09-7701

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Arthur Singleton, #300109,

Petitioner-Appellant,

v.

Willie Eagleton, Warden,

Respondent-Appellee.

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

BRIEF OF APPELLEE

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEYS FOR APPELLEE

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In the underlying action, Petitioner-Appellant, Arthur Singleton (Singleton) filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina, on July 17, 2008, in which he sought relief from his state court convictions and sentence. **JA 6-19**. Respondent-Appellee Eagleton, Warden of Evans Correctional Institution, in the South Carolina Department of Corrections (SCDC) where Singleton was incarcerated (the State), filed a Return and a motion for summary judgment on October 15, 2008. **JA 21-45**. The District Court had jurisdiction over the case under 28 U.S.C. § 2254.

Singleton now appeals from a July 29, 2009 Order (**JA 249-53**) and Judgment (**JA 264**) of the United States District Court for the District of South Carolina granting Respondent's motion for summary judgment and denying habeas corpus relief. Singleton timely served and filed a notice of appeal in the District Court on September 10, 2009. He now invokes this Court's jurisdiction to hear the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Petitioner-Appellant's statement of the issue is as follows:

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?

COUNTER-STATEMENT OF THE ISSUE

Whether the District Court correctly determined that the state courts rejection of Singleton's allegation that trial counsel was ineffective because counsel did not consult with him about and perfect an appeal from his state court convictions was not contrary to and did not involve an unreasonable application of clearly established federal law under § 2254(d)(1)?

COUNTER-STATEMENT OF THE CASE

Singleton appeals from a July 29, 2009 Order of the Honorable R. Bryan Harwell, United States District Judge for the District of South Carolina, granting Respondent's motion for summary judgment and denying federal habeas relief

pursuant to 28 U.S.C. § 2254. **JA 249-53**. He timely perfected an appeal from that Order.

A. State court proceedings.

Singleton is presently confined in the McCormick Correctional Institution of the South Carolina Department of Corrections (SCDC), Sumter County convictions and sentence. The Sumter County Grand Jury indicted him at the January 2000 term of court for two counts assault and battery with intent to kill (ABIK) and one count of possession of a firearm during the commission of a crime of violence (00-GS-43-134). **JA 65-66**. Steven Smith McKenzie, Esquire, represented him on these charges.

Singleton was aware that his trial would start on September 23rd, but he did not cooperate with his attorney and he did not show for trial. **JA 129-30**. As a result, he received a jury trial *in absentia* on September 23, 2003, before the Honorable Clifton Newman. The jury found him guilty as charged; and Judge Newman issued a sealed sentence. **JA 62-64; 122-99**.

On February 26, 2004, the Honorable Howard P. King unsealed the sentence and sentenced Singleton to twelve years imprisonment for one count of ABIK, and concurrent sentences of seven years imprisonment for the other count of ABIK and five years imprisonment for possession of a firearm. Judge King also revoked an unrelated probationary sentence at that time. **JA 73-81**. Singleton did not file an

appeal.

However, he filed a *pro se* Post-Conviction Relief (PCR) Application (04-CP-43-501) on April 16, 2004. **JA 49-61**. Among other grounds, he alleged that:

> 3. "Trial counsel was ineffective, for denying Applicant his constitutional rights [by failing to appeal although instructed by Applicant to perfect an appeal]."

JA 50-51; 59-60. The State filed a Return dated May 9, 2005. **JA 69-72**.

The Honorable Thomas W. Cooper, Jr., held an evidentiary hearing into the matter on October 6, 2005. Singleton was present at the hearing; and Charles Brooks, Esquire, represented him. Singleton testified on his own behalf, and trial counsel, Mr. McKenzie, also testified. **JA 83-102**.

On March 17, 2006, Judge Cooper filed an Order of Dismissal with Prejudice, in which he denied relief and dismissed the Application with prejudice. The Order addressed Singleton's claims that trial counsel was ineffective because he failed to (1) obtain a continuance, and (2) file a notice of intent to appeal on Singleton's behalf. Judge Cooper found that Singleton had waived all other allegations because he failed to present any evidence to support them. **JA 104-09**.

Singleton timely served and filed a notice of appeal. Deputy Chief Attorney Wanda H. Carter, of the South Carolina Commission on Indigent Defense's Division of Appellate Defense, represented him in collateral appellate proceedings. On

October 23, 2006, Ms. Carter filed a *Johnson* Petition for Writ of Certiorari[1] on Singleton's behalf and petitioned to be relieved as counsel. **JA 201-08**. The *Johnson* Petition contained only Question Presented:

> The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

JA 233. Singleton did not file a *pro se* response to the *Johnson* Petition. The South Carolina Supreme Court filed an Order denying certiorari and granting counsel's petition to be relieved on September 6, 2007. **JA 209-10**. It sent the Remittitur to the Sumter County Clerk of Court on September 24, 2007. **JA 211**.

B. Proceedings in the lower federal courts.

Singleton filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on March 13, 2007, in which he sought relief from his state court convictions and sentence. **JA 6-19**. He raised five allegations of ineffective assistance of counsel, claiming that trial counsel failed "to

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[1] *See Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). *Johnson* sets forth the procedures for counsel to follow when filing meritless appeals in state PCR cases pursuant to *Anders v. California*, 386 U.S. 738 (1967). *Contra Pennsylvania v. Finley*, 481 U.S. 551 (1987) (prisoner, who had no equal protection or due process right to appointed counsel in post-conviction proceedings, also had no right to insist on *Anders* procedures for withdrawal of appointed counsel when collateral counsel determined direct appeal was frivolous).

(1) obtain a continuance; (2) interview potential witnesses; (3) file direct appeal; (4) properly conduct reasonable pre-trial investigations; and (5) object to the out-of-court identification procedure." **JA 10**.

The State filed a Return and a motion for summary judgment on October 15, 2008. **JA 21-45**. The State argued that the state courts' rejection of Petitioner's claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent. § 2254(d)(1). **JA 29-40**. Singleton filed an Objection to Motion for Summary Judgment. **JA 212-20**.

