APPENDIX

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FILED: June 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6217
(2:19-cv-00760-RMG)

CLINTON FOLKES

Petitioner - Appellee

v.

WARDEN NELSEN

Respondent - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6217

CLINTON FOLKES,

Petitioner – Appellee,

v.

WARDEN NELSEN,

Respondent – Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Richard Mark Gergel, District Judge. (2:19-cv-00760-RMG)

Argued: September 17, 2021 Decided: May 10, 2022

Before AGEE and WYNN, Circuit Judges, and Frank W. VOLK, United States District Judge for the Southern District of West Virginia, sitting by designation.

Reversed and remanded with instructions by published opinion. Judge Agee wrote the opinion, in which Judge Volk joined. Judge Wynn wrote a dissenting opinion.

ARGUED: Michael Douglas Ross, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellant. Jason Scott Luck, JASON SCOTT LUCK ATTORNEY AT LAW, Bennettsville, South Carolina, for Appellee. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellant.

AGEE, Circuit Judge:

Clinton Folkes is serving a life sentence upon a South Carolina conviction for assault and battery with intent to kill. One claim in Folkes' state habeas petition alleged that his state appellate counsel "was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving [him] of his right to seek certiorari in the Supreme Court of South Carolina." J.A. 679. The state habeas court denied relief on that—and all other—claims. Folkes then filed a 28 U.S.C. § 2254 petition in the U.S. District Court for the District of South Carolina again alleging, verbatim, that appellate counsel had been ineffective by "failing to file a Petition for Rehearing in the Court of Appeals." J.A. 28. The district court granted § 2254 relief, but not on the ground Folkes raised. Instead, the district court determined Folkes was entitled to relief because his appellate counsel (1) failed "to timely advise [Folkes] of the adverse decision of the Court of Appeals on his direct appeal and of his right to seek further appellate review," and (2) sent a letter containing counsel's "forged signature" that "inaccurately inform[ed] [Folkes] that his state court appellate rights had been exhausted." J.A. 160.

The State of South Carolina[1] appeals, arguing that the district court's judgment conflicts with the rigorous standards that apply when a state prisoner seeks to challenge the constitutionality of his state sentence in federal court. We agree with the State and hold that the district court impermissibly altered the claim presented in Folkes' § 2254 petition

[1] The named respondent is Kenneth Nelsen, the applicable warden of the South Carolina Department of Corrections. For ease of reference, we refer to the warden as "the State."

and thus granted relief on grounds that were not properly before it. As for the claim Folkes actually raised, the district court properly held that he had not shown that he was entitled to relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). And even had Folkes' petition raised the expanded claims recognized by the district court and the dissenting opinion, Folkes would not be entitled to federal habeas relief because the Supreme Court has held that no ineffective assistance of counsel claim can arise based on conduct relating to discretionary, subsequent appeals. Accordingly, we reverse the judgment of the district court and remand with instructions to deny Folkes' petition.

I.

In 2008, a South Carolina jury convicted Folkes of assault and battery with intent to kill, and he was sentenced to life imprisonment. *See Folkes v. Nelsen*, No. 2:19-0760-RMG, 2021 WL 62577, at *1 (D.S.C. Jan. 7, 2021) (describing Folkes' conviction as "stem[ming] from a July 2007 physical fight during which [Folkes] cut a man in the neck with a knife and was heard at the time, by witnesses who testified at trial, to have said, 'I should have killed you'").

On direct appeal, Folkes was represented by court-appointed counsel, Celia Robinson, who worked for the South Carolina Commission on Indigent Defense ("the Commission"). The appellate brief argued that the trial court had erred by refusing to give an instruction about the intent required to convict on a lesser-included offense. After briefing concluded (the appeal was not scheduled for oral argument), Robinson left her position with the Commission without notifying either Folkes or the appellate court. Ten

days after Robinson's departure, the South Carolina Court of Appeals issued a decision affirming Folkes' conviction. *See State v. Folkes*, No. 2010-UP-420, 2010 WL 10080232 (S.C. Ct. App. Sept. 24, 2010) (per curiam).

Several days after the decision on direct appeal was issued, Folkes received a letter on Commission letterhead purporting to bear Robinson's signature but dated two weeks after the termination of her employment. This September 2010 letter informed Folkes—incorrectly—that the South Carolina Court of Appeals had denied his petition for writ of certiorari and that his state court remedies had been exhausted. It also provided instructions about Folkes' right to file a federal petition for a writ of habeas corpus within one year of the decision.

Notwithstanding the September 2010 letter's incorrect information, the following month, Folkes filed a timely application for post-conviction relief in South Carolina state court ("the state PCR court"). He initially filed *pro se*, but later was represented by counsel, who filed an amended application raising additional claims.[2] In relevant part, the amended PCR application alleged that "Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving [Folkes] of his right to seek certiorari in the Supreme Court of South Carolina." J.A. 679. Specifically, it argued that because South Carolina procedural rules require filing a petition for rehearing in the intermediate appellate court as a prerequisite for further review in the state supreme court,

[2] Throughout the state PCR court and § 2254 district court proceedings, Folkes asserted additional claims that were denied. These claims are not before us on appeal, so this opinion distills the narrative to the pertinent claim.

counsel's failure to file a petition for rehearing deprived Folkes of the opportunity to pursue what he contended would have been a meritorious challenge to the jury instructions.

The state PCR court held a hearing at which Folkes, Robinson, and her Commission supervisor testified. Folkes testified that he was unaware that Robinson had left her position and that he "would have wanted his attorney to petition for rehearing and certiorari to have his case reviewed by the South Carolina Supreme Court." J.A. 793. Robinson testified that had she not left her position, "she would have petitioned for rehearing at the Court of Appeals and then for certiorari at the Supreme Court" because she thought the jury instruction claim was worth pursuing. J.A. 800. Robinson's supervisor testified that he also believed Folkes had a meritorious claim and that he could not explain why his office had not pursued it at the time. He testified that after Robinson's departure, he had reviewed all decisions issued in her pending cases and decided how to proceed, but that he had no independent recollection of reviewing the decision in Folkes' appeal or directing a particular course of action. Nor could he explain the September 2010 letter Folkes received from the Commission, other than noting that it appeared a paralegal sent the wrong form letter. Both Robinson and her supervisor testified that attorneys—not defendants—ultimately decided whether to file petitions for rehearing and for certiorari and that both stages of appellate review were discretionary with the court.

The state PCR court denied relief, concluding that an ineffective assistance of counsel ("IAC") claim cannot be brought based on appellate counsel's failure to file a petition for rehearing in the court of appeals. The court relied on *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam), and *Ross v. Moffitt*, 417 U.S. 600 (1974), to note that

defendants have "no constitutional right to the effective assistance of counsel when seeking discretionary appellate review." J.A. 802. In addition, the court pointed to multiple Supreme Court of South Carolina decisions reiterating that both rehearing in the intermediate appellate court and certiorari to the state supreme court are discretionary, and that appellate counsel has no duty to pursue either course. Drawing from both lines of cases, the court concluded that Folkes' appellate counsel could not have been ineffective for failing to file a petition seeking purely discretionary review.

Folkes, still represented by counsel, petitioned the Supreme Court of South Carolina for certiorari to review the denial of his IAC claim, framing the issue as follows:

> Did the lower court err denying [Folkes] relief where the record below demonstrates that he meet [sic] his burden of proof concerning his allegation that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal where Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals thereby depriving [him] of his right to seek certiorari in the Supreme Court of South Carolina?

J.A. 833. Consistent with this issue statement, Folkes' substantive argument pressed the missed opportunity for the state supreme court to consider the propriety of the jury instructions given that appellate counsel had not filed the requisite petition for rehearing in the court of appeals to allow further review. The petition was summarily denied.[3]

Next, Folkes timely filed a *pro se* § 2254 petition in the U.S. District Court for the District of South Carolina. The third ground for relief raised in Folkes' § 2254 petition

[3] Although a PCR applicant's petition for certiorari is filed with the state supreme court, the governing South Carolina rules permit the supreme court to remand the petition to the state court of appeals for decision. *See* S.C. R. App. Ct. 243(a), (*l*). That is what occurred here.

copied, verbatim, the claim identified in his state PCR application: "Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina." J.A. 28; *accord* J.A. 679. His § 2254 petition later characterized the issue using the identical question he had raised in his state petition for certiorari of the state PCR court's decision:

> Did the lower court err denying [Folkes] relief where the record below demonstrates that he meet [sic] his burden of proof concerning his allegation that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal where Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals thereby depriving [him] of his right to seek certiorari in the Supreme Court of South Carolina?

J.A. 31; *accord* J.A. 833. The petition contained no further argument or discussion supporting or elaborating upon this ground for relief.

The State moved for summary judgment. Although a magistrate judge's report and recommendation recommended granting the motion in full, the district court granted as to all grounds for relief except the third. *Folkes v. Nelsen*, No. 2:19-0760-RMG, 2020 WL 728698, at *3–4 (D.S.C. Feb. 12, 2020). In the district court's view, Folkes' third ground "raise[d] questions" that had not been adequately addressed "concerning whether [Folkes] was actually or constructively denied counsel from the time of the decision of the South Carolina Court of Appeals on the direct appeal until the time expired for petitioning for rehearing—a necessary step if review was to be sought by certiorari before the South Carolina Supreme Court." *Id.* at *4. It further expressed concern about "whether [Folkes] received proper consultation on his appeal rights from an attorney following the decision

of the South Carolina Court of Appeals." *Id.* Accordingly, it directed that Folkes be appointed counsel and that both parties file supplemental briefs addressing seven additional "issues and questions" J.A. 114, "raised by this [third] Ground," 2020 WL 728698, at *1.

After reviewing the supplemental briefing, the magistrate judge again recommended granting summary judgment to the State, but the district court concluded otherwise and granted the § 2254 petition. *See Folkes*, 2021 WL 62577, at *1, *10. The district court's opinion characterized Folkes' third ground for relief as "assert[ing] a claim for ineffective assistance of appellate counsel from the time of the adverse decision of the South Carolina Court of Appeals on September 24, 2010[,] until the issuance of remittitur on October 18, 2010." *Id.* at *4.[4] And while it agreed with the state PCR court that counsel was not ineffective for failing to *file* a petition for rehearing or certiorari—the ground Folkes actually raised to the state PCR court and in his § 2254 petition—it faulted the state PCR court for limiting its analysis to that issue. In the district court's view, the state PCR court should have addressed appellate counsel's duties and performance "in the immediate post-decision period when the appeal remained before the Court of Appeals and [Folkes] was given no notice of the adverse decision or of his right to seek further appellate review." *Id.* at *9.

[4] The remittitur returns the case from the appellate court to the trial court. Under South Carolina's Rules of Appellate Practice, parties have fifteen days after the filing of the court of appeals' decision to file a petition for rehearing. S.C. R. App. Ct. 221(a). Once that period has elapsed, the remittitur, containing a copy of the judgment of the appellate court with the seal and signed by the clerk of the court, is sent to the trial court. *Id.* R. 221(b).

Undertaking *de novo* review of this broader claim, the district court determined that Folkes had been deprived of effective assistance because counsel had not informed him of the state court of appeals' adverse decision or of his right to further appellate review, and—in the September 2010 letter—misinformed him about the status of his case and appellate rights. The district court also concluded that Folkes suffered prejudice because the record supported the conclusion Folkes would have timely petitioned for rehearing and certiorari. Lastly, the court concluded the above problems occurred at a critical stage of the direct appeal, *i.e.*, at a time when Folkes was entitled to the effective assistance of appointed counsel. For these reasons, the court granted the § 2254 petition and directed the State to reinstate Folkes' right to discretionary appellate review of the court of appeals' adverse decision, though it left the precise mechanism for compliance to the state court's prerogative. *Id.* at *8–10. Thereafter, the district court stayed relief pending a decision in this appeal.

The State noted a timely appeal, and we have jurisdiction under 28 U.S.C. § 1291.

II.

We review *de novo* the district court's grant of § 2254 relief, *Horner v. Nines*, 995 F.3d 185, 197 (4th Cir. 2021), though as explained in greater detail below, AEDPA greatly circumscribes that de novo review, *see Nicolas v. Att'y Gen. of Md.*, 820 F.3d 124, 129–30 (4th Cir. 2016).

On appeal, Folkes repeats the reasoning of the district court to defend its grant of habeas relief. Namely, he asserts the third ground of his § 2254 petition fairly implied a

claim that his court-appointed counsel on direct appeal provided him ineffective assistance of counsel by failing to consult with him regarding the decision of the South Carolina Court of Appeals in that appeal and his right to petition for rehearing in that court, which was a necessary prerequisite to petitioning the South Carolina Supreme Court for certiorari. He further posits that, on the merits, Ms. Robinson's failure to inform him that his appeal had been decided and of his discretionary appeal rights violated his Sixth Amendment right to counsel.

We disagree. Even when liberally construing Folkes' *pro se* § 2254 petition, Ground 3 did not adequately plead a failure to consult claim. That pleading inadequacy cannot be excused by asserting that an ineffective assistance of counsel claim premised upon counsel's failure to *file* a discretionary appeal necessarily implies that counsel was also deficient in failing to inform her client of the results of the direct appeal or to consult with him regarding the opportunity to file such a discretionary appeal. But even if we accepted that erroneous premise—as the dissenting opinion does—it fails on the merits. Accordingly, we reverse the district court's judgment.

III.

By design, AEDPA reinforces the long-held recognition that "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998)). Rather than operating as "a complete bar on federal-court relitigation of claims already rejected in

state proceedings," AEDPA imposes extensive limits on when a federal court is permitted to grant habeas relief to state prisoners and how a federal court is to review claims presented in a § 2254 petition. *Id.* at 102; *Winston v. Pearson*, 683 F.3d 489, 498 (4th Cir. 2012) ("To effectuate a regime that embraces federalism in the habeas realm, AEDPA carefully circumscribes federal review of the habeas claims of state prisoners.").

We begin with a principle even more foundational than AEDPA's extensive limits on federal review of a state prisoner's habeas claims: a federal court reviews only the claims presented in the § 2254 petition. *See Harrison v. Warden, Md. Penitentiary*, 890 F.2d 676, 679 (4th Cir. 1989) (declining, pre-AEDPA, to consider a new argument "not raised in the habeas petition filed with the district court").[5] AEDPA provides that a state prisoner can file for federal habeas corpus solely "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." § 2254(a). While each § 2254 petition must contain the overarching assertion of custody in violation of federal law, it must also contain specifically "asserted grounds for relief," otherwise termed as "issues" or "claims." *Samples v. Ballard*, 860 F.3d 266, 273 (4th Cir. 2017).

Both AEDPA and the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Corpus Rules") provide "that different grounds for relief are

[5] Under AEDPA, a petitioner is required to obtain a certificate of appealability showing that he has satisfied certain benchmarks before obtaining appellate review of a district court's denial of habeas relief. The Court is then limited to considering "the specific issue or issues" that were granted in a certificate. 28 U.S.C. § 2253(c)(3); *see also* Fed. R. App. P. 22. This case presents a State appeal, so no certificate of appealability was issued. And, as discussed in the analysis that follows, this case also presents the rare case in which the district court rather than the petitioner supplied the grounds justifying habeas relief.

treated as different claims," *Samples*, 860 F.3d at 274, and that petitioners must "state the facts supporting each ground," *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quoting Habeas Corpus R. 2(c)). Unlike most federal civil proceedings, which require that a complaint provide only "fair notice of what the plaintiff's claim is and the grounds upon which it rests," "Habeas Corpus Rule 2(c) is more demanding." *Mayle*, 545 U.S. at 655 (citation omitted). That rule requires petitions to "'specify all the grounds for relief available to the petitioner' and 'state the facts supporting each ground.'" *Id.* (quoting Habeas Corpus R. 2(c)); *see also* Habeas Corpus R. 4 advisory committee's note ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (citation and internal quotation marks omitted)). As the Supreme Court has noted, "[i]n the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important." *Mayle*, 545 U.S. at 655 (quoting Habeas Corpus R. 2(c) advisory committee's note). For that reason, "the model form available to aid prisoners in filing their habeas petitions" cautions that the petition must contain *all* grounds for relief being challenged and "state the facts that support each ground." *Id.* In addition, it warns that failure to comply may bar the petitioner "from presenting additional grounds at a later date." *Id.*

Case law bears witness that each ground for relief must be tied to a specific factual basis supporting that claim. This leads to the unremarkable conclusion that a petitioner may

assert multiple *claims* based on the same legal theory (*e.g.*, IAC, *Brady*[6] violations, actual innocence) with each claim connected to different acts or omissions by counsel. *See, e.g.*, *Porter v. Zook*, 898 F.3d 408, 434–37 (4th Cir. 2018) (analyzing different factual grounds as separate IAC claims); *Moore v. Hardee*, 723 F.3d 488, 495–500 (4th Cir. 2013) (same); *Basden v. Lee*, 290 F.3d 602, 616–19 (4th Cir. 2002) (same); *Baker v. Corcoran*, 220 F.3d 276, 293–97 (4th Cir. 2000) (same). At all times, the petitioner is responsible for identifying the allegedly deficient performance that the federal court is to review. And once the petitioner has identified specific conduct in his petition, he is constrained to rely only on that conduct.

Our discussion in *Samples* illustrates this point. The issue presented there required us to address whether a petitioner's reliance on new factual bases for an IAC claim set out new claims or were merely new arguments in support of previously raised claims.[7] In his prior filings, the petitioner had "claimed ineffective assistance of counsel based on an incomplete voir dire, permitting the jury to be informed that [he] was a convicted felon . . . , failure to propose certain limiting instructions, and failure to ensure that defense witnesses would not appear before the jury in prison garb." 860 F.3d at 275. But the petitioner later expanded his arguments to assert ineffective assistance based on "a freestanding claim [that] state habeas counsel" was ineffective and that trial counsel was ineffective based on

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] The specific question presented was whether a district court was required to consider *de novo* "claims raised for the first time in objections to a magistrate judge's proposed findings and recommendations." 860 F.3d at 268.

"six acts of omission." *Id.* In concluding the petitioner was asserting these new *claims*, we observed that his prior "express reliance on the[] four claims of ineffective assistance of counsel are to the exclusion of other claims of ineffective assistance of counsel." *Id.* Because, consistent with the Habeas Corpus Rules noted above, the petitioner had identified discrete facts constituting the alleged IAC, we made clear those alone were the claims he had put forward in his § 2254 petition. His ability to rely on a different factual basis for an IAC claim would be governed—and limited—by AEDPA and other applicable rules.[8]

These principles restricting a petitioner's advocacy throughout the § 2254 proceeding apply equally to a court's adjudication of that proceeding. Nothing authorizes a district court to expand or contract a petitioner's claim *sua sponte*. Instead, the court must consider claims as they are presented in the petition, reviewing them under the applicable standard. A court that alters the nature of a petitioner's claim, and grants habeas relief on

[8] For example, Federal Rule of Civil Procedure 15 governs when and how § 2254 petitioners may amend their pleadings, and § 2254(b)(1)(A) bars § 2254 petitioners from raising a claim without first exhausting their state court remedies as to each. Subject to limited exceptions, both rules impose exacting standards that bar petitioners from altering the factual basis for their claims between state and federal habeas proceedings and during the course of their § 2254 proceeding. *See, e.g.*, Fed. R. Civ. P. 15(c)(1) (discussing when amended pleadings "relate back" to the original filing to ensure their timeliness); *Mayle*, 545 U.S. at 655–63 (discussing the interplay between § 2254's one-year limitations period and Rule 15's provisions regarding amending pleadings); *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (reiterating that to exhaust state court remedies, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues," "[a]nd this opportunity must be given by fairly presenting to the state court *both the operative facts* and the controlling legal principles associated with each claim" (emphasis added) (internal quotation marks and citation omitted)).

that different ground, crosses the line between jurist and advocate. *See Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (admonishing district courts from "conjur[ing] up questions never squarely presented to them" by *pro se* litigants, because "requiring those courts to explore exhaustively all potential claims of a *pro se* plaintiff . . . would transform the district court from its legitimate advisory role to the improper role of an advocate"). A court acting in this manner also bypasses AEDPA's framework, thus allowing a petitioner to do indirectly what the foregoing principles barred the petitioner from doing directly. *Cf. Shoop v. Hill*, 139 S. Ct. 504, 507–09 (2019) (per curiam) (vacating award of § 2254 relief after concluding the court of appeals failed to limit review to the proper AEDPA standards when the petitioner originally briefed his claim as warranting relief under § 2254(d)(2), but the court ordered supplemental briefing on a case that post-dated the state PCR court's decision and then relied extensively on the new case and briefing to support relief under § 2254(d)(1)).

Courts of appeals have expressly recognized the district court's duty to consider only the specific claims raised in a § 2254 petition. *Ellis v. Raemisch*, 872 F.3d 1064, 1090–94 (10th Cir. 2017) (reversing a district court's judgment granting § 2254 relief when the attorney conduct serving as the basis for an IAC claim was raised *sua sponte* and differed from the conduct that formed the basis for the originally presented and exhausted claim); *Bracken v. Dormire*, 247 F.3d 699, 702 (8th Cir. 2001) ("Earlier cases have made clear that 'we will not consider issues or grounds for relief that were not alleged in a prisoner's habeas petition.'" (quoting *Frey v. Schuetzle*, 78 F.3d 359, 360 (8th Cir. 1996)); *Frey*, 78 F.3d at 360–61 ("[D]istrict courts must be careful to adjudicate only those claims upon which the

petitioner seeks relief and take care not to decide claims upon which the habeas petitioner never intended to seek relief."). Because it follows from both the general habeas principles discussed previously as well as our long-standing recognition that plaintiffs—not the district court—typically determine the case for decision, we adhere to this course in the context of a district court's duty when considering the grounds for relief presented in a § 2254 petition. *See, e.g.*, *Beaudett*, 775 F.2d at 1278; *Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1982) (affirming the district court's conclusion, pre-AEDPA, that a § 2254 petitioner had "waived" the right to raise a new claim during argument before the magistrate because the allegations in his habeas complaint did not identify the factual basis for that claim); *cf. United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 405–06 (4th Cir. 2013) (discussing cases relying on the principle that the plaintiff is the "master of his complaint" and thus responsible for describing his claims, identifying the defendants, and otherwise crafting the case he presents to the district court for decision).[9]

[9] The Supreme Court's holding in *Jennings v. Stephens*, 574 U.S. 271 (2015), bolsters this conclusion. There, the Court considered the circuit split that had developed as to whether a § 2254 petitioner had to obtain a certificate of appealability when he was the appellee on appeal and wanted to defend the judgment on alternative grounds the district court had rejected. *Id.* at 273. In holding that a petitioner-appellee did not have to obtain a certificate of appealability to "defend[] his judgment," the Court admonished that he would be "confined to those alternative grounds present *in the record*: he may not simply argue *any* alternative basis, regardless of its origin." *Id.* at 279. Once again, case law emphasized the federal courts' duty to guard against new bases of decision throughout the state habeas petitioners' federal proceedings.

