RECORD NO. 09-7701

In The
United States Court of Appeals
For The Fourth Circuit

ARTHUR SINGLETON,

Plaintiff – Appellant,

v.

WILLIE EAGLETON, Warden,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT BEAUFORT

BRIEF OF APPELLANT

James E. Coleman, Jr.
Sean E. Andrussier
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Durham, North Carolina 27708
(919) 613-7057

Counsel for Appellant

On the Brief:

Daniel Kronberg
Leslie Cooper Mahaffey
Leah Shen
Matthew Vandenberg
Paul A. Woodard

Students, Duke University School of Law

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 10

STANDARD OF REVIEW 13

ARGUMENT 14

I. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY FAILING TO FULFILL HIS DUTY TO CONSULT WITH MR. SINGLETON ABOUT AN APPEAL 14

A. Counsel Had a Duty to Consult Because a Rational Defendant Would Have Wanted to Appeal 17

1. A rational defendant would have wanted to appeal because non-frivolous grounds for appeal existed 17

a. Ineffective assistance of counsel at trial was a non-frivolous ground for appeal 19

b. Insufficiency of the evidence was a second non-frivolous ground for appeal 23

c. Denial of counsel's motion for a continuance was a final non-frivolous ground for appeal 26

2. A rational defendant would have wanted to appeal following a contested trial that hinged upon eyewitness testimony 29

B. The Conversations Counsel "May Have" Had with Mr. Singleton Did Not Constitute Consultation 30

C. Counsel's Failure to Consult with Mr. Singleton Prejudiced Him Because a Reasonable Defendant Would Have Appealed If Properly Informed 35

II. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY ERRONEOUSLY ADVISING MR. SINGLETON THAT HE LACKED GROUNDS FOR APPEAL 36

A. Counsel Performed Deficiently by Erroneously Advising Mr. Singleton That He Could Not Appeal a Conviction Following a Trial *in Absentia* 37

B. Counsel's Erroneous Advice Prejudiced Mr. Singleton Because a Reasonable Defendant Would Have Appealed If Correctly Advised 39

III. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY FAILING TO FOLLOW MR. SINGLETON'S SPECIFIC INSTRUCTIONS TO FILE A NOTICE OF APPEAL 40

CONCLUSION 42

REQUEST FOR ORAL ARGUMENT 42

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Anders v. California,
386 U.S. 738 (1967).....15

Ard v. Catoe,
642 S.E.2d 590 (S.C. 2007).....20

Bostick v. Stevenson,
589 F.3d 160 (4th Cir. 2009).....*passim*

Brown v. Johnson,
224 F.3d 461 (5th Cir. 2000).....38

Denton v. Hernandez,
504 U.S. 25 (1992).....18

Frazer v. South Carolina,
430 F.3d 696 (4th Cir. 2005).....*passim*

Gladney v. Pendleton Corr. Facility,
302 F.3d 773 (7th Cir. 2002).....18, 19, 29

Griffin v. United States,
109 F.3d 1217 (7th Cir. 1997).....38

Hill v. Lockhart,
474 U.S. 52 (1985).....38

Hudson v. Hunt,
235 F.3d 892 (2000).....30, 35

Lounds v. State,
670 S.E.2d 646 (S.C. 2008).....20, 21

McLean v. United States,
566 F.3d 391 (4th Cir. 2009) 18, 28, 29

Morris v. State,
639 S.E.2d 53 (S.C. 2006) 26

Neitzke v. Williams,
490 U.S. 319 (1989).....18, 29

Peguero v. United States,
526 U.S. 23 (1999).....40

Powell v. Kelly,
562 F.3d 656 (4th Cir. 2009) 41

Rodriquez v. United States,
395 U.S. 327 (1969).....40

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

Simuel v. State,
No. 26885, 2010 WL 4183927 (S.C. Oct. 25, 2010).....33

South Carolina v. McCrary,
131 S.E.2d 687 (S.C. 1963) 23

South Carolina v. Wright,
405 S.E.2d 825 (S.C. 1991) 27

State v. Burdette,
515 S.E.2d 525 (S.C. 1999) 23

State v. Hatcher,
681 S.E.2d 925 (S.C. Ct. App. 2009) 26

State v. Johnson,
512 S.E.2d 795 (S.C. 1999) 23

State v. Martin,
533 S.E.2d 572 (S.C. 2000) 23, 25

State v. McKnight,
576 S.E.2d 168 (S.C. 2003) 23

State v. McMillian,
561 S.E.2d 602 (S.C. 2002) 26

State v. Peer,
466 S.E.2d 375 (S.C. App. 1996) 23

State v. Simmons,
417 S.E.2d 92 (S.C. 1992) 22

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

Thompson v. United States,
504 F.3d 1203 (11th Cir. 2007) 31, 32, 34

United States v. Cooper,
617 F.3d 307 (4th Cir. 2010) 19, 29, 30

United States v. Mooney,
497 F.3d 397 (4th Cir. 2007) 38

United States v. Russell,
221 F.3d 615 (4th Cir. 2000) 37

United States v. Witherspoon,
231 F.3d 923 (4th Cir. 2000) 15

Wiggins v. Smith,
539 U.S. 510 (2003) 21

Williams v. Taylor,
529 U.S. 362 (2000).....13

Wilson v. State,
559 S.E.2d 581 (S.C. 2002).....15

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI.....10, 14, 24, 42

STATUTES

28 U.S.C. § 1291.....1

28 U.S.C. § 2254.....1

28 U.S.C. § 2254(d).....13

S.C. Code § 17-25-45.....9

RULE

S.C. R. Evid. 104(c).....22

OTHER AUTHORITIES

ABA Standards for Criminal Justice 4-8.2 (3d ed. 1993).....32

Model Rules of Prof'l Conduct R. 1.1 (2009).....37

STATEMENT OF JURISDICTION

The United States District Court for the District of South Carolina had jurisdiction over this Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. That court entered the final judgment from which this appeal is taken on July 29, 2009. Petitioner filed a timely notice of appeal from that judgment on September 10, 2009. Accordingly, this Court has jurisdiction to hear Petitioner's appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err in rejecting Petitioner's federal habeas claim that he received ineffective assistance of counsel where his trial counsel, who was retained more than three years after Petitioner was first charged and only eleven days before Petitioner was tried *in absentia*, (1) failed to consult with Petitioner about his right to appeal, (2) erroneously advised Petitioner that he could not appeal from his conviction because he had been tried *in absentia*, and (3) failed to file a notice of appeal to preserve Petitioner's constitutional right to a review of his conviction?

STATEMENT OF THE CASE

On January 10, 2000, a South Carolina grand jury indicted Petitioner on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a firearm. (J.A. 117.) On September 25, 2003, after Petitioner's trial had been delayed numerous times (J.A. 130-31), the State tried Petitioner *in*

absentia (J.A. 135-36), and a petit jury convicted him on all charges. (J.A. 196-97). The trial court sentenced Petitioner to twelve years in prison for one count of ABWIK, seven years for the second count of ABWIK, and five years for possession of a firearm. (J.A. 76-77.) The sentence was sealed until February 26, 2004, when Petitioner next appeared in court. (J.A. 73, 75.)

Petitioner's trial counsel did not file a notice of appeal from Petitioner's conviction. (J.A. 97.) Consequently, Petitioner's conviction was not reviewed on appeal. (*Id.*) On April 15, 2004, less than two months after his sentence was unsealed, Petitioner filed an Application for Post-Conviction Relief in state court, (J.A. 49-54), claiming that the failure of trial counsel to preserve Petitioner's right to a direct appeal denied him effective assistance of counsel in violation of the United States Constitution. (J.A. 50-51.)