On June 15, 2009, United States Magistrate Judge Bristow Marchant filed his Report and Recommendation, recommending that Singleton's Petition be denied and the State's summary judgment motion be granted. **JA 221-37**. He addressed the issue before this Court at **Recommendation at pp. 11-12, JA 231-32**. Singleton filed a response to the Report and Recommendation on June 25, 2009. **JA 239-48**. United States District Judge R. Bryan Harwell filed an Order denying federal habeas relief and dismissing the Petition on July 28, 2009. **JA 249-53**. Judgment was entered thereon, **JA 254**.

Singleton timely filed his notice of appeal on September 10, 2009. On September 15, 2010, this Court granted a certificate of appealability on the issue of whether trial counsel had a duty to consult with Singleton about pursuing an appeal,

and if so, whether trial counsel breached that duty. **JA 273**.

STATEMENT OF FACTS

This case involved a shooting that occurred in downtown Sumter, South Carolina, on October 2, 1999. It apparently stemmed from a prior confrontation between Singleton and one of his victims, Lionel Bradley.[2] However, Mr. Bradley had not threatened Singleton in the earlier confrontation, and they had not exchanged any words the day of the shooting. Singleton and another man were riding in a blue car, which stopped near the victims. Mr. Bradley testified that Singleton exited the car near Mr. Bradley, armed with a weapon. He then shot Bradley. Another eyewitness testified that Singleton shot twice from the car. His other victim was Sherman Sanders. Both witnesses agreed that he shot without provocation. **JA 147-50; 152-53; 158-59; 162-66**.

SUMMARY OF ARGUMENTS

Petitioner-Appellant Singleton, a state court inmate convicted *in absentia* of two counts of ABIK and one count of possession of a firearm during the commission of a crime of violence, cannot show that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to file a notice of appeal on his behalf. After exhausting his state court remedies on the claim, he filed a Petition for Writ of Habeas Corpus raising, among other grounds, counsel's supposed ineffectiveness in

[2] Singleton was dating the mother of Mr. Bradley's child.

failing to perfect an appeal on his behalf. The State submits that the lower federal courts properly determined that the state court's rejection of his claim was not contrary to and did not involve an unreasonable application of clearly established federal law under § 2254(d)(1).

First, "[w]hen applying *Flores-Ortega*, [528 U.S. 470 (2000)] our court has found a breach of the *Strickland* duty usually because the defendant said something to his counsel indicating that he had an interest in appealing." *United States v. Cooper*, 617 F.3d 307, 313 (4th Cir. 2010). Here, however, the state PCR court's findings that Singleton had not requested counsel to appeal his case and that if Singleton had asked counsel to file an appeal, counsel would have filed the notice are not objectively unreasonable under § 2254(d)(2), and Singleton cannot rebut the presumptive correctness of these findings. *See* § 2254(e)(1). As a result, the question of whether counsel's failure to appeal is constitutionally deficient depends upon "whether counsel in fact consulted with the defendant about an appeal."

The State submits that counsel "consulted" with Singleton about an appeal. Counsel specifically recalled a conversation with Singleton after the case. Singleton did not ask counsel to perfect an appeal. **JA 98**. Although counsel did not recall the specifics of this conversation, he testified that "[w]e may have discussed the appeal, . . . [from] the standpoint of, [Singleton], I don't think you have a case to appeal

because you 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." **JA 98**. Thus, counsel discussed whether or not to appeal with Singleton; he told Singleton that he did not see any viable grounds on which to appeal, based upon Singleton's decision not to attend trial; and Singleton did not request counsel to perfect an appeal. To rule otherwise would ignore the circumstances under which the advise was given, contrary to *Strickland*, 466 U.S. at 689 (a reviewing court must "evaluate the [challenged] conduct from counsel's perspective as the time").

Nor did counsel misadvise Singleton as to the effect on the appeal caused by his absence from trial, as Singleton asserts. Rather, under the circumstances of this case - where Singleton was voluntarily absent from his trial in an effort "to stall for some time to try to . . . get the case further down the road before he had to do anything" (**JA 95**) - the advice given satisfied the constitutional duty to consult. Counsel's testimony that any advice would have been that "if you don't show up for trial, it's kind of difficult for ... there to be any evidence really to appeal on" (Sic) (**JA 98**), must be viewed in the context of counsel's testimony as a whole. This testimony underscored counsel's repeated efforts to have Singleton show up for trial and testify, so that counsel could more successfully mount a defense on his behalf. Having failed to attend trial, Singleton impaired, if not prevented, any realistic chance that counsel

may have had at supporting a request for a jury charge on self-defense or a lesser-included offense. Under these circumstances, the emphasis on the futility of an appeal was proper.

Even if the Court finds that counsel's conversation with Singleton did not satisfy counsel's duty to consult with Singleton about an appeal, counsel's performance was still not deficient because Singleton cannot show (1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) that he reasonably demonstrated an interest in appealing. Again, the state PCR judge's findings that Singleton had not requested counsel to appeal his case and that if Singleton had been counsel to file an appeal, counsel would have filed the notice are not objectively unreasonable under § 2254(d)(2), and Singleton cannot rebut the presumptive correctness of these findings. *See* § 2254(e)(1). Further, and despite Singleton's contrary argument, a *rational* defendant, as opposed to a manipulative defendant - who sought to endlessly delay the trial and who did not bother to attend his trial although aware that it was taking place and that counsel needed his presence - would not want to appeal because there were not any non-frivolous grounds to pursue on appeal.

Moreover, most of Stevenson's ineffectiveness claims stem from the supposed insufficient time that had to investigate the case and prepare for trial. These

allegations conveniently ignore, as they must, that Singleton was the architect of the blueprint for his case failing and he, alone, was responsible for any such deficiencies by counsel. This does not demonstrate ineffectiveness by trial counsel.