Applying those principles here, Ground 3 of Folkes' § 2254 petition referred to appellate counsel's alleged ineffective assistance and stated a single fact supporting that claim—"failing to file a Petition for Rehearing in the Court of Appeals." J.A. 28. He later characterized the claim using slightly different surrounding language, but again pointed unambiguously and exclusively to the sole act of failing to file the petition for rehearing:

> Did the lower court err denying [Folkes] relief where the record below demonstrates that he meet [sic] his burden of proof concerning his allegation that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal *where Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals* thereby depriving [him] of his right to seek certiorari in the Supreme Court of South Carolina?

J.A. 31 (emphasis added). These were, verbatim, the issue statements he presented in his state PCR application and subsequent petition for certiorari review of the state PCR court decision. *Compare* J.A. 28, *with* J.A. 679, *and* J.A. 31, *with* J.A. 833. Folkes' "express reliance on [this one] claim[] of ineffective assistance of [appellate] counsel [is] to the exclusion of other claims of ineffective assistance of [appellate] counsel." *Samples*, 860 F.3d at 275.

Instead of adjudicating the claim set out in the § 2254 petition, the district court *sua sponte* required additional briefing on conduct encompassing other components of representation. The facts supporting the district court's new claims involved acts of omission and commission, looking beyond the only act identified in the § 2254 petition—counsel's "fail[ure] *to file* a Petition for Rehearing in the Court of Appeals." J.A. 28 (emphasis added). Specifically, the district court granted relief based on the following conduct: failing to advise Folkes of the South Carolina Court of Appeals' decision, failing

to consult with him about his opportunities to seek further discretionary appellate relief, and sending a form letter that incorrectly advised Folkes that he had exhausted his right to state relief. These claims all require looking at different conduct over a broader period of time and under different caselaw than the specific claim Folkes raised in his § 2254 petition.

Perhaps most illuminating for purposes of understanding the district court's alteration of the factual basis for an IAC claim is its express recognition that had the factual basis for Folkes' claim been solely whether appellate counsel was ineffective for failing to file a petition for rehearing, he would not be entitled to relief. In that regard, the court stated:

> The PCR court and [the State] have attempted to posit this case as only raising the question of whether [Folkes] had a constitutional right to have his counsel file a petition for rehearing to the South Carolina Court of Appeals and for certiorari to the South Carolina Supreme Court. *If this were the sole issue before the Court, the PCR court and [the State] would be correct.* What the PCR court did not address, and [the State] seeks to avoid, are the duties of appellate counsel during the period post an adverse decision while the appeal is still pending on direct appeal before the appellate court. . . . [F]rom the issuance of the adverse decision on September 24, 2010[,] until the filing of the remittitur on October 18, 2010[,] appellate counsel had the duty to advise the client of the adverse decision and of his right to seek further appellate review.

J.A. 158 (emphasis added) (internal citation omitted).

Tellingly, the district court pointed to no basis in law or fact for its declaration that an IAC claim based solely on failure to file a petition for rehearing necessarily encompasses additional conduct that occurs from the time the court of appeals issued its decision to the remittitur. Notwithstanding whatever additional duties appellate counsel may have had during the relevant timeframe, none of those were the solitary duty Folkes'

petition put before the district court. As the earlier recited AEDPA principles make clear, courts can no more alter the factual basis for a claim simply because other alleged duties may have arisen after issuance of an appellate decision than they can alter the factual basis for a claim because the alleged duties arose during trial. *See Samples*, 860 F.3d at 275. Here, the act of not filing a petition for rehearing is distinct from the other conduct the district court expanded its review to encompass, and then relied on to grant relief. Federal courts are not responsible for identifying the factual basis for a petitioner's claims; the petitioner is. And, as Folkes' § 2254 petition makes clear, appellate counsel's failure to file a petition for rehearing *was* his sole IAC claim.

The district court's conclusion that the state PCR court misunderstood the full scope of Folkes' claim is not supported by the record. To the contrary, the state PCR court addressed the precise factual circumstance Folkes presented as the issue before it. Moreover, Folkes—*who was represented by counsel throughout the state PCR proceedings*—did not file a motion to reconsider in the state PCR court or assert in his subsequent petition for certiorari to the Supreme Court of South Carolina that the state PCR decision mistakenly narrowed either the issue he was presenting or the factual basis to support his claim. The sole issue identified for the state PCR courts asserted that appellate counsel's performance was deficient for failing to *file* the petition for rehearing. Only after Folkes' § 2254 petition was filed did his claim adopt a different hue. And even then, that was only after the district court required Folkes to respond to its *sua sponte* questions about the facts and law surrounding the period following the filing of the South Carolina Court

of Appeals' decision. Before that time, Folkes' claim rested on the failure to file a petition for rehearing because that omission prevented him from filing a petition for certiorari.

That Folkes filed his § 2254 petition *pro se* does not alter this conclusion. To be sure, *pro se* filings are "h[e]ld to less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), but that does not give a court license to look beyond the claim presented. *Beaudett*, 775 F.2d at 1278; *see Bing v. Brivo Sys., LLC*, 959 F.3d 605, 618 (4th Cir. 2020) (stating that liberal construction of a *pro se* litigant's pleadings "does not mean overlooking the pleading requirements"); *Williams v. Ozmint*, 716 F.3d 801, 805 (4th Cir. 2013) ("[L]iberal construction does not require us to attempt to 'discern the unexpressed intent of the [petitioner],' but only to determine the actual meaning of the words used in the [pleading]." (citation omitted)). Here, there is no specialized procedural or substantive legal barrier that would warrant reading "filing a petition for rehearing" to encompass any other acts. *See Bing*, 959 F.3d at 618 (observing that the court's conclusions did not arise from the filing using "unsophisticated language or [its] failure to adhere to formalities"). That is particularly true here because Folkes' *pro se* § 2254 petition used the precise issue statements from his state PCR application and subsequent petition for certiorari to the Supreme Court of South Carolina, *language crafted when he was represented by counsel*. He included no additional argument in support of his IAC claim. Thus, while Folkes' § 2254 petition was filed *pro se*, the language he submitted to the district court that identified the issue before the court was prepared by counsel.

By considering, and then granting relief based on, a different factual ground than that originally presented in Folkes' § 2254 petition, the district court considered a claim

that Folkes did not raise. In so doing, it permitted Folkes to circumvent AEDPA's framework for how federal courts are to review § 2254 claims raised by state prisoners.

IV.

The above analysis of the generally applicable principles for understanding what "claims" are raised in a § 2254 petition is alone sufficient to reverse the district court's judgment. But further discussion is warranted given the specific nature of Folkes' claim and the dissenting opinion's contrary understanding of its scope. In particular, the dissent would hold that Folkes' claim both encompassed and entitled him to habeas relief on the additional issues decided by the district court. In reaching both conclusions, the dissenting opinion draws on principles applicable when considering the right to counsel in transitioning from conviction in the trial court to an initial appeal as of right. Those principles have no applicability where the setting is the transition from an appellate court's decision in an initial appeal as of right to a subsequent, discretionary appeal in the same or another appellate court. Moreover, grafting them into this context runs directly counter to the Supreme Court's holdings that specifically address the pursuit of a subsequent, discretionary appeal.[10] Before discussing how the dissenting opinion's mistaken view

[10] We use the terms "direct appeal" and "initial appeal as of right" interchangeably. They refer to the proceeding following a defendant's conviction and sentence in the trial court that operates as an error correction for the proceedings in that court.

As its individual parts suggest, the phrase "subsequent, discretionary appeals" refers to any additional appellate proceedings beyond the initial appeal of right. They are secondary (or later) reviews of the original appellate court's review of the proceedings in

taints its analysis of both the threshold issue of the scope of Folkes' claim and its merits analysis of that claim, we first review the applicable Supreme Court case law.

A.

1.

The Sixth Amendment guarantees not just a right to counsel, but to the effective assistance of that counsel in all criminal prosecutions. The Supreme Court has long recognized that counsel "plays a crucial role in the adversarial system . . . since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (citation and internal quotation marks omitted). Indeed, the right to counsel "protect[s] the fundamental right to a fair trial." *Id.* at 684. The right to counsel is meaningless without "the right to *the effective assistance of* counsel." *Id.* at 686 (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Accordingly, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* On that basis, the *Strickland* Court developed the familiar two-part test for establishing IAC claims.

trial court. And they are discretionary in that the court being appealed to plays a gatekeeper function in deciding whether to consider the appeal at all. Examples include a petition for rehearing in the same court that heard the direct appeal or a petition for writ of certiorari to a higher court such as the Supreme Court of the United States.

The constitutional right to counsel—and to the effective assistance of said counsel—extends to a "first appeal as of right," when one is provided. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see id.* at 392–400 (explaining why the Sixth Amendment guarantees this right). Briefly, the Supreme Court has recognized that "if a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Id.* at 393 (cleaned up); *see also Douglas v. California*, 372 U.S. 353, 357 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."). However, counsel's role significantly differs at the appellate stage. At trial, counsel acts "as a shield to protect [a defendant] against being 'haled into court' by the State and stripped of his presumption of innocence." *Ross*, 417 U.S. at 610–11. By contrast, during the initial appeal as of right, counsel's role is to act "as a sword to upset the prior determination of guilt." *Id.* And when undertaking that swordsman task, appellate counsel must provide *effective* representation, or else the right to counsel during an initial appeal as of right "would be a futile gesture." *Evitts*, 469 U.S. at 397.

However, the Supreme Court has drawn a bright line regarding the constitutional right to counsel between an initial appeal as of right and subsequent, discretionary appeals. Defendants "do[] *not* have a constitutional right to counsel to pursue discretionary state appeals or applications for review in [the Supreme Court]." *Wainwright*, 455 U.S. at 587 (citing *Ross*, 417 U.S. at 612) (emphasis added). In explaining this division, the Supreme

Court first noted that the Constitution guarantees the right to counsel in the *initial appeal as of right* because, otherwise, indigent defendants would be "denied meaningful access to the appellate system because of their poverty," *Ross*, 417 U.S. at 611, given that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits," *Evitts*, 469 U.S. at 393. During a subsequent, discretionary appeal, however, the assistance counsel provides lessens, as does the "handicap borne by the indigent defendant." *Ross*, 417 U.S. at 616. The Supreme Court has reiterated that the Sixth Amendment does not guarantee the right of counsel to "assist[] [a defendant] in every conceivable manner at every stage in the proceeding," but instead "assure[s] the indigent defendant an adequate opportunity to present his claims fairly," a goal that is accomplished by guaranteeing the assistance of counsel in preparing the initial appeal as of right. *Id.* at 616.

And because no similar right exists during a subsequent, discretionary appeal, the Supreme Court has consistently held that IAC claims based on conduct related to that stage of the appellate process are not cognizable. *E.g.*, *Wainwright*, 455 U.S. at 587–88. In short, when a defendant "has no constitutional right to counsel" for a particular proceeding, "he [cannot] be deprived of the effective assistance of counsel by his retained counsel's" conduct related to that proceeding. *Id.*

2.

The significant difference between the constitutional right to counsel in an initial appeal and the absence of such a right in a subsequent, discretionary one is particularly evident in how the Supreme Court has analyzed IAC claims based on counsel's failure to

file for each type of appeal. For example, when confronted with an IAC claim based on counsel's failure to file an appeal in an initial appeal as of right when it is unknown whether the defendant requested him to do so, the Supreme Court has stated that this claim requires courts to consider whether trial counsel consulted with the defendant about his direct appeal rights. But when confronted with an IAC claim based on counsel's failure to file a subsequent, discretionary appeal, the Supreme Court has simply rejected such claims based on the absence of any right to counsel at that stage of the appellate process.

Because the Constitution "guarantees a criminal appellant pursuing a *first appeal as of right* certain minimum safeguards," *Evitts*, 459 U.S. at 392 (emphasis added), the Supreme Court "ha[s] long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable" for purposes of establishing an IAC claim, *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The Supreme Court was confronted in *Flores-Ortega* with a nuanced question in the context of the initial appeal as of right: whether counsel was "deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other." *Id.* The Supreme Court stated that this question was "best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal." *Id.* at 478. It used "the term 'consult' to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* The two questions were tethered together, in the Court's reasoning, because when counsel has consulted with the defendant, then courts can better determine whether counsel performed unreasonably by

failing to file a notice of appeal by looking to whether counsel "follow[ed] the defendant's express instructions" after that consultation. *Id.* But if counsel failed to consult, then courts had to consider "whether [the] failure to consult with the defendant itself constitute[d] deficient performance." *Id.*

Rather than creating a bright-line rule that counsel has a duty to consult in the context of a direct appeal, the Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. *Flores-Ortega* thus established the interconnectedness of a claim that counsel was ineffective for failing to file a *direct appeal* and counsel's duty to consult about a defendant's ability to pursue that appeal with the assistance of counsel.

In stark contrast to the approach it adopted in *Flores-Ortega*, when confronted with an IAC claim based on *appellate counsel's* failure to file for timely subsequent, discretionary review, the Supreme Court outright rejected that claim because no right to counsel existed in that next stage of the appeals process. *Wainwright*. 455 U.S. at 587–88. Specifically, after an intermediate appellate court affirmed a state petitioner's convictions, appellate counsel filed a petition for writ of certiorari to the state supreme court, which the court dismissed as untimely. *Id.* at 586. The state petitioner alleged an IAC claim based on appellate counsel's failure to file a timely petition. *Id.* at 586–87. It was not disputed that review by the state supreme court was discretionary. *Id.* at 587. Citing *Ross*, the Supreme Court unequivocally held that because the state petitioner "had no constitutional right to

counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Id.* at 587–88.

B.

1.

This Supreme Court precedent demonstrates why the district court and the dissent are incorrect in positing that the ground for relief Folkes asserted—an IAC claim based on the failure to file for discretionary review—encompassed additional claims. In *Wainwright*, the Supreme Court was confronted with a claim identical to the one Folkes raised, which it analyzed and rejected. It did not view that claim as actually presenting or requiring discussion of any additional ones, including any duty to consult. *Wainwright* governs our analysis here and precludes the one adopted by the dissent.

To reach a different conclusion, the dissent relies principally on *Gordon v. Braxton*, 780 F.3d 196, 200–02 (4th Cir. 2015), in which we held that an IAC claim based on *trial counsel's failure to file a direct appeal of right* necessarily encompassed the issue of whether trial counsel was ineffective for failing to consult with the defendant about his ability to pursue *an initial appeal as of right*. As should be clear from our earlier discussion, *Gordon* is simply a straightforward application of the Supreme Court's instruction in *Flores-Ortega*.

In *Gordon*, a § 2254 petitioner had asserted in his state habeas proceedings that trial counsel had rendered ineffective assistance by failing to file notice of an initial appeal as of right. 780 F.3d at 199. The state habeas court found that petitioner "had not shown deficient performance because [he] had merely inquired about an appeal, not directly

requested one." *Id.* at 200. Its analysis went no further and denied relief. The petitioner's § 2254 petition argued counsel was ineffective for both "failing to file a notice of appeal and for not consulting with him about an appeal." *Id.* at 199. The district court dismissed the § 2254 petition "based on the state court's reasoning." *Id.* at 200.

On appeal to this Court, the Commonwealth argued that the petitioner failed to exhaust his state remedies as to the failure-to-consult claim because he had not "identif[ied] it as a separate claim." *Id.* at 200. We disagreed, holding that the petitioner had fairly presented "both the operative facts and the controlling legal principles . . . to the state court." *Id.* at 201 (citation omitted). We pointed out that the state court's finding that the petitioner "never expressly requested an appeal" did not end the analysis because the fact that the petitioner "asked [counsel] is there anything else we can do from this point," "indicat[ed] his interest in appealing which, at a minimum, triggered counsel's duty to consult." *Id.* Put another way, although the state habeas court concluded that the petitioner had not specifically instructed counsel to file a notice of appeal, it failed to undertake the "antecedent" inquiry *Flores-Ortega* directed courts to consider when assessing an IAC claim based on *trial counsel's* failure to file a direct appeal when the defendant had not "clearly conveyed his wishes one way or the other." 528 U.S. at 478. Importantly, we further observed that the state-court filings referenced *Strickland*, *Flores-Ortega*, and *Miles v. Sheriff*, 581 S.E.2d 191 (Va. 2003), three cases assessing ineffective assistance of counsel claims in which the petitioner "allege[d] that they were denied their right to [a direct] appeal because of counsel's ineffective assistance." *Gordon*, 780 F.3d at 201. Based on *Flores-Ortega*'s specific recognition that the duty to file a direct appeal and the duty to

consult about that appeal "fall[] along a 'spectrum,'" we held that the petitioner had exhausted his state remedies as to both the failure-to-file and the failure-to-consult claims. *Id.* at 201–02 (quoting *Flores-Ortega*, 528 U.S. at 477).[11]

By treating *Gordon* with near-dispositive effect, the dissent unmoors that decision from its necessary context: the transition from trial proceedings to a direct appeal, throughout which a defendant has the right to counsel. Proceeding in that manner so elides the legally significant differences between that stage of proceedings and the stage at issue in this case, the transition from the direct appeal to a discretionary appeal, where the Supreme Court has drawn a bright line as to the constitutional right to effective counsel. The spectrum analysis from *Flores-Ortega* and *Gordon* simply does not apply with respect to Folkes' claim that counsel was ineffective for failing to file a subsequent, discretionary petition for rehearing. Nor does it follow from either of those decisions that all "failure to file" claims necessarily implicate counsel's earlier conduct (or lack thereof).

[11] The dissent observes that "[l]ike the petitioner in *Gordon*, Folkes cited to *Strickland*" in his state PCR filings. Diss. Op. 60. But that hardly demonstrates exhaustion of remedies. *Strickland* established the generic standard for ineffective assistance of counsel but says nothing about the specific context of ineffective assistance of counsel for failing to file a discretionary appeal *or* failing to consult about any next steps in the proceedings. By contrast, *Gordon* observed that the petitioner's state habeas claim had cited not just *Strickland*, but also *Flores-Ortega* and a related state case that identified the specific claim alleged—ineffective assistance of counsel for failure to file a notice of direct appeal—and also discussed why that claim necessarily raised the issue of counsel's duty to consult in that context. Neither Folkes' § 2254 petition nor his state PCR filings similarly cited case law reflecting any interconnectedness between a duty-to-file claim and a duty-to-consult claim in the context of discretionary appeals.

Moreover, *Wainwright precludes* applying the reasoning of *Flores-Ortega* to the context presented here. When confronted with the question of whether appellate counsel was ineffective for failing to file a petition for a subsequent, discretionary appeal, the Supreme Court limited its analysis to that discrete question without conducting the sort of spectrum analysis it used in *Flores-Ortega*. We have no authority to do otherwise.

These distinct approaches to IAC claims based on the initial appeal as of right and subsequent, discretionary appeals make sense given that they arise in separate stages of the criminal proceedings, which the Constitution protects differently. Because the Constitution imposes a duty on trial counsel to file a direct appeal (1) when instructed to do so, and (2) sometimes even when not instructed to do so, bringing an IAC claim based on failure to file necessarily requires courts to consider trial counsel's consultation with the client about pursuing an initial appeal as of right. But because the Constitution imposes no duty on counsel to file a discretionary appeal—regardless of whether one is requested—analyzing that claim never implicates "antecedent" questions concerning consultation between counsel and the client. *Flores-Ortega*, 528 U.S. at 478. Accordingly, when a petitioner raises an IAC claim based on failure to file for a subsequent, discretionary appeal, that is the extent of the claim presented and the sole basis upon which habeas relief could be granted. In short, *Wainwright*—not *Flores-Ortega* or *Gordon*—answers the question of whether the claim raised in Folkes' § 2254 petition encompasses anything beyond a duty-to-file claim. And it answers the question with a clear "no."

2.

As the foregoing principles reflect, by alleging appellate counsel ineffective for failing to *file* a subsequent, discretionary appeal—the petition for rehearing, which was required to file a petition for certiorari (also a subsequent, discretionary appeal)—Folkes alleged a claim based solely on that conduct. That conclusion is the same under both the generally applicable principles for understanding the scope of a petitioner's § 2254 ground for relief discussed at the outset and the specific case law relevant to an IAC claim based on appellate counsel's conduct related to a subsequent, discretionary appeal. The district court erred in expanding the scope of Folkes' claim.

We need not remand the case for the district court to limit its review to this one issue, however, because the district court already addressed it. And it properly recognized that Folkes would not be entitled to habeas relief based on *Wainwright*'s holding that there is "no right to counsel for discretionary appellate review." *See Folkes*, 2021 WL 62577, at *9 (citing *Wainwright*, 455 U.S. at 587–88); *see also Ross*, 455 U.S. at 587–88. By concluding that the state PCR court's decision was correct, the district court necessarily concluded that Folkes could not satisfy § 2254's requirement of showing that the state PCR court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1); *see Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (emphasizing "the special importance of the AEDPA framework in cases involving *Strickland* claims" because *Strickland*'s "general standard[] [provides] a state court [with] even more latitude to reasonably determine that a defendant has not satisfied that standard" (citation omitted));

Harrington, 562 U.S. at 101–02 (discussing the differences between undertaking § 2254(d)(1)'s review of a state court's adjudication of an IAC claim and directly considering whether counsel's performance fell below *Strickland*'s standards).