On October 6, 2005, the state court held an evidentiary hearing on Petitioner's ineffective assistance of counsel claim. (J.A. 83.) The court entered an order denying Petitioner's claim and dismissing his Application on March 14, 2006. (J.A. 110.) Petitioner filed the Petition for Writ of Certiorari to the South Carolina Supreme Court on October 23, 2006, seeking review of the dismissal of his Application. (J.A. 201-06.) The South Carolina Supreme Court denied the Petition on September 6, 2007. (J.A. 210.)

Petitioner filed his Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina on July 17, 2008. (J.A. 19.) Respondent filed a motion for summary judgment on October 15, 2008 (J.A. 21), to which Petitioner responded on January 21, 2009. (J.A. 212). The Magistrate Judge to whom the motion was referred filed his Report and Recommendation on June 15, 2009, recommending that the district court grant summary judgment for Respondent. (J.A. 236-37.) Petitioner filed a response to the Report and Recommendation on June 25, 2009. (J.A. 239.) The district court accepted the recommendation of the Magistrate Judge and dismissed the habeas petition with prejudice on July 28, 2009. (J.A. 252-53.)

Petitioner filed a timely notice of appeal to this Court on September 10, 2009. (J.A. 4.) On September 15, 2010, this Court granted a certificate of appealability on the issue of whether trial counsel had a duty to consult with Petitioner about pursuing an appeal, and if so, whether Petitioner's trial counsel breached that duty. (J.A. 273.)

STATEMENT OF FACTS

Petitioner Arthur Singleton was convicted *in absentia* of three serious felonies. (J.A. 196-97.) Mr. Singleton was represented by a private lawyer whom he retained only eleven days before his trial. (J.A. 130-31.) At trial, the state's case against Mr. Singleton consisted entirely of the testimony of two witnesses;

only one of the two alleged victims testified. (J.A. 147-176.) The alleged victim who testified stated Mr. Singleton exited a car and then shot him. (J.A. 149.) The second witness saw a person shooting from the passenger side of a car; the witness heard later that the shooter was Mr. Singleton. (J.A. 167-68.) From start to finish, Mr. Singleton's criminal case was unusual.

On January 10, 2000, a grand jury indicted Mr. Singleton on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a firearm. (J.A. 117.) The alleged criminal acts occurred on October 2, 1999. (*Id.*)

The state court appointed public defender Joseph Spigner to represent Mr. Singleton on these charges. (J.A. 75, 130.) Mr. Spigner represented Mr. Singleton for three and a half years, during which the case never reached trial. (J.A. 130.) On the eve of trial, Mr. Singleton terminated his relationship with Mr. Spigner and retained a private defense attorney, Steven McKenzie. (J.A. 130-31.)

Mr. McKenzie was retained as counsel only three days before Mr. Singleton's next scheduled court appearance, and eleven days before Mr. Singleton's trial ultimately occurred. (*Id.*) Mr. McKenzie's partner attended the first scheduled appearance on Mr. Singleton's behalf and requested the continuance for Mr. McKenzie. (*Id.*) The court granted Mr. McKenzie an eight-day continuance, during which he completed trial of another case. (*Id.*)

The court granted the motion for a continuance on September 15, 2003 and set Mr. Singleton's trial for September 23, 2003. (J.A. 122, 131.) During that period, Mr. McKenzie and Mr. Singleton discussed the need to obtain another continuance; they agreed that Mr. McKenzie would ask the court for a continuance when trial began on September 23. (J.A. 87-88, 95.) On that day, Mr. Singleton did not appear in court (J.A. 129), partially because he believed his trial would be continued and partially because he was scared. (J.A. 88).

At the start of Mr. Singleton's trial, Mr. McKenzie asked the court for a continuance on the grounds that his client was not present and that Mr. Singleton's behavior suggested that he needed a competency evaluation. (J.A. 129-30.) Mr. McKenzie did not inform the court of the short time he had to prepare for trial, nor did he offer evidence of any difficulty he was having in getting Mr. Singleton to assist with his defense. (*See id.*) Nevertheless, the court was aware that Mr. McKenzie had represented Mr. Singleton for only a short period of time. (J.A. 130-31.) The court also was aware that for some of that time, Mr. McKenzie was out of town working on another case. (J.A. 130.) The prosecutor acknowledged that Mr. McKenzie was "in a difficult spot," but opposed any further continuance. (J.A. 131.) Though nearly four years had passed since Mr. Singleton's indictment, and trial counsel had represented Mr. Singleton for only eleven of those days (J.A. 130-31), the trial court denied the motion to continue (J.A. 132).

Mr. Singleton's entire trial *in absentia* occurred on September 25, 2003.[1] (J.A. 135-36.) At the outset, the prosecutor informed the court he might call up to nine witnesses, including three law enforcement officers. (J.A. 125.) But the state rested its case after calling only two witnesses: one of the alleged victims (J.A. 147-62) and an alleged eyewitness who was intoxicated at the time of the alleged crimes (J.A. 162-75). The other alleged victim did not testify.[2] (*See* J.A. 146-76.) The state did not introduce any physical evidence; there was no expert medical testimony about the alleged victims' injuries; and there was no forensic evidence to show that the two alleged victims were shot with the same weapon. (*See id.*)

The two state witnesses offered materially different testimony. The alleged victim, Lionel Bradley, claimed that on October 2, 1999, Mr. Singleton shot him in the chest. (J.A. 149.) According to Mr. Bradley, immediately prior to the alleged shooting, a blue car with two occupants drove up to where Mr. Bradley was standing. (J.A. 148-49.) Mr. Singleton got out of the car with a gun in his hand and fired two shots, the first of which struck Mr. Bradley in the chest. (J.A. 149.) Mr. Bradley did not testify about an alleged second victim. (*See* J.A. 147-62.)

[1] Mr. Singleton does not dispute that he was in contact with counsel throughout the trial, and he was aware that the trial was occurring in his absence. (J.A. 87-88.)

[2] The prosecutor informed the court that the individual declined to testify because he did not believe he was an intended victim. (J.A. 198-99.)

The state's only other witness, Ronnette Davis, provided a significantly different account of the incident. At the time of the shooting, Ms. Davis was under the influence of alcohol and recovering from a hangover. (J.A. 172-73.) She saw a blue car (J.A. 164) with three individuals inside. (J.A. 167). After she heard "something like a firecracker about two times," she looked up to see a man sitting inside the car, pointing a gun out the window. (J.A. 164.) Unidentified individuals later told Ms. Davis that the person pointing the gun out the window was "Arthur." (J.A. 167-68.) Ms. Davis did not see anybody actually fire any of the shots that allegedly wounded either of the alleged victims. (J.A. 167.) At some point, she noticed Sherman Sanders, the alleged second victim, lying on the ground. (J.A. 164.) She did not notice that Mr. Bradley had been shot. (*Id.*)

At the close of the state's case, Mr. Singleton's counsel moved for a directed verdict. (J.A. 175.) The defense then promptly rested without offering any evidence on Mr. Singleton's behalf. (J.A. 175-76.) The jury deliberated for little more than an hour and returned a verdict of guilty on all three counts. (J.A. 195-97.)[3] The court placed its sentence under seal until Mr. Singleton appeared in court. (J.A. 75.)