Given the present record, the State submits that the State's evidence was more than sufficient to submit the charges of ABIK to the jury. Therefore, appeal of the trial judge's denial of this motion would have been a frivolous issue on appeal, both legally and factually. Further, Singleton cannot demonstrate any possible abuse of discretion resulting from the trial judge's denial of counsel's motion for a continuance until Singleton could be picked up and a competency evaluation could be done, where counsel's request was based solely upon Singleton's voluntary absence from the trial that he knew would proceed in his absence. Also, there was no "showing" that Singleton was incompetent apart from his voluntary refusal to cooperate; counsel admittedly did not know whether Singleton "needs a competency evaluation" (**JA 130**); previous counsel had represented him for over three years and did not request a competency evaluation. **JA 131**; and state supreme court precedent is that where the record clearly revealed that an appellant was aware of the term of court, and that he knew he would be tried *in absentia* if he failed to appear, the trial judge did not abuse his discretion in refusing to grant a continuance. Under these circumstances, the appeal of the trial judge's ruling would be frivolous because Singleton was

voluntarily absent; and under both state and federal law, he could not take advantage of an error that he, alone, attempted to create.

Finally, the State submits that Singleton cannot show prejudice. He did not have any non-frivolous grounds to appeal his convictions. Also, the PCR judge's finding that there was no credible evidence that he indicated to counsel that he wanted counsel to file an appeal is not objectively unreasonable. § 2254(d)(2). Moreover, even assuming that Singleton had received constitutionally reasonable advice from counsel about the appeal, he would not have instructed his counsel to file an appeal. *Contra Frazer*, *supra*. Also, he cannot show that he "was so determined to appeal that consultation would not have dissuaded that petitioner from doing so." *Contra Bostick*, 589 F.3d at 168. Thus, he cannot meet his burden to show prejudice.

ARGUMENT

A. Standard of Review

This Court reviews a district court ruling *de novo*, based on review of the records before the state court in ruling upon same. *Robinson v. Polk*, 438 F.3d 350, 354 (4th Cir. 2006); *Bell v. Ozmint*, 332 F.3d 229, 233 (4th Cir. 2003). Where a habeas petitioner's claim has been "adjudicated on the merits" by a state court, section 104 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)), precludes a federal court

from granting relief unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "The Supreme Court has interpreted these provisions to require that federal courts accord considerable deference in their review of state habeas proceedings." *Lovitt v. True*, 403 F.3d 171, 178 (4th Cir. 2005), *citing Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The "contrary to" provision means the state court failed to apply the holding of a Supreme Court case, or made a decision contrary to the holding of a Supreme Court case when the facts that were presented were "materially indistinguishable" from those in the cited decision. *Id.*

The issue is not simply whether the law was, in the opinion of the reviewing court, erroneously or incorrectly applied, but whether the state court's decision was unreasonable in its application of same. *Id*. If the United States Supreme Court has never addressed the claim presented to the state court, then, the state court decision cannot be said to have "unreasonabl[y] appli[ed] clearly established Federal law' [under § 2254(d)(1)]." *Carey v. Musladin*, 549 U.S. 70, 77 (2007). Also, state court factual findings reviewed in a habeas action must be presumed to be correct, § 2254(d)(2); and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Discussion of Issues

I. The state court's rejection of Singleton's claim that trial counsel rendered ineffective assistance by failing to consult with him about a direct appeal and thereafter perfect an appeal was not contrary to and did not involve an unreasonable application of clearly established federal law under § 2254(d)(1).

Singleton asserts that trial counsel rendered ineffective assistance by failing to consult with him about a direct appeal and thereafter perfect an appeal. Notwithstanding his argument to the contrary, the District Court properly found that the state court's rejection of his claim was not contrary to and did not involve an unreasonable application of clearly established federal law under § 2254(d)(1).

A. How issue developed.

1. State court proceedings.

A. In the trial court.

The record reflects that the crimes at issue occurred in 1999. **JA 65**. Before Singleton's case was tried, he was picked up and released on a bench warrant. Joseph Spigner, Esquire, had represented him until September 15, 2003, and the State had Mr. Spigner given notice of a September 15th trial date. However, Singleton hired Mr. McKenzie on September 12th. Through a lawyer in his firm, Mr. McKenzie moved for a continuance and a state circuit court judge granted one until September 23rd. That judge issued a bench warrant for Singleton on the same date. **JA 129-31**.

Although Singleton was aware that his trial would start on September 23rd, he did not cooperate with his attorney and he did not show for trial. **JA 129-30**. The trial judge denied trial counsel's motions for a continuance and for a competency evaluation. As a result, he received a jury trial *in absentia* on September 23, 2003. The jury convicted him, as charged; and the trial judge issued a sealed sentence. **JA 62-64; 122-99**.

Singleton was eventually located and arrested. On February 26, 2004, a state circuit judge unsealed the sentence. Singleton was sentenced to twelve years imprisonment for one count of ABIK, and concurrent sentences of seven years imprisonment for the other count of ABIK and five years imprisonment for possession of a firearm.[3] **JA 73-81**. Singleton did not file an appeal.

B. State PCR.

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[3] An unrelated probationary sentence was also revoked at that time. Singleton suggests that "[t]he 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." **Brief of Appellant, p. 8 n. 4**. However, this assertion lacks any evidentiary support on the record.

Additionally, he references his subsequent convictions in 2006 and sentence of life without parole (LWOP), pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2006), for armed robbery and conspiracy to commit armed robbery. **Brief of Appellant, p. 9**. The only reference to those proceedings in this record was that they were pending and Singleton was on bond for them at the time of trial. **JA 130-31**. Those charges are irrelevant to the issues before this Court and his reference to them is a red herring.

Singleton testified that he made a voluntary decision not to attend his trial because he was scared, he thought that retained counsel was there for him and counsel had allegedly promised him that counsel would obtain a continuance. He was arrested in December 2003. However, he claimed that he was in communication with trial counsel up until the time that he was incarcerated in December. He also testified that he was at his home throughout that time. **JA 87-93**.

Singleton testified at the PCR hearing that trial counsel failed to file a notice of intent to appeal on his behalf, even though Singleton told counsel that he wished to appeal after the sealed sentence was imposed. His testimony conflicted with his sworn allegation in his PCR Application that he asked counsel to take an appeal on September 25, 2003 (**JA 59**), which was while he remained at large and before the sentence was imposed in February 2004. **JA 89; 92-93**.[4]

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[4] "In South Carolina, a criminal defendant may not appeal until sentence has been imposed. *Parsons v. State*, 289 S.C. 542, 347 S.E.2d 504 (1986); *State v. Washington*, 285 S.C. 457, 330 S.E.2d 289 (1985)." *State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 705-06 (1986). Thus, counsel could not have perfected an appeal at that time.

