prove indigency that could not be used against him. The trial court also failed to adequately inform Herrington about the charges he faced, including the lesser included offense of attempt. Taken as a whole, these errors demonstrate that Herrington's waiver of counsel was not valid.

The Virginia Supreme Court did not address these claims on the merits, holding only that they were procedurally barred under the *Slayton* rule. JA167. Accordingly, there is no state court determination to defer to under AEDPA and this Court's review is de novo. And because an inadequate waiver of the right to counsel is a "structural error . . . bear[ing] directly on the framework within which the trial proceeds," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-50 (2006) (internal quotations omitted), prejudice is presumed and the appropriate remedy is a new trial.

A. The Trial Court Impermissibly Forced Herrington To Choose Between His Fifth and Sixth Amendment Rights

The Sixth Amendment guarantees a criminal defendant the right to counsel. But the same Amendment also protects a defendant's affirmative right to self-representation. *Faretta v. California*, 422 U.S. 806, 820 (1975). Because exercising one of these rights demands relinquishing the other, courts must proceed with great caution. *See Fields*, 49 F.3d at 1028. This Court has clarified that "the right to counsel is preeminent and hence, the default position." *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). Accordingly, criminal defendants must affirmatively waive their right to counsel, and the waiver must be: (1) knowing,

intelligent, and voluntary; (2) clear and unequivocal; and (3) timely. *United States v. Bernard*, 708 F.3d 583, 588 (4th Cir. 2013).

Herrington repeatedly expressed hesitation about proceeding pro se. *See supra* pp. 9-13. If the trial court had probed Herrington's reluctance with appropriate care, it would have understood that he declined appointed counsel because he feared the indigency affidavits would necessarily provide evidence that he was guilty of the various perjury and tax evasion charges he was facing. Put simply, Herrington was forced to choose between his right to counsel and his right against self-incrimination.

Herrington actually explained this dilemma to the trial judge several times. At the February 21, 2012 hearing, for example, Herrington explained "that's what all these perjuries are for is that I did not consider that in my last time for obtaining an attorney. All the perjuries are basically for obtaining an attorney." JA254. The judge replied, "I understand that. So that leaves us with two options and that is either for you to hire an attorney or for you to go forward and represent yourself." JA255.

The district court's opinion denying habeas relief took the view that "the trial judge's apparent willingness to appoint petitioner counsel in this case without requiring petitioner to file an indigency affidavit rendered moot any Fifth Amendment concerns." JA444. But the trial judge made no such offer. To the contrary, she expressly told Herrington that if he declined to fill out the required forms, his only options were to hire an attorney or proceed pro se. Herrington

responded that he had been trying to hire an attorney but felt he needed to "change [his] bond situation" in order to "obtain employment in either Maryland or D.C." so that he could afford it. JA256.

In June, the trial court made a last effort to see if Herrington wanted to apply for appointment of counsel, stating that "I would have to think that there is at least a chance that you would qualify, or that this Court would appoint counsel if you want it on these charges." JA317-319. That was very far from a clear offer to appoint counsel without an indigency affidavit. The court specifically invoked the possibility that Herrington might "qualify" for counsel, apparently referring to the usual financial standards. The court's next words *might* be understood to recognize a disjunctive "chance" that the court "would appoint counsel if you want it." But that implication is vague at best, and certainly did not constitute a clear offer to consider appointing counsel without financial affidavits. And even if that sentence could be understood as a real offer to alleviate Herrington's self-incrimination dilemma, it came on the eve of trial and after many critical stages of the criminal proceeding had passed. *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977) (right to counsel during pre-trial period between arraignment and trial start); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *Massiah v. United States*, 377 U.S. 201 (1964) (informal meetings between government and defendant); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment).

It was clear almost from the beginning of the proceedings that Herrington wanted an attorney but could not pay for one, and that his reasonable concerns about self-incrimination were keeping him from seeking court-appointed counsel. This situation arises infrequently, but this Court's most analogous precedent suggests that district courts should take steps to alleviate self-incrimination dilemmas like Herrington's. In *Davis*, a defendant facing tax evasion charges declined to complete a financial affidavit. 958 F.2d at 48. The district court directed an in camera hearing and assured the defendant that the evidence would be taken "on a confidential basis." *Id.* The defendant still "refused . . . 'to waive [his] fifth amendment right to obtain a—sixth amendment right to counsel." *Id.* Counsel nonetheless was appointed at government expense for trial, but Davis complained on appeal that there had been no counsel at his arraignment. *Id.* This Court recognized that "Fifth and Sixth Amendment concerns are intertwined when court appointed counsel is sought by a defendant charged with an income tax violation," but held that "the district court avoided any serious Fifth Amendment challenge by conducting an *ex parte* examination and informing him that the stenographic copy of his answers would be sealed." *Id.* at 49 n.4. The Seventh Circuit reached a similar conclusion in *United States v. Sarsoun*, holding that any Fifth Amendment concerns were alleviated by the trial court's repeated assurances that the defendant could disclose information

confidentially and that it could not be used against him. 834 F.2d 1358, 1362-63 (7th Cir. 1987).