As to this specific ground for relief, we agree with the district court's conclusion that the state PCR court did not act contrary to or unreasonably apply those principles when it concluded that Folkes could not assert an IAC claim based on counsel's failure to file a petition for rehearing because that stage of South Carolina's appellate process is purely discretionary. J.A. 802 (discussing *Douglas v. State*, 631 S.E.2d 542, 543–44 (S.C. 2006), which held that appellate counsel has no duty "to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal" because that constitutes discretionary relief and that no claim of ineffective assistance of appellate counsel can be made against an attorney pursuing discretionary relief after a direct appeal); *see also Chalk v. Kuhlmann*, 311 F.3d 525, 528–29 (2d Cir. 2002) (holding that although state law required appointed counsel to file for discretionary appellate relief, no ineffective assistance of counsel claim could be asserted against counsel for defective performance related to that discretionary appeal because any such "failure would not violate any constitutional right"). Folkes was not entitled to § 2254 relief on the sole claim adequately alleged in his petition. Accordingly, we reverse the district court and remand for entry of an order denying Folkes' § 2254 petition.

C.

Even if the dissent is correct on the threshold question of what issues were part of Folkes' § 2254 petition, its substantive analysis of those claims is in error and thus warrants

a response. Because Folkes had no constitutional right to counsel regarding the petition for rehearing, he cannot allege an IAC claim based on a failure to consult about either the outcome of his direct appeal or his next steps in the state's discretionary appeals process. In short, a merits analysis of these additional unpled claims leads to the same conclusion: Folkes is not entitled to habeas relief. [12]

Both the district court and the dissent recognize that under Supreme Court precedent, appellate counsel would not have been required to *represent* Folkes in any proceeding for discretionary relief. Nor does either suggest that counsel would be required to discuss with Folkes the pros and cons of filing a petition for rehearing or preparing a petition that Folkes could then use to file—hence, the dissenting opinion's attempt to narrow the novel duty being crafted as a "duty to consult" that means something less than the duty to consult discussed in *Flores-Ortega*. *See* Diss. Op. 50 n.1 (defining its understanding of counsel's duty to "consult" about a subsequent, discretionary appeal to something narrower than *Flores-Ortega*'s description of it in the context of an initial appeal as of right). So framed, the dissent's formulation of appellate counsel's duty to consult rests on the faulty premise that Folkes had a constitutional right to have counsel inform him of

[12] The proper standard of review for such a claim presents multiple problems under AEDPA's framework. For purposes of this section, we will assume that review is *de novo* and that the dissent is correct that Folkes' state PCR petitions implicated both claims it enumerates (failure to file and failure to consult), but the state PCR courts failed to address the latter claim. *See Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011) (recognizing that *de novo* review of a § 2254 claim is appropriate when the state court "did not address" an issue raised in a state habeas petition, so there are no state-court findings or conclusions to defer to in considering § 2254 relief).

two things: (1) the South Carolina Court of Appeals' decision; and (2) his opportunity to pursue further discretionary appeals.

But the Supreme Court has never held that appellate counsel has a constitutional duty to do either one. Applying Supreme Court precedent to the analysis, multiple circuit courts have held that no such duty to consult exists. Indeed, the dissent acknowledges this majority view in out-of-circuit authority and instead adopts a position broader than any of our sister circuits follows. *See* Diss. Op. 70–72. Adopting the dissenting opinion's substantive view would have us create a circuit split in the first instance, and would further put us in plain tension with the Supreme Court's relevant case law. Even were we to reach the merits of the issues the district court and dissenting opinion concluded to be part of Folkes' § 2254 petition, we would conclude that Folkes is not entitled to relief because the Constitution does not impose the duties both opinions impose on appellate counsel.

1.

While state rules, ethical canons, or other sources may impose a duty on counsel to inform their clients of the decision of a direct appeal, the Constitution does not. Instead, as the Fifth Circuit has recognized, "[t]he constitutionally secured right to counsel ends when the decision by the appellate court is entered." *Moore v. Cockrell*, 313 F.3d 880, 882 (5th Cir. 2002). This conclusion rests squarely on the Supreme Court's reasoning about the right to effective counsel in the first instance.

When it first recognized the constitutional right to counsel in the first appeal as of right, the Supreme Court framed the basis in terms of the necessary value counsel adds in presenting the case to the appellate court for its review. *Douglas*, 372 U.S. at 357 ("[W]here

the merits of the one and only appeal an indigent has as of right are *decided without benefit of counsel*, we think an unconstitutional line has been drawn between rich and poor." (emphasis added)); *see also id.* at 356 (observing that its holding was not concerned with questions "that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been *presented by a lawyer and passed upon by an appellate court*" (emphasis added)).

The Supreme Court's subsequent discussions of the right to appellate counsel similarly address the assistance counsel provides in *preparing* and *presenting* the defendant's appeal for review by the court. *Evitts*, 469 U.S. at 393–94 ("[T]he services of a lawyer will for virtually every layman be necessary *to present* an appeal in a form suitable for appellate consideration on the merits. . . . [Counsel] must be available to assist in *preparing and submitting a brief* to the appellate court, and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." (emphases added) (internal citations omitted)); *Ross*, 417 U.S. at 610–11 (describing appellate counsel's constitutional role "as a sword to upset the prior determination of guilt"); *Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (per curiam) ("The assistance of appellate counsel in *preparing and submitting a brief* to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant." (emphasis added)). This constitutionally guaranteed role has been served in its entirety once the appellate court issues its decision.

Indeed, it is precisely because the appeal has already "been presented by a lawyer and passed upon by an appellate court" that the Supreme Court has concluded no further right to counsel exists beyond the initial appeal as of right. *Ross*, 417 U.S. at 614 ("[The defendant] . . . received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.'" (quoting *Douglas*, 372 U.S. at 356)); *id.* at 616 ("The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant *an adequate opportunity to present his claims fairly* in the context of the State's appellate process." (emphasis added)); *see also Coleman v. Thompson*, 501 U.S. 722, 755–56 (1991) (holding a state criminal defendant had no "constitutional right to counsel on appeal from the state habeas trial court judgment" because he had already "had his one and only appeal" during which counsel had assisted in providing him with "an adequate opportunity *to present* his claims fairly in the context of the State's appellate process" (cleaned up) (emphasis added)); *Anders v. California*, 386 U.S. 738, 744 (1967) (explaining that appellate counsel's "role as advocate requires that he *support his client's appeal* to the best of his ability" and that this role is satisfied by, *inter alia*, notifying the court that she has found no meritorious issues for appeal "accompanied by a brief referring to anything in the record that might arguably support the appeal").

Supreme Court case law thus supports the conclusion that the constitutional right to appellate counsel is satisfied in advance of the appellate court's decision and that counsel's role ends upon issuance of that decision. As the Fifth Circuit has explained, citing the Supreme Court's decision in *Ross*: "[t]he constitutionally secured right to counsel ends when the decision by the appellate court is entered." *Moore*, 313 F.3d at 882.

The dissent adopts the contrary view partially espoused by the Sixth Circuit, concluding that the right to appellate counsel encompasses a duty to "notify a defendant of the outcome of his direct appeal." Diss. Op. 71. While this may be the ethically appropriate course, it is not a constitutionally required one. Neither the dissent's nor the Sixth Circuit's reasoning is persuasive otherwise and finds no support from the Supreme Court.

In *Smith v. Ohio Department of Rehabilitation & Corrections*, 463 F.3d 426, 432–33 (6th Cir. 2006), the court held that a § 2254 petitioner's procedural default of a claim was excused because appellate counsel had rendered ineffective assistance by "fail[ing] to notify him promptly of the [state] Court of Appeals decision denying his claims," which led to his untimely filing of a notice of appeal to the state supreme court. The court recognized that "[t]here can be a constitutional claim of ineffective assistance only at a stage of the proceedings when there is a right to counsel under the Sixth Amendment." *Id.* at 433. But the court declared that the petitioner's "claim does not relate to his lawyer's performance regarding" discretionary relief, but rather to "[counsel's] representation . . . during his direct appeal." *Id.*

To support its view, the Sixth Circuit failed to consider any of the foregoing principles concerning why the right to counsel on a direct appeal exists. Instead, it relied

on inapposite principles from *Flores-Ortega* and similar cases governing *trial counsel*'s duties to prepare a defendant to take an initial appeal as of right. *Id.* at 433–35. For the reasons already detailed, that's a false analogy to the end of a first appeal of right and the initiation of any discretionary appeals. The constitutional basis necessitating client–counsel communication to facilitate the defendant's decision whether to take that initial appeal as of right—during which time the right to counsel continues unabated—does not exist *after* the decision on direct appeal. What remains is simply the Sixth Circuit's *ipse dixit* declaration that appellate counsel's responsibilities do not end "the moment the court of appeals hands down its decision." *Id.* at 433. Therefore, nothing in *Smith* casts doubt on the proper application of the Supreme Court's relevant case law discussed earlier.

In consequence, even if Folkes' § 2254 petition had raised a claim of ineffective assistance of counsel based on appellate counsel's failure to inform him of the outcome of his direct appeal of right, it would not support the granting of habeas relief. Folkes' claim had "once been presented by a lawyer and passed upon by an appellate court," which fulfilled all constitutional duties of his counsel. *Douglas*, 372 U.S. at 356.

2.

The dissenting opinion's further view that Folkes' counsel had a duty to inform Folkes about the existence of his next, discretionary appellate options has no support in the case law of the Supreme Court or any court of appeals. The constitutional right to effective assistance of counsel does not extend to any attorney–client discussion about additional proceedings available to the client after the first appeal of right. Filing a petition for rehearing in the South Carolina Court of Appeals is a solely discretionary proceeding,

meaning the constitutional right of counsel does not extend to it. Accordingly, counsel's failure to consult with Folkes about it does not implicate his constitutional right to effective assistance of counsel.

Leaving the Sixth Circuit's approach for later, all other courts of appeals to consider similar claims have held that because the Constitution does not guarantee a right to effective assistance of counsel relating to a discretionary appeal, IAC claims are not cognizable based on appellate counsel's mistaken advice or failure to advise about an unsuccessful appellant's opportunities for subsequent, discretionary relief. For example, in *Jackson v. Johnson*, 217 F.3d 360, 364–65 (5th Cir. 2000), the Fifth Circuit rejected a defendant's claim that counsel was ineffective for failing to file—and failing to inform him of his right to file—a motion for rehearing of the direct appeal because that motion "come[s] after the appellate court has passed on the claims[] [and] there can be no question that the granting of a motion for rehearing lies entirely within the discretion of a court of appeals." The Fifth Circuit explained that under *Ross* and *Wainwright*, "a criminal defendant has no constitutional right to counsel on matters related to filing a motion for rehearing following the disposition of his case on direct appeal." *Id.* at 365.

For the same reasons, in *Pena v. United States*, 534 F.3d 92, 94–95 (2d Cir. 2008) (per curiam), the Second Circuit denied relief to a federal petitioner claiming ineffective assistance of appellate counsel "for failing to notify him of his right to file" a petition for writ of certiorari from the Supreme Court of the United States. Like Folkes, the petitioner testified he would have petitioned for a writ of certiorari if he had been aware of the ability to do so, and that appellate "counsel's failure to inform him of the opportunity 'denied his

right to have a lawyer prepare and submit a petition.'" *Id.* But the court rejected petitioner's argument that a duty to consult was part of the "right to the effective assistance of counsel on first-tier appeal"—its "last step"—rather than being "the first step of the subsequent discretionary appeal." *Id.* at 95–96 (quoting *Chalk*, 311 F.3d at 529). Calling that argument "ingenious, but wrong," *id.* at 96 (emphasis omitted) (quoting *Chalk*, 311 F.3d at 529), the Second Circuit recounted the previously discussed Supreme Court case law regarding the interconnectedness of IAC claims to the constitutional right to counsel and the different treatment of claims surrounding the initial appeal as of right and subsequent, discretionary appeals, *id.* at 95–96. In particular, the court observed that the right to counsel exists for an initial appeal as of right to protect a defendant from "the prejudice that might ensue from an improperly pursued initial appeal" in which a court adjudicates the merits of issues presented to it and "performs the role of 'error-correction.'" *Id.* at 95 (citation omitted). After the decision in the direct appeal, however, "the harm done by a certiorari petition drafted without the aid of an effective lawyer is unlikely to resemble" that level of prejudice and thus is not constitutionally required. *Id.* Accordingly, the court concluded that no IAC claim could be predicated on counsel's failure to inform the petitioner that he had the opportunity to pursue further, discretionary appeals. *Id.* at 96.

These courts of appeals decisions, among others, properly applied existing Supreme Court precedent and demonstrate why Folkes would not be entitled to habeas relief even if his claim encompassed his counsel's failure to consult with him about the availability of additional, discretionary appeals. *See also Ahumada v. United States*, 994 F.3d 958, 960–61 (8th Cir. 2021) (rejecting IAC claim based on counsel's failure "to communicate" about

the process for filing a petition for rehearing because "[t]here is no constitutional right to counsel for discretionary appeals" such as rehearing, so "[a habeas petitioner cannot claim ineffective assistance of counsel" for matters related to pursuing that relief); *Miller v. Keeney*, 882 F.2d 1428, 1430–33 (9th Cir. 1989) (holding that a petitioner could not establish an ineffective assistance of appellate counsel based on "incomplete" and possibly even constitutionally deficient advice about whether to pursue a subsequent, discretionary appeal because the "constitutional right to counsel . . . c[a]me to an end" once the decision issued in the initial, direct appeal).

The dissenting opinion purports to adopt the solitary view of the Sixth Circuit as support for its conclusion that the Constitution requires "an appellate attorney . . . to inform his client of the existence of and deadlines for collateral relief, even though counsel had no duty to file the application itself." Diss. Op. 71–72. To do so, it relies on *Gunner v. Welch*, 749 F.3d 511 (6th Cir. 2014), in which the Sixth Circuit found that appellate counsel had a limited duty to advise his client about certain matters related to the filing of his petition for state post-conviction relief. But *Gunner* provides an incomplete picture of the Sixth Circuit's relevant case law, and the dissent acknowledges that "*Gunner* is not controlling Sixth Circuit law," but merely provides "logically persuasive" reasoning for the dissent's own position. Diss. Op. 72 n.8. To be sure, *Gunner* has no bearing on how the Sixth Circuit would resolve whether counsel had a duty to consult with a petitioner like Folkes about an option to pursue additional, discretionary appeals. Thus, not even binding Sixth Circuit case law would agree with the dissent's conclusion that Folkes' counsel had a duty to consult about any subsequent, discretionary appeals. Simply put, *Gunner* lacks the

"logical[] persuasive[ness]" the dissenting opinion bestows on it because it addressed appellate counsel's duty with respect to a different type of post-conviction proceeding than is at issue in this case and, consequently, it failed to grapple with relevant Supreme Court case law.

In *Gunner*, an Ohio state prisoner raised claims in his § 2254 petition that would ordinarily have been procedurally defaulted. *Id.* at 515. The prisoner argued that the default should be excused because appellate counsel had been ineffective in failing to notify him of the filing deadlines for state post-conviction relief. *Id.* Ohio's postconviction relief system operates somewhat unusually from other states in that certain types of ineffective assistance of trial counsel claims (including this prisoner's) must be raised in a state petition for post-conviction relief filed *before* the decision in the direct appeal has been issued. Accordingly, the deadline for filing his petition ran from the time the trial transcript is filed in the direct appeal. *See* Ohio Rev. Code Ann. § 2953.21(A)(1)(a)(i), (2)(a). The prisoner did not know the transcript filing date or its implications for a petition alleging ineffective assistance and, as a result, his state petition for post-conviction relief was untimely. *Gunner*, 749 F.3d at 515.

The issue before the Sixth Circuit was whether these circumstances excused the prisoner's procedural default of the affected claim. *Id.* at 515–16. The court held that it did, recognizing that the prisoner's state appellate counsel had a duty to consult with his client about when the trial transcript had been docketed in the direct appeal and the consequences of that filing date on the deadline for filing his petition for post-conviction relief. *Id.* at 517.

In so holding, the Sixth Circuit rejected the state's argument that counsel did not have a duty to inform the prisoner about the state collateral proceedings because the Constitution did not guarantee a right to counsel during those proceedings. *Id.* at 518–19. The court relied on *Martinez v. Ryan*, 566 U.S. 1, 8–9 (2012), in which the Supreme Court recognized, but did not answer, the question of whether the Constitution "require[s] states to provide counsel *in initial-review collateral proceedings* because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" (alterations in original) (emphasis added) (citation omitted). The *Martinez* Court reiterated that *Douglas*' reasoning for why the right to counsel existed in a direct appeal of right "*may*" also apply when "the initial-review collateral proceeding[]" is "a prisoner's 'one and only appeal' as to an ineffective-assistance claim." *Id.* (emphasis added) (citation omitted); *see Coleman*, 501 U.S. at 755 (declining to resolve whether an exception to the rule "that there is no right to counsel in state collateral proceedings" exists when "state collateral review is the first place a prisoner can present a challenge to his conviction"). *But see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. . . . We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process." (internal citation omitted)).

Citing *Martinez*, the Sixth Circuit concluded that the prisoner had a right to counsel during his state post-conviction relief proceeding because, under Ohio law, that proceeding was the first opportunity for him to present his IAC claim. *Gunner*, 749 F.3d. at 518–19. In its view, the Supreme Court's suggestion that the right to counsel may exist when an IAC claim can only be brought in an initial-review collateral proceeding provided a "complete answer to the . . . argument that petitioner cannot complain of [counsel's] failure to advise him of the filing deadline for an initial-review collateral proceeding because that proceeding is one 'for which there is no right to any attorney under the Constitution.'" *Id.* at 519.

Gunner's *Martinez*-based reasoning for why a duty to consult existed plainly does not apply here. Folkes has no *Martinez* claim and has never asserted otherwise. Nor could he: his underlying claim was raised, albeit unsuccessfully, in his initial appeal as of right. Regardless of what aspect of appellate counsel's conduct is considered, it is all in the context of Folkes' desire to pursue a *second* presentation of an issue the state court previously rejected, i.e., filing for a subsequent, discretionary appeal. Thus, to the extent *Gunner*'s holding that a duty to consult existed because a right to counsel existed during the proceeding about which counsel had a constitutional duty to consult, it has no bearing on this case.

That said, *Gunner* did indicate that it would find a constitutional right to counsel existed independently from the "complete answer" *Martinez* provided. *Id.* Specifically, the court indicated it would have rejected the state's argument "even before" *Martinez*. *Id.* Acknowledging the Supreme Court's holding in *Wainwright* that an IAC claim could not

be based on counsel's failure to file for discretionary relief, the Sixth Circuit declared that *Wainwright* involved "an altogether different question from whether a defendant can complain about the failure of counsel to advise him of relief that may be available to him or of the necessity to proceed expeditiously if he wishes to obtain such relief." *Id.* Rather than explaining why that was so, the court set aside the constitutional right to counsel and noted that the prisoner "would have very likely have been provided" a right to counsel during the state post-conviction proceeding under "Ohio law and practice." *Id.* This rationale is unpersuasive for two reasons.

First, *Gunner*'s alternative pronouncement lacks a reasoned explanation for why this "different question" than *Wainwright* should be answered differently. *Id.* It does not address any of the relevant Supreme Court precedent or explain how it concluded that an IAC claim could be based on conduct relating to a proceeding during which no constitutional right to counsel exists. The court's only explanation addresses an entirely different issue: whether other sources, such as state law and agency principles, provided a right to counsel. But that is irrelevant to the question of whether a petitioner can assert an IAC claim, which requires a petitioner to show that counsel's conduct fell below the *Constitution*'s requirements. *United States v. Palacios*, 982 F.3d 920, 923 (4th Cir. 2020) ("To succeed on an ineffective assistance of counsel claim, the movant must show that counsel performed in a constitutionally deficient manner and that the deficient performance was prejudicial.").

Second, quite apart from *Gunner*'s lack of persuasiveness on this point, an even more forceful barrier prohibits reliance on it: controlling Sixth Circuit precedent. *Gunner*

is not the only—or first—Sixth Circuit case to consider whether counsel had a duty to consult with a client about an appellate proceeding other than the initial appeal as of right. In several published opinions decided before *Gunner*, the Sixth Circuit held that appellate counsel does *not* have a duty to "consult" about a proceeding when the Constitution does not guarantee right to counsel during that proceeding. For example, in *Tolliver v. Sheets*, 594 F.3d 900, 929 (6th Cir. 2010), the court rejected a § 2254 petitioner's argument that his procedural default of a claim should be excused because appellate counsel was ineffective for "faili[ng] to warn him about the ninety-day deadline" to file for discretionary reopening of his direct appeal "or even to tell him in time about the possibility of filing" such a motion. *Id.* at 929.[13] The court observed that the petitioner had "no constitutional right to counsel," let alone a right to "effective counsel," in pursuing reopening of his direct appeal. *Id.* (emphasis omitted). As such, "any poor advice he received from an attorney [related to his filing a motion to reopen] cannot establish cause for his default." *Id.*; *see Scuba v. Brigano*, 527 F.3d 479, 488–89 (6th Cir. 2007) (holding similarly regarding counsel's failure to timely file motion to reopen); *see also Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012) (holding the same as *Scuba*, after *Martinez* was decided).

[13] *Tolliver* and the other Sixth Circuit cases mentioned in this paragraph specifically considered Ohio's appellate proceedings, in which a motion to reopen the direct appeal is considered a "'separate collateral' proceeding" from the initial appeal of right. *Tolliver*, 594 F.3d at 929 (citation omitted); *see Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir. 2005) (en banc) (holding that a motion to reopen is "part of the collateral, postconviction process rather than direct review" such that no constitutional right to counsel exists at that stage); *cf. Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 831 (6th Cir. 2019) (holding that no right to counsel exists during the reopened appeal either because that proceeding is also not the initial appeal of right contemplated by *Douglas*).