The State would note that the PCR judge's Order contains a finding that "Applicant admitted that the sentencing judge advised him of his right to appeal." **Order, p. 5, JA 108**. Singleton did not testify to this matter. Nor did Judge King, who unsealed the sentence and sentenced him, give him such advice. **JA 73-81**. Therefore, it appears that this was an unreasonable factual finding under § 2254(d)(2). However, the State brought that finding to the attention of the lower federal courts, **JA 10 n. 6** and the Magistrate Judge correctly found that it does not

Trial counsel testified that Singleton "came to me trying to stall for some time to try to . . . get the case further down the road before he had to do anything." He told Singleton that the best he could do was make a continuance motion. However, he did not promise to get a continuance for Singleton because the State controlled when the case would be called. The State would have to agree to a continuance and the trial judge would have to grant his motion, and he could not guarantee either would happen. Counsel's continuance motion and a motion for a competency evaluation were denied. **JA 95-96**.

Counsel further testified that "I do recall having a discussion with [Singleton] after the case. He did not ask me to appeal." **JA 98**. Counsel added that:

> We may have discussed the appeal, but it was only to the standpoint of, [Singleton], I don't think you have a case to appeal because you 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.

JA 98. Although Singleton never asked him to appeal his case, he would have filed the notice if he had been asked to file an appeal. **JA 97-98**. Later, counsel testified that "there wasn't any evidence to appeal." And if [Singleton] and I discussed the appeal, that's what I would have told him, but he never asked me to appeal." **JA 99-100**.

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entitle Singleton to relief. **JA 229**.

In counsel's estimation, the real problem in the case was that Singleton refused to attend the trial, even though counsel repeatedly attempted to persuade him, even during the trial itself. "I had to call [Singleton] actually at one of the breaks during the trial trying to get him to come up to the courthouse."[5] Singleton had a prior conviction for crack cocaine and "was no stranger" to the system. However, "he was scared of the trial and just said, ['']I just can't do it, I can't come up there.['']" Counsel felt that if Singleton had attended trial and "told his side of the story, the jury would have acquitted him." **JA 98-99**.

The PCR judge found that trial counsel's testimony was credible and that Singleton's testimony was not credible. The PCR judge further found that: (1) counsel testified that he discussed an appeal with Singleton and the lack of a basis for an appeal; (2) counsel, however, testified that Singleton never asked him to appeal his case; (3) counsel further testified that if Singleton had been counsel to file an appeal, he would have filed the notice; and (4) Singleton failed to prove that trial counsel's representation was deficient, or that there was a reasonable probability that counsel's deficient conduct prejudiced the outcome of Singleton's trial. **Order, pp.**

[5] Singleton only contacted counsel via a telephone that showed as "private number," thus severely restricting even trial counsel's ability to contact him. *See* **JA 96**. This is yet another example of how Singleton manipulated the system and the participants therein every chance he had.

4-5, JA 107-08.

Singleton timely served and filed a notice of appeal. Collateral appellate counsel filed a *Johnson* Petition for Writ of Certiorari on Singleton's behalf and petitioned to be relieved as counsel. **JA 201-08**. The *Johnson* Petition raised only one Question Presented:

> The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

JA 233. Petitioner did not file a *pro se* response to the *Johnson* Petition. The state supreme court filed an Order denying certiorari and granting counsel's petition to be relieved on September 6, 2007. **JA 209-10**.

2. The lower federal courts.

Singleton filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on March 13, 2007, in which he raised five allegations of ineffective assistance of counsel. **JA 6-19**. Among the allegations raised was his contention that counsel was ineffective for not filing a direct appeal. **Ground One(3)**. **JA 10**.

Thereafter, the State filed a Return and a motion for summary judgment. **JA 21-45**. The State argued that the state courts' rejection of Petitioner's claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent. § 2254(d)(1). **JA 29-40**. Singleton filed an

Objection to Motion for Summary Judgment. **JA 212-20**.

The Magistrate Judge filed his Report and Recommendation on June 15, 2009, recommending that Singleton's Petition be denied and the State's summary judgment motion be granted. **JA 221-37**. In pertinent part, he found that:

> Petitioner testified that immediately following his sentencing, while he was still at the courthouse, he asked his counsel to file an appeal. (R.pp. 41, 44). Petitioner was not sentenced until February 26, 2009. However, as was pointed out in Petitioner's cross-examination, Petitioner stated in his APCR application that he asked counsel to appeal on September 25, 2003. (R.p. 11).6 In any event, Petitioner's Counsel testified that Petitioner never requested that he file an appeal, and that if Petitioner had done so, he would have filed a notice of appeal. (R.pp. 49-50). Counsel also testified that he advised Petitioner that he did not think there was a basis for an appeal. (R.p. 50). The PCR Court had the opportunity to observe and evaluate the witnesses during this testimony, and found counsel's testimony to be credible. The PCR Court's finding that there was no ineffective assistance of counsel was upheld by the state Supreme Court on appeal, and Petitioner has presented no cogent argument for why this finding should be overturned by this Court. [Evans v. Smith, 220 F.3d 306, 312 (4th Cir. 2000)].
>
> Therefore, Petitioner has failed to present evidence sufficient to show that the state court's rejection of this claim was unreasonable. Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or 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]; Bell v. Jarvis, 236 F.3d at 157-158; 28 U.S.C. § 2254(e)(1) [determination of a factual issue by the state court shall be presumed correct unless rebutted by

clear and convincing evidence]. This claim should be dismissed.

Recommendation at pp. 11-12, JA 231-32.

Singleton filed a response to the Report and Recommendation on June 25, 2009. **JA 239-48**. The District Court filed an Order denying federal habeas relief and dismissing the Petition on July 28, 2009. **JA 249-53**. Judgment was entered thereon, **JA 254**.

B. The lower federal courts properly determined that the state court's rejection of Singleton's claim was not contrary to and did not involve an unreasonable application of clearly established federal law under § 2254(d)(1).