In *Davis* this Court cited several cases from other circuits reversing and granting a new trial when tax evasion defendants *were not* offered an opportunity to disclose financial information relevant to appointment of counsel confidentially and in camera. *See* 958 F.2d at 49 n.4 (collecting cases). In *United States v. Anderson*, for example, the Eighth Circuit held that the district court erred by failing "to make further inquiry, by whatever means appropriate" when a tax defendant refused to fill out a financial affidavit for appointment of counsel. 567 F.2d 839, 840 (8th Cir. 1977). The court "should have given Anderson an opportunity to disclose the required financial information . . . for it to review in camera," because "[t]o hold otherwise would force Anderson to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination." *Id.* at 840-41.

Similarly, in *United States v. Gravatt*, the Third Circuit held that a district court erred by failing to appoint counsel when a tax evasion defendant refused to complete the CJA 23 financial affidavit. 868 F.2d 585, 588-92 (3d Cir. 1989). Although "[a] defendant has the burden of establishing financial eligibility for appointed counsel," the district court has an independent "responsibility, once on notice of the defendant's inability to retain private counsel, 'to make further inquiry into the defendant's financial condition,'" and may not "place the defendant in the

constitutionally untenable position of having to choose between his Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination." *Id.* at 588-89 (citations omitted; collecting cases). *See also United States v. Pavelko*, 992 F.2d 32 (3d Cir. 1993) (admitting financial affidavit for court-appointed counsel into evidence required defendant "to choose between the privilege [against] self incrimination and the right to court-appointed counsel").

The Fifth Circuit reached the same conclusion in *United States v. Moore*, holding that the district court abused its discretion by insisting that the defendant was required to fill out a CJA 23 affidavit, despite self-incrimination concerns. 671 F.2d 139, 140-41 (5th Cir. 1982). The Fifth Circuit held that evidence already before the district court "laid most of a foundation" to establish the defendant's indigency, and that "[i]t would have taken little more" for the court to fully understand "the overall personal circumstances of the defendant." *Id.* at 141.

These decisions are consistent with broader jurisprudence emphasizing that courts should never, if at all possible, put litigants in the position of having to choose between constitutional rights. In *Simmons v. United States*, for example, the Supreme Court held that it was impermissible for a criminal defendant's testimony in a suppression hearing to be used against him at trial. 390 U.S. 377, 393-94 (1968). "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. Similarly, in *United States v. Midgett* this

Court held that a defendant should not have been forced, by a strategic disagreement with his counsel, to choose between his right to counsel and his right to testify on his own behalf. 342 F.3d 321, 322-23 (4th Cir. 2003). "When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." *Id.* at 327 (citation omitted).

Herrington was put to an even more extreme version of this dilemma, given that several of his charges arose directly from prior indigency affidavits. He explicitly told the judge that his reluctance to fill out additional affidavits was "absolutely" because of concerns about self-incrimination. As in *Anderson* and *Gravatt*, the court then had an obligation to probe more deeply, and to assure him that he could apply for appointed counsel confidentially and in a way that would not be used against him. Herrington was never meaningfully given that opportunity. Indeed, as in *Moore*, the evidence before the court *already* showed he was unemployed and that his assets had been seized. It would not have taken much (if any) additional inquiry for the court to determine his indigency.

The federal district court reasoned that Herrington "could easily have averted the possibility of later perjury charges simply by being honest and thorough in his responses to the questionnaire." JA441. But Herrington's concern was not only about *more* perjury charges; it was also about incriminating himself on the perjury charges he was currently facing.

The district court also opined that "the record affords ample evidence to support the notion that petitioner did not require court-appointed counsel for financial reasons." JA441. But the trial judge made no finding that Herrington could afford a lawyer and did not proceed on that assumption. To the contrary, she continued asking him if he wanted to file an indigency affidavit, and stated that she thought "there is at least a chance that you would qualify" for appointment of counsel. JA317-319. The state courts determined that Herrington was indigent just a few months later, and he was represented by appointed counsel on appeal. *See* JA220. If there was any genuine dispute about this issue Herrington would be entitled to an evidentiary hearing. But there is no real dispute.