The Sixth Circuit adheres to the well-recognized principle that a later panel decision of the court cannot conflict with an earlier decision except in limited circumstances that do not apply here. *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001) ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."); *see United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014) ("A panel of this court may not overturn binding precedent because a published panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" (citation omitted)). Thus, to the extent the decision in *Gunner* conflicts with these prior, binding precedents, future Sixth Circuit panels are not bound by *Gunner*.

The Sixth Circuit itself recognized this tension between *Gunner* and the court's prior cases (*Tolliver*, *Scuba*, etc.), albeit in an unpublished opinion, and concluded that *Gunner*'s holding was limited to a *Martinez* context. *McClain v. Kelly*, 631 F. App'x 422, 429–38 (6th Cir. 2015) (analyzing Supreme Court and Sixth Circuit precedents predating *Gunner* and holding that "to the extent . . . that *Gunner* announced a rule *independent* of *Martinez*, applying its rule to the [motion to reopen] context would conflict with binding circuit precedent," such as *Scuba* and *Tolliver*, which recognized there is no duty to consult or advise about a proceeding when there is no right to counsel during that proceeding). Contrary to the dissenting opinion's discussion, *Gunner* (and the Sixth Circuit more broadly) provides no persuasive reasoning to support the conclusion that the Constitution

required Folkes' appellate counsel to consult with him about how to raise an issue already rejected by a state appellate court in another subsequent, discretionary appeal.

* * * *

What's left of the dissenting opinion is its idiosyncratic application of the Supreme Court's case law. The dissenting opinion erroneously draws on principles articulated in the context of trial counsel's constitutional duties relating to the initial appeal as of right to find novel constitutional duties that appellate counsel has relating to a subsequent, discretionary appeal. But appellate counsel has no duties related to a subsequent, discretionary appeal because a defendant has no constitutional right to counsel related to those proceedings. The Supreme Court has drawn a bright line that places conduct looking forward to a subsequent, discretionary appeal outside the scope of a criminal defendant's constitutional right to counsel. Consequently, even were we to conclude that Folkes' § 2254 petition encompassed the full panoply of claims the district court relied on to grant relief, we would be compelled to reverse. Doing so faithfully applies Supreme Court precedent, which also aligns us with every court of appeals' (including the Sixth Circuit's) understanding of that precedent.[14]

[14] The dissent's remaining reasoning to affirm can be distilled to its subjective view that the district court must be permitted to provide relief to a poorly treated defendant. *See* Diss. Op. 50 (referencing the "compellingly troubling story" surrounding Ms. Robinson's departure from the Commission and the follow-up letter to Folkes); *id.* at 65 (opining that federal courts should not "draw . . . harsh lines where we are not truly obligated to do so" or "sit by though clear injustice stares us in the face due to a self-imposed, unnecessarily strict application of procedural rules"). But the principles we apply here respect the district court's proper role in the process as neutral arbiter of the claims presented rather than an advocate in favor of un-raised challenges of one party, no matter how sympathetic. They

V.

For the reasons stated, we reverse the district court's judgment and remand with instructions to deny Folkes' § 2254 petition.

REVERSED AND REMANDED WITH INSTRUCTIONS

also respect *Congress*' rules established in AEDPA, which were intended to respect the function of state courts in vindicating federal rights. *See Burt v. Titlow*, 571 U.S. 12, 19 (2013). No matter how short of best or ethical practices Ms. Robinson's failure to notify Folkes she was withdrawing from representing him or the Commission's letter to Folkes may have fallen, that conduct was not the basis for any constitutional claim Folkes presented in his state PCR application for relief, it was not the claim the state PCR court decided, and—most relevantly—it was not the ground for relief asserted in Folkes' § 2254 petition. That other conduct cannot now form the basis for relief.

WYNN, Circuit Judge, dissenting:

If, as my good colleagues in the majority posit, the only issue properly before us was whether Folkes's appellate counsel was ineffective for failing to file a rehearing petition, I would concur in the judgment, as the state postconviction relief court's finding on that point is not "contrary to" or an "unreasonable application of" federal law. Majority Op. at 31. But instead, the issue that we confront in this appeal is whether Folkes's ineffective-assistance-of-counsel claim, which necessarily incorporated a duty-to-consult[1] argument, was fairly presented to the state court, and properly before the district court. Confronting this issue, the district court recognized that the facts in this matter tell a compellingly troubling story.

It is undisputed that Folkes, an indigent defendant, was abandoned, without notice, by his lawyer before his appeal was resolved. And not only was he left in the dark about the outcome of his direct appeal, but he was also misinformed of the status of his case and his remaining rights. Because the district court correctly addressed the issue, used the proper standard of review, and came to the correct decision as to counsel's constitutional duties, I would affirm.

[1] It is important to define what "consult" means in this context. Traditionally, courts have defined "consult" to mean "advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. 470, 471 (2000). However, for purposes of this dissent, I use the term "consult" in a more pared-down sense—referring only to counsel's duty to inform the client about the court's resolution of his claim and advise him of his next step for appeal.

I.

In 2008, a jury found Folkes guilty of assault and battery with intent to kill. The trial court sentenced him to life in prison without parole pursuant to South Carolina's "three strikes" law. *See Folkes v. Nelsen* (*Folkes II*), No. 2:19-CV-0760-RMG, 2021 WL 62577, at *1 (D.S.C. Jan. 7, 2021); S.C. Code Ann. § 17-25-45 (2015); Response Br. at 3. Folkes challenged his conviction via direct appeal. On September 24, 2010, the South Carolina Court of Appeals affirmed his conviction in a one-paragraph, per curiam opinion. *State v. Folkes*, No. 2010-UP-420, 2010 WL 10080232, at *1 (S.C. Ct. App. Sept. 24, 2010).

Like all South Carolina criminal defendants, Folkes had the option to pursue discretionary review of the Court of Appeals' ruling—first by filing a petition for rehearing in that court, and then by seeking certiorari from the state Supreme Court. S.C. App. Ct. R. 242; *see Douglas v. State*, 631 S.E.2d 542, 543 (S.C. 2006). Under South Carolina procedure, the state Supreme Court will not review a Court of Appeals' decision "until the petition for rehearing or reinstatement has been acted on by the Court of Appeals." S.C. App. Ct. R. 242(c). Though facing a life sentence, Folkes did not pursue further review.

The reason that he did not pursue further review is now apparent. During his state appeal, Folkes was represented by Celia Robinson, an attorney for the South Carolina Commission of Indigent Defense ("the Commission"). Robinson wrote Folkes's appellate brief. However, she left the Commission on September 14, ten days before the Court of Appeals issued its decision. No one ever informed Folkes of Robinson's departure. Robinson never officially withdrew as Folkes's counsel, and no one else from the Commission formally took over his case. Then, on September 28, two weeks after

Robinson resigned and four days after the Court of Appeals' decision, Folkes received a letter bearing Robinson's signature and typed on Commission letterhead.[2] The letter explained that the Court of Appeals had denied his petition for writ of certiorari and that Folkes had "exhausted [his] state court remedies." J.A. 777. The letter further explained that the clock was ticking on his time to file a federal habeas petition. This information was patently false, as no petition for rehearing or writ of certiorari had ever been filed on Folkes's behalf, let alone denied. Significantly, the letter was not from Robinson at all, but rather was sent by a paralegal who used the incorrect form letter and forged Robinson's signature.

After the time to continue with his direct appeal had passed, Folkes filed a pro se application in state court for postconviction relief. This application was later amended and expanded by counsel. In his application, Folkes raised over twenty allegations of ineffective assistance of counsel. Ground 3 of his amended application asserted a claim based on the failure to file a petition for rehearing. The state postconviction relief ("PCR") court conducted an evidentiary hearing at which Folkes, Robinson, and the Commission's chief appellate defender, Robert Dudek, testified. At this hearing the facts leading up to, and resulting in, the failure to file a rehearing petition were examined at length. Indeed,

[2] It is not clear from the record whether or when Folkes received the opinion of the South Carolina Court of Appeals. The district court suggested that Folkes was not timely informed of the adverse appellate court decision, at least by any attorney. *Folkes II*, 2021 WL 62577, at *8 ("[T]here is no record evidence that any licensed attorney assumed the duties of substitute counsel, including the most basic duties of appellate counsel of informing the Petitioner of the adverse decision, of his right to seek further appellate review, and of the consequences of failing to do so."); *see id.* at *8–10.

much of the testimony at the state evidentiary hearing focused on Robinson's early departure, Folkes's lack of subsequent legal representation, and the erroneous letter.

Dudek confirmed that Robinson left the Commission before the state appellate opinion was issued. He explained that when an attorney leaves, the "cases are [usually] reassigned," J.A. 696, though that did not happen here. He acknowledged that the forged letter "obviously" "contains an error because it refers to denial of the petition for writ of certiorari and, in fact, this is a summary unpublished opinion of the court of appeals." J.A. 696. And Dudek testified that he did not believe he had seen the letter before it went out. He also admitted he had never read the case transcript and stated he had "no independent recollection of reviewing" the South Carolina Court of Appeals' opinion or making any decisions in Folkes's case. J.A. 712–14. When probed by counsel, Dudek readily agreed that there was "nothing in [his] file to indicate that [he] did review this case after the opinion came out." J.A. 714.

Similarly, Folkes's state PCR counsel questioned Robinson about the date of her departure and whether she believed another attorney would take over her active cases. Robinson stated that though she thought someone would review her files after she left, that did not appear to have happened here. Robinson further explained that her paralegal signed and sent the erroneous letter after her departure and without her knowledge. Folkes himself testified that he never knew Robinson had stopped representing him and thought the September 28 letter was signed by Robinson.

The two counsels and Folkes expressed that a rehearing petition should have been filed. Robinson testified that, had she remained with the Commission, she "certainly"

would have filed a petition for rehearing on Folkes's behalf, as she thought his issue "was a winner." J.A. 723–24. And Dudek stated that, while he "wish[ed]" rehearing had been pursued, he had no specific recollection of reviewing Folkes's case at the time or making any decision regarding the merits of further review. J.A. 699–701, 713, 717. Lastly, Folkes explained that, had he known of the option, he would have wanted to press his appeal before the state Supreme Court.

On January 14, 2014, the state PCR court dismissed all of Folkes's claims. In its factual summary, the state court described these events at length. However, in dismissing Folkes's failure-to-file claim, the state court dealt with none of the facts described above nor the intertwined lack-of-consultation issue. Instead, the state PCR court only addressed the failure-to-file component. In dismissing this claim, it relied on two U.S. Supreme Court cases, *Wainwright v. Torna*, 455 U.S. 586 (1982), and *Ross v. Moffitt*, 417 U.S. 600 (1974), for the proposition that "[a]n individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review." J.A. 800–03. The state PCR court also cited *Douglas v. State*, 631 S.E.2d 542, noting that in South Carolina, appellate counsel has no duty "to pursue rehearing and/or certiorari following the decision of the [South Carolina] Court of Appeals in a criminal direct appeal." J.A. 802–03 (quoting *Douglas*, 631 S.E.2d at 543–44). The state court concluded that, because Folkes's counsel had no state-law duty to pursue rehearing or certiorari and he had no constitutional right to effective assistance of counsel during discretionary appellate review anyway, his failure-to-file claim lacked merit.

Folkes then filed a petition for certiorari to the Supreme Court of South Carolina. This petition outlined all the conduct leading up to the failure to file a rehearing petition, including Robinson's departure, Folkes's subsequent lack of representation, and the existence of the erroneous, forged letter. The Supreme Court of South Carolina transferred the appeal to the South Carolina Court of Appeals, which denied the petition on October 16, 2018.

Thereafter, Folkes filed a pro se federal habeas petition, raising the same claims previously rejected by the state PCR court. Recognizing the severe injustice reflected in the facts and the intertwined nature of the duty to consult and the duty to file, Judge Gergel posed a series of factual and legal questions to the parties and ordered further briefing as to Ground 3. *Folkes v. Nelsen* (*Folkes I*), No. 2:19-CV-0760-RMG, 2020 WL 728698, at *4 (D.S.C. Feb. 12, 2020); *see Folkes II*, 2021 WL 62577, at *5–7. The parties provided answers and additional briefs.

Judge Gergel understood Ground 3 to "assert[] a claim for ineffective assistance of appellate counsel from the time of the adverse decision of the South Carolina Court of Appeals on September 24, 2010[,] until the issuance of remittitur on October 18, 2010." Majority Op. at 8 (quoting *Folkes II*, 2021 WL 62577, at *4). Finding this issue to have been raised but not adjudicated in the state PCR court, Judge Gergel undertook de novo review. *See id.* at 9; *Folkes II*, 2021 WL 62577, at *9–10. Ultimately, Judge Gergel concluded that Folkes had been deprived of effective assistance of counsel at a critical stage of his direct appeal and was prejudiced by that failure. *Folkes II*, 2021 WL 62577, at *8–10.

The majority disagrees, arguing that this expanded interpretation of Ground 3 was neither properly raised in Folkes's § 2254 petition nor fairly presented to the state court. Majority Op. at 17–21. Consequently, the majority asserts that the district court reversibly erred by considering the claim and impermissibly "circumvent[ing] [the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')] framework." *Id.* at 21. The majority further asserts that even if this issue was properly before us, these events do not amount to a deprivation of Folkes's right to effective assistance of counsel, since he had no right to counsel at the time any error occurred. *See id.* at 32–34.

The majority errs by considering Folkes's pro se petition in a vacuum and by disregarding the extensive and egregious facts clearly implicating a limited duty to consult. This failure was properly before the state PCR court and the district court. Because the state PCR court declined to adjudicate the failure-to-consult issue on the merits, the district court was correct to review the issue de novo. Moreover, because the failures of counsel occurred during the tail end of Folkes's first appeal as of right, at which time there is a constitutional right to counsel, I agree with the district court's conclusion that Folkes demonstrated ineffective assistance of counsel.

II.

I turn first to the issue of whether the failure-to-consult argument was properly before the state PCR Court. The duty to file an appeal, in this instance, includes filing a petition for rehearing at the appellate court because that is a required step under South Carolina law before certiorari may be sought. *See* S.C. App. Ct. R. 242(c)–(d). Because

this Court has stated that counsel's duty to file an appeal and the duty to consult are intertwined, *see Gordon v. Braxton*, 780 F.3d 196, 200 (4th Cir. 2015), the failure-to-consult argument was fairly before the state court.

A "§ 2254 petitioner is required to 'exhaust' all state court remedies before a federal district court can entertain his claims." *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir. 1997) (quoting 28 U.S.C. § 2254(b)–(c)), *overruled on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (collecting cases). Thus, before we may hear a claim, the petitioner must show that the relevant issues were "fairly presented" to the state courts. *Matthews*, 105 F.3d at 911; *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994) (explaining that petitioner has the burden to make this showing).

"A claim is fairly presented when the petitioner presented to the state courts the '"substance" of his federal habeas corpus claim.'" *Matthews*, 105 F.3d at 911 (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (citation omitted)). To meet this requirement, a petitioner must "do more than scatter some makeshift needles in the haystack of the state court record." *Mallory*, 27 F.3d at 995 (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). "To satisfy his burden, the petitioner must show that 'both the operative facts and the controlling legal principles [were] presented to the state court.'" *Gordon*, 780 F.3d at 201 (quoting *Jones v. Sussex I State Prison*, 591 F.3d 707, 713 (4th Cir. 2010)); *Mallory*, 27 F.3d at 994–95 (stating that a claim "must be presented face-up and squarely" and that a "habeas petitioner cannot simply apprise the state court of the facts underlying a claimed constitutional violation," but "must also explain how those

alleged events establish a violation of his constitutional rights" (first quoting *Martens*, 836 F.2d at 717, then citing *Anderson*, 459 U.S. at 6)).

Our decision in *Gordon v. Braxton* is illustrative here. In *Gordon*, after failing to timely file a direct appeal, Gordon filed a pro se habeas petition in Virginia state court for ineffective assistance of counsel arising from his sentencing hearing. 780 F.3d at 199. Gordon later amended the petition to add a sixth claim alleging his trial counsel was ineffective since he "failed to file an appeal when asked to do so." *Id.* On this claim, the state PCR court found that Gordon failed to show ineffective assistance since he had merely inquired about an appeal, instead of directly requesting one. *Id.* at 200. The state court's decision thus focused on the failure to file an appeal, "but said nothing about counsel's duty to consult." *Id.* His petition for appeal to the Supreme Court of Virginia was denied. *Id.*

Thereafter, Gordon filed a pro se habeas petition in federal district court. *Id.* The district court dismissed his petition. *Id.* On appeal, this Court reversed. We noted that "Gordon's claim implicate[d] two related duties entrusted to criminal defense attorneys": the duty to file an appeal when so instructed and the duty to consult with a client, even if no appeal is expressly requested, "when a rational defendant would want to appeal or [the] client expresses an interest in appealing." *Id.* "Dereliction in either duty," we advised, "constitutes deficient performance." *Id.*

The State claimed that Gordon failed to exhaust his consultation claim because his state court petition only mentioned a failure-to-file claim. *Id.* We disagreed and held that the failure-to-consult issue had been fairly presented to the state court. *Id.* at 200–02. We

found the failure-to-consult issue implicit in the failure-to-file claim, noting that the two duties fell along a "spectrum" and were often addressed together. *Id.* at 201 (citations omitted). We further explained that facts alleged in the parties' filings, such as Gordon's inquiry "about what could be done after" sentencing, were sufficient to trigger counsel's duty to consult. *Id.* Moreover, we noted that the "parties' filings before the state court referred to *Strickland*, *Flores-Ortega*," and a state Supreme Court decision all of which discussed the duty to file and the duty to consult. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984) and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). Thus, because of the related nature of these duties and the presence of illustrative facts and legal authority in the record, we found the failure-to-consult theory to have been properly presented. *See id.* at 201–02.

The facts here are similar. In his state habeas petition, Folkes asserted an ineffective-assistance-of-counsel claim for appellate counsel's failure to file a petition for rehearing, his next step for appeal. As in *Gordon*, while the exact language of Folkes's petition did not separately assert the failure-to-consult issue, a review of the surrounding facts clearly implicated questions regarding the duty to file *and* the duty to consult. In *Gordon*, the petitioner indicated an interest in an appeal. *Id.* In this case, before he could even express such an interest, Folkes received a forged letter suggesting that an appeal had *already* been filed on his behalf and been denied. In other words, the failure to consult here interfered with Folkes's basic understanding of where his case stood and any attempt to request a rehearing he could or would have made.

Tellingly, Dudek and Robinson admitted that they believed a rehearing petition would have been appropriate and, as Folkes was facing life in prison, it is certainly reasonable to believe that Folkes would have wished to pursue any appeals available to him. In fact, Folkes confirmed that he would have wanted to pursue such an appeal. In short, the facts before the state court implicated a duty to consult since "there [was] reason to think . . . that a rational defendant would want to appeal" the decision. *Flores-Ortega*, 528 U.S. at 471.

Both the facts and the failure-to-consult argument were thus squarely presented to the state court within Ground 3 of Folkes's petition. Like the petitioner in *Gordon*, Folkes cited to *Strickland* and described the egregious facts indicating a failure-to-consult issue throughout his state-court filings. *See* Attach. #2 to Return and Mem. to Pet. for Writ of Habeas Corpus at 281–89, *Folkes II*, 2021 WL 62577 (No. 2:19-CV-0760-RMG). The facts implicating the duty to consult were hardly "scatter[ed] . . . makeshift needles in the haystack of the state court record." *Mallory*, 27 F.3d at 995 (quoting *Martens*, 836 F.2d at 717). Facts demonstrating counsel's early departure, Folkes's lack of subsequent representation, and the forged letter were front and center at the state PCR court evidentiary hearing. Thus, the state court was in no way left to divine the failure-to-consult issue from "[o]blique references . . . lurking in the woodwork," or "vague whispers . . . [of] a federal constitutional violation." *Id.* at 995–96. The failure-to-consult aspect of Ground 3 stared the state PCR court directly in the eyes.

Because the failure-to-consult argument was properly before the state PCR court as part of Ground 3, Folkes exhausted his state remedies.

III.

For similar reasons, the failure-to-consult argument was also properly before the district court. As noted above, the duty to file and the duty to consult are closely intertwined, such that arguments raising either one of these duties may exist under one ineffective-assistance-of-counsel claim through implication, even if one is not specifically invoked. *See Gordon*, 780 F.3d at 200–202, 202 n.2. For this very reason, we rejected the State's argument in *Gordon* that the petitioner should have identified counsel's failure to consult as a separate claim. *Id.* For the following reasons, we should not depart from that logic now.

A.

To begin, the situation here is akin to that in *Gordon*. Although, like in *Gordon*, the language of Ground 3 only specifically mentioned a failure to file, extensive facts developed in the record and noted in the state PCR court's decision clearly implicated counsel's duty to consult. So, also like in *Gordon*, Folkes's claim here effectively incorporates a failure-to-consult argument for relief. This notion is further supported by the fact that, in this case, the duty-to-consult and the duty-to-file theories arise from the same series of facts, all of which were before the state court when it made its decision. *See* Attach. #2 to Return and Mem. to Pet. for Writ of Habeas Corpus at 281–89, *Folkes II*, 2021 WL 62577 (No. 2:19-CV-0760-RMG). Moreover, both parties have acknowledged the close relationship between these two duties, as even the State's counsel at oral argument initially described these issues as "intertwined" and "part and parcel" of the same claim.