Singleton is not entitled to relief. To demonstrate ineffective assistance of counsel, a defendant must show (1) that counsel's representation "fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and (2) that "the deficient performance prejudiced the defense." *Id*. at 687. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the United States Supreme Court clarified the application of the *Strickland* standard to a claim that an attorney was constitutionally deficient for failing to file a notice of appeal in any context.

In the absence of a direct instruction from a defendant to appeal, the question of whether counsel's failure to appeal is constitutionally deficient depends upon "whether counsel in fact consulted with the defendant about an appeal." *Id* at 478. If counsel has consulted with the defendant, the failure to file an appeal is deficient

only if it contradicts the defendant's instructions to appeal. *Id*. However, if counsel has failed to consult, the reviewing court must consider whether this failure constitutes deficient performance. The Court expressly declined to impose any bright-line test in *Flores-Ortega*, noting that the circumstances may be such that even a failure to consult would not render counsel's performance deficient. *See id* at 479 ("We cannot say, as a constitutional matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense"). In doing so, a Court should consider whether "(1) . . . a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); [and] (2) . . . [whether] this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id*. at 480.

"Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id*. This Court, however, has indicated that the inquiry begins with a rebuttable presumption that the lack of consultation demonstrates deficient performance. *See Frazer v. South Carolina*, 430 F.3d 696, 707 (4th Cir.2005) ("Where, as here, the defendant has not specifically requested an appeal, counsel is under a professional

obligation to 'consult' with defendant regarding [the appeal], unless circumstances demonstrate that consultation is unnecessary") (citing *Flores-Ortega*, 528 U.S. at 478-79).[6]

If the Court determines that counsel's performance was deficient, the Court must then determine whether the defendant was prejudiced thereby. "[E]vidence that there were non-frivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in" demonstrating prejudice. *Id* at 485. However, in the prejudice context, the Petitioner must make the "additional showing 'that, had he received reasonable advice from counsel about an appeal, he would have instructed his counsel to file an appeal.' " *Frazer*, 430 F.3d at 708 (quoting *Flores-Ortega*, 528 U.S. at 486).

1. Counsel "consulted" with Singleton about an appeal.

"When applying *Flores-Ortega*, our court has found a breach of the *Strickland* duty usually because the defendant said something to his counsel indicating that he

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[6] Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. *Flores-Ortega*, 528 U.S. at 479; *see also id* at 488 (Breyer, J. concurring in part and dissenting in part). Even where the defendant pleads guilty, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Id* at 479.

had an interest in appealing." *United States v. Cooper*, 617 F.3d 307, 313 (4th Cir. 2010). *See also Bostick*, 589 F.3d at 162; *Frazer*, 430 F.3d at 702; *Hudson v. Hunt*, 235 F.3d 892, 894 (4th Cir.2000); *United States v. Witherspoon*, 231 F.3d 923, 925 (4th Cir.2000). However, the state PCR court, here, found that there was no credible evidence of such a request. Relying upon counsel's testimony (**97-100**), which the state PCR judge found was credible, the PCR judge found that Singleton had not requested counsel to appeal his case and that if Singleton had asked counsel to file an appeal, counsel would have filed the notice. **Order, p. 5, JA 108**. Respondent submits that these findings are not objectively unreasonable under § 2254(d)(2), and that Singleton cannot rebut the presumptive correctness of these findings. *See* § 2254(e)(1).

As a result, the question of whether counsel's failure to appeal is constitutionally deficient depends upon "whether counsel in fact consulted with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 478. Contrary to the arguments advanced by Singleton, the State submits that counsel "consulted" with his client about whether to appeal. Counsel specifically recalled a conversation "with [Singleton] after the case. He did not ask me to appeal." **JA 98**. Although counsel did not recall the specifics of this conversation, he testified that "[w]e may have discussed the appeal, . . . [from] the standpoint of, [Singleton], I don't think you have a case to

appeal because you 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." **JA 98**. *See also* **JA 99-100**.

The State submits that this constituted "consultation" within the meaning of *Flores-Ortega*: counsel discussed whether or not to appeal with Singleton; he told Singleton that he did not see any viable grounds on which to appeal, based upon Singleton's decision not to attend trial; and Singleton did not request counsel to perfect an appeal. *See* 528 U.S. at 478. *Contra Bostick v. Stevenson*, 589 F.3d 160, 166-67 (4th Cir. 2009); *Frazer*, 430 F.3d at 706-07.

In support of his argument, Singleton relies heavily upon the Eleventh Circuit Court of Appeals' decision in *Thompson v. United States*, 504 F.3d 1203, 1207 (11th Cir. 2007). In *Thompson*, the Court found that plea counsel's advice that the petitioner had the right to appeal from his guilty plea but that counsel "did not think that an appeal would be successful or worthwhile" did not satisfy the duty to consult about an appeal because counsel did not provide the petitioner with any information from which the petitioner "could have intelligently and knowingly either asserted or waived his right to an appeal." *Id*. at 1207. Even though this Court cited *Thompson* in *Bostick*, 589 F.3d at 166, the State submits that his reliance is misplaced.

First, *Thomson* was decided in the Court's role as the supervising authority

over the district courts within the Eleventh Circuit. It was not decided under the deferential standards of the AEDPA. Second, the United States Supreme Court has never held that advice concerning the futility of appeal does not constitute adequate consultation about an appeal. Further, there is no question that Singleton was aware of his right to appeal and that he did not ask for counsel to perfect one. Where, as in this case, the defendant was voluntarily absent from his trial in the effort "to stall for some time to try to . . . get the case further down the road before he had to do anything" (**JA 95**), the advice given here satisfies the constitutional duty to consult. To rule otherwise would ignore the circumstances under which the advise was given, contrary to *Strickland*, 466 U.S. at 689 (a reviewing court must "evaluate the [challenged] conduct from counsel's perspective as the time").