[3] At the evidentiary hearing on Mr. Singleton's state court claim of ineffective assistance of counsel, Mr. McKenzie testified that he spoke with a number of the jurors following the verdict. (J.A. 98-99.) They indicated that their decision had been tenuous. Specifically, a juror told Mr. McKenzie that the jury would likely not have found Mr. Singleton guilty had he testified. (*Id.*)

On February 26, 2004, Mr. Singleton's sentence was unsealed. (J.A. 73, 75.) The court sentenced him to twelve years for one count of ABWIK, seven years for the second count,[4] and five years for possession of a firearm, all to run concurrently. (J.A. 76-77.) Mr. Singleton's counsel did not move to reconsider the sentence. (J.A. 97.) Instead, he lamented, "there is not a whole lot we can do about the sentence imposed" and attempted to explain the effect Mr. Singleton's absence from trial likely had on the jurors. (J.A. 79.)

Following the sentencing hearing, Mr. McKenzie and Mr. Singleton talked (J.A. 98); they later provided conflicting accounts of what they discussed. Mr. Singleton stated that he specifically instructed Mr. McKenzie to file a notice of appeal. (J.A. 89.) Mr. McKenzie denied that Mr. Singleton directed him to appeal but could not recall the substance of his conversation with Mr. Singleton with any certainty. (J.A. 98.) Nevertheless, Mr. McKenzie acknowledged that he and Mr. Singleton "may have discussed the appeal" but "only to the standpoint of, Arthur, I don't think you have a case to appeal because you didn't show up for trial." (*Id.*) Counsel further stated that Mr. Singleton "just didn't have anything—there wasn't any evidence to—to appeal. And if Arthur and discussed the appeal, that's what I would have told him." (J.A. 99.)

[4] The trial court apparently imposed a lighter sentence for the second count of ABWIK because of the weakness of the state's evidence linking Mr. Singleton to the alleged shooting of Mr. Sanders.

Mr. McKenzie did not file a timely notice of appeal on Mr. Singleton's behalf. (J.A. 97.) As a consequence, Mr. Singleton was unable to exercise his constitutional right to a direct appeal from his conviction.

At the time of the crimes for which he was convicted, Mr. Singleton was seventeen years old and had never been convicted of a felony. (J.A. 113.) By the time of his trial, nearly four years later, Mr. Singleton was twenty-one years old—no longer a minor—and charges for other violent crimes had been filed against him. (J.A. 130-31.) Subsequent to his conviction in this case, Mr. Singleton was convicted of armed robbery and conspiracy to commit armed robbery. *State v. Singleton*, No. 2004-GS-43-504 (S.C. Ct. Gen. Sess., June 6, 2006). Though the other two individuals convicted along with Mr. Singleton in that case received lighter sentences, Mr. Singleton was sentenced to life in prison as the result of a South Carolina statute mandating that anyone convicted of a second "most serious offense" be sentenced to life without the possibility of parole. *State's Return to Defendant's Motion for Reconsideration of Sentence*, No. 2004-GS-43-504 (2006); *see* S.C. Code § 17-25-45. Mr. Singleton's two convictions for ABWIK in this case were the offenses that brought him within the statute. *Id.*#

SUMMARY OF THE ARGUMENT

Petitioner Arthur Singleton was denied effective assistance of counsel by his defense counsel, in violation of the Sixth Amendment to the United States Constitution. Counsel, who failed to file a notice of appeal following Mr. Singleton's conviction, had a duty to consult with Mr. Singleton about his right to an appeal. As a consequence of his breach of that duty, counsel deprived Mr. Singleton of the opportunity to appeal several non-frivolous claims arising from his conviction. Counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). The state court's rejection of this claim is "contrary to, or involved an unreasonable application" of clearly established federal law.

Counsel has a constitutional duty to consult with his client when there is reason to believe a rational defendant in Petitioner's situation would wish to appeal. The inquiry focuses on whether such a defendant would have non-frivolous grounds for doing so. Mr. Singleton had several non-frivolous claims that a rational defendant would have wished to pursue on appeal.

First, the record shows that Mr. Singleton's trial counsel failed to conduct an adequate investigation prior to trial, and as a result, among other things, failed to challenge the unreliable out-of-court identification of Mr. Singleton by one of the State's two witnesses. Based on these facts, Mr. Singleton could have appealed his

conviction on the ground that his counsel provided ineffective assistance of counsel.

Second, the State's entire case rested upon the contradictory testimony of two witnesses; only one of the two men allegedly shot by Mr. Singleton testified. The second witness told a story that was materially different than the story told by the alleged victim. According to the state's own evidence, there may have been two people shooting at the alleged victims. As a consequence, the evidence against Mr. Singleton, even viewed in the light most favorable to the state, was insufficient to prove beyond a reasonable doubt that Mr. Singleton caused any of the injuries allegedly suffered by the two gunshot victims. He could have appealed his conviction on that ground.

Finally, Mr. Singleton could have appealed the trial judge's denial of the defense's motion for a continuance. The trial court was aware that Mr. Singleton had retained his trial counsel only eleven days before trial and that counsel did not have time during those eleven days to prepare for trial. The court gave counsel an eight-day continuance to complete the trial of another case, but set Mr. Singleton's trial to start after the continuance. An appeal from the denial of the second continuance to prepare for Mr. Singleton's trial would not have been frivolous.

Because non-frivolous grounds existed for an appeal, Mr. Singleton's counsel had a duty to consult with him. Counsel failed in that duty. According to counsel, if he spoke with Mr. Singleton about an appeal at all, he merely stated summarily that there were no grounds to appeal. Such a limited discussion did not satisfy counsel's constitutional duty to consult. But for his counsel's deficient performance, Mr. Singleton would have appealed his conviction. Moreover, because counsel's deficient performance denied Mr. Singleton an appeal altogether, prejudice is presumed.

Even if the conversation which counsel speculates he *may* have had with Mr. Singleton amounted to consultation, counsel nonetheless denied Mr. Singleton effective assistance of counsel by advising him that he lacked grounds for appeal. Counsel had a duty to provide Mr. Singleton with competent legal advice regarding any grounds for appeal. Counsel's erroneous advice that there were no grounds for appeal and his erroneous representation to Mr. Singleton that he could not appeal because he was not present at trial breached that duty.

Mr. Singleton's counsel also denied him effective assistance of counsel when he ignored Mr. Singleton's explicit instruction to file a notice of appeal. At the state evidentiary hearing, counsel denied that Mr. Singleton gave him such an order. However, counsel did not deny that he and Mr. Singleton discussed an appeal; rather he was unsure whether they did. He could only speculate about what

they might have discussed if they talked about an appeal. In those circumstances, the state court's finding that Mr. Singleton did not instruct his counsel to file a notice of appeal constitutes an unreasonable determination of the facts in light of the evidence presented in that court. #

STANDARD OF REVIEW

This Court reviews a district court's denial of a habeas petition *de novo*. *Bostick v. Stevenson*, 589 F.3d 160, 163 (4th Cir. 2009). When a claim has been adjudicated on the merits in state court, review is governed by section 104 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)). Under AEDPA, habeas relief should be granted if the court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2006); *see Williams v. Taylor*, 529 U.S. 362, 385-86 (2000).

ARGUMENT

I. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY FAILING TO FULFILL HIS DUTY TO CONSULT WITH MR. SINGLETON ABOUT AN APPEAL

By failing to consult with Mr. Singleton about appealing the guilty verdict in his trial, counsel performed in a constitutionally deficient manner, and Mr. Singleton was prejudiced because he was denied his constitutional right to pursue a direct appeal. The PCR court's finding to the contrary was inconsistent with well-established federal law, and the district court's determination that it was not should be reversed.

It is undisputed that Mr. Singleton's attorney failed to file a timely notice of appeal following Mr. Singleton's sentencing and that, because of his attorney's conduct, Mr. Singleton was unable to exercise his right to a direct appeal. *Strickland v. Washington*, 466 U.S. 668 (1984), established that the Sixth Amendment guarantees a criminal defendant the right to "reasonably effective" legal counsel. *Id.* at 687. *Strickland* announced a two-part test for determining whether an attorney's performance has reached this level: (1) whether "counsel's representation fell below an objective standard of reasonableness" and (2) whether counsel's deficient behavior resulted in prejudice to the defendant. *Id.* at 688, 691-92.