B. The Trial Court Did Not Obtain A Knowing, Voluntary, Clear And Unequivocal Waiver From Herrington

Herrington's obvious reluctance to proceed pro se further invalidates his waiver. A defendant who wishes to waive his right to counsel must do so "clearly and unequivocally." *Fields*, 49 F.3d at 1029 (collecting cases). This requirement "greatly aids the trial court" in navigating the tension between the rights to counsel and self-representation "by allowing the court safely to presume that the defendant should proceed with counsel absent an *unmistakable expression* by the defendant that so to proceed is contrary to his wishes." *Id.* (emphasis added).

Given the trial court's obligation to "indulge in every reasonable presumption against waiver [of the right to counsel]," *Brewer*, 430 U.S. at 404, the facts of

Herrington's case are highly unusual. Criminal defendants who invoke their right to self-representation tend to fall into two camps: those who are not ultimately allowed to represent themselves, *see United States v. Frazier-El*, 204 F.3d 553 (4th Cir. 2000); *Fields*, 49 F.3d 1024; *United States v. Edwards*, 535 F.App'x 285 (4th Cir. 2013); *Koon v. Rushton*, 364 F.App'x 22 (4th Cir. 2010), and those who vehemently insist upon their right to proceed pro se over the trial court's strong objections. *See, e.g., United States v. Roof*, 10 F.4th 314, 359-60 (4th Cir. 2021).

Herrington's case stands out because he expressed considerable hesitation about representing himself but was still permitted to do so. He told the judge that he wanted to hire an attorney but was having difficulty finding one. He said he would hire an attorney when he "[had] the funds to do so," to which the court replied, "Well, you're out of time, Mr. Herrington." JA231-232; *supra* p. 7. Several weeks later, Herrington again explained that he was seeking an attorney but could not find one to take his case as "[i]t's too document heavy." JA248. He then stated that he did not feel qualified to represent himself on such serious charges, and thus wished to hire an attorney, but feared that continuing to search for one would unacceptably delay his case. JA248-249, 251-53; *supra* pp. 8-11.

Indeed, the transcripts show that Herrington opted to move forward pro se with preliminary motions precisely because he hoped they might help him afford a

lawyer, either by modifying his bond conditions so he could "obtain employment," or by returning to him items of value that had been seized. JA256.

Certainly, there are places in the transcript where Herrington stated that he intended to waive his right to an attorney and understood the consequences. But he had previously told the trial court that he was concerned about incriminating himself and was only representing himself because he could not find counsel he could afford. The trial court should have interpreted Herrington's subsequent confirmations that he intended to proceed pro se in light of those foundational early exchanges.

This Court's precedents make clear that the trial court should have appointed counsel—or, at a bare minimum, probed more deeply into the situation—when, as here, the defendant expressed misgivings and reluctance about the choice to proceed pro se. The requirement that a waiver of counsel be "clear and unequivocal," *Fields*, 49 F.3d at 1028, means that criminal defendants who verbalize hesitation about representing themselves should virtually never be permitted to do so. *See, e.g., Ductan*, 800 F.3d 642; *Frazier-El*, 204 F.3d 553; *Fields*, 49 F.3d 1024; *Edwards*, 535 F.App'x 285; *Koon*, 364 F.App'x 221.

Ductan presented the rare situation when an equivocal criminal defendant was allowed to proceed pro se—and the result was a reversal by this Court. The defendant was charged with several drug offenses and hired an attorney who quickly withdrew, citing the defendant's uncooperativeness. *Ductan*, 800 F.3d at 644. When the trial

court asked Ductan if he planned to hire another attorney he said yes, explaining that he did not wish to represent himself but was having some difficulty finding a new lawyer. *Id.* at 644-45. Later in the same hearing, though, Ductan seemed to dissolve into confusion. *Id.* at 645. The magistrate judge held that Ductan's erratic behavior amounted to a forfeiture of his right to counsel. *Id.* at 645. Nonetheless, the judge appointed standby counsel to monitor the proceedings and assist him. *Id.* Throughout later proceedings, Ductan repeatedly expressed his desire to hire an attorney and reluctance to proceed pro se. *Id.* at 645-46. In response, the court asked if he would like to have standby counsel assume duties as trial counsel. *Id.* at 646. When he said no, the court stated that it "appears . . . he's choosing self-representation then because we're ready to go." *Id.* Ultimately, Ductan represented himself at trial and was found guilty on all counts. *Id.*

On appeal, this Court rejected the possibility of forfeiture of the right to counsel, despite the "undeniably difficult position" Ductan had put the trial court in by resisting both appointed counsel and self-representation. *Id.* at 651. This Court also held that there had been no "clear and unequivocal" waiver, reiterating that "a court must *insist* on appointed counsel against a defendant's wishes in the absence of an unequivocal request to proceed pro se." *Id.* at 652 (emphasis added).