Nor did counsel misadvise Singleton as to the effect on the appeal caused by his absence from trial. Counsel did not "admit[] 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.)," as Singleton claims. **Brief of Appellant p. 15 n. 5**. Rather than informing Singleton that he could not appeal, counsel testified that any advice would have been that "if you don't show up for trial, it's kind of difficult for . . . there to be any evidence really to appeal on." (Sic). **JA 98**. Such advice must be viewed in the context of counsel's testimony of his

efforts to have Singleton show up for trial and testify, so that counsel could more successfully mount a defense on his behalf. Having failed to attend trial, Singleton impaired, if not prevented, any realistic chance that counsel may have had at supporting a request for a jury charge on self-defense or a lesser-included offense. The denal for the request of either charge would be an issue that could have been appealed. Under these circumstances, the emphasis on the futility of an appeal was proper.[7]

Yet, even assuming that the Court finds that counsel's conversation with Singleton did not amount to consultation, counsel has a constitutional duty to consult with a defendant about an appeal and counsel's failure to consult is deficient under *Strickland* when: (1) a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) the defendant reasonably demonstrated an interest in appealing. *Flores-Ortega*, 528 U.S. at 480; *Bostick*, 589 F.3d at 166-67; *Frazer*, 430 F.3d at 707-08.

As discussed, the state PCR judge's findings that Singleton had not requested

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[7] Singleton also relies upon the state supreme court's decision in *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739-40 (2010). However, *Simuel* is distinguishable from this case because there is no question that Singleton was aware of his right to appeal. The questions in state court were whether he asked counsel to perfect an appeal and whether counsel would have done so if requested. Further, Singleton's counsel specifically recalled a conversation with Singleton, just not the specifics thereof.

counsel to appeal his case and that if Singleton had been counsel to file an appeal, counsel would have filed the notice are not objectively unreasonable under § 2254(d)(2), and Singleton cannot rebut the presumptive correctness of these findings. *See* § 2254(e)(1). Further, and despite Singleton's contrary argument, a *rational* defendant, as opposed to a manipulative defendant - who sought to endlessly delay the trial and who did not bother to attend his trial although aware that it was taking place and that counsel needed his presence - would not want to appeal because there were not any non-frivolous grounds to pursue on appeal. *Cf. Cooper*, 617 F.3d at 313-14 (concluding that, under the particular circumstances of that case, counsel "was justified in believing that a rational defendant in Cooper's situation would not want to appeal"); *contra Bostick*, 589 F.3d at 167. In short, how could a rational defendant in Singleton's circumstance want an appeal when he did not want a trial?

C. There were no "non-frivolous grounds" to appeal.

In determining if there were "non-frivolous grounds for an appeal," this Court need "not decide whether any of these grounds would ultimately be successful on appeal." Rather, the Court must determine if the issues " 'lack[ ] an arguable basis either in law or in fact.' " *Bostick*, 589 F.3d at 167 n. 9 (quoting *McLean v. United States*, 566 F.3d 391, 399 (4th Cir.2009) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). Here, the issues that Stevenson

suggests were preserved were all frivolous, either legally or factually.

1. Ineffective assistance of trial counsel.

Relying upon this Court's decision in *Bostick*, Stevenson asserts for the very first time in collateral litigation[8] that he could have raised the ineffective assistance of trial counsel as a non-frivolous issue on direct appeal. This Court did indicate in *Bostick* that the ineffectiveness of trial counsel was a possible non-frivolous issue on direct appeal. 589 F.3d at 167. However, this finding is inconsistent with well-settled authority from the state supreme court to the contrary. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986) ("Appellant claims his counsel was ineffective in his representation at the trial level. **This issue is not appropriate for review on direct appeal, and may be asserted only in proceedings under the Post-Conviction Procedure Act**, S.C. Code Ann. §§ 17-27-10 through 120 (1985)") (emphasis added); *State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981). Because the United States Supreme Court has never held that state courts must entertain ineffectiveness claims on direct

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[8] *Contra Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) ("the exhaustion requirement demands that the petitioner 'do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented must be presented face up and squarely; the federal question must be plainly defined. Bleak references which hint that a theory may be lurking in the woodwork will not suffice'").

appeal and because the state supreme court is the final arbiter of appellate procedure in South Carolina, *see Estelle v. McGuire*, 502 U.S. 62, 68-69 (1991), Stevenson's reliance upon *Bostick* is misplaced.[9] As a result, there is no basis in law to support such a claim on direct appeal in South Carolina appellate courts.

Further, most of Stevenson's ineffectiveness claims stem from the supposed insufficient time that had to investigate the case and prepare for trial. These allegations conveniently ignore, as they must, that Singleton was the architect of the blueprint for his case failing and he, alone, was responsible for any such deficiencies by counsel.[10] This does not demonstrate ineffectiveness by trial counsel. *Strickland*, 466 U.S. at 691 ("the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends upon such information"). *See also*

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[9] The finding in *Bostick* that ineffectiveness claims may be raised on direct appeal in South Carolina ignores that, in this Circuit, claims of ineffective assistance of counsel are not cognizable on direct appeal unless the record *conclusively* establishes that counsel provided ineffective assistance. *United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir.2006).

[10] Other allegations, including the assertion (on p. 20 of his brief) that counsel did not call any potentially favorable witnesses at trial are not supported by the record.

United States v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted").

2. The insufficiency of the evidence.

The trial judge denied counsel's directed verdict motion. **JA 127**. Because trial counsel did not make any argument in support of this motion, any argument on appeal would have been procedurally barred because not raised in the trial court. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal") (citing *Easterlin v. Green*, 248 S.C. 389, 150 S.E.2d 473 (1966)). Nevertheless, Stevenson maintains that he could have raised the ineffective assistance of trial counsel as a non-frivolous issue on direct appeal. The State disagrees.

State v. Stokes, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989), holds that, in determining whether to submit the case to the jury, the trial judge is concerned only with the existence or non-existence of evidence. He is not concerned with its weight. It is his duty to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. *State v. Brisbon*, 474 S.E.2d 433, 436 (1996). In

making this determination, the evidence presented at trial must be viewed in the light most favorable to the State. This standard applies to both direct or circumstantial evidence cases. *Id*; *State v. Edwards*, 298 S.C. 272, 370 S.E.2d 888 (1989), *cert. denied*, 493 U.S. 895 (1989); *State v. Williams*, 468 S.E.2d 626 (1996); *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993).[11]

In *State v. Sutton*, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000), the Court explained that:

> ABIK is an unlawful act of violent nature to the person of another with malice aforethought, either express or implied. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). The often cited language to describe ABIK is: if the victim had died from the injury, the defendant would have been guilty of murder. *See*, *e.g.*, *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302, 305 (1987). Furthermore, a specific intent is not required to commit ABIK. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50, 51 (1996).