Oral Arg. at 3:20–3:32, 4:57–5:20, https://www.ca4.uscourts.gov/OAarchive/mp3/21-6217-20210917.mp3.[3]

Additionally, even if raising a failure-to-file claim would not be enough, on its own, for a counseled individual to show that he preserved his failure-to-consult argument, Folkes, like the petitioner in *Gordon*, filed his § 2254 petition pro se. And "[a] document filed *pro se* is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *United States v. Brown*, 797 F. App'x 85, 89 (4th Cir. 2019) (unpublished but orally argued) (noting that courts "are obliged to liberally construe filings by pro se litigants"); *Fitz v. Terry*, 877 F.2d 59, No. 88-7328, 1989 WL 64157, at *1 (4th Cir. 1989) (per curiam) ("Initially, *pro se* petitions are to be given a liberal construction."). Certainly, this generosity is not without limits. Courts need not anticipate arguments from fleeting or obscure references and should not "seek[] out the strongest arguments and most successful strategies for a party." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). However, we have previously noted that "liberal construction requires active interpretation in some cases," *Fitz*, 877 F.2d 59, 1989 WL 64157, at *2 (quoting *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (per curiam)), and that "litigants with meritorious claims should not be tripped up in court on technical niceties," *Beaudett*, 775 F.2d at 1278.

[3] He later backtracked and stated that they were different issues. Oral Arg. at 6:45–7:35.

Liberally construing Folkes's pro se petition, as we must, we should find that he sufficiently raised the failure-to-consult theory.

B.

The first section of the majority opinion focuses on strict adherence to procedural rules. Relying primarily on *Samples v. Ballard*, 860 F.3d 266 (4th Cir. 2017), the majority holds that Folkes never properly raised the failure-to-consult argument as a separate claim in his § 2254 petition. Majority Op. at 11–21. According to the majority, we should strictly construe the language of Folkes's pro se petition and only consider the exact wording—"fail[ure] to file a Petition for Rehearing"—when determining the scope of his claim. *Id.* at 4 (quoting J.A. 679); *see id.* at 19. However, this interpretation stretches *Samples* too far and undercuts the reasoning of our earlier decision in *Gordon*.[4]

First, the facts giving rise to our decision in *Samples* are not similar to those before us now. In *Samples*, this Court considered whether a magistrate judge abused their discretion in refusing to hear new ineffective-assistance-of-counsel claims admittedly raised for the first time in objections to the magistrate's proposed findings and recommendations. *Samples*, 860 F.3d at 268–270, 274–76. That is simply not the context we have here.

[4] These opinions need not conflict, but to the extent the majority believes they do, when there are "conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions." *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004).

Second, to the extent *Samples* stands for the proposition that petitioners, even pro se petitioners, should state the claimed grounds of relief discretely, *see id.* at 274–75, this general principle cannot override *Gordon*'s holding that these duties are so intertwined that raising one necessarily implicates the other. The majority stresses that in *Samples*, we explained that the petitioner's "express reliance on [his initial] four claims of ineffective assistance of counsel" were "to the exclusion of other claims of ineffective assistance of counsel." *Id.* at 275 (citing *Mayle v. Felix*, 545 U.S. 644, 661 (2005), for the proposition that different habeas claims "must be pleaded discretely"); *see* Majority Op. at 13–14, 17–19. Thus, the majority concludes that Folkes defaulted on the failure-to-consult theory by not raising it as a separate claim. Majority Op. at 17–21. But this conclusion stretches *Samples* beyond its context and, in doing so, runs counter to *Gordon*. *Gordon*, 780 F.3d at 200–02. Consequently, *Samples* does not control in this case.

Lastly, the majority contends that the Supreme Court decision in *Wainwright* involved "a claim identical" to that at issue here, thus prohibiting the application of *Gordon*'s reasoning to the duties of appellate counsel in wrapping up a direct appeal. Majority Op. at 27. I disagree. *Wainwright* held that a defendant could not be "deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely" because he had "no constitutional right to counsel" for a discretionary appeal. 455 U.S. at 587–88. But the Court in *Wainwright* had no reason to discuss any limited duty of consultation because the defendant's counsel "promised him that he would seek review in the Florida Supreme Court." *Id.* at 589 (Marshall, J., dissenting). Thus, in *Wainwright*, it appears that counsel spoke with his client about the opportunity and need to appeal. *See id.*

By contrast, here, neither Robinson nor any other attorney ever spoke with Folkes about the outcome of his direct appeal or the chance to file a petition for rehearing. *Folkes II*, 2021 WL 62577, at *4 ("What is undisputed is that . . . no attorney advised [Folkes] of the adverse decision of the Court of Appeals or of his right to seek further appellate review."). Indeed, no lawyer was officially representing Folkes at all during this time. Therefore, I disagree that *Wainwright* forecloses a limited duty to consult or severs all ties between the duty to consult and the duty to file at the appellate stage.

C.

The majority also faults Folkes for not using precise language or adhering strictly to all § 2254 filing requirements. Majority Op. at 17–21. And the majority's belief that it is tightly bound by these procedural rules is understandable. There are certainly reasons to require petitions, even pro se petitions, to adhere to these standards. But we should hesitate to draw such harsh lines where we are not truly obligated to do so. Courts should not be forced to sit by though clear injustice stares us in the face due to a self-imposed, unnecessarily strict application of procedural rules. The district court exercised discretion and common sense to address the injustice clearly present in the facts before it. Because Folkes's claim included the failure-to-consult theory, we should too.

IV.

Having found that the claim was properly presented under these extraordinary facts, the next step is to determine whether the state court adjudicated the failure-to-consult issue on the merits. It did not.

Under AEDPA, a federal court may only grant a state prisoner habeas relief "with respect to any claim that was adjudicated on the merits" if the state court's decision "was contrary to . . . clearly established [f]ederal law"; "involved an unreasonable application" of such law; or "was based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. § 2254(d); *see, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 100 (2011). However, if a state court fails to adjudicate the merits of a claim, then the "gloves come off" and federal courts may review the claim de novo. *Valentino v. Clarke*, 972 F.3d 560, 576 (4th Cir. 2020) ("[I]f a state court shuns its primary responsibility for righting wrongful convictions and refuses to consider claims of error, the weighty concerns of federalism and comity are diminished."); *see Gordon*, 780 F.3d at 202.

Whether the state court adjudicated the failure-to-consult issue on the merits "is a case-specific inquiry," *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012), and "a legal question that we review *de novo*," *Valentino*, 972 F.3d at 576. If a claim has been presented and denied by a state court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication . . . to the contrary," even if it did not give reasons for its opinion. *Harrington*, 562 U.S. at 99. The petitioner bears the burden of "overcoming this 'strong but rebuttable' presumption." *Valentino*, 972 F.3d at 576 (quoting *Johnson v. Williams*, 568 U.S. 289, 301 (2013)). However, this presumption is not insurmountable and "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Harrington*, 562 U.S. at 99–100.

Here, Folkes met this burden. The facts before the state PCR court "clearly implicated [counsel's] duty to consult, which the state court did not address at all." *Gordon*,

780 F.3d at 203–04. While the state court acknowledged the facts implicating a duty to consult and discussed appellate counsel's duty when seeking discretionary review, it said "nothing at all" in its analysis about Robinson's departure prior to the issuance of the Court of Appeals' opinion, the fact that no lawyer informed Folkes of the outcome of his appeal, or the misinformation provided by the forged form letter. *Id.* at 202 (finding that the state court failed to adjudicate the failure-to-consult issue on the merits since it (1) "unreasonably truncated further factual development" on that issue and (2) "said nothing at all about [petitioner's] assertion that [counsel] failed to consult with him"). And the cases upon which the state court relied do not clearly define what duties appellate counsel owes to an indigent defendant before the ink dries on their direct appeal opinion, let alone in the weeks before any opinion is issued. *See Porter v. Zook*, 898 F.3d 408, 425 (4th Cir. 2018) (finding the state habeas court failed to address a claim on the merits where it "*did not* recognize the governing legal principle[s]" and failed to recognize the distinction between two separate claims).

The notable lack of analysis on this issue gives "reason to think some other explanation for the state court's decision is more likely" than an assumption that it adjudicated it on the merits. *Harrington*, 562 U.S. at 99–100. This is particularly true when one considers the state court's repeated reference only to the failure to file the petition itself, excluding all conduct leading up to and effectuating that failure. The combination of

these considerations indicates that, contrary to implicitly adjudicating the issue, the state PCR court never decided the failure-to-consult issue at all.[5]

Consequently, the state PCR court failed to adjudicate the claim on the merits.

V.

Because the state PCR court did not adjudicate the failure-to-consult issue on the merits, the district court, and this Court, owe "no deference to the state court's ruling." *Gordon*, 780 F.3d at 204. Instead, we must review de novo the question of whether counsel's failure to consult constituted ineffective assistance. *Id.* at 202.

However, before reaching the merits of this argument, this Court must first determine, as the district court did, whether any right to counsel exists at the time the alleged failure occurred. If such a right does exist, then Folkes must demonstrate that counsel's failure was objectively unreasonable and resulted in prejudice. *Bostick v. Stevenson*, 589 F.3d 160, 166 (4th Cir. 2009) (citing *Strickland*, 466 U.S. at 688–90). I turn first to the foundational issue of whether Folkes had any constitutional right to representation at the time of appellate counsel's failure to consult with him.

A.

To have a Sixth Amendment claim for ineffective assistance of counsel, a defendant must first have the right to counsel. *Wainwright*, 455 U.S. at 587–88 (explaining that a

[5] The State argues otherwise. But notably, most of the cases cited by the State to give support for the notion that the state PCR court considered the failure-to-consult issue and adjudicated it reasonably, appear nowhere in the state PCR court's analysis of the issue.

defendant who has "no constitutional right to counsel . . . [cannot] be deprived of the effective assistance of counsel"). A defendant is entitled to effective assistance of counsel during a direct appeal as of right, just as he is so entitled at trial.[6] *E.g.*, *Smith v. Robbins*, 528 U.S. 259, 275–76 (2000); *Douglas v. California*, 372 U.S. 353, 357–58 (1963); *Tisdale v. State*, 594 S.E.2d 166, 167 (S.C. 2004). But a criminal defendant has no constitutional right to counsel in the pursuit of "discretionary appeals" beyond a "first appeal as of right." *Moffitt*, 417 U.S. at 607, 612, 619; *see Wainwright*, 455 U.S. at 587.

The majority posits that Supreme Court precedent establishes that the right to counsel on appeal truly pertains only to counsel's duty to *present* the client's case on appeal and mandates that said duty terminates before a defendant even knows the outcome of his first appeal. Majority Op. at 24–30, 32–38. I disagree.

Supreme Court precedent certainly establishes that a criminal defendant (1) has a constitutional right to have an appellate lawyer file a brief and support him in presenting his case during his direct appeal, *see, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985), and (2) has no right to have counsel file for a discretionary appeal, *Wainwright*, 455 U.S.

[6] The Sixth Amendment, made applicable to the States via the Fourteenth Amendment, establishes a defendant's right to counsel at the trial level and guarantees the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 392 (1985). The right of an indigent criminal defendant to counsel at the appellate level, by contrast, is grounded in the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *United States v. Marshall*, 872 F.3d 213, 217 (4th Cir. 2017). Despite this difference, where "a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel." *McCoy v. Ct. of Appeals of Wis.*, 486 U.S. 429, 436 (1988); *accord Evitts*, 469 U.S. at 396 ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

at 587–88. But this sets out only a floor and a ceiling—and what duties may exist in the space between these two parameters is not as settled as the majority suggests.[7]

As the district court acknowledged, whether the duty to consult—in this case to notify and advise a defendant of an adverse appellate decision and his remaining recourses—constitutes part of a direct appeal or the first step of a discretionary appeal, remains an open and debated question. *Folkes II*, 2021 WL 62577, at *9. Indeed, our sister circuits have taken conflicting positions on this issue.

Several circuits have adopted an approach in line with that espoused by the majority and found that counsel is not required either to notify their client of an adverse appellate decision or to advise them of the existence of remaining appeals or other avenues of relief. *See, e.g.*, *Miller v. Keeney*, 882 F.2d 1428, 1430–33 (9th Cir. 1989) (rejecting an ineffective-assistance claim based on appellate counsel's incorrect advice on subsequent appeals resulting in defendant's forfeiture thereof, explaining that when counsel gave defendant faulty advice, "she was no longer acting as counsel for his first appeal as of right; that appeal was long since gone, and with it went [defendant]'s constitutional right to the

[7] It is true that many of the Supreme Court's cases "dealing with the right to counsel—whether at trial or on appeal—have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor." *Evitts*, 469 U.S. at 394–95 n.6. But appellate representation requires more than simply filing a brief and then running for the hills. After all, another "aspect of counsel's role" is "that of [an] expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision[.]" *Id.* The question at issue here is simply where to draw the line. The majority would end appellate counsel's duties the second the court enters its decision, even though a defendant has not yet obtained the results. As explained below, I do not believe this line must be drawn with same the brushstroke as the docket entry.

effective assistance of counsel"); *Pena v. United States*, 534 F.3d 92, 94–96 (2d Cir. 2008) (rejecting the argument that a first-tier appeal "encompasses a requirement that his attorney inform him of the possibility of certiorari review and assist him with filing a petition" as "ingenious, but *wrong*" (quoting *Chalk v. Kuhlmann*, 311 F.3d 525, 529 (2d Cir. 2002))); *Moore v. Cockrell*, 313 F.3d 880, 881–82 (5th Cir. 2002) (rejecting a defendant's claim that his appellate counsel was ineffective for "failing to notify him timely of the outcome of his direct appeal," thereby preventing him from filing a timely discretionary appeal, because the "constitutionally secured right to counsel ends when the decision by the appellate court is entered"); *cf. Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008) (finding no constitutional ineffective-assistance-of-counsel claim where the appellate attorney sent a letter to the defendant informing her of his decision not to file a petition for writ of certiorari, but not informing her of the procedure and time limits for filing a certiorari petition pro se).

The Sixth Circuit, however, has leaned away from such a harsh rule, finding that the Constitution requires counsel to notify a defendant of the outcome of his direct appeal and that a failure to do so "constitutes constitutionally deficient performance." *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 435 (6th Cir. 2006); *see id.* at 433. In *Gunner v. Welch*, a Sixth Circuit panel extended this right to hold that an appellate attorney had a constitutional duty to inform his client of the existence of and deadlines for collateral relief,

even though counsel had no duty to file the application itself.[8] 749 F.3d 511, 517–19 (6th Cir. 2014). The Fourth Circuit has yet to decide this issue, but the district court found the Sixth Circuit's reasoning in *Smith* persuasive. Because a defendant is entitled to effective assistance throughout his *entire* first appeal as of right, I agree.

The Supreme Court has recognized that the right to representation is a "fundamental component of our criminal justice system" and that "[l]awyers in criminal cases 'are necessities, not luxuries.'" *United States v. Cronic*, 466 U.S. 648, 653 (1984). In fact, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Id.* at 654 (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)). The appointment of counsel is not intended to be a "sham" or token tip of the hat to the constitutional requirement. *Id.* at 654. Thus, the right to counsel necessarily ensures the right to *effective assistance* of counsel at all critical stages. *Id.* at 654, 659; *see Penson v. Ohio*, 488 U.S. 75, 88 (1988).

[8] The majority distinguishes *Gunner* by noting that it (1) discussed a right to initial review on collateral proceedings for which the Supreme Court in *Martinez v. Ryan* recognized that there "may" be a constitutional right to counsel, and (2) is not controlling Sixth Circuit precedent. Majority Op. at 43 (emphasis omitted) (quoting *Martinez v. Ryan*, 566 U.S. 1, 8–9 (2012)); *see id.* at 43–48. But, as the majority admits, the *Gunner* panel stated that it would find the same duty "even before the holding in *Martinez*." 749 F.3d at 519; *see* Majority Op. at 44–45. Moreover, while the majority is correct that *Gunner* is not controlling Sixth Circuit law, Majority Op. at 45–48, it need not be for the reasoning employed by the *Gunner* panel to be logically persuasive—which is the sole question we must consider in looking to out-of-circuit precedent anyway.

It does not automatically follow that because a defendant has no right to counsel in pursuing a discretionary appeal, he has no right to counsel in the conclusion of his direct appeal. Because a combination of the Sixth Circuit's approach in *Smith* and the panel's reasoning in *Gunner* accounts for this narrow distinction, those views are the most persuasive among those expressed by our sister circuits. As the Sixth Circuit has repeatedly recognized, appellate counsel's duties do not end after filing briefs or even after the opinion is issued. Instead, the Sixth Circuit has explained that "[b]ecause a defendant is entitled to effective assistance of counsel on direct appeal, such an individual must be accorded effective assistance of counsel throughout *all* phases of that stage of the criminal proceedings." *Smith*, 463 F.3d at 433 (quoting *White v. Schotten*, 201 F.3d 743, 752–53 (6th Cir. 2000), *overruled on other grounds by Lopez v. Wilson*, 426 F.3d 339, 341 (6th Cir. 2005) (en banc)).

Consequently, I believe this duty encompasses notifying a defendant of the outcome of a proceeding and advising the client about the existence of further appeals. *See Gunner*, 749 F.3d at 517. The "Constitution requires 'that counsel make objectively reasonable choices,' . . . not only *during* the legal proceeding for which the counsel represents the client, but also *after* the judicial proceeding has concluded in determining whether an appeal should be filed." *Smith*, 463 F.3d at 433–34 (quoting *Flores-Ortega*, 528 U.S. at 479). So, where counsel "delay[s] in informing [a] defendant of the decision on his first appeal of right" and "fail[s] to communicate to his client how to proceed with further appeals, it cannot fairly be said that [the defendant] truly had his first appeal of right." *Gunner*, 749 F.3d at 517 (internal quotations omitted). Though the duty to consult and the

duty to file are closely intertwined and often considered in tandem, they are distinct legal obligations—counsel may violate one without running afoul of the other. *See id.* at 519. Thus, while a defendant cannot "complain of the failure of counsel to file an application for relief to which the Constitution did not entitle him, . . . that is an altogether different question from whether a defendant can complain about the failure of counsel to advise him of relief that may be available to him or of the necessity to proceed expeditiously if he wishes to obtain such relief." *Id.* This is precisely the situation we have before us now.

At a minimum, the scope of a direct appeal includes a constitutional duty of defense counsel to notify a defendant of the ultimate resolution of that direct appeal. *See Smith*, 463 F.3d at 433.[9] "The court's ultimate decision regarding a particular legal proceeding is *part of that legal proceeding*, and [defense] counsel's duties in representing a client during that legal proceeding include the duty of informing her client of the outcome of the proceeding." *Id.*; *cf. Ex parte Wilson*, 956 S.W.2d 25, 27 (Tex. Crim. App. 1997) (discussing state code, state case precedent, and U.S. Supreme Court precedent and finding that since "the scope of the right to counsel is governed by the right to which it attaches[, i]t makes sense that counsel on direct appeal must inform a defendant of the result of the appeal"). Accordingly,

[9] In finding that a defendant did not require an attorney to pursue discretionary appeals, the Supreme Court noted that a defendant at such a stage will have access to the relevant materials—including the disposition of the Court of Appeals—required to file a petition. *See Ross*, 417 U.S. at 615 ("At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."). While a defendant may benefit from counsel at any stage, he is sufficiently equipped with these materials to file a petition on his own. But the issue still remains: without notice of an adverse decision, there is nothing for a pro se defendant to appeal.

"a decision cannot be logically separated from the proceeding itself; it is the necessary end point of a single process." *Gunner v. Welch*, No. 3:09 CV 3009, 2011 WL 10467929, at *8 (N.D. Ohio Mar. 29, 2011), *report and recommendation adopted*, No. 3:09 CV 03009, 2013 WL 774154 (N.D. Ohio Feb. 28, 2013), *rev'd and remanded on other grounds*, 749 F.3d 511 (6th Cir. 2014). "The mouth and the source are different points, but manifestly a single river. As such, if the [C]onstitution requires counsel when a defendant journeys on the river, counsel's responsibilities include, in essence, making the full trip." *Id.* Failing to acknowledge counsel's duty to inform a defendant of an appellate court's ultimate resolution of his case essentially allows counsel to hurl his client overboard before reaching the safety of the docks.[10] This cannot be consistent with what our Constitution requires.

Similarly, the right to counsel on direct appeal includes some duty to consult, even if in a more limited fashion than what is required at the trial stage. As such, counsel must inform a defendant of the next stage of appeals and any corresponding procedural requirements, even if we do not require them to offer any advice on the merits of pursuing

[10] A defendant who is uninformed of the appellate court's decision, through no fault of his own, cannot reasonably be expected to timely pursue an appeal of his own accord. After all, if a defendant is not notified by anyone of the outcome of his case, he does not even know that there is anything to appeal—let alone the date on which his time to appeal began to run. *See Smith*, 463 F.3d at 434 ("The only way that [the defendant] could have learned of the unpublished decision of the Ohio Court of Appeals affirming his conviction was if his counsel notified him. When she failed to do so, [the defendant] was without any means of notice of the decision and thus did not and could not know that the . . . deadline for filing a notice of appeal . . . had started to run.").

further relief.[11] *See Gunner*, 749 F.3d at 517 ("[J]ust as the debt collector was obligated to inform his principal of the necessity to take immediate legal steps to collect the debt, even though he was not obligated to take those legal steps, [counsel] was obligated to communicate comparable information to petitioner."). Criminal law is complex. The majority sets the bar too high by requiring a pro se, indigent, and imprisoned defendant, who is without knowledge that the direct appeal has ended and under the reasonable belief that he is represented by counsel, to retain alternative counsel[12] and file a timely appeal.

Requiring counsel to merely inform a defendant of when their next ship will depart is a far cry from requiring counsel to serve as the captain of that ship. *See id.* (explaining that where appellate counsel "knew or should have known that this proceeding had to be brought within 180 days of the date on which the trial transcript was filed with the Ohio

[11] *Compare Paris v. Turner*, No. 97–4129, 1999 WL 357815, at *3 (6th Cir. May 26, 1999) (unsigned order) (finding ineffective assistance of counsel sufficient to excuse procedural default where petitioner's counsel "on his appeal of right gave him no guidance on how to further appeal and failed to develop the legal issues that would most likely allow [him] to succeed" and noting that "it would be unjust to blame a layman" for appellate counsel's failure since "[t]hey did not inform him that he was in danger of procedural default and as a layman it would not be evident to him that his claim might procedurally expire while in the hands of the Public Defender"), *with Hale v. Burt*, 645 F. App'x 409, 417 (6th Cir. 2016) ("There is no principled difference between having counsel *represent* a defendant during a second, discretionary appeal and having counsel *advise* a defendant on *whether or not to seek* a second, discretionary appeal, and a criminal defendant does not have a constitutional right to counsel to pursue second, discretionary state appeals.").