This Court's en banc decision in *Fields* illustrates how trial courts are supposed to approach an ambiguous or reluctant request for self-representation.

Defendant Fields went back and forth on whether he wanted an attorney, sometimes asking that his court-appointed lawyer be replaced and sometimes asking to represent himself. 49 F.3d at 1026-28. The trial court denied both requests. *Id.* at 1028. After his conviction Fields appealed, arguing that the two denials amounted to a violation of his right to self-representation. *Id.* This Court held that Fields had not been improperly denied the right to represent himself, noting that he expressed a desire to proceed pro se while also acknowledging his limited knowledge of the law in a single letter to the court. *Id.* at 1033. Because Fields had "failed to invoke his right to self-representation clearly and unequivocally," *id.* at 1034, the trial court properly erred on the side of caution. The en banc court further explained that a strong bias in favor of appointing counsel absent an "unmistakable expression by the defendant" will "greatly aid[] the trial court" in navigating difficult conflicts between competing constitutional rights. *Id.* at 1029.

Edwards, 535 F.App'x 285, illustrates this point. Edwards, charged with heroin trafficking and related firearms offenses, requested to represent himself. *Id.* at 286. In a lengthy colloquy with the trial judge, Edwards relayed that he felt he "ha[d] to proceed pro se" because of his attorney's poor skill level, that he was "somewhat pressured into doing it," and that he did not "have too much choice." *Id.* at 286-87. The trial judge denied his request, stating that Edwards was "looking at severe penalties" and needed "somebody that knows what they are doing." *Id.* at

287. When Edwards argued on appeal that he was denied his right to self-representation, this Court held that "when a court is faced with ambiguity, vacillation, or a potential manipulation, it must ascribe a constitutional primacy to the right to counsel." *Id.* (quoting *Frazier-El*, 204 F.3d at 559) (internal quotations omitted).

Cases affirming decisions to let defendants represent themselves further illustrate the care that courts are expected to take. Upon learning that his defense team planned to present mental health evidence, Dylann Roof "reacted immediately" and insisted on self-representation. 10 F.4th at 362. Though Roof consistently and unequivocally demanded that he be allowed to represent himself, *id.* at 360, the district court held a formal hearing at which it "outlined to Roof the charges and punishment he faced," "ensured that Roof knew that self-representation would be hazardous and would render his defense less effective," and "outlined Roof's personal responsibilities." *Id.* at 359. The court also appointed standby counsel "to sit at Roof's table, advise him about potential jurors, pass him notes, confer during the proceedings, and provide him with suggested voir dire questions." *Id.* at 360. On appeal, this Court held that the government had "met its heavy burden of proving that Roof's waiver of counsel was valid." *Id.* at 359 (internal quotations omitted). To be sure, the stakes for Roof were unusually high, but this Court's precedents affirming self-representation decisions consistently emphasize that the defendant

was "clear, unequivocal, and adamant" about representing himself. *United States v. Nabaya*, 765 F.App'x 895, 898 (4th Cir. 2019); *see also, e.g., United States v. Parker*, 576 F.App'x 157, 164 (4th Cir. 2014) (trial court "did all it could in this case to protect [the defendant's] constitutional rights" by engaging in multiple colloquies and issuing numerous warnings about the dangers of proceeding pro se).

In contrast, Herrington clearly communicated his desire for an attorney and his belief that he was unqualified to represent himself. Although he eventually accepted self-representation, the transcripts show he remained reluctant and conflicted, and would have preferred the aid of counsel. JA234-35, 251-59. This Court's precedents required the trial court to resolve all ambiguities in favor of appointment of counsel. At a bare minimum, the court should have probed more deeply before accepting such an equivocal waiver.

When denying Herrington's habeas petition, the district court did not address this Court's requirement of a "clear and unequivocal" waiver. *See* JA325. Instead, the court simply stated that "the trial judge advised plaintiff against waiving his right to counsel and, on several occasions, offered petitioner opportunities to recant that waiver." JA440. That is not sufficient under this Court's precedents.