Further, "[a] defendant has a right to pursue a direct appeal, even if frivolous." *Frazer v. South Carolina*, 430 F.3d 696, 705 (4th Cir. 2005) (citing *Anders v. California*, 386 U.S. 738, 744 (1967)). Based upon counsel's duty to render effective assistance and a defendant's right to file a direct appeal,[5] clearly established Supreme Court precedent and the law of this Court confirm that the failure to file a notice of appeal can render an attorney's performance constitutionally deficient. *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000); *see, e.g.*, *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000).

Under *Flores-Ortega*, counsel's failure to file a notice of appeal is professionally unreasonable if either (1) his client specifically requested an appeal or (2) he failed to consult with his client despite having a duty to do so. 528 U.S. at 478-80. An attorney has a constitutional duty to consult about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in

[5] South Carolina recognizes that a defendant's right to a direct appeal from a criminal conviction can be waived only if the accused makes a "knowing and intelligent decision not to pursue the appeal." *E.g.*, *Wilson v. State*, 559 S.E.2d 581, 582 (S.C. 2002). In this case, Mr. Singleton's lawyer admitted that, if he discussed an appeal with Mr. Singleton at all, counsel advised Mr. Singleton that he could not appeal his conviction because Mr. Singleton was not present at his trial. (J.A. 98.) That advice was manifestly wrong, and any decision not to appeal that relied on this advice would not have been a "knowing and intelligent decision."

appealing." *Id.* at 480. Consultation requires "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478. If counsel's performance was deficient under *Flores-Ortega*, the defendant is entitled to relief upon a showing that, "but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. This Court has held that "[t]he mere presence of non-frivolous issues to appeal is generally sufficient to satisfy the defendant's burden to show prejudice." *Frazer*, 430 F.3d at 708.

Here, Mr. Singleton's attorney failed to consult with him about an appeal despite a duty to do so. First, Mr. Singleton had non-frivolous grounds for appeal and Mr. Singleton's guilty verdict followed a contested trial, thus requiring his trial counsel to consult with him regarding an appeal. Second, based on the state post-conviction relief (PCR) court's findings of fact, counsel either did not speak with Mr. Singleton about an appeal or, if he did, the conversation did not satisfy the lawyer's duty to consult. Finally, Mr. Singleton is entitled to relief because he was prejudiced by his attorney's failure to consult; a reasonable defendant in Mr. Singleton's position would have wanted to appeal had he been adequately informed that there were non-frivolous grounds for appeal stemming from his trial. The record thus demonstrates that the PCR court erred in its application of well-

established federal law, and the district court's affirmation of the PCR court's decision was erroneous and should be reversed.

A. Counsel Had a Duty to Consult Because a Rational Defendant Would Have Wanted to Appeal

Though an attorney who fails to consult with his client about an appeal is not "necessarily unreasonable," counsel *does* have a "constitutionally imposed duty to consult with the defendant about an appeal" when (1) circumstances suggest that a rational defendant would have wanted to appeal—as one would when non-frivolous grounds for appeal exist—or when (2) a particular defendant reasonably demonstrates an interest in appealing to counsel. *Flores-Ortega*, 528 U.S. at 479-80. Courts take into account "all the information counsel knew or should have known" when making this determination. *Id.* at 480.

1. A rational defendant would have wanted to appeal because non-frivolous grounds for appeal existed

An attorney's failure to consult his client about an appeal is unreasonable when there are non-frivolous grounds for appeal. *Frazer*, 430 F.3d at 708 ("[W]hen there are non-frivolous issues to appeal . . . , *Strickland* requires that counsel consult with the defendant in deciding whether to go forward."). For a court to find that grounds for appeal are non-frivolous, it need not "decide whether . . . these grounds would ultimately be successful on appeal." *See Bostick v. Stevenson*, 589 F.3d 160, 167 n.9 (4th Cir. 2009). Rather, it must determine only

that the "issues do not clearly 'lack[] an arguable basis either in law or in fact.'" *See id.* (quoting *McLean v. United States*, 566 F.3d 391, 399 (4th Cir. 2009)). In *Bostick*, for example, this Court held that sufficiency of the evidence at trial, deficiency of the indictment, and ineffective assistance of counsel at trial for "opening the door to evidence of . . . prior bad acts" were all possible non-frivolous grounds for appeal—though the Court made no judgment as to the potential success of any of these claims on appeal. *Id.* at 167. Similarly, this Court held in *Frazer* that a defendant who pleaded guilty and unexpectedly received a harsher sentence than he had agreed upon with prosecutors had a non-frivolous ground for appeal, despite the sentencing judge's broad discretion to determine the penalty imposed. 430 F.3d at 701, 711-12.

In contrast, the Supreme Court has defined frivolous claims as those lacking even "an *arguable* basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (emphasis added). Frivolous claims include "those whose factual allegations are 'so nutty,' 'delusional,' or 'wholly fanciful' as to be simply 'unbelievable.'" *McLean*, 566 F.3d at 399 (quoting *Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 774 (7th Cir. 2002); *Denton v. Hernandez*, 504 U.S. 25, 29 (1992)). For instance, in *Gladney*, the Seventh Circuit found that a prisoner's allegations that he had been repeatedly drugged and raped but lacked any recollection of these events were factually baseless and, therefore, frivolous. 302

F.3d at 774. Similarly, this Court held that when a criminal defendant pleaded guilty and received the sentence he had negotiated with prosecutors, the defendant lacked non-frivolous grounds for appeal. *United States v. Cooper*, 617 F.3d 307, 314 (4th Cir. 2010).

Here, a reasonable defendant would have wanted to appeal because there were non-frivolous grounds for doing so. Mr. Singleton arguably could have appealed his conviction on at least three non-frivolous grounds: (1) ineffective assistance of counsel at trial, (2) sufficiency of the evidence, and (3) the denial of defendant's motion for a continuance.

a. Ineffective assistance of counsel at trial was a non-frivolous ground for appeal

First, there are several indications that counsel's performance at trial was deficient, thus raising the possibility of an ineffective assistance of counsel claim on appeal. A defendant may demonstrate ineffective assistance of counsel by showing (1) that an attorney's performance "fell below an objective standard of reasonableness" and (2) that defendant was prejudiced by this deficient representation—meaning counsel's errors were "sufficient to undermine confidence in the outcome [of the trial]." *Strickland*, 466 U.S. at 687-88, 694. In *Bostick*, this Court found that ineffective assistance of counsel at trial can be a non-frivolous ground for appeal for the purpose of determining whether an attorney had a duty to consult about an appeal. 589 F.3d at 167. In the present case, Mr.

Singleton could have claimed ineffective assistance of counsel based upon his attorney's failure to prepare adequately for trial and upon counsel's failure to object to an improper out-of-court identification.

Under South Carolina law, "[a] criminal defense attorney has a duty to perform a reasonable investigation," including, "at a minimum, . . . interview[ing] potential witnesses and [making] an *independent* investigation of the facts and circumstances of the case." *Lounds v. State*, 670 S.E.2d 646, 649 (S.C. 2008) (quoting *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007) (internal quotation marks omitted)). The record shows that Mr. Singleton's counsel did not call any witnesses in Mr. Singleton's favor at trial (J.A. 175-76) although several potentially favorable witnesses—including an alleged second victim[6]—were present at the scene of the crime (J.A. 163-64). Further, counsel appeared to be questioning the state's witnesses for the first time during cross-examination, as demonstrated by his repetition of questions—including questions whose answers were unfavorable to Mr. Singleton.[7] (*See* J.A. 153-61, 167-74.) Given that trial counsel was retained only eleven days prior to the beginning of trial and that

[6] As discussed above, opposing counsel informed the trial judge after the verdict that when interviewed by police, the alleged second victim, Sherman Sanders, reported that he was an "unintended victim" in a "dispute between Bradley and Singleton." (J.A. 198-99.)