[12] At the PCR hearing, Dudek testified that the South Carolina Court of Appeals "no longer accept[s] pro se petitions for rehearing." J.A. 698–99. Robinson concurred, stating that the appeals court "at some point . . . stopped accepting" pro se rehearing petitions. J.A. 717–18. Neither party challenged this interpretation of state procedural rules in briefing. Assuming this is true, Folkes needed to retain alternative counsel to file a brief on his behalf—something he could only do if he knew it was necessary.

Court of Appeals, and he also knew that his client would surely have not known when the trial transcript was filed or of the necessity to take immediate legal steps," he was "obligated to communicate" that information to the petitioner, even though he had no obligation to pursue the next steps himself); *see also id.* at 519. In short, counsel should be required, as part of a defendant's direct appeal, to at least inform his client of what the immediate next step may be, as well as any applicable time limits or procedural requirements. *See id.* at 517–19.

Adopting a contrary approach leads to unsettling results. A rule that releases appellate counsel from all constitutional obligations the moment an opinion is issued, or in this case ten days *before* that point, seems unduly harsh and out of step with the duties required of counsel in parallel circumstances. What sense does it make to equip an indigent defendant with counsel, who zealously pursues an appeal, only to leave him in the dark about the outcome? Or to only inform a defendant sitting in prison, facing a lifetime behind bars, of the outcome of his direct appeal so late that any further review is foreclosed? The constitutional right to appellate counsel must cover more than merely filing the briefs and allowing counsel to depart without a word. Otherwise, an indigent defendant has no meaningful recourse as we would effectively put the onus on criminal defendants to be ready to fend for themselves at all times, since if counsel withdraws without notice, it is the defendant whose rights are sacrificed. That is precisely what happened here.

B.

The foregoing discussion shows why the Sixth Amendment requires counsel to notify an indigent defendant of the outcome of his direct appeal and advise the defendant

of the next potential avenue for appeal. Thus, because there is a right to counsel during all stages of the direct appeal, the next question is whether Folkes has successfully showed he was deprived of effective assistance of counsel. He has.

To prove ineffective assistance of counsel, a petitioner "must show [(1)] that counsel's performance was . . . objectively unreasonable under prevailing professional norms and (2) that petitioner was prejudiced by that deficient performance." *Bostick*, 589 F.3d at 166 (citing *Strickland*, 466 U.S. at 688–90).

1.

Under the first *Strickland* prong, a court must ask "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. The rules reflected in the American Bar Association standards "are guides to determining what is reasonable," though they are not dispositive. *Id.* at 688–69. Our review of counsel's performance "must be highly deferential." *Id.* at 689.

Here, there can be no question that appellate counsel's actions were objectively unreasonable. Before a decision was even issued, appellate counsel left her job and failed to inform either Folkes or the court of her departure, despite ethical obligations to do so. *See* S.C. App. Ct. R. 264. The record suggests that no one at the Commission reviewed Folkes's case, let alone informed him of a change in representation, leaving him constructively unrepresented during the tail end of his appeal. Then when an unpublished per curiam opinion came down, no attorney informed Folkes of the adverse decision against him or consulted with him at all. *Folkes II*, 2021 WL 62577, at *4 ("What is undisputed is that neither Mr. Dudek nor any other attorney moved to be substituted as

Petitioner's counsel upon Ms. Robinson's departure and that no attorney advised Petitioner of the adverse decision of the Court of Appeals or of his right to seek further appellate review."); *see Standards for Crim. Just.–Def. Function* § 4-9.2(i) (Am. Bar Ass'n 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourth Edition/ (stating that "[i]f appellate counsel's representation ends but further appellate review is possible, appellate counsel should advise the client of further options and deadlines, such as for a petition for *certiorari*") (saved as ECF opinion attachment); *Gunner*, 749 F.3d at 517 (discussing the duties of an agent and finding that an appellate attorney had a duty to inform his client of the existence of and deadlines for collateral review where the timing was "integrally related to the filing of the transcript on direct appeal"); *cf.* Jonathan M. Purver & Lawrence E. Taylor, *Handling Criminal Appeals* § 186 (Mar. 2022 Update) ("If counsel has lost on appeal, he has a duty to his client to fully explain the meaning of the court's decision and what further avenues of review are open. An explanation to the client as to how he may petition for further review, *with special attention to informing him of the time limits involved*, should be rendered.").

This lack of notice and consultation is particularly glaring since Dudek and Robinson testified that they believed there to be not only nonfrivolous grounds for appeal, but strong ones. And there was every suggestion that a rational defendant would wish to appeal in this case, since Folkes was facing a life sentence. *See Flores-Ortega*, 528 U.S. at 480 (noting that trial counsel has a "constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think . . . that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)").

Finally, the only sliver of communication Folkes *did* receive came from a form letter, with a forged signature from his former attorney (who, as far as he knew, was still his attorney), erroneously informing him that the Court of Appeals denied his petition for certiorari and that he had therefore exhausted his state court remedies. Notably, some of this conduct occurred *before* any appellate court "passed" upon his claim, *see Douglas*, 372 U.S. at 356, and all of it occurred *before and apart from* any filing for a rehearing on the part of appellate counsel.

Accordingly, appellate counsel's conduct was objectively unreasonable.

2.

Even if an error by counsel is "professionally unreasonable," a court may not set aside the judgment unless the alleged deficiency is prejudicial to the defense. *Strickland*, 466 U.S. at 691–92. However, "[a]ctual or constructive denial of the assistance of counsel altogether is legally *presumed* to result in prejudice." *Id.* at 692 (emphasis added). In *United States v. Cronic*, the Supreme Court found this presumption appropriate where "the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659. The same concept applies on appeal. *Flores-Ortega*, 528 U.S. at 483; *Penson*, 488 U.S. at 88. A "critical stage" is one that holds "significant consequences for the accused." *Woods v. Donald*, 575 U.S. 312, 315 (2015) (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)).

It is hard to imagine a more "critical stage" with "significant consequences for the accused" than the time at which a court issues its decision—particularly when that decision, short though it may be, affirms a life sentence. Additionally, the time at which a court issues its opinion is supremely important for any number of subsequent remedies, as many

direct and collateral appeals have timeliness requirements. *See, e.g.*, S.C. App. Ct. R. 221(a) ("Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court."); 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]"). A defendant cannot timely appeal a decision he does not know has been issued. *See Smith*, 463 F.3d at 434. Yet during this crucial time, Folkes was not only bereft of counsel, but unaware of that fact.

This case bears a striking resemblance to the Supreme Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012). In *Maples*, while the petitioner's state postconviction claim was still pending, his two attorneys of record left their firm and ceased to represent him. *Id.* at 270. Neither informed the petitioner of their departure, sought leave of the court to withdraw, or moved for substitution of new counsel. *Id.* at 270–71, 275. Months later, the state court denied the petitioner's claim and sent notice to the counsel of record. *Id.* However, as there was "no attorney of record in fact acting on [petitioner's] behalf," the postings "were returned, unopened" and the time to appeal ran out. *Id.* at 271. The petitioner subsequently petitioned for a writ of habeas corpus in federal court. *Id.* However, the district court and Eleventh Circuit "rejected his petition, pointing to the procedural default in state court, *i.e.*, [the petitioner's] failure timely to appeal the [state] trial court's order denying him postconviction relief." *Id.* The Supreme Court determined that the

"extraordinary facts" of the petitioner's case demonstrated "cause"[13] sufficient to "excuse the default." *Id.* Concluding that the petitioner was "[a]bandoned by counsel . . . [and] left unrepresented at a critical time for his state postconviction petition," the Court noted that the petitioner "lacked a clue of any need to protect himself *pro se*." *Id.* The default, therefore, could not be laid at the petitioner's "death-cell door." *Id.*

Here, like in *Maples*, Folkes "was disarmed by extraordinary circumstances quite beyond his control." *Id.* at 289. During the pendency of his direct appeal, counsel abandoned him without giving him notice or seeking leave of the court, and no lawyer officially took over his representation. Folkes not only had no reason to believe he lacked representation, but also had every reason to think Robinson *was* still representing him. He heard nothing indicating otherwise, and in fact received a letter purportedly signed by her, expressly informing him that she had filed a petition for certiorari on his behalf that had been denied. Folkes, like the petitioner in *Maples*, lacked any indication that he "need[ed] to protect himself" either pro se or by seeking new counsel. *See id.* at 271. Because Folkes

[13] "Cause for a procedural default exists where 'something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . "impeded [his] efforts to comply with the State's procedural rule."'" *Maples*, 565 U.S. at 280 (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), *holding modified by Martinez*, 566 U.S. at 9). Because there "is no constitutional right to an attorney in state post-conviction proceedings[,]" and therefore no right to ineffective assistance of counsel in such proceedings, the Court in *Maples* did not look to constitutional rights when considering the duties of counsel, but instead focused on agency principles. *Coleman*, 501 U.S. at 752; *see Maples*, 565 U.S. at 280–81. As Folkes does not argue cause to excuse any procedural default, my focus here is on the constitutional claim of ineffective counsel.

was constructively denied assistance of counsel altogether during the conclusion of his direct appeal, prejudice may fairly be presumed. *See Strickland*, 466 U.S. at 692.

However, even if the court's ultimate resolution of a criminal case cannot be considered a "critical stage" of review, Folkes can still demonstrate prejudice here. A defendant can establish prejudice "when he demonstrates a reasonable probability that he would have filed an appeal 'but for' counsel's failure to file or consult." *Gordon*, 780 F.3d at 200 (quoting *Flores-Ortega*, 528 U.S. at 484). In this situation, a "defendant need not show that his appeal has merit." *Id.*

Here, Folkes testified that, had he known of the option, he would have wanted to press his appeal before the state Supreme Court. Dudek and Robinson indicated that they would have filed a rehearing petition on Folkes's behalf, had the choice been before them. And, even though Dudek testified that the decision to file for a rehearing rests with appellate counsel and may not be filed pro se, he acknowledged that, if advised, Folkes could have obtained alternative counsel and proceeded with the appeal.

Consequently, Folkes has sufficiently demonstrated prejudice resulting from appellate counsel's failure to notify and advise.

VI.

For the reasons stated above, this is not a close case, but one in which the error of counsel is glaring. District courts are not obligated to bury their heads in the sand due solely to a self-imposed, overly restrictive interpretation of procedural rules and allow injustice

to silently proceed—particularly when, as here, it is not necessary to draw such uncompromising lines based on the unique facts before us.

Here, Judge Gergel exercised discretion and common sense to overcome a procedural bar to remedying a glaring injustice.[14] We should too. Accordingly, we should affirm the district court's decision.

[14] Moreover, it is worth noting that the remedy sought here is not expansive. *Folkes II*, 2021 WL 62577, at *10 n.6. Instead, the district court fashioned the remedy based on that provided in *Bostick*, 589 F.3d at 168, and ordered that Folkes be released from prison *only if* the State of South Carolina refused to reinstate his right to discretionary appellate review. *See Folkes II*, 2021 WL 62577, at *10 & n.6 (explaining that the remedy at issue was "fashioned to restore Petitioner's right to seek discretionary review of the South Carolina Court of Appeals adverse decision of September 24, 2010").

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Clinton Folkes, # 216506, Petitioner, v. Warden Nelsen, Respondent.	)	Civil Action No. 2:19-0760-RMG **ORDER AND OPINION**

Before the Court is the Petitioner's petition for a writ of habeas corpus on a single remaining ground, Ground 3, challenging the effectiveness of appellate counsel following the issuance of the adverse decision of the South Carolina Court of Appeals on September 24, 2010 until the issuance of the remittitur on October 18, 2010. The Magistrate Judge issued a Report and Recommendation ("R & R") recommending that Respondent's motion for summary judgment be granted. (Dkt. No. 38.) Petitioner filed objections to the R & R and the Respondent filed no reply. (Dkt. No. 39.) For reasons set forth below, the petition is granted.

I. Background

Petitioner Clinton Folkes proceeded *pro se* to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is incarcerated on a term of life imprisonment without possibility of parole. In 2008, he was tried in the Richland County Court of General Sessions and found guilty by a jury of assault and battery with intent to kill. The conviction stemmed from a July 2007 physical fight during which Petitioner cut a man in the neck with a knife and was heard at the time, by witnesses who testified at trial, to have said, "I should have killed you[.]" (Dkt. No. 14-1 at 245, 247, 436.)

The Warden moved for summary judgment on Petitioner's § 2254 motion, to which Petitioner responded in opposition. The Court granted summary judgment as to Grounds One, Two, and Four through Twenty-Two, denied summary judgment without prejudice as to Ground Three, and appointed Petitioner counsel because there were substantial issues raised by Ground Three that were not adequately briefed by Respondent or Petitioner, who was at that time proceeding *pro se*. (Dkt. No. 28.) The Court, therefore, set a supplementary briefing schedule and directed the parties to address seven specific issues. (Dkt. No. 30.) The parties have submitted this supplemental briefing, and the Magistrate Judge now recommends that the Court grant summary judgment to dismiss the remaining Ground Three. Petitioner filed an objection to this recommendation. (Dkt. No. 39.)

II. Legal Standard

A. Review of R & R

The Magistrate Judge makes a recommendation to the Court that has no presumptive weight and the responsibility to make a final determination remains with the Court. *See, e.g.*, *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Where there are specific objections to the R & R, the Court "makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id*. In the absence of objections, the Court reviews the R & R to "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note; *see also Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983) ("In the absence of objection . . . we do not believe that it requires any explanation.").

B. Motion for Summary Judgment

Summary judgment is appropriate if a party "shows that there is no genuine dispute as to any material fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In other words, summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Props.,* 810 F.2d 1282, 1286 (4th Cir. 1987). "In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party." *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996). The movant has the initial burden of demonstrating that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, to survive summary judgment the respondent must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, "[c]onclusory or speculative allegations do not suffice, nor does a 'mere scintilla of evidence'" in support of the non-moving party's case. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (quoting *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 287 (4th Cir. 1999)).

C. Federal Habeas Relief Pursuant to 28 U.S.C. § 2254

A state prisoner who challenges matters "adjudicated on the merits in State court" can obtain federal habeas relief only if he shows that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" 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). When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because

that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). The state court's application is unreasonable if it is "objectively unreasonable, not merely wrong." *White v. Woodall*, 572 U.S. 415, 419 (2014). Meaning, the state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The state court's determination is presumed correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The state court's decision "must be granted a deference and latitude that are not in operation" when the case is considered on direct review. *Harrington*, 562 U.S. at 101. This is because habeas corpus in federal court exists only to "guard against extreme malfunctions in the state criminal justice systems." *Id*. at 102 (citation and internal quotation marks omitted). Accordingly, pursuant to 28 U.S.C. § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. *Harrington*, 562 U.S. at 102. "If this standard is difficult to meet, that is because it was meant to be." *Id*.

Before the petitioner may pursue federal habeas relief to this standard, he must first exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). The petitioner "must present his claims to the state's highest court," *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (abrogated on other grounds by *United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011)), which requires the petitioner to have "fairly present[ed] to the state court both the operative facts and

the controlling legal principles associated with each claim." *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks omitted). A federal habeas court should not review the merits of claims that would be found to be procedurally defaulted or barred under independent and adequate state procedural rules. *Lawrence v. Banker*, 517 F.3d 700, 714 (4th Cir. 2008). Rather, for a procedurally defaulted claim to be properly considered by the federal habeas court, the petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

III. The Critical Factual Issues and the Court's Seven Questions

Ground Three of Petitioner's § 2254 petition alleges:

> Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina.

(Dkt. No. 1-1 at 7.)

A petitioner may demonstrate ineffective assistance of counsel by showing the attorney's work was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it was unreasonable under the circumstances of the case and the then-prevailing professional norms. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). To meet the *Strickland* standard, "an attorney's performance must be objectively unreasonable." *Bostick v. Stevenson*, 589 F.3d 160, 166 (4th Cir. 2009). Prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Kimmelman*, 477 U.S. at 384. Where a defendant loses his appeal rights due to counsel failing to consult and inform him of his appellate

rights, prejudice may be shown by establishing that "but for [counsel's] failure, he would have timely appealed." *Bostick*, 589 F.3d at 168.

The *Strickland* test for ineffective assistance of counsel is highly deferential to the attorney, and the standard for § 2254 relief is itself highly deferential to the state court. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). As a result, when the state court adjudicated an ineffective assistance claim on its merits, the § 2254 district court's review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The district court's focus is "not whether counsel's actions were reasonable," but rather "whether there is any reasonable argument that [the petitioner's] counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

On his direct appeal, Petitioner was represented by M. Celia Robinson, a member of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, who raised the following issue on direct appeal: "Did the trial judge err reversibly in refusing to issue the requested charge on the lesser included offense of Assault and Battery of a High and Aggravated Nature (ABHAN) indicating that the absence of malice is not a required element for an ABHAN conviction?" (Dkt. No. 14-1 at 455.) On September 24, 2010, the South Carolina Court of Appeals affirmed Petitioner's conviction in a *per curiam* opinion. (*Id*. at 489-90.) Ms. Robinson, although still counsel of record to Petitioner, had left the Commission on Indigent Defense on September 14, 2010 and was no longer providing any legal representation to Petitioner. In clear violation of South Carolina Appellate Court Rule 264, she had not provided Petitioner notice of her withdrawal, petitioned the South Carolina Court of Appeals to withdraw, obtained an order from the Court of Appeals to withdraw, or provided notice of her withdrawal to the opposing party.

Following the issuance of the adverse decision by the South Carolina Court of Appeals, no attorney advised Petitioner of the decision, nor informed him of his right to seek further review via a petition for rehearing before the South Carolina Court of Appeals or a petition for certiorari before the South Carolina Supreme Court. Further, no attorney advised Petitioner that if he failed to timely seek further relief, his right to pursue a state court appeal would end.

Respondent contends that the Chief Appellate Defender, Robert Dudek, assumed responsibility for all of Ms. Robinson's pending cases upon her departure from the office. However, Mr. Dudek had no recollection of reviewing the adverse decision of the South Carolina Court of Appeals, nor of assessing whether a petition for further relief should be sought, nor is there any record evidence that he performed any legal services on Petitioner's behalf during the period from the issuance of the adverse decision on September 24, 2010 until the filing of the remittitur on October 18, 2010. (Dkt. No. 14-2 at 57-58, 71.) What is undisputed is that neither Mr. Dudek nor any other attorney moved to be substituted as Petitioner's counsel upon Ms. Robinson's departure and that no attorney advised Petitioner of the adverse decision of the Court of Appeals or of his right to seek further appellate review. Ms. Robinson testified at the state PCR hearing that had she still been representing Petitioner when the decision was entered, she would have petitioned for rehearing and certiorari. (*Id*. at 81.) Mr. Dudek testified at the same hearing that he disagreed with the South Carolina Court of Appeals decision. (*Id.* at 60-61.)

In his PCR action, Petitioner raised whether "Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals, thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina." (Dkt. No. 14-2 at 335.) This ground asserts a claim for ineffective assistance of appellate counsel from the time of the adverse decision of the South Carolina Court of Appeals on September 24, 2010 until the

issuance of the remittitur on October 18, 2010. The PCR court denied the claim, reasoning that because criminal appellate counsel has no duty to pursue rehearing or certiorari and a petitioner has no constitutional right to effective assistance of counsel when seeking discretionary appellate review, Petitioner could not demonstrate deficiency and prejudice. (Dkt. No. 14-2 at 338.) The PCR court did not address the issue of whether appellate counsel's performance was ineffective in the immediate post-decision period when the appeal remained before the Court of Appeals and Petitioner was given no notice of the adverse decision or of his right to seek further appellate review.

On September 28, 2010—four days after the South Carolina Court of Appeals adverse decision—Petitioner was sent a letter on the letterhead of the South Carolina Commission on Indigent Defense, purportedly signed by Ms. Robinson, stating that the South Carolina Court of Appeals had denied his petition for certiorari and granted a petition for counsel to be relieved. The letter further stated that Petitioner had now exhausted his state court remedies. There is no dispute that Ms. Robinson's signature was a forgery and that the letter was sent by a paralegal without any supervision or knowledge of a licensed attorney. (Dkt. No. 14-2 at 80-81.) Further, there is no dispute that this letter contained multiple false statements, including that (1) a petition for certiorari had been submitted, (2) an order had been issued denying certiorari review, (3) an order had been issued relieving Ms. Robinson as counsel, and (4) Petitioner's right to seek further state court review had been exhausted.[1]

[1] The September 28, 2010 letter on the letterhead of the South Carolina Commission on Indigent Defense and purportedly hand signed by Ms. Robinson, states, *inter alia*: "Enclosed is a copy of the Order of the Court of Appeal's [sic] denying our Petition for Writ of Certiorari, and granting the petition to be relieved. This means that you have now exhausted your state court remedies." Petitioner was then advised of the one year statute of limitations regarding any petition for habeas corpus in federal court. (Dkt. 14-2 at 253).

Now, to determine whether Ground Three of this § 2254 should be dismissed on summary judgment, the Court directed the parties to address seven specific questions (Dkt. No. 30), to which Respondent and Petitioner answered (Dkt. Nos. 31, 32, 34).[2] The Court reviews the answers, and provides its own assessment of them, in turn:

A. Did an attorney acting on behalf of Petitioner review the decision of the South Carolina Court of Appeals of September 24, 2010 and make a determination whether a petition for rehearing should be filed? If the answer is in the affirmative, identify that attorney.

Petitioner: No.

Respondent: Respondent's answer is unclear, instead offering that (1) Dudek "reviewed the judicial opinions on [Robinson's] cases as they were received" and (2) "[d]espite conflicting evidence, it appears that Dudek made the decision not to seek certiorari in petitioner's case."