C. Herrington Should Not Have Been Permitted To Represent Himself Without An Adequate Explanation Of The Charges Against Him

Herrington's waiver of his right to counsel also was not knowing and voluntary because the court failed to ensure he was adequately informed about the charges he faced. Both this Court and the Supreme Court have cautioned that "[t]o be valid," a waiver of the right to counsel "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Lord*, 412 F.2d at 502–03 (quoting *Von Moltke*, 332 U.S. at 721-24). And although "no particular form of interrogation is required," "it is incumbent upon the trial court to determine that a defendant's waiver of his right to counsel is knowing and intelligent." *United States v. King*, 582 F.2d 888, 890 (4th Cir. 1978). Herrington's waiver fell short of this standard.

The indictment charged Herrington with three counts of obtaining money by false pretenses. His planned defense to those charges was that he never obtained the money. JA342-343. That was a perfectly rational strategy for a pro se litigant. However, unbeknownst to Herrington, Virginia treats attempt as a lesser included offense of every substantive charge, such that a jury may be given attempt instructions in any case without amending the indictment. Va. Code § 19.2-286.

Herrington became aware that he could be found guilty of attempt only when he heard the jury instruction. His surprise is apparent from the transcript.

> COURT: [T]he finding instruction includes an option for finding that it was an attempted possession of funds by false pretenses. Do you want to be heard on that issue, Mr. Herrington?
>
> HERRINGTON: On the attempted?
>
> COURT: Uh-huh.
>
> HERRINGTON: Are you saying that they could find me guilty of attempted?

JA344-345. The trial court did not answer Herrington's question, moving on to other jury instructions. JA345-346. But the prosecution was aware that Herrington's prepared defense to the charges of obtaining money by false pretenses hinged on the fact that he was unsuccessful. Earlier that day, the prosecution explained:

> STATE: Your Honor, I understand that the argument is going to be put forth by the defendant . . . [is] that he will argue I'm not guilty of obtaining money by false pretenses because the debt setoff procedure in which the Commonwealth of Virginia was notified of an outstanding debt to Stafford County on two occasions and Stafford County ended up seizing my tax return on two occasions, and on one occasion Virginia Employment Commission ended up seizing my return, so in all three of these offenses I'm not guilty. . . . So we believe it's proper to go forward on a charge of obtaining money by false pretenses, but as an alternative theory, the lesser-included offense which is a part of the law is attempting to obtain money by false pretenses, and this man certainly attempted to obtain money by false pretenses.

JA342-343. But at that point it was too late for Herrington to change course.

A knowing and voluntary waiver of the right to counsel requires *at least* awareness of "the nature of the charges" and "the statutory offenses included within them." *Lord*, 412 F.2d at 502-03. The trial court judge did little to nothing to meet these standards. At the hearing where Herrington waived his right to counsel, the

judge listed his charges, then asked if he understood the charges and was aware of their sentencing ranges. JA246-248. Herrington said that he understood. JA246-48. But faced with a reluctant pro se defendant who was open about his lack of legal training, the judge took no additional steps to ensure that was true. She said nothing about lesser-included offenses; she did not offer the exact sentencing ranges for his felony charges; and she neglected to even mention that Virginia law mandates up to three years of supervised release with any felony conviction, on top of the maximum statutory punishments for the specific crimes charged. Va. Code § 19.2-295.2. The judge ultimately did not inform Herrington about the mandatory supervised release until his sentencing. Though no "particular form of interrogation is required," *King*, 582 F.2d at 890, by any measure, the trial court's explanation of Herrington's charges was cursory. As a result, Herrington was not given a fair understanding of his charges, their "possible defenses," and "circumstances in mitigation thereof." *Lord*, 412 F.2d at 503.

The district court thought that requiring a trial judge "to be sure a petitioner has concrete and specific knowledge of every possible lesser-included offense" would "render meaningless the far more recent Fourth Circuit cases which explicitly hold that no specific or formal inquiry is required of a judge to find valid a criminal defendant's waiver of his right to counsel," citing only *Gallop*. JA445; 838 F.2d 105 (4th Cir. 1988). In *Ductan*, however, this Court noted that *Gallop* "predated the

'clear and unequivocal' requirement that the en banc court adopted in *Fields*." 800 F.3d at 652. Regardless, the defendant in *Gallop* had standby counsel to help flag legal pitfalls like the one that ensnared Herrington. Accordingly, this Court held, upon a review of the whole record, "that generally adequate assistance of counsel was guaranteed" by the presence of backup counsel throughout the proceedings. 838 F.2d at 111. Still, this Court recognized that "[a]t a minimum the district court should, before permitting an accused to waive his right to counsel, explain the charges and possible punishments." *Id.* at 110. The fact that no specific or formal inquiry is required does not mean that a court can permit an unassisted defendant to represent himself without explaining the charges and penalties in full, including that the defendant faces legally "included" crimes that were not mentioned in the indictment and that may substantially negate the most obvious defenses the defendant may wish to present.