[7] For example, Mr. Singleton's attorney asked state witness Lionel Bradley five times, in various forms, whether Mr. Bradley saw Mr. Singleton shoot him. (J.A. 159.) Each time, Mr. Bradley answered that he had. (*Id.*)

counsel stated on the record that he was working on at least one other trial during that time (J.A. 130-31), it is reasonable to infer that counsel simply did not have the time to properly investigate the facts and interview witnesses. Nothing in the record suggests otherwise. Though counsel generally will not be deemed ineffective if he purposefully declined to call witnesses or introduce evidence pursuant to a valid trial strategy, in this case, it appears that counsel failed to fulfill his duty to adequately investigate. *See Lounds*, 670 S.E.2d at 650-51. And as the Supreme Court has stated, a valid trial strategy must be informed by an adequate investigation. *See Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Strickland*, 466 U.S. at 680.

Because of the lack of physical evidence and the state's complete reliance on the testimony of two alleged eyewitness, the failure to investigate potential exculpatory evidence or witnesses would have prejudiced Mr. Singleton. Jurors' statements that their verdict would have been different had Mr. Singleton testified in his own defense indicate the tenuous nature of their determination and suggest that additional evidence or witnesses favorable to the defense could have resulted in a different outcome. (J.A. 98-99.) Therefore, ineffective assistance of counsel for failure to prepare adequately for trial was a non-frivolous ground upon which Mr. Singleton could have appealed and a ground upon which a rational defendant would have wanted to appeal.

South Carolina law also counsels that a witness's identification of the accused should arise from her observation of the commission of the crime charged and must be independent of any later suggestion that the defendant was the perpetrator. *See State v. Simmons*, 417 S.E.2d 92, 93 (S.C. 1992). Here, state witness Ronnette Davis admitted that she did not identify Mr. Singleton at the time of the alleged offenses, but only later when friends told her that Mr. Singleton was the shooter. (J.A. 167-68.) If counsel had been aware of Ms. Davis's proposed testimony prior to the beginning of trial, he could have challenged it as an improper out-of-court identification and asked for a pretrial hearing. *See* S.C. R. Evid. 104(c). His failure to do so may constitute deficient performance.

Moreover, because Ms. Davis's testimony was the only evidence linking Mr. Singleton to the shooting of a second alleged victim (*see* J.A. 147-76), Mr. Singleton was prejudiced if the identification was improperly admitted, *see Simmons*, 417 S.E.2d at 94 (holding that if an improper "identification was the sole evidence linking [the defendant] to the crime, a harmless error analysis would not be appropriate"). Thus, Mr. Singleton also could have appealed based on ineffective assistance of counsel for failure to object to an improper identification, and a rational defendant would have done so.

b. Insufficiency of the evidence was a second non-frivolous ground for appeal

Second, Mr. Singleton could have appealed his conviction to challenge the sufficiency of the evidence against him. Counsel preserved the issue by moving for a directed verdict following the close of the state's case. *See South Carolina v. McCrary*, 131 S.E.2d 687, 689 (S.C. 1963). Under South Carolina law, when determining whether to direct a verdict in a criminal case, a trial court focuses on the existence of evidence, not its weight or the veracity of witnesses. *State v. Burdette*, 515 S.E.2d 525, 531 (S.C. 1999); *State v. Peer*, 466 S.E.2d 375, 378 (S.C. App. 1996). A directed verdict is proper "when the State fails to produce evidence of the offense charged." *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003). Similarly, "[t]he trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *State v. Martin*, 533 S.E.2d 572, 574 (S.C. 2000). Evidence "which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced," on the other hand, will be submitted to the jury. *State v. Johnson*, 512 S.E.2d 795, 798 (S.C. 1999). Upon review, an appeals court will consider the evidence in the light most favorable to the state. *Id.*

Here, the state offered no physical evidence and no police testimony implicating Mr. Singleton in the crime, and in the case of one of the charges, the alleged victim did not testify. (*See* J.A. 147-76.) Instead, the government

provided nothing more than the testimony of two alleged eyewitnesses, one of whom testified about only the first alleged shooting, the other of whom testified about only the second alleged shooting. (*See id.*) The testimony of the two witnesses, moreover, was contradictory.

The evidence against Mr. Singleton with regard to the alleged second shooting is particularly suspect. Ronnette Davis, the witness who provided the state's only evidence remotely linking Mr. Singleton to this crime, did not identify Mr. Singleton as the shooter at the time of the alleged shooting. (J.A. 164.) Instead, she relied on a friend's subsequent hearsay claims to identify Mr. Singleton as the shooter. (J.A. 167-68.) Because Ms. Davis's testimony rested entirely upon an improper out-of-court identification—and arguably also violated Mr. Singleton's Sixth Amendment right to confrontation—the court could have granted a directed verdict on this count without regard to the credibility of the witness. The court could have determined that, due to material procedural deficiencies, there was no admissible evidence linking Mr. Singleton to the second alleged shooting. Thus, the trial court arguably should have granted a directed verdict on at least one count of assault and battery with intent to kill (ABWIK).

The trial court would have been similarly justified in granting a directed verdict acquitting Mr. Singleton of the alleged shooting of Mr. Bradley. Though Mr. Bradley testified that he saw Mr. Singleton shoot at him (J.A. 149, 159), the

state failed to produce any physical evidence demonstrating that the shots Mr. Singleton allegedly fired were actually the cause of Mr. Bradley's injury. (J.A. 147-76.) Indeed, when Mr. Bradley's statements are compared to Ms. Davis's contradictory testimony, it suggests that Ms. Davis and Mr. Bradley saw different shooters. (*See* J.A. 147-62, 166-71.) First, while Mr. Bradley claimed his shooter was outside the car (J.A. 149), Ms. Davis claimed the shooter she saw remained in the car (J.A. 167). Second, Ms. Davis heard four shots (J.A. 170), while Mr. Bradley testified to witnessing only two shots. (J.A. 149.) Finally, Ms. Davis could not identify the person she saw in the car until a third party identified the shooter for her (J.A. 167-68), and she did not witness any shot that allegedly wounded either of the alleged victims. (J.A. 164.) Thus, even when the evidence is viewed in the light most favorable to the state, it likely fails to meet the state's high burden to demonstrate beyond a reasonable doubt that Mr. Singleton fired the shots that allegedly wounded the two victims. Without physical evidence creating a concrete connection between Mr. Singleton's conduct and the alleged shooting of Mr. Bradley, the trial court would have been justified in determining that the state did not meet its burden to produce sufficient evidence to allow a jury to convict Mr. Singleton on either count of ABWIK beyond a reasonable doubt.