Analysis: There is no record evidence that any attorney reviewed the adverse decision of the South Carolina Court of Appeals or made any determination whether a petition for rehearing should be filed. Respondent's claim that Mr. Dudek *may* have conducted such a review is inconsistent with his testimony that he had no recollection of conducting such a determination and regretted that no petition for rehearing had been filed. (Dkt. No. 14-2 at 58.)

B. Did an attorney acting on behalf of Petitioner consult with him regarding whether a petition for rehearing should be filed following the decision of the South Carolina Court of Appeals on September 24, 2010? If the answer is in the affirmative, identify that attorney.

Petitioner: No.

Respondent: No. ("[I]t appears no attorney personally consulted with petitioner after the Court of Appeals issued its opinion.")

Analysis: There is no dispute of material fact: no attorney acting on behalf of Petitioner consulted with him regarding petitioning for rehearing.

[2] Petitioner answered each question squarely and directly in a clear format, by listing each question and stating yes or no with supporting reasoning. Respondent, by contrast, twice provided a block narrative answer containing argument that does not squarely answer each question asked.

C. Were the decisions whether to file a request for rehearing and a petition for certiorari following the decision of the South Carolina Court of Appeals of September 24, 2010 critical stages of the criminal proceedings?

Petitioner: Yes [both decisions are critical]. A critical stage is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218 (1967). Here, a determinative opinion was issued that could have been reheard or petitioned, which means it was a critical stage of the proceedings. But Robinson had already absented herself at that time, thereby causing prejudice.

Respondent: No. If an individual does not have a constitutional right to counsel at a certain stage of the proceedings, then he cannot claim ineffective assistance of counsel during that stage, and therefore the stage is not critical.

Analysis: There is a dispute regarding whether the period following the adverse decision of the Court of Appeals on September 24, 2010 until the issuance of the remittitur on October 18, 2010, while Petitioner's appeal was still pending before the Court of Appeals on direct appeal, constituted a critical stage of the direct appeal proceedings.

D. If no attorney acting on behalf of the Petitioner (i) reviewed the decision of the South Caroline Court of Appeals, (ii) made the decision whether a request for rehearing should be made, or (iii) consulted with Petitioner regarding his right to seek rehearing due to an attorney assignment error within the offices of his court appointed appellate-counsel, would such failures, individually or collectively, constitute the actual or constructive denial of appellate counsel and/or constitute ineffective assistance of counsel?

Petitioner: Yes. Prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984). Petitioner had no legal representation when the opinion was issued and could have been reheard or petitioned, because Robinson had left her job and Dudek, even if he were considered Petitioner's counsel, did not inform him of Robinson's resignation or review the opinion. "Based on Fourth Circuit precedent, the failure of an attorney to inform his client of the right to file a petition for writ of certiorari and to file a petition if requested by his client constitutes ineffective assistance of counsel under both prongs of *Strickland*." *Moton v. United States*, 2016 WL 1732736, at *3 (E.D. Va. Apr. 28, 2016) (citing *United States v. King*, 11 Fed.Appx. 219, 221 (4th Cir. 2001)).

Respondent: Respondent's answer is unclear, instead noting that "the decision to seek additional review is a matter of professional judgment" and "in deciding whether to seek further review, the attorney must assess if there is a reasonable chance of certiorari being granted."

Analysis: The parties dispute whether these failures by counsel, individually or collectively, constitute actual or constructive denial of appellate counsel and/or constitute ineffective assistance of counsel.

E. If the Court were to determine that Petitioner was actually or constructively denied counsel at a critical stage of the criminal proceeding, would prejudice be presumed without the necessity of Petitioner showing actual prejudice or a likelihood of prevailing on appeal?

Petitioner: Yes, prejudice would be presumed under *United States v. Cronic* and related caselaw. But Petitioner could also show actual prejudice or a likelihood of prevailing on appeal because, (1) to the extent he had any representation at the time, failure to inform him of his right to file a petition or writ of certiorari constitutes ineffective assistance under *King* and related caselaw; and (2) in light of record evidence that Robinson would have sought rehearing and a rehearing cannot otherwise be sought *pro se*.

Respondent: No, prejudice would not be presumed because "appellate counsel subjected the State's case to meaningful and adversarial testing" but it was affirmed. And, Petitioner cannot demonstrate actual prejudice or a likelihood of prevailing on appeal because "it is entirely speculative to conclude [the Court of Appeals] opinion would have been reversed" because the Court of Appeals affirmed.

Analysis: There is a dispute regarding whether prejudice can be presumed if Petitioner was actually or constructively denied counsel at a critical state of the proceeding. There is also a dispute whether Petitioner could otherwise show actual prejudice or a likelihood of prevailing on the merits.

F. The letter sent to Petitioner of September 28, 2010 (Dkt. No. 14-2 at 253) states that Petitioner's Writ of Certiorari had been denied, the court had granted his attorney her petition to be relieved, and Petitioner had exhausted his state court remedies. Does that communication meet professional standards of competence and reasonableness? Was that communication sent by an attorney acting on behalf of the Petitioner?

Petitioner: No, the letter does not meet professional standards of competence and reasonableness. No, the letter was not sent by an attorney acting on behalf of Petitioner; it was prepared by a paralegal and signed in Robinson's name despite the fact that Robinson had already resigned.

Respondent: No, the letter "likely does not meet professional standards." No, it was not sent by an attorney acting on Petitioner's behalf. Instead, it was drafted by a paralegal, using the wrong form, advising that the Court of Appeals had denied a writ of certiorari to review a denial of post-conviction relief, and signed on Robinson's behalf by the paralegal.

Analysis: There is no dispute of material fact that the letter does not meet professional standards and was not sent by a lawyer acting on Petitioner's behalf.

G. If the Court were to determine that Petitioner was denied his right to counsel at a critical stage of the criminal proceeding and that he has *per se* suffered prejudice as a result, what would be the appropriate remedy? Would reinstating Petitioner's right to seek rehearing to the South Carolina Court of Appeals and, if necessary, to petition for certiorari, provide him his appropriate constitutional remedy?

Petitioner: "Reinstating Folkes' right to seek rehearing is an appropriate remedy. The Court of Appeals issued its remittitur in Folkes' direct appeal on October 18, 2020. (ECF Entry 14-1 p. 491). Accordingly, at this time the Court of Appeals only has the jurisdiction to entertain a motion to recall remittitur. *See Wise v. SCDOC*, 642 S.E.2d 551 (S.C. 2007). Using the relief awarded in *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009) and *Galloway v. Stephenson*, 510 F. Supp. 840, 845 (M.D.N.C. 1981) as a guide, a possible order granting a writ of habeas corpus would order Folkes' judgment and conviction be vacated and he be released from custody, unless within 60 days of the District Court's order the Court of Appeals (1) recalls its remittitur in *State v. Folks*, 2008-096806, and (2) entertains Folks' petition for rehearing. This relief is also consistent with Fourth Circuit decisions finding in adequacy of appellate counsel after an opinion was issued. *See King, Moton*."

Respondent: "The Court of Appeals likely does not have jurisdiction to consider any matter relating to this case, even a motion to recall the remittitur. *See Wise v. SCDC*, 642 S.E.2d 551 (S.C. 2007). . . . Because the Court of Appeals did not issue its remittitur by mistake, it could foreseeably decline to recall the remittitur based on a lack of jurisdiction. But there are other avenues of appellate relief available." (Dkt. No. 33 at 6). Respondent referenced South Carolina Appellate Court Rule 245(a) and the Fourth Circuit's decision in *Bostick v. Stevenson*, 589 F.3d 160, 168 (4th Cir. 2009) where a habeas petition was granted because defense counsel failed to consult with his client regarding his right to appeal. The South Carolina Supreme Court subsequently granted the appeal and overturned the defendant's murder conviction in *State v. Bostick*, 708 S.E .2d 774 (S.C. 2011). (*Id.* at 6-7).

Analysis: The parties dispute whether the Court of Appeals would have jurisdiction, but do not dispute that an avenue of South Carolina court appellate relief is available.

IV. Discussion

A. Was appellate counsel's performance following the issuance of the decision of the South Carolina Court of Appeals on September 24, 2010 and before the Court of Appeals entered the remittitur on October 18, 2010 "objectively unreasonable?"

The Court must first address whether Petitioner had any functioning counsel during the period from the Court of Appeals' adverse decision issued on September 24, 2010 to the remittitur issued on October 18, 2010. The record is clear that Ms. Robinson had left her position with the Commission on Indigent Defense on September 14, 2010 without seeking and obtaining permission to withdraw as Petitioner's counsel, as required by South Carolina Appellate Court Rule 264. The record is also clear that no substitute counsel had appeared on Petitioner's behalf and there is no record evidence that any licensed attorney assumed the duties of substitute counsel, including the most basic duties of appellate counsel of informing the Petitioner of the adverse decision, of his right to seek further appellate review, and of the consequences of failing to do so. Indeed, the record evidence supports finding that after Ms. Robinson left the Commission on Indigent Defense on September 14, 2010 until the remittitur was issued on October 18, 2010, that Petitioner's legal representation was left in the hands of a non-attorney staff member.

The duty of appellate counsel to advise the client of an adverse decision and his right to seek further appellate review are mandatory under these circumstances and the failure to do so constitutes ineffective assistance of counsel. *See Bostick*, 589 F.3d at 168; *Proffitt v. United States*, 549 F. 2d 910, 912 (4th Cir. 1976); *United States v. Tajeda-Ramirez*, 380 Fed.Appx. 252, 2010 WL 2182187, at *1-2 (4th Cir. 2010); *United States v. King*, 11 Fed.Appx. 219, 2010 WL 568022, at *1 (4th Cir. 2001). The failure of Petitioner's appellate counsel to perform these most basic duties of appellate representation strongly support a finding that Petitioner's counsel had

for all practical purposes abandoned him at a critical time in the appellate process before the South Carolina Court of Appeals.

An analogous factual situation arose in *Maples v. Thomas*, 565 U.S. 266 (2012), where two post-conviction counsel for a death row inmate left their law firm without informing their client or the court of their departure. An adverse state court order was subsequently issued and the time for appeal expired without any filing of a notice of appeal. The issue before the U.S. Supreme Court in *Maples* was whether, under these circumstances, the defendant could show cause for procedural default. Justice Ginsburg, writing for the Court's majority, described the post-conviction attorneys' actions as "abandonment," leaving the defendant "unrepresented at a critical time for his state postconviction petition."[3] *Id*. at 271. The Court concluded that "no just system would lay the default at Maples' death-cell door." *Id*.

Moreover, even if this Court were to assume that Petitioner had not been abandoned by counsel, the performance (or lack thereof) of appellate counsel following the issuance of the adverse Court of Appeals decision on September 24, 2010 and before the issuance of the remittitur on October 18, 2010 was objectively unreasonable. The failure to advise Defendant of the adverse decision and of his right to seek further review under these circumstances falls far short of competent representation.

Additionally, the Court can not let pass without further comment regarding the gravity of the extraordinarily unprofessional and illegal conduct associated with the letter to Petitioner of

[3] The Court emphasized, "Maples maintains that there is [cause to excuse the default], for the lawyers he believed to be vigilantly representing him had abandoned the case without leave of court, without informing Maples they could no longer represent him, and without securing any recorded substitution of counsel. We agree. Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples's death-cell door."

September 28, 2010 on the letterhead of the Commission on Indigent Defense. The letter contained a forged signature of counsel, was prepared and delivered by a non-attorney staff member of the Commission engaged in the unauthorized practice of law, and inaccurately informed Petitioner that his still active state court appellate rights had expired. The letter also falsely represented that the Court of Appeals had issued an order denying a petition of certiorari and an order relieving counsel of further representation. The September 28, 2010 letter provides an additional and independent basis for a finding that Petitioner was denied effective assistance of counsel.[4]

B. Did Petitioner suffer prejudice as a result of the ineffective assistance of assistance of counsel following the adverse decision of the South Carolina Court of Appeals on September 24, 2010 and the issuance of the remittitur on October 18, 2010?

Where a defendant was denied effective assistance of counsel by being informed of neither an adverse appellate court decision nor his right to seek further appellate review, he may demonstrate prejudice by showing that "but for [counsel's] failure, he would have timely appealed." *Bostick*, 589 F.3d at 168. All the record evidence supports the conclusion that had Petitioner received timely notice of the adverse decision of the Court of Appeals and of his right to seek further appellate review, he would have pursed an appeal. First, Ms. Robinson testified that had she still been Petitioner's counsel she would have filed a petition for rehearing and for certiorari, and Mr. Dudek testified he wished a rehearing and certiorari had been pursued.

[4] Respondent dismisses the September 28, 2010 letter as simply an oversight by a paralegal who used the wrong form letter. (Dkt. No. 31 at 3.) The Court finds this a far too benign interpretation of a seriously unprofessional act of professional conduct undertaken under the letterhead of the Commission on Indigent Defense. Ms. Robinson testified at the PCR hearing that the letter was prepared and signed by a paralegal without her knowledge or consent. (Dkt. No. 14-2 at 81.) Nonetheless, Ms. Robinson's forged signature was placed on correspondence to Petitioner. Mr. Dudek acknowledged that no attorney had assumed responsibility for Petitioner's case at the time the letter was sent and he had no recollection of seeing the letter. (*Id.* at 58.)

Second, Petitioner has diligently pursued his habeas petition, initially *pro se*, attempting to raise, among other things, a number of issues he had raised unsuccessfully in his direct appeal. Third, having been sentenced to life without a possibility of parole, it seems implausible that Petitioner would have not wished to pursue every appellate avenue. Petitioner has clearly established prejudice under these facts.

C. Was Petitioner denied counsel at the stage of his appellate proceedings in which he had a constitutional right to counsel?

The PCR court and Respondent have attempted to posit this case as only raising the question of whether Petitioner had a constitutional right to have his counsel file a petition for rehearing to the South Carolina Court of Appeals and for certiorari to the South Carolina Supreme Court. If this were the sole issue before the Court, the PCR court and Respondent would be correct. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (no right to counsel for discretionary appellate review). What the PCR court did not address, and Respondent seeks to avoid, are the duties of appellate counsel during the period post an adverse decision while the appeal is still pending on direct appeal before the appellate court. During this critical period in state court appellate practice—in this case from the issuance of the adverse decision on September 24, 2010 until the filing of the remittitur on October 18, 2010—appellate counsel had the duty to advise the client of the adverse decision and of his right to seek further appellate review. If appointed counsel was unable or unwilling to pursue further appellate review on Petitioner's behalf, Petitioner retained the right to pursue his appeal *pro se*, just as he initially did in the filing of his habeas petition.

The Court recognizes that there has been considerable debate among federal courts regarding what actions of appellate counsel fall within the proceedings of direct state court review, where the defendant enjoys the right to competent appointed counsel. These cases often

turn on the specific facts of each case. The Court finds persuasive the Sixth Circuit's well-reasoned decision in *Smith v. State of Ohio Department of Rehabilitation and Corrections*, holding that appellate counsel's failure to inform the defendant of the adverse decision on his direct appeal was an integral part of counsel's representation at the direct appeal stage. 463 F.3d 426, 432-33 (6th Cir. 2006) ("The court's ultimate decision regarding a particular legal proceeding is *part of that legal proceeding*, and appointed counsel's duties in representing a client during that legal proceeding include the duty of informing her client of the outcome of the proceeding.") (emphasis in original).[5] *See also Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (noting that Constitution requires "that counsel make objectively reasonable choices" and must do so not only during the legal proceeding for which counsel represents the client, but also after the judicial proceeding has concluded in determining whether an appeal should be filed); *Strickland*, 466 U.S. at 688 ("From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (because defendant's decision regarding whether to "take an appeal" is a "fundamental decision" that "the accused has the ultimate authority to make," it follows that counsel has duty to timely inform accused of proceeding's resolution); *Paris v. Turner*, 187 F.3d 637 (Table), 1999 WL 357815, at *2-3 (6th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000) (where counsel delays informing defendant of decision on first appeal of right and "fails to communicate to his client

[5] The facts of *Smith* bear important resemblance to those here. As that court emphasized: "The only way that Smith could have learned of the unpublished decision of the Ohio Court of Appeals affirming his conviction was if his counsel notified him. When she failed to do so, Smith was without any means of notice of the decision and thus did not and could not know that the forty-five day deadline for filing a notice of appeal to the Ohio Supreme Court had started to run." *Id*. at 434.

how to proceed with further appeals," it cannot "fairly be said that [defendant] truly had his first appeal of right").

The Court finds that the failure of appellate counsel to timely advise Petitioner of the adverse decision of the Court of Appeals on his direct appeal and of his right to seek further appellate review was integral to their duties in representing Petitioner at the direct appeal stage. Consequently, the failure of appellate counsel to perform in an objectively reasonable way at the state court direct appeal stage entitles Petitioner to habeas relief. Moreover, the delivery of the September 28, 2010 letter to Petitioner on the letterhead of the Commission on Indigent Defense with the forged signature of departed counsel, Ms. Robinson, inaccurately informing Petitioner that his state court appellate rights had been exhausted, was also integral to appellate counsel's representation at the direct appeal stage and provides an additional and independent basis for habeas relief.

V. Remedy

Having found that Petitioner was denied effective assistance of counsel at a critical time in his direct state court appeal proceedings and suffered prejudice as a result, the Court must now fashion an appropriate remedy. It is worthwhile to note that Petitioner's requested remedy is rather modest: the reinstatement of his right to seek discretionary state court appellate review of the adverse decision of the Court of Appeals in his direct appeal.

Respondent suggests as a model for a remedy the Fourth Circuit's decision in *Bostick v. Stevenson*, which involved defense counsel's failure to consult with his client regarding his right to pursue a direct appeal. (Dkt. No. 33 at 6-7.) In *Bostick*, the Fourth Circuit instructed the district court on remand to "issue a writ of habeas corpus and that it order Bostick released from prison unless the state grants him a direct appeal within a reasonable time." 589 F.3d at 168. The

district court thereafter issued an order on January 25, 2010 granting the petition for habeas corpus and directed that "the State of South Carolina shall grant Mr. Bostick direct appeal no later than May 1, 2010 or he shall be released from prison pursuant to the Fourth Circuit mandate." *Bostic v. Warden of Broad River Correctional Institute*, C.A. No. 8:07-727, 2010 WL 360514 (D.S.C. 2010). The South Carolina Supreme Court subsequently allowed Bostick to file a belated appeal and reversed his murder conviction. *State v. Bostick*, 708 S.E. 2d 774 (S.C. 2011).

Petitioner urges the Court to grant a slightly different remedy, by directing the South Carolina Court of Appeals to recall its remittitur and to entertain a petition for rehearing. (Dkt. No. 32 at 7-8.) Respondent argues that this proposed remedy would be technically defective because the South Carolina Court of Appeals has no authority under these facts to recall its remittitur. Respondent suggests that the better course is for this Court to follow the *Bostick* model, ordering the State of South Carolina to reinstate Petitioner's appeal rights or release him from prison. (Dkt. No. 33 at 6.)

After carefully considering the appropriate remedy under these highly unusual facts, the Court hereby **GRANTS** Petitioner's habeas petition as to Ground 3 (Dkt. No. 1-1) and **ORDERS** that Petitioner be released from prison on or before May 1, 2021 unless the State of South Carolina before then reinstates his right to discretionary appellate review of the September 24, 2010 decision of the South Carolina Court of Appeals denying his direct appeal.[6]

[6] The Court's remedy is fashioned to restore Petitioner's right to seek discretionary review of the South Carolina Court of Appeals adverse decision of September 24, 2010. The Court will leave to the South Carolina Supreme Court whether it will simply allow Petitioner to petition for certiorari review before it or remand the matter to the South Carolina Court of Appeals with instructions that the remittitur be recalled and discretionary review of a petition for rehearing be granted. Should the Court of Appeals recall its remittitur and then deny a petition for rehearing,

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

January 7, 2021
Charleston, South Carolina

Petitioner shall be entitled to seek certiorari review, before the South Carolina Supreme Court, of the adverse decision of the Court of Appeals on his direct appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Clinton Folkes, # 216506, Petitioner, v. Warden Nelsen, Respondent.	Case No. 2:19-cv-760-RMG-MGB **REPORT AND RECOMMENDATION**

Clinton Folkes, a *pro se* state prisoner, seeks habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) The Warden seeks summary judgment. (Dkt. No. 15.) This Court has granted the Warden's motion for summary judgment as to Grounds One, Two, and Four through Twenty-Two. (Dkt. No. 28.) However, the parties were directed to submit supplemental briefing as to Folkes' Ground Three. (Dkt. No. 30.) The parties have submitted supplemental briefing, and the motion is ripe for review. Under 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to review the motion and submit a recommendation to the District Judge. For the following reasons, the undersigned recommends granting the Warden's motion and dismissing this case with prejudice.

BACKGROUND

The undersigned provided a detailed summary of the facts and procedural history of this matter in the previous report and recommendation. (*See* Dkt. No. 19.) To assess the remaining ground in Folkes' habeas petition, it is sufficient to note that Folkes is serving life in prison without the possibility of parole for assault and battery with intent to kill ("ABWIK"). (Dkt. No. 14-1 at 433, 436.) His imprisonment is the product of a July 2007 fight he started at Finlay Park in Columbia, South Carolina. In the fight, he slashed the victim's arm and neck with a knife.

(*Id.* at 118.) Following his conviction in a jury trial, Folkes availed himself of a direct appeal and a post-conviction relief ("PCR") action in state court, but he was unsuccessful.

PROCEDURAL HISTORY

On March 11, 2019, Folkes filed his habeas petition, raising the same twenty-two claims he raised in his PCR action. (Dkt. No. 1.) The Warden moved for summary judgment, and the undersigned recommended granting the motion. (Dkt. Nos. 15; 19.) The District Judge adopted the report and recommendation as to Grounds One, Two, and Four through Twenty-Two but found that there were questions regarding Ground Three that were not adequately addressed in the parties' briefing. (Dkt. Nos. 28; 30.) Accordingly, the District Judge appointed counsel to represent Folkes and directed the parties to submit supplemental briefing as to Ground Three. (Dkt. Nos. 29; 30.) The parties have now filed the requested supplemental briefing, and the remaining issue—whether summary judgment should be granted as to Ground Three—is ripe for review.

LEGAL STANDARD

Habeas corpus in federal court exists to "guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citation and internal quotation marks omitted). Federal habeas is neither an alternative to state-court relief nor an additional chance to appeal erroneous state-court rulings. *See id.* That preference for, and deference to, state courts is borne out in the various constraints placed on federal courts. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (stating § 2254 "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases"); *see also Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (stating § 2254 "reflect[s] a presumption that state courts know and follow the law" (citation and internal quotation marks omitted)).

For instance, state prisoners who challenge matters "adjudicated on the merits in State court" cannot get relief in federal court unless they show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" announced by the Supreme Court or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). That means a state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Federal courts must also defer to state courts' factual determinations, which are presumed correct until the prisoner rebuts that presumption with clear and convincing evidence. § 2254(e)(1).

The ultimate issue in this case is, of course, whether Folkes should receive habeas relief under these standards. However, the Warden's summary judgment motion and briefing presents narrower questions. Summary judgment is appropriate only if the moving party shows that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Rule 12, Rules Governing § 2254 Cases (stating courts may apply in habeas cases any of the Federal Rules of Civil Procedure to the extent they are not inconsistent with statutes or the § 2254 rules). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

While delving into a more detailed analysis of Ground Three, the undersigned is mindful of the following questions:

(1) Are there genuine issues of fact as to whether Folkes' Ground Three is properly before the Court?
(2) Are there genuine issues of fact as to the merits of Folkes' Ground Three?
(3) If the answer to either (or both) of the first two questions is "no," is the Warden entitled to judgment as a matter of law?

In answering those questions, the undersigned has carefully considered the record before the Court.

DISCUSSION

In Ground Three, Folkes alleges that "Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina." (Dkt. No. 1-1 at 7.)

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A petitioner proves ineffective assistance by showing his attorney's performance was deficient and prejudiced him. *Id.* at 687. An attorney's performance is deficient if it was unreasonable under the circumstances of the case and under then-prevailing professional norms. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Kimmelman*, 477 U.S. at 384.

Strickland is highly deferential to counsel, and § 2254(d) is highly deferential to state courts. *Harrington*, 562 U.S. at 105. That means when a state court has adjudicated an ineffective-assistance claim on the merits, this Court's review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In other words, the question becomes "not whether

counsel's actions were reasonable," but "whether there is any reasonable argument that [Folkes'] counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.[1] The undersigned is mindful of the doubly deferential standard in analyzing Folkes' Ground Three.

State Court Proceedings

M. Celia Robinson, an appellate defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense ("Appellate Defense"), represented Folkes in his direct appeal. (Dkt. No. 14-1 at 452.) Appellate counsel raised the following issue in the direct appeal: "Did the trial judge err reversibly in refusing to issue the requested charge on the lesser included offense of Assault and Battery of a High and Aggravated Nature (ABHAN) indicating that the absence of malice is not a required element for an ABHAN conviction?" (Dkt. No. 14-1 at 455.) The South Carolina Court of Appeals affirmed Folkes' conviction in a per curiam opinion issued on September 24, 2010. (Dkt. No. 14-1 at 489–90.) The matter was remitted to the lower court on October 18, 2010. (Dkt. No. 14-1 at 491.)

In his PCR action, Folkes challenged appellate counsel's failure to file a petition for rehearing following the court of appeals' affirmance of his conviction. (Dkt. No. 14-2 at 29.) Appellate counsel testified at the PCR hearing. (*See id.* at 79–101.) As noted above, when appellate counsel represented Folkes, she practiced at Appellate Defense, which handles criminal appeals for the indigent. (*See id.* at 80–81.) She resigned while Folkes' appeal was pending; the Court of Appeals issued its opinion ten days after she left. (*Id.* at 50, 80–81.) Appellate counsel

[1] Subsection 2254(d)'s standards are to be applied to the decision from the highest state court to decide the claim at issue on the merits. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Where, as here, the highest state court rules summarily, the federal habeas court should "look through" that unexplained decision to the last state-court decision that provides a relevant rationale, and "should then presume that the unexplained decision adopted the same reasoning." *Id.* In this case, the PCR court was the only one to issue a reasoned decision on Folkes' claim. As neither party contends the court of appeals denied certiorari on different reasoning than what the PCR court provided, the undersigned has used the PCR court's reasoning to analyze the

testified that, had she stayed at Appellate Defense, she "certainly" would have petitioned for rehearing and certiorari. (*Id.* at 81.) "I thought it was a winner. I thought it was clear error. I thought it was reversible." (*Id.* at 81–82.)

The chief appellate defender at Appellate Defense, Robert Dudek, testified as well. (*See id.* 14-2 at 49–79.) He testified that, when Folkes' appellate counsel quit, Folkes' case became his responsibility. (*Id.* at 57–58.) He could not recall if, when the Court of Appeals issued its opinion, he read the opinion, reviewed Folkes' file, or assessed whether he should seek rehearing and certiorari. (*Id.* at 58–59.) However, he disagreed with the court of appeals' ruling, and he "wish[ed]" that rehearing and certiorari had been pursued. (*Id.* at 75.)

The PCR court denied the claim.[2] (Dkt. No. 14-2 at 335–38.) The court based its conclusion on the state Supreme Court's ruling in *Douglas v. State* that, in criminal cases, appellate counsel has no duty to pursue rehearing or certiorari after the Court of Appeals issues an adverse decision. *See* 631 S.E.2d 542, 543 (S.C. 2006). (Dkt. No. 14-2 at 336, 338.) The PCR court also cited United States Supreme Court precedent that "[a]n individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review." (Dkt. No. 14-2 at 336 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982) (finding no Sixth Amendment right to counsel in pursuing discretionary appeal); *Ross v. Moffitt*, 417 U.S. 600 (1974) (finding no Fourteeth Amendment right to counsel when pursuing discretionary appeal after an appeal of right)).) The PCR court reasoned that because the appellate lawyers had no duty to seek rehearing, and because Folkes had no right to appellate review beyond "his full and complete review by the Court of Appeals," Folkes could not establish either deficiency or prejudice. (*Id.* at 338.)

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merits of Folkes' claim.

[2] The undersigned notes that pages 24 and 25 of the PCR court's opinion are out of order in the

Federal Habeas Corpus Proceedings

The undersigned previously expressed hesitance in accepting the entirety of the PCR court's findings in light of the evidence presented in state court. (Dkt. No. 19 at 10–11.) But, ultimately, due to the deferential nature of habeas corpus review and the precedent that a petition for rehearing is discretionary, the undersigned recommended that summary judgment be granted as to Ground Three. (Dkt. No. 19 at 11.)

The District Judge directed the parties to submit supplemental briefing to address particular questions regarding Ground Three, including:

A. Did an attorney acting on behalf of Petitioner review the decision of the South Carolina Court of Appeals of September 24, 2010 and make a determination whether a petition for rehearing should be filed? If the answer is in the affirmative, identify that attorney.

B. Did an attorney acting on behalf of Petitioner consult with him regarding whether a petition for rehearing should be filed following the decision of the South Carolina Court of Appeals of September 24, 2010? If the answer is in the affirmative, identify that attorney.

C. Were the decisions whether to file a request for rehearing and a petition for certiorari following the decision of the South Carolina Court of Appeals of September 24, 2010 critical stages of the criminal proceedings?

D. If no attorney acting on behalf of the Petitioner (i) reviewed the decision of the South Carolina Court of Appeals, (ii) made the decision whether a request for rehearing should be made, or (iii) consulted with Petitioner regarding his right to seek rehearing due to an attorney assignment error within the offices of his court appointed appellate counsel, would such failures, individually or collectively, constitute the actual or constructive denial of appellate counsel and/or constitute ineffective assistance of counsel?

E. If the Court were to determine that Petitioner was actually or constructively denied counsel at a critical stage of the criminal proceeding, would prejudice be presumed without the necessity of Petitioner showing actual prejudice or a likelihood of prevailing on appeal?

Appendix. (*See* ECF No. 14-2 at 337–38.)

F. The letter sent to Petitioner of September 28, 2010 (Dkt. No. 14-2 at 253) states that Petitioner's Writ of Certiorari had been denied, the court had granted his attorney her petition to be relieved, and Petitioner had exhausted his state court remedies. Does that communication meet professional standards of competence and reasonableness? Was that communication sent by an attorney acting on behalf of the Petitioner?

G. If the Court were to determine that Petitioner was denied his right to counsel at a critical stage of the criminal proceeding and that he had per se suffered prejudice as a result, what would be the appropriate remedy? Would reinstating Petitioner's right to seek rehearing to the South Carolina Court of Appeals and, if necessary, to petition for certiorari, provide him his appropriate constitutional remedy?

(Dkt. No. 30 at 2–3.) The undersigned outlines the parties' responses to these questions below.

Did an attorney review the appellate court decision and decide whether to petition for rehearing?

The parties disagree as to whether an attorney reviewed the decision of the South Carolina Court of Appeals and decided not to file a petition for rehearing. (*See* Dkt. No. 31 at 2 ("Despite conflicting evidence, it appears that Dudek made the decision not to seek certiorari in petitioner's case."); Dkt. No. 32 at 3 ("No. . . . Robinson's supervisor Robert Dudek, who was never counsel of record for Folkes, does not recall reviewing this opinion.").)

It is clear that Robinson did not review the court of appeals decision because she had already resigned when it was issued. (Dkt. No. 14-2 at 80–81.) Nor did she have any input into whether to seek rehearing and petition for certiorari following the decision. (*Id.*)

However, it is unclear from the evidence adduced at the PCR evidentiary hearing whether Dudek reviewed the decision and decided not to petition for rehearing. Dudek testified that since Robinson had resigned prior to the decision in Folkes' appeal, "it should have been run by me as far as a decision whether we would have proceeded with rehearing . . . which is the prerequisite to go certiorari to the state supreme court." (Dkt. No. 14-2 at 57–58.) But he had "no

independent recollection of making a decision to close this case and not go certiorari." (Dkt. No. 14-2 at 58.)

In short, it is simply unclear from the record whether an attorney acting on Folkes' behalf reviewed the decision of the state court of appeals and decided whether to petition for rehearing. Robinson did not. Dudek may have (and "should have"), but he could not recall.

Did an attorney consult with Folkes about filing a petition for rehearing?

The parties agree that no such consultation occurred. (Dkt. Nos. 31 at 3; 32 at 3.) Notably, Dudek's testimony indicated that the decision as to whether to continue with an appeal "rests with the attorney" and is not a decision with which counsel at Appellate Defense necessarily consult a defendant. (Dkt. No. 14-2 at 56–57, 73–75.)

Were the decisions whether to file a petition for rehearing and/or a petition for writ of certiorari critical stages?

"The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80 (2004) (citing *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Wade*, 388 U.S. 218, 224 (1967)). The United States Supreme Court has "characterized a 'critical stage' as one that 'held significant consequences for the accused.'" *Woods v. Donald*, 575 U.S. 312, 315 (2015) (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)).

In response to the District Court's question, Folkes states that both decisions are critical stages, but he fails to cite any authority specifically stating as much. (*See* Dkt. No. 32 at 4.)

The Warden, on the other hand, argues that "[w]here the United States Supreme Court has held no right to counsel exists, it follows that there can be no right to effective assistance of counsel. It also follows that the stage of the proceedings is not 'critical.'" (Dkt. No. 31 at 14.) The Warden also notes that "[t]he Supreme Court has never explicitly ruled that the right to

counsel exists to seek a rehearing with an intermediate appellate court" though "a reasonable argument can be made that the right to counsel extends to a petition for rehearing." (Dkt. No. 31 at 8–9.)

If an attorney did not review, decide, or consult, would such errors, either individually or collectively, constitute the actual or constructive denial of appellate counsel and/or constitute ineffective assistance of counsel?

Folkes asserts that he was unrepresented from the time that Robinson left Appellate Defense, thus indicating that he believes he was denied counsel from that point forward. (Dkt. No. 32 at 4–5.) He further asserts that, to the extent he was represented by Dudek after Robinson's departure, he was constructively denied counsel because he was not informed of Robinson's resignation. (*Id.* at 5.)

While not squarely confronting this question, the Warden's submissions imply that there is not a clear answer as to whether such errors would constitute the ineffective assistance of counsel—some federal cases indicate that the right to counsel ends when the court of appeals issues its opinion. (*See* Dkt. No. 31 at 7–13.)

If there was an actual or constructive denial of counsel at a critical stage, would prejudice be presumed or would prejudice need to be proven?

Folkes claims that prejudice should be presumed. (Dkt. No. 32 at 5.) However, even if a presumption of prejudice does not apply, he asserts that he can show a likelihood that he would have prevailed on appeal. (*Id.* at 5–6.)

The Warden disagrees that Folkes can demonstrate prejudice in this case. (Dkt. No. 34 at 4.) The Warden also seems to disagree that a presumption of prejudice is appropriate in this case. (*See* Dkt. No. 34 at 2 ("[I]n order to establish a constructive denial of counsel for failing to subject the case to meaningful adversarial testing, 'the attorney's failure must be complete.'")

(quoting *Bell v. Cone*, 535 U.S. 685, 697 (2002).) The Warden does not believe that *Cronic*[3] is applicable in this case. (*Id.* at 2–4.)

Did the letter sent to Folkes after the denial of his direct appeal meet professional standards? Was it sent by an attorney?

Both parties agree the letter did not meet professional standards. (ECF Nos. 31 at 3; 32 at 6.)

The record reflects that on September 28, 2010, Appellate Defense sent a letter to Folkes erroneously informing him that his petition for writ of certiorari had been denied by the court of appeals and that he had exhausted his state court remedies. (Dkt. No. 14-2 at 253.) The letter purports to be signed by Robinson (or on her behalf), but she testified at the PCR evidentiary hearing that her paralegal at Appellate Defense, Lauren Crews, had actually signed the letter. (*Id.* at 80.) Dudek agreed that apparently Crews had signed for Robinson. (*Id.* at 51–54.) He also testified that he was "very confident" that no other attorney would have been assigned to Folkes' case when the letter was sent. (*Id.* at 57.) As to his own involvement in Folkes' appeal, Dudek testified, "I have no independent recollection of making a decision to close this case and not go certiorari. I, frankly, do not have any recollection of, you know, seeing this letter. And I'm pretty confident if I had, it would not have gone out." (*Id.* at 58.) Crews was not called to testify in the PCR proceedings. It does not appear that the letter was reviewed by an attorney before it was sent.

Should habeas relief be granted, what is the appropriate remedy?

The parties appear to disagree about what type of appellate relief is available at the state level. Folkes argues that "at this time the Court of Appeals only has the jurisdiction to entertain a motion to recall remittitur." (Dkt. No. 32 at 7.)

[3] *United States v. Cronic*, 466 U.S. 648 (1984).

However, the Warden asserts,

> The Court of Appeals likely *does not* have jurisdiction to consider any matter relating to this case, even a motion to recall the remittitur. *See Wise v. S.C. Dep't of Corr.*, 642 S.E.2d 551 (S.C. 2007). In *Wise*, the Supreme Court of South Carolina held that "[w]hen the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court." *Id.* (emphasis added) (internal citations omitted).

(Dkt. No. 34 at 6.)

Habeas Corpus Analysis

The undersigned now turns to whether habeas corpus relief should be granted for Ground Three. The specific issue that the PCR court considered was whether "Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina." (Dkt. No. 14-2 at 335.) After citing both state and federal case law, the PCR court denied and dismissed Folkes' claim of ineffective assistance of appellate counsel based on the following reasoning:

> Appellate counsel had no duty to petition for rehearing or to the Supreme Court for discretionary review. Furthermore, Applicant had no right to appellate review from the Supreme Court following his full and complete review by the Court of Appeals. Applicant cannot establish deficiency or prejudice as to this allegation, which must be denied and dismissed with prejudice.

(Dkt. No. 14-2 at 338.)

Having reviewed the facts presented to the PCR court and the applicable law, the undersigned concludes that the PCR court's denial of the claim was not unreasonable. *See Gill v. Mecusker*, 633 F.3d 1272, 1292 (11th Cir. 2011) (stating § 2254(d)(1) directs federal habeas courts to "focus[] on the result, not on the reasoning that led to the result"). The Constitution does not guarantee assistance of counsel in the pursuit of discretionary appellate review. *See Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam) (no Sixth Amendment right to

counsel in pursuing discretionary appeal); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (no Fourteenth Amendment right to counsel when pursuing discretionary appeal). Consequently, Folkes was not entitled to the effective assistance of counsel in filing a petition for certiorari to the South Carolina Supreme Court.[4] Arguably, Folkes was similarly not entitled to the effective assistance of counsel in filing a petition for rehearing to the South Carolina Court of Appeals. *See Cabbagestalk v. McFadden*, No. 5:14-cv-3771-RMG-KDW, 2015 WL 4077211, at *36 (D.S.C. July 1, 2015) (finding PCR court reasonably denied ineffective-assistance claim of failure to seek rehearing; petitioner had no right to counsel for that discretionary review). *But see Nichols v. United States*, 563 F.3d 240, 252 (6th Cir. 2009) (asking, but not deciding, "Is a motion for rehearing part of the first-tier appeal (i.e., a motion within the first-tier appeal), or is it a separate review? Does a defendant have a right to the assistance of counsel on a motion for rehearing of an appellate decision?"). The PCR court noted as much and found that appellate counsels' failure to seek rehearing could not serve as the basis for relief.

Folkes has not identified, and the undersigned has not found, a United States Supreme Court case stating that a defendant is entitled to the effective assistance of counsel in filing a petition for a rehearing as part of a direct appeal of right. Federal courts are split on the issue. As the Warden noted, some believe that the right to counsel ends when the decision by the appellate court is issued. (Dkt. No. 31 at 9–13.) *See Jackson v. Johnson*, 217 F.3d 360, 363–64

[4] Other federal courts have questioned the logic of this tenet. *See Miller v. Keeney*, 882 F.2d 1428, 1432 (9th Cir. 1989) ("*Torna* . . . rests on a single proposition: If a state is not constitutionally required to provide a lawyer, the constitution cannot place any constraints on that lawyer's performance. Whatever the soundness of this logic, we observe that it has not commanded the Court's respect in other areas of the law. Moreover, we cannot overlook the irony inherent in the fact that while the constitution does not require a state to provide any direct appeals at all, once it has done so a number of constitutional requirements spring into place: The state must provide free transcripts to indigent appellants; cannot require indigent appellants to pay a filing fee; and must provide an attorney. Why the provision of appellate counsel beyond the first appeal as of right should be treated any differently is not self-evident." (citations

(5th Cir. 2000) ("[A]lthough Jackson does make a colorable argument that his opportunity to file a motion for rehearing should be considered the last step in his first appeal of right, a holding to that effect would surely create a new rule of constitutional law."). Others, like the Sixth Circuit, have questioned that logic, *see Nichols, supra* p. 13, but have made clear that the signature by an appellate court judge is not a clear endpoint for constitutionally-required representation. *See Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 433 (6th Cir. 2006) ("The court's ultimate decision regarding a particular legal proceeding is *part of that legal proceeding*, and appointed counsel's duties in representing a client during that legal proceeding include the duty of informing her client of the outcome of the proceeding." (emphasis in original)); *see also Gunner v. Welch*, No. 3:09 CV 3009, 2011 WL 10467929, at *8 (N.D. Ohio Mar. 29, 2011) ("[A] decision cannot be logically separated from the proceeding itself; it is the necessary end point of a single process. The mouth and the source are different points, but manifestly a single river. As such, if the constitution requires counsel when a defendant journeys on the river, counsel's responsibilities include, in essence, making the full trip.").

There is not clear authority that the receipt and review of the court of appeals decision constitutes a critical stage of appeal. United States Supreme Court precedent makes clear that a defendant is entitled to counsel on their first appeal as of right. *See Douglas v. California*, 372 U.S. 353, (1963) (finding that counsel must be appointed to indigent defendants in their first appeal as of right). If the constitution requires counsel be offered for a first appeal of right, then it logically follows that the receipt and review of the appellate court's opinion would be part of that. *Cf. United States v. Smith*, 411 F.2d 733, 736 (6th Cir. 1969) (finding the return of a jury verdict to be a critical stage of trial). Nevertheless, the Supreme Court has not definitively stated that is the case. In *Ross v. Moffitt*, the Supreme Court declined to extend the right to counsel to

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omitted)).

discretionary appeals, emphasizing "the benefit of counsel in examining the record of [the defendant's] trial and in preparing an appellate brief on [the defendant's] behalf for the state Court of Appeals." 417 U.S. at 614. In finding that a state was not constitutionally required to provide counsel for discretionary appeals, the Court noted that "[a]t that stage [(seeking discretionary review to the North Carolina Supreme Court)] he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." *Id.* at 615. The Court further explained,

> Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.
>
> . . . .
>
> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Id. at 615–16. As far as constitutionally required representation, the reasoning in *Ross* appears to put a premium on appellate counsel participating in the identification and presentation of issues for appellate review, but it is unclear whether the Court believes that counsel need also review how the appellate court received those issues and decide if a petition for rehearing should be filed.[5] Ultimately, neither *Ross*, nor any other Supreme Court opinion identified by the parties deems the receipt and review of an appellate court opinion and the decision as to whether to petition for rehearing as a critical stage of appeal. The PCR court relied upon Supreme Court

[5] For example, in *Ross* the Court notes that "[t]he Supreme Court [of North Carolina] may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect . . . since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria [for

precedent in reaching its conclusion that Folkes had failed to demonstrate ineffective assistance of appellate counsel. And the undersigned cannot find that the PCR court's decision resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.

Furthermore, even if it was clear that Folkes was entitled to the effective assistance of counsel in filing a petition for rehearing, he failed to show that counsel was deficient at that stage. Based on his testimony, Dudek should have been the attorney reviewing Folkes' case and deciding whether to petition for rehearing, but he could not recall whether he did or not. Folkes failed to meet his burden of proof in state court that Dudek performed deficiently in receiving and reviewing the