(Footnotes omitted).

Applying this criteria to the case at bar, it is clear that Singleton was not entitled to a directed verdict on the charges against him, and that an appeal of the trial judge's implicit adverse ruling would not have been a non-frivolous appellate issue. Lionel Bradley testified that he had been released from the hospital four or five days before October 2, 1999. A school teacher whom he knew came to his residence and

[11] This standard is consistent with *Wright v. West*, 505 U.S. 277, 296 (1992) and *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)

offered to sell him a car. After their conversation, she apparently drove him to a corner in downtown Sumter, South Carolina, near where his child's mother lived. **JA 146-47**.

He remained there for five or ten minutes. A friend, Sherman Sanders, saw him and they briefly spoke. As his son was walking to where he was standing on his crutches, Mr. Bradley saw Petitioner and another person drive by in a blue car. Their car turned onto a side street and Bradley continued talking to his friend. However, he turned around when he heard "a car slamming on brakes." Mr. Bradley then turned around and faced the roadway. When he did, he saw Petitioner get out of the car, armed with a gun in his hand. **JA 1148-49**.

Mr. Bradley turned back around to see where his son was. As he did so, two gunshots "went off." The first shot struck him in the chest. He immediately dropped his crutches, and tried to "get out of the way. And after that, I just jumped in the car with [Sanders] and asked him to take me to the hospital." They met an ambulance on the way to the hospital and Mr. Bradley got in it. He remained in the hospital four or five days. The bullet had pierced his lung and wound up in his chest. a tube was inserted into his chest to drain blood; but doctors could not remove the bullet because it was too close to his heart, and it was still in his chest. **JA 149; 152-53; 158-59**.

Mr. Bradley had previously had a confrontation with Petitioner, who was

dating the mother of Mr. Bradley's child. However, he had not threatened Petitioner; and he and Petitioner had not exchanged any words that day. **JA 149-50; 153**.

Ronnette Davis was on a friend's porch, near the shooting, that day and she was the other prosecution witness. She saw the blue car back up, but she did not initially pay much attention to it because she thought that the occupants merely wanted to talk to a group of people who had congregated in the area. She heard what she thought were two firecrackers explode and when she looked in the area of the noise, she saw a man pointing a gun out of the window of the blue car. She also saw Petitioner's friend, Sherman Sanders, "on the ground[,] wallowing." She testified that he had been shot in the leg. **JA pp. 162-66**.

Before this Court, Singleton attacks the credibility of the prosecution witnesses, conflicts between the eyewitnesses testimony the supposed absence of physical evidence,[12] the failure of one victim to testify and the absence of testimony by members of law enforcement. The state supreme court, however, would not have considered the merits of any of these arguments because they were not raised at trial. *Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584. Moreover, each of his proposed arguments goes to the weight that he feels the jury should assign to it, and not to whether the directed verdict motion should have been granted. *See Stokes*, *supra*. *See also*

[12] His argument in this regard ignores that one bullet was too close to Mr. Bradley's heart to remove it without endangering Mr. Bradley's health.

Jackson, 443 U.S. at 326 (when faced with evidence that allows conflicting inferences, this Court must presume that the jury resolved such conflicts in the state's favor).

Given the present record, the State submits that this evidence was more than sufficient to submit the charges of ABIK to the jury. Therefore, appeal of the trial judge's denial of this motion would have been a frivolous issue on appeal, both legally and factually.

3. Denial of a continuance.

Finally, Singleton contends that the trial judge's denial of trial counsel's motion for a continuance is a non-frivolous issue that could have been raised on direct appeal. Because the only basis for that motion was Singleton's absence from trial as the result of his knowing and voluntary decision not to be present, the State disagrees. *See State v. Wright*, 304 S.C. 529, 532, 405 S.E.2d 825, 827 (1991).

Counsel moved for a continuance pretrial. He initially noted that he did not have a client present. He had been in contact with Singleton and he had spoken to Singleton on the night before the trial. He told Singleton "what is going on" and that the case was going to be tried that day. Singleton's response, however, "was that he would call me back this afternoon." **JA 129**.[13]

[13] Counsel had problems contacting Singleton. Singleton had counsel's cell phone number; but the caller identification on counsel's phone always indicated

Singleton had not cooperated in preparing for trial, and he noted that a bench warrant had been issued the previous week when Singleton failed to appear for court. He acknowledged that this was an old case and that "I don't know where he is in order to get him to be here for this trial." He added that Singleton was scared. However, counsel was not asking to be relieved because he felt that might prejudice Singleton before the jury. Instead, he asked for a continuance, until Singleton could be picked up and a competency evaluation could be done. **JA 129-30**.

The State opposed the motion. The Assistant Solicitor first pointed out that this case originated in 1999; and he noted that Singleton had "already been picked up and released on one bench warrant. Also, Singleton had been represented by another attorney (Joseph Spigner, Esquire) until September 15, 2003, or eight days before September 23, 2003 trial. Original counsel had received notice of the trial date on the 15th. However, Singleton had retained Mr. McKenzie Friday September 12th, and counsel obtained a continuance because he was recently retained from Judge Cooper. **JA 130-31**.

Judge Cooper revoked Singleton's bond and issued the bench warrant because it appeared that Singleton was attempting to delay his trial. The Assistant Solicitor recognized that trial counsel was "in a difficult spot," but he argued that the case

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that the number was private.

would never be tried if Singleton was allowed "to pick and choose when he wants to come to court." The Assistant Solicitor also noted that Singleton had been arrested two or three other occasions following his arrest in this case and he was out on bond for those charges. The State agreed to a continuance until that afternoon but asked that the case be tried that day. **JA 131-32**.