Herrington's background obviously did not equip him to navigate these waters. His earlier criminal trial was for a handful of minor drug offenses, and he was represented by counsel. He had no legal training. JA251-252. He repeatedly expressed that he did not feel qualified to represent himself on serious felony charges, much less complex financial charges. JA252. "[B]efore allowing a defendant to represent himself, a district court must find that the defendant's background, appreciation of the charges against him and their potential penalties,

and understanding of the advantages and disadvantages of self-representation support the conclusion that his waiver of counsel is knowing and intelligent." *Ductan*, 800 F.3d at 649 (citing *Singleton*, 107 F.3d at 1098-99); *cf. United States v. Pena*, 314 F.3d 1152, 1156 (9th Cir. 2003) (merely asking whether defendant understood charges in plea agreement inadequate to ensure defendant was aware of the "*nature* of his charges"). Here, the trial court allowed a defendant who confessed his lack of qualifications, was openly equivocal, repeatedly stated that he wanted an attorney, and had a deeply flawed understanding of the nature and consequences of the charges he faced to proceed without the assistance of even backup or standby counsel.

D. Herrington's Claims Based On Invalid Waiver Of Counsel Are Not Procedurally Defaulted

Herrington obviously could not forfeit a challenge to the validity of his waiver by failing to raise it at the trial itself. The Virginia Supreme Court found a forfeiture because counsel failed to raise this issue on direct appeal. But this Court expressed considerable doubt about whether the *Slayton* rule is consistently and regularly applied to cases, like this one, involving inherently jurisdictional defects. JA201. This Court's concerns were entirely correct. *Slayton* is not an adequate bar here.

Regardless, there cannot be a *Slayton* default on direct appeal if appellate counsel was constitutionally ineffective. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

That issue merges with the merits of Herrington's ineffective assistance of counsel claim, discussed below.

II. HERRINGTON'S APPELLATE COUNSEL WAS INEFFECTIVE

The Sixth Amendment guarantee of effective assistance of counsel "extends to require such assistance on direct appeal of a criminal conviction." *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc); *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The performance of Herrington's appellate counsel fell below a standard of objective reasonableness, prejudicing him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). This is true in at least two respects: (1) he failed to raise Herrington's strong challenge, discussed above, to the validity of his waiver of the right to counsel, and (2) he failed to raise serious defects in the 2009 failure-to-file charge. Both errors clearly prejudiced Herrington.

The Virginia Supreme Court addressed Herrington's appellate ineffective assistance claims only in the most abstract terms, concluding that appellate counsel generally has discretion to select the issues to pursue. JA173. But this Court has already determined that "the Virginia Supreme Court did not address the potential merit of any claim that Herrington argued should have been raised on appeal, perhaps because the court mistakenly concluded that Herrington failed to identify any such claims." JA202; *see* JA172 ("[P]etitioner fails to articulate the issue or issues he wished counsel to add to his petition for appeal."). The Virginia Supreme

Court also did not meaningfully address Herrington's claim that counsel failed to consult with him or to respond to his letters. JA171. Accordingly, the Virginia Supreme Court's decision is not entitled to AEDPA deference and the issues should be reviewed de novo.

If the Court disagrees, it should hold that the Virginia Supreme Court unreasonably applied clearly established federal law and/or based its decision on an unreasonable determination of the facts, for all the reasons discussed below. *See* 28 U.S.C. § 2254(d).

A. Appellate Counsel Clearly Fell Below Constitutional Standards

Appellate counsel's performance was clearly deficient in several respects. First, counsel barely consulted with Herrington or investigated the claims available to him. Though there is no per se rule, a lawyer "must play the role of an active advocate," *Evitts*, 469 U.S. at 394, and should consult with their client about the advantages and disadvantages of taking an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). As this Court has recognized, in that "context, consult convey[s] a specific meaning—advising the defendant about the . . . appeal, and making a reasonable effort to discover the defendant's wishes." *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000) (cleaned up). Although those cases addressed the decision about whether or not to file an appeal, one of the "basic duties" of defense counsel in every setting is "to consult with the defendant on important decisions and

to keep the defendant informed of important developments in the course of prosecution." *Strickland*, 466 U.S. at 688. Herrington explicitly instructed his counsel not to file an appeal without letting him first review the brief. JA94-95. Counsel ignored this directive. And this was not a setting in which the pressures of trial required counsel to make snap decisions without consultation.

Herrington's federal and state habeas petitions alleged that, from the time of his appointment to filing his *Anders* brief, appellate counsel only communicated with him once—during an eight-minute phone call nearly two and a half months after being appointed. JA87, JA98. Over this period, Herrington sent four letters suggesting numerous potential issues with supporting citations to statutes and case law. JA87, JA98. Herrington asked his counsel to "please copy all . . . the errores I wrote and mail them back to me." JA94. Concerned at the lack of communication, Herrington asked "[a]m I realy only suposed to write you? I cant call?" JA94.

Still receiving no response, two weeks later, Herrington wrote another letter, saying "I dont no what to do . . . this is my third letter and I have made call's. Can you please meet with me." JA95. Again, he asked counsel to make copies of his proposed errors. JA95. In his letters, Herrington repeatedly stated that he did not want counsel to file an appeal without letting him read it first. JA95.

Notwithstanding Herrington's outreach, counsel's only response was a letter on April 30, 2013, notifying Herrington of his intention to withdraw. JA97. Counsel

never informed Herrington what claims he planned to raise on appeal. Herrington only found out that the appeal had been filed after the fact. JA97. Plainly, his counsel did not "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Virginia State Bar Rules of Professional Conduct, Rule 1.4(b); *see also* ABA Rule 1.4(a)(2). Counsel did not afford Herrington the opportunity to make any decision, let alone an informed one, about his appeal.

There also is no evidence that counsel investigated any of the potential claims Herrington identified. While the specific letters in which Herrington flagged these issues are not in the record, his pro se supplemental brief identified waiver of counsel and innocence of the 2009 filing charge as appellate issues. JA124-132 (Waiver: Issues #1, #2, #3, #109; Tax: Issues #76, #77, #82, #85, #99, #122, #123, #124, #125, #126). The first three issues raised in Herrington's pro se supplement concerned his invalid waiver and stated that he "declined form because of fear of more charges." JA124. Had counsel even read the transcript pages referenced on the first page, he would have seen that Herrington did not unequivocally waive his right to counsel. And Herrington actually did preserve an objection to the adjusted gross income instructions at trial—a fact that appellate counsel could easily have discovered. Indeed, at a post-trial hearing, the court acknowledged that the issue was preserved. *See,* JA360-361 ("I think this issue was well-addressed by Mr. Herrington and Ms.

Mooney. I'm looking at this transcript . . . and Mr. Herrington is objecting to the instruction because it doesn't include the language adjusted gross income.").

"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." *Jones v. Barnes*, 463 U.S. 745, 753 (1983). But all counsel's *Anders* brief contained was a conclusory statement there were no meritorious issues for appeal. So appellate counsel's affirmation that he engaged in "a conscientious examination of the trial record and the applicable law, find[ing] that the grounds for this appeal are wholly frivolous" rings hollow. JA103-104.

Often, it "is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy," but the behavior of Herrington's appellate counsel seems practically perfunctory. *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Here, counsel's "failure to investigate cannot be excused by [his] other efforts (which, in any event, were meager and superficial)." *Elmore v. Ozmint*, 661 F.3d 783, 861 (4th Cir. 2011).

The Supreme Court and this Court have made clear that a failure to conduct a proper investigation of the law and the facts is itself deficient performance, and precludes the deference ordinarily given to counsel's tactical choices. *See, e.g., Strickland*, 466 U.S. at 690-91; *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (ignorance of important governing law is a "quintessential example of unreasonable

performance"); *United States v. Carthorne*, 878 F.3d 458, 466-69 (4th Cir. 2017) (normal deference "defeated" if counsel fails in their "duty to investigate and to research a client's case in a manner sufficient to support informed legal judgments.") The Virginia Supreme Court did not address that sort of claim, and is entitled to no deference on it.

Second, appellate counsel's failure to raise the two issues on which this Court has granted a certificate of appealability was objectively unreasonable and deficient. While "appellate counsel does not have a duty to raise every nonfrivolous argument on appeal," *Bell*, 236 F.3d at 180, when counsel omits "significant and obvious issues while pursuing issues that were clearly and significantly weaker" this will "establish constitutionally inadequate performance." *Id*. (citing *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994)).

Counsel's decision to challenge only Herrington's sentence was objectively unreasonable. Counsel "may omit meritorious claims in order to avoid burying issues in a legal jungle," *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000), but here counsel decided to raise only one claim which he himself indicated was unlikely to succeed. And he was correct. In Virginia, "[i]t is well-established that if a sentence imposed is within the statutory limits fixed by the legislature, the assumption is that the sentence will not be disturbed on appeal." *Taylor v. Commonwealth*, 77 Va. App. 149, 176 (2023) (cleaned up). Here, counsel did not—

and could not—argue that the sentence was outside the statutory sentencing ranges. *See* Va. Code §§ 18.20, 18.2-11, 18.2-26, 18.2-178, 18.2-434, 19.2-161, and 58.1-348. Virginia appellate courts' review of a sentence generally ends at this point, "[a]bsent an alleged statutory or constitutional violation." *Minh Duy Du v. Commonwealth*, 292 Va. 555, 563 (2016).

The merits of Herrington's invalid waiver claim are discussed at length above. Any attorney familiar with criminal practice would have recognized a promising issue there—particularly given Herrington's unique self-incrimination dilemma. And counsel's failure to challenge the 2009 filing conviction is, if anything, even more egregious. As the Commonwealth now concedes, "Herrington is not guilty of this offense" because unemployment income does not count toward the filing threshold under Virginia law. Fourth Cir. Dkt 27, Informal Response Brief of Harold Clarke, at 36. The Commonwealth acknowledges that "appellate counsel's performance fell below an objective standard of reasonableness." *Id.* at 38. That is obviously correct.

B. Herrington Was Prejudiced By These Deficiencies

Prejudice from deficient representation requires only a "reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different." *Strickland*, 466 U.S. at 703. If he had presented the issue, counsel *clearly* could have gotten the 2009 filing conviction thrown out.

Herrington also had more than a "reasonable probability" of success on the waiver of counsel issue. This Court's precedents require a clear and unequivocal decision to proceed pro se, affirmative steps to protect defendants from having to choose between constitutional rights, and that the defendant be informed of the nature of the charges—specifically including statutorily included offenses—and the potentially viable defenses to them. And since an invalid *Faretta* waiver is a structural error, the result "would have been different"; Herrington would be entitled to a new trial. *Strickland*, 466 U.S. at 703.

C. This Court Is The Proper Forum To Grant Herrington Relief On His Ineffective Assistance Claims Relating To The 2009 Tax Charge

While the Commonwealth concedes the merits of Herrington's challenge to the 2009 filing charge, it suggested he failed to preserve the issue in state court and that the appropriate remedy therefore would be to seek extraordinary relief before the Virginia Supreme Court. Fourth Cir. Dkt 27, Informal Response Brief of Harold Clarke, at 36. That is incorrect.

Herrington *did* object to the jury instruction at trial, *supra* p. 45, and raised this issue in his pro se supplemental appellate brief. JA125. A pro se litigant surely cannot be held to better performance than that. Regardless, any procedural default at trial is resolved by the invalidity of Herrington's waiver of counsel, and any default on appeal by the ineffectiveness of appellate counsel.

Herrington has properly presented a fully exhausted claim on federal habeas that, if accepted, authorizes a grant of federal relief on this issue. There may be some extraordinary remedy available in the Virginia Supreme Court. One hopes there would be. But Herrington gave that court a fair opportunity to fix this problem in his state habeas proceedings. He has established a right to federal relief, and there is nothing the state courts can do that this Court cannot do just as well, and much more expeditiously. This Court should grant Herrington immediate relief because to do otherwise would "needlessly postpone[] final adjudication . . . and perversely prolong[] the very injustice" suffered—unauthorized incarceration. *Dretke v. Haley*, 541 U.S. 386, 398 (2004) (Stevens, J., dissenting).

CONCLUSION

Under any standard of review, it is clear that Donald Herrington's Sixth Amendment rights to trial counsel and effective appellate counsel were violated. He is entitled to a new trial on all charges and vacatur of his sentence for the 2009 tax evasion charge of which he is factually innocent.

Respectfully submitted,

/s/ J. Scott Ballenger

J. Scott Ballenger
Catherine E. Stetson
Madeline Killen (Third Year Law Student)
Nikolai Morse (Third Year Law Student)

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
Appellate Litigation Clinic
580 Massie Road
Charlottesville, VA 22903-1789
(202) 701-4925
sballenger@virginia.edu

Counsel for Donald Herrington

CERTIFICATE OF COMPLIANCE

1. The foregoing brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, the foregoing brief contains 12,096 words.

3. I understand that a material misrepresentation can result in the Court striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief with the word or line printout.

October 18, 2023

/s/ J. Scott Ballenger
J. Scott Ballenger
Counsel for Appellant