Though an appellate court would review the evidence presented in the light most favorable to the state, *see Martin*, 533 S.E.2d at 574, the shaky foundation

upon which the state built its case against Mr. Singleton makes sufficiency of the evidence a non-frivolous issue for appeal.

c. Denial of counsel's motion for a continuance was a final non-frivolous ground for appeal

Third, Mr. Singleton could have appealed the trial court's denial of his motion for a continuance. Under South Carolina law, trial counsel's objections are preserved for appeal provided they are raised to and ruled upon by the lower court and are "sufficiently specific to identify the grounds for the trial court." *See State v. Hatcher*, 681 S.E.2d 925, 927 (S.C. Ct. App. 2009). Though reversals based on denial of a continuance are admittedly infrequent, they do occur. *See, e.g., State v. McMillian*, 561 S.E.2d 602, 604-05 (S.C. 2002). In criminal cases, an appellate court may overrule a trial court's decision to deny a motion for continuance if it amounts to an abuse of discretion that prejudiced the defendant. *Morris v. State*, 639 S.E.2d 53, 56 (S.C. 2006); *McMillian*, 561 S.E.2d at 605-06.

Here, after discussing the matter with Mr. Singleton (J.A. 87-88), defense counsel moved for a continuance (J.A. 129-30), and the trial judge subsequently denied it (J.A. 132), properly preserving the issue for appeal. Counsel cited Mr. Singleton's absence as the primary reason the court should grant a continuance. (J.A. 129-30.) Though the Supreme Court of South Carolina has held that denial of a continuance sought because of defendant's absence is not an abuse of discretion when the defendant is aware of proceedings against him and chooses not

to appear,[8] a reviewing court still could have examined the decision to grant a continuance in light of Mr. Singleton's unique situation. *See South Carolina v. Wright*, 405 S.E.2d 825, 827 (S.C. 1991). The short amount of time that elapsed between Mr. Singleton's retention of his new attorney and the beginning of the trial suggests that a continuance might have been warranted—indeed, that it was necessary to permit the new lawyer to conduct constitutionally required investigations. Counsel was retained only eleven days prior to the beginning of trial, and even the state recognized that the short preparation time put Mr. Singleton's counsel "in a difficult spot." (J.A. 130-31.) Moreover, counsel's failure to call any witnesses at trial (J.A. 175-76) and his seemingly uninformed questioning of the state's witnesses (J.A. 153-61, 166-74) indicate that he was not prepared for trial and would have benefitted from a continuance. That the trial court permitted Mr. Singleton's public defender to withdraw only eight days before trial indicates that the court was aware that new counsel likely had not prepared for trial. (*See* J.A. 130-31.)

Additionally, counsel argued that the court should grant a continuance to evaluate whether Mr. Singleton was competent to stand trial. (J.A. 130.) Opposing counsel resisted this motion, arguing that the public defender who previously represented Mr. Singleton had never asked for an evaluation. (J.A.

[8] Mr. Singleton does not contest the trial court's finding that he was properly noticed of his right to appear at trial.

131.) The record, however, does not indicate that Mr. Singleton's previous counsel had spent enough time with Mr. Singleton to have any knowledge of his mental state, and Mr. Singleton's decision to hire new counsel (J.A. 130-31) suggests that the public defender likely had not. That Mr. Singleton's trial lawyer was not able to persuade him to attend his trial and that counsel did not even know how to get in touch with his client (J.A. 129-30) strongly suggest that trial counsel was not prepared to conduct the trial and that a continuance was necessary to allow him to prepare an adequate defense. Though the trial court had broad discretion to grant or deny counsel's request for a continuance, the multiple factors suggesting that a continuance may have been warranted make this issue a non-frivolous ground for appeal.

Though Mr. Singleton would have had to overcome a high burden in order to prevail on any of these claims on an appeal, the record unquestionably indicates that an attempt to do so would not have been frivolous. Further, this Court does not attempt to determine the likelihood of success on the merits when determining whether potential grounds for appeal are non-frivolous. *See Bostick*, 589 F.3d at 167 n.9. Instead, it seeks only to ensure that the grounds on which the defendant seeks to appeal "do not clearly 'lack[] an arguable basis either in law or in fact.'" *Id.* (*quoting McLean*, 566 F.3d at 399). As demonstrated above, the grounds for appeal arising from Mr. Singleton's trial plainly *do* have "an arguable basis . . . in

law [and] in fact," *Neitzke*, 490 U.S. at 325, and are clearly *not* "'so nutty,' 'delusional,' or 'wholly fanciful' as to be simply 'unbelievable.'" *McLean*, 566 F.3d at 399(quoting *Gladney*, 302 F.3d at 774; *Denton*, 504 U.S. at 29). Thus, several non-frivolous grounds for appeal existed following Mr. Singleton's trial, which should have alerted counsel of his duty to consult with Mr. Singleton about an appeal.

2. A rational defendant would have wanted to appeal following a contested trial that hinged upon eyewitness testimony

In addition to examining whether non-frivolous grounds for appeal exist, this Court also considers "whether the defendant's conviction followed a trial or a guilty plea" in determining whether a rational defendant would have wanted to appeal. *Cooper*, 617 F.3d at 313; *accord Flores-Ortega*, 528 U.S. at 480 ("Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or guilty plea . . . ."). This Court has observed that "[t]hough there is no per se rule, a lawyer who fails to consult with a client about an appeal following a jury trial almost always acts unreasonably." *Bostick*, 589 F.3d at 167.

That Mr. Singleton's conviction followed a trial supports the conclusion that a reasonable defendant would have wanted to appeal. *See Bostick*, 589 F.3d at 167 (holding that "trial counsel had a duty to consult" because, *inter alia*, defendant

"went to trial"); *Hudson v. Hunt*, 235 F.3d 892, 896-97 (2000) (holding that, following a trial and conviction by jury, "Hudson's attorneys were constitutionally deficient for failing to consult with him regarding the filing of an appeal"); *cf. Cooper*, 617 F.3d at 313 (stating as highly relevant "whether the defendant's conviction followed a trial or a guilty plea" and finding that counsel's failure to consult regarding an appeal was not constitutionally deficient following a guilty plea). Further, the trial was by no means open-and-shut. To the contrary, the prosecution offered no physical evidence (*see* J.A. 147-76), the credibility of both of its witnesses was questionable (*see* J.A. 155-57, 172-73), and Mr. Singleton's counsel testified that several members of the jury told him the entire verdict turned on Mr. Singleton's failure to appear (J.A. 98-99). Because there were arguably non-frivolous grounds for appeal and because Mr. Singleton's conviction followed a contested trial, counsel should have known that a reasonable defendant would have wanted to appeal.

B. The Conversations Counsel "May Have" Had with Mr. Singleton Did Not Constitute Consultation

When determining whether counsel's failure to file a notice of appeal rendered his performance deficient, a court must first examine "whether counsel in fact consulted with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 478. For an attorney to "consult" with his client about a direct appeal, the attorney must "advis[e] the defendant about the advantages and disadvantages of taking an

appeal, and mak[e] a reasonable effort to discover the defendant's wishes." *Id.* at 478; *see Bostick*, 589 F.3d at 166.

This Court's decision in *Bostick* is instructive. In that case, this Court held that counsel had not consulted with his client about an appeal when counsel merely agreed with his client's statement[9] "that he was going to be satisfied with what the jury came up with, win, lose, or draw." *Bostick*, 589 F.3d at 163. Counsel's post-trial conversation with the defendant's wife, during which he told her, "The jury has spoken. What possible grounds are there for an appeal?" similarly failed to provide the back-and-forth dialogue consultation requires. *Id.* at 166.

Thompson v. United States, 504 F.3d 1203, 1207 (11th Cir. 2007), an Eleventh Circuit decision cited favorably by this Court, is similarly instructive. In *Thompson*, the Eleventh Circuit held that counsel's statement that an appeal would not be "successful or worthwhile" without an explanation of "the appellate process or the advantages and disadvantages of taking an appeal" fell short of the requirement of meaningful consultation. *Id.* at 1207; *see Bostick*, 589 F.3d at 166 (citing *Thompson*). *Thompson* also emphasized that an attorney must "mak[e] a reasonable effort to determine whether the client wishes to pursue an appeal,

[9] The client in *Bostick* made this statement prior to his trial; this Court assumed *arguendo* that a pretrial conversation could fulfill the duty to consult. 589 F.3d at 166.

regardless of the merits of such an appeal." 504 F.3d at 1206 (citing *Frazer*, 430 F.3d at 711).

Strickland advised that "[p]revailing norms of practice," such as the American Bar Association (ABA) standards, can be used as "guides" for measuring whether an attorney's performance was objectively reasonable—though "they are only guides." 466 U.S. at 688. The ABA counsels that, following a conviction, defense counsel should "give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal" but must also "explain to the defendant the advantages and disadvantages of an appeal." *ABA Standards for Criminal Justice* 4-8.2 (3d ed. 1993). Most importantly, the ABA standards insist that "[t]he decision whether to appeal must be the defendant's own choice." *Id.*

The record in this case indicates that Mr. Singleton's attorney did not consult with him about an appeal. First, counsel never firmly stated in the PCR evidentiary hearing that he discussed appealing with Mr. Singleton. (*See* J.A. 98-99.) Rather, his recollections were all speculative, positing that he "may have discussed the appeal" with Mr. Singleton (J.A. 98) and surmising what he "would have told" Mr. Singleton "if [he and Mr. Singleton had] discussed the appeal" (J.A. 99). The PCR court's evidentiary findings in favor of counsel (J.A. 108),

therefore, do not establish that he even notified Mr. Singleton of his right to appeal.[10]

Second, even if counsel had discussed the appeal with Mr. Singleton in the manner he speculates he may have, the discussion would not have met the legal standard for consultation. Counsel admits the extent of any conversation he may have had with Mr. Singleton was to state that he "[did not] think [Mr. Singleton had] a case to appeal because [he] did [not] show up for trial" and that there was no evidence on which to base an appeal. (J.A. 98.) Putting aside the dubious nature of counsel's legal advice,[11] these statements do not constitute consultation because they do not explain "the advantages and disadvantages of taking an appeal" or attempt to discern "the defendant's wishes." *See Flores-Ortega*, 528 U.S. at 478.

[10] A recent South Carolina Supreme Court decision supports the conclusion that counsel's inability to definitively state whether he notified Mr. Singleton about his right to appeal requires that Mr. Singleton's request for relief be granted. In *Simuel v. State*, No. 26885, 2010 WL 4183927 (S.C. Oct. 25, 2010), the South Carolina Supreme Court considered a PCR court's denial of a defendant's request for a belated appeal. The PCR court had made findings in favor of defendant's lawyer, who could not recall whether he had informed defendant of his right to an appeal, and denied defendant's request for a belated appeal. *Id.* at *1. Without challenging the PCR court's factual findings, that court held that counsel's tenuous recollections did not provide probative evidence that defendant had intelligently waived his right to an appeal and granted the defendant the opportunity to file a belated direct appeal. *Id.* at *2. Similarly, here, given counsel's unsure testimony regarding whether he discussed an appeal with Mr. Singleton, this Court should grant Mr. Singleton habeas relief even if it does not determine that the PCR court's factual findings were clearly erroneous.

[11] We discuss the erroneous nature of counsel's legal advice and its impact on Mr. Singleton's rights in Part II, *infra*.

Instead, counsel's statements display the same lack of back-and-forth dialogue as those of the attorney in *Bostick*, who simply agreed with his client's statement that he would be satisfied with the jury verdict and told the defendant's wife that no grounds for appeal existed after "[t]he jury [had] spoken." *See* 589 F.3d at 166.

Further, even if the hypothetical conversation counsel described actually occurred, his advice to Mr. Singleton is comparable to opining that an appeal was unlikely to be "successful or worthwhile," which, without further elaboration, *Thompson* deemed insufficient. *See* 504 F.3d at 1207. *Thompson* also makes clear that "making a reasonable effort to determine whether the client wishes to pursue an appeal, *regardless of the merits of such an appeal*" is a separate, required step in the consultation process. *Id.* at 1206 (emphasis added). Counsel never made any representation that he attempted to discern his client's wishes or did anything more than instruct Mr. Singleton about his own (erroneous) views. (*See* J.A. 98-99.) To the contrary, in the PCR evidentiary hearing, the only conversation counsel even claimed to have had with Mr. Singleton was to say that he "just didn't have anything—there wasn't any evidence to—to appeal." (J.A. 99.) As *Bostick* and *Thompson* plainly demonstrate, this type of definitive statement, without more, is not consultation about an appeal as required by *Flores-Ortega*.

Therefore, because counsel did not definitively contend that he even notified Mr. Singleton about his right to appeal and because he neither discussed the

advantages and disadvantages of an appeal nor attempted to discern his client's wishes as required by *Flores-Ortega* and by this Court, counsel did not consult with Mr. Singleton about an appeal.

C. Counsel's Failure to Consult with Mr. Singleton Prejudiced Him Because a Reasonable Defendant Would Have Appealed If Properly Informed

When counsel fails to consult with his client about an appeal in the face of a duty to do so, a presumption of prejudice arises if "there is a reasonable probability that, but for counsel's deficient failure to consult with [defendant] about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. This presumption is warranted because the failure to consult effectively "deprive[s] [defendant] of the appellate proceeding altogether." *Id.* at 483. Because it is reasonable to assume that a defendant would have appealed if non-frivolous issues to appeal existed, this Court recognizes that counsel's failure to consult about an appeal despite the presence of non-frivolous grounds for appeal generally will satisfy the prejudice requirement. *Frazer*, 430 F.3d at 708 ("The mere presence of non-frivolous issues to appeal is generally sufficient to satisfy the defendant's burden to show prejudice."). Moreover, this Court is reluctant to find a lack of prejudice based on a failure to articulate non-frivolous grounds for appeal if "the habeas petition is filed by an indigent, pro se defendant." *Hudson*, 235 F.3d at 896.

Here, because there were non-frivolous grounds for appeal, counsel's failure to consult about an appeal prejudiced Mr. Singleton. Further, the district court should have taken an especially close look at Mr. Singleton's allegations due to his status as an indigent, pro se defendant in previous stages of this litigation. *See id.* Therefore, because Mr. Singleton can show that counsel did not consult with him in spite of a duty to do so, Mr. Singleton can also demonstrate that he was prejudiced by counsel's actions.

To summarize, because counsel did not consult with Mr. Singleton despite the existence of non-frivolous grounds for appeal and a contested trial, and because Mr. Singleton lost access to the entire appellate proceeding due to counsel's failure to consult, counsel's performance was constitutionally deficient, and Mr. Singleton was prejudiced by counsel's deficient performance. The state PCR court's decision rejecting Mr. Singleton's claims was contrary to well-established federal law, and the district court erred in upholding the state court's determinations. Accordingly, this Court should remedy this error by overturning the district court's decision.

II. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY ERRONEOUSLY ADVISING MR. SINGLETON THAT HE LACKED GROUNDS FOR APPEAL

Even if the conversation that trial counsel "may" have had with Mr. Singleton amounted to consultation, counsel nonetheless denied Mr. Singleton

effective assistance by erroneously advising him that he lacked grounds for an appeal and depriving Mr. Singleton of the opportunity to pursue an appeal.

As discussed above, to prevail on an ineffective assistance of counsel claim, *Strickland* requires a defendant to demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient representation prejudiced the defendant. 466 U.S. at 687-88. In the present case, counsel performed deficiently by incorrectly advising Mr. Singleton that he lacked grounds for appeal when, in fact, non-frivolous grounds for appeal existed. Counsel's unreasonable performance prejudiced Mr. Singleton by denying him the opportunity to appeal his conviction.

A. Counsel Performed Deficiently by Erroneously Advising Mr. Singleton That He Could Not Appeal a Conviction Following a Trial *in Absentia*

To prevail on a claim of ineffective assistance of counsel, a criminal defendant first must demonstrate that counsel performed deficiently. *Id.* at 687. Counsel's performance is judged according to a standard of reasonableness under the prevailing norms of practice. *Id.* at 688. At minimum, counsel's representation must be competent, *id.* at 690, and at the very heart of competence is a familiarity with current, relevant law, *United States v. Russell*, 221 F.3d 615, 620-21 (4th Cir. 2000); *see also* Model Rules of Prof'l Conduct R. 1.1 (2009). To this end, "counsel has a duty to make reasonable investigations." *Strickland*, 466 U.S. at

691. This requirement includes not only examining the facts of the case, but also conducting appropriate legal research. *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007).

At the appellate stage, counsel's performance is deemed deficient if his advice regarding an appeal falls outside "the range of competence demanded of attorneys in criminal cases." *Griffin v. United States*, 109 F.3d 1217, 1220 n.4 (7th Cir. 1997) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)); *see also Strickland*, 466 U.S. at 690 (stating that the question of deficiency turns upon "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"). For example, the Fifth Circuit held in *Brown v. Johnson*, 224 F.3d 461 (5th Cir. 2000), that when counsel erroneously advised his client that he would be eligible for parole before the court would be able to rule on an appeal, his representation was deficient. *Id.* at 466.

Here, counsel performed deficiently when he erroneously informed Mr. Singleton that he could not appeal his case because Mr. Singleton did not attend his trial. Counsel had a duty to provide Mr. Singleton with competent advice regarding grounds for appeal and, thus, to conduct legal research regarding potential claims if necessary. During the PCR hearing, counsel testified that if he had discussed the appeal at all with Mr. Singleton, he advised Mr. Singleton that he did not "have a case to appeal because [he] didn't show up for trial, and if you

don't show up for trial, it's kind of difficult for . . . there to be any evidence really to appeal on." (J.A. 98.)

Yet, as discussed above, Mr. Singleton had numerous non-frivolous grounds for appeal, including ineffective assistance of counsel, insufficiency of the evidence, and erroneous denial of counsel's motion for a continuance. These claims are well established under both state and federal law, which basic legal research would have revealed. Moreover there was no basis for advising Mr. Singleton that his absence from the trial barred him from appealing his conviction. Thus, counsel's erroneous advice fell outside the range of competence required of counsel, and, as such, he performed deficiently by informing Mr. Singleton that he lacked grounds for appeal.

B. Counsel's Erroneous Advice Prejudiced Mr. Singleton Because a Reasonable Defendant Would Have Appealed If Correctly Advised

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must further demonstrate that counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. When counsel's deficient performance denies his client an appeal altogether, a presumption of prejudice arises. *Flores-Ortega*, 528 U.S. at 483. Thus, the defendant must demonstrate that if not for counsel's deficient performance, he would have appealed his conviction.

Id. at 484. A defendant can meet this requirement by showing that non-frivolous grounds for appeal existed. *Id.* at 486.

Here, there were several non-frivolous grounds for appeal. Thus, in advising Mr. Singleton otherwise (J.A. 98-99), counsel effectively denied Mr. Singleton the opportunity to appeal his conviction, and Mr. Singleton was prejudiced by counsel's deficient performance. As such, Mr. Singleton received ineffective assistant when counsel erroneously advised him that he lacked grounds for appeal.

III. MR. SINGLETON'S ATTORNEY PERFORMED DEFICIENTLY BY FAILING TO FOLLOW MR. SINGLETON'S SPECIFIC INSTRUCTIONS TO FILE A NOTICE OF APPEAL

Regardless of the merits of counsel's advice to Mr. Singleton regarding an appeal, counsel nonetheless denied Mr. Singleton effective assistance by disregarding his explicit instructions to appeal his conviction. Both the performance and prejudice prongs of *Strickland*'s ineffective assistance of counsel test are satisfied when counsel fails to file a notice of appeal after being specifically instructed to do so by his client. *Flores-Ortega*, 528 U.S. at 477, 485 (citing *Rodriquez v. United States*, 395 U.S. 327, 328 (1969)); *cf. Peguero v. United States*, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to . . . an appeal without showing that his appeal would likely have had merit.").

Here, Mr. Singleton specifically instructed counsel to appeal his conviction. (J.A. 89.) Mr. Singleton has maintained this claim since he first filed for post-conviction relief less than two months after his sentencing. (J.A. 59, 89, 205.) Counsel testified at the PCR hearing that Mr. Singleton did not ask him to file a notice of appeal (J.A. 98), and the court made findings in favor of counsel (J.A. 108). Although under AEDPA this Court typically must defer to a state court's factual findings, *see, e.g., Powell v. Kelly*, 562 F.3d 656, 664 (4th Cir. 2009), a review of the record reveals that the PCR court's finding was an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing.

Counsel's recollection of his post-sentencing conversation with Mr. Singleton was tenuous, at best. In fact, counsel repeatedly stated that he was uncertain whether he even discussed the appeal with his client. (J.A. 98-99.) According to counsel's testimony, his only definite recollection of the discussion was the self-serving assertion that Mr. Singleton did not instruct him to file a notice of appeal. (J.A. 98.) Because counsel was unable to recall with any certainty whether he and Mr. Singleton had discussed an appeal (J.A. 98-99), his testimony that Mr. Singleton definitely did not instruct him to appeal is merely speculation. Moreover, given counsel's further speculation about what he and Mr. Singleton may have discussed about the appeal (*id.*) and Mr. Singleton's continued

insistence that he asked his counsel to appeal (J.A. 59, 89, 205), it is unreasonable to conclude that Mr. Singleton did not request his counsel to appeal his conviction. In his speculation about their discussion, counsel never stated unequivocally that Mr. Singleton agreed with his assertion that there was no ground for appeal. (*See* J.A. 98-99.) In failing to follow Mr. Singleton's instructions, counsel denied Mr. Singleton effective assistance, and as well-established Supreme Court precedent makes clear, counsel's failure to follow Mr. Singleton's specific instructions to file a notice of appeal prejudiced Mr. Singleton.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and grant Mr. Singleton's Petition for a Writ of Habeas Corpus.

REQUEST FOR ORAL ARGUMENT

Petitioner respectfully requests that this Court hear oral argument in this matter. This case raises important questions about the Sixth Amendment right to counsel, and oral argument would be particularly helpful in facilitating their resolution.

Respectfully submitted,

/s/ James E. Coleman, Jr.

James E. Coleman, Jr.
Sean E. Andrussier
Duke University School of Law
210 Science Drive
Durham, NC 27708
(919) 613-7057
Counsel for Appellant

On the brief:

Daniel Kronberg
Leslie Cooper Mahaffey
Leah Shen
Matthew Vandenberg
Paul A. Woodard

Students, Duke University School of Law

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2007.

/s/ James E. Coleman, Jr.
James E. Coleman, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this the 15th day of November, 2010, I caused this Brief of Appellant to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

William E. Salter, III
OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA
1000 Assembly Street
Columbia, South Carolina 29211
(803) 734-6305

Counsel for Appellee

I further certify that on this the 15th day of November, 2010, the required number of bound copies of the foregoing Brief of Appellant and Joint Appendix have been hand-filed with the Clerk of this Court and that one copy of the Joint Appendix has been served, via UPS Ground Transportation, upon all Counsel of Record at the above-listed address.

/s/ James E. Coleman, Jr.
James E. Coleman, Jr.