The trial judge found that Singleton had not made a meritorious showing for a continuance, and that there was "no showing of merit in order for a competency evaluation. The trial judge then set an estreatment hearing for the bondsman that afternoon in order that he could explain Singleton's whereabouts. The trial judge expected Singleton to attend that hearing and noted that there could be a trial *in absentia* if the State met its burden or the ciourt could try another pending case. **JA 132**. *See also* **JA 140–42**.

After this ruling, trial counsel stated that he had spoken to the lawyer in the pending case and that attorney felt the other case would take the remainder of the day to try. However, the trial judge confirmed that he would hold the estreatment hearing that afternoon and that Singleton's case would follow. He suggested that counsel "light a fire under [Singleton] since he is on the bond." Counsel stated that he had a number for Singleton's girlfriend and would attempt to locate Singleton there. **JA 132-33**.

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Morris*, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). Reversals for the denial of a continuance "are about as rare as the proverbial hens' teeth." *State v. McMillian*, 349 S.C. at 21, 561 S.E.2d at 604 (citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859, (1957)).

Likewise, the ordering of a competency examination is within the discretion of the trial judge. *State v. Drayton*, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978); *State v. Singleton*, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct.App.1996). The refusal to grant such an examination will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Drayton*, 270 S.C. at 584, 243 S.E.2d at 459; *State v. Buchanan*, 302 S.C. 83, 85, 394 S.E.2d 1, 2 (Ct.App.1990). "This is so, because the determination of whether there is 'reason to believe' a defendant lacks a certain mental capacity necessarily requires the exercise of discretion." *State v. White*, 364 S.C. 143, 147-48, 611 S.E.2d 927, 929 (Ct.App.2005) (citing and quoting *State v. Bradshaw*, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977)).

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); *State v. Funderburk*, 367 S.C. 236, 239, 625 S.E.2d

248, 249-50 (Ct.App.2006). If there is any evidence to support the trial judge's decision, it will be affirmed on appeal. *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001); *State v. Taylor*, 360 S.C. 18, 598 S.E.2d 735 (Ct.App.2004). Even without any evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." *State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); *see also State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000); *State v. Wyatt*, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

In the present case, Singleton could not show any conceivable abuse of discretion where the only basis for the continuance motion was a request for a competency evaluation after Singleton was located and locked up. *See Wright*, 304 S.C. at 532, 405 S.E.2d at 827 (where the record clearly revealed that appellant was aware of the term of court, and that he knew he would be tried *in absentia* if he failed to appear, the trial judge did not abuse his discretion in refusing to grant a continuance).[14] In turn, the only "showing" that Singleton was incompetent was predicated upon his voluntary refusal to cooperate and counsel admittedly did not know whether Singleton "needs a competency evaluation." **JA 130**. Also, previous counsel had represented him for over three years and did not request a competency

[14] Singleton acknowledges Wright in his brief at pp. 26-27.

evaluation. **JA 131**.

Under these circumstances, the appeal of the trial judge's ruling would have been frivolous legally and factually because there was no "reason to believe" that Singleton's competency was at issue. *White*, 364 S.C. at 147-48, 611 S.E.2d at 929. Rather, Singleton was voluntarily absent and under both state and federal law, he could not take advantage of an error that he, alone, attempted to create.[15]

D. Singleton cannot show prejudice under *Flores-Ortega*.

Finally, the State submits that Singleton cannot show prejudice under *Flores-Ortega*. A defendant may prove prejudice under such circumstances by showing that a rational defendant would want to appeal by demonstrating either that there were non-frivolous issues for appeal, or that he had adequately indicated his interest in appealing. 528 U.S. at 480. As this Court explained in *Frazer*:

> The mere presence of non-frivolous issues to appeal is generally sufficient to satisfy the defendant's burden to show prejudice. [*Flores-Ortega*, 458 U.S. at 486 ...]. Attempting to demonstrate prejudice based on a reasonably obvious interest in pursuing an appeal, however, necessitates an additional showing "that, had the defendant received reasonable advice from counsel about the appeal, he would have

[15] The concept that a party may not take advantage of "invited error" is well settled in both state and federal court. *See United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *State v. Logan*, 279 S.C. 345, 306 S.E.2d 622 (1983).

instructed his counsel to file an appeal." *Id*.

Frazer, 430 F.3d at 708.

Here, as discussed, Stevenson did not have any non-frivolous grounds to appeal his convictions. Also, the PCR judge's finding that there was no credible evidence that he indicated to counsel that he wanted counsel to file an appeal is not objectively unreasonable. § 2254(d)(2). Moreover, even assuming that Singleton had received constitutionally reasonable advice from counsel about the appeal, he would not have instructed his counsel to file an appeal. *Contra Frazer*, *supra*. Also, he cannot show that he "was so determined to appeal that consultation would not have dissuaded that petitioner from doing so." *Contra Bostick*, 589 F.3d at 168. Thus, he cannot meet his burden to show prejudice. *Id*. *See also Flores-Ortega*, 528 U.S. at 485-86.

CONCLUSION

The District Court's judgment must be affirmed and the Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEYS FOR APPELLEE

By:s/ William Edgar Salter, III

Columbia, South Carolina.

January 12, 2011.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, hereby certify that I have served the ***Brief of Appellee*** in the foregoing case by depositing two (2) copies in the United States mail, postage prepaid, to James E. Coleman, Jr., Esq., Duke University School of Law, 210 Science Dr., Durham, North Carolina 27708, his 12th day of January, 2011.

s/ William Edgar Salter, III

WILLIAM EDGAR SALTER, III

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 09-7701 Caption: Arthur Singleton, #300109 vs. Willie Eagleton, Warden

Pursuant to FRAP 26.1 and Local Rule 26.1,

Willie Eagleton, Warden (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on 1-12-11 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

James E. Coleman, Jr., Esq.
Duke University School of Law
210 Science Drive
Durham, NC 27708

s/ William Edgar Salter, III (signature) 1-12-11 (date)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7701 **Caption:** Arthur Singleton, #300109 vs. Willie Singleton

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(s) William Edgar Salter, III

Attorney for Respondent/Appellee

Dated: 1-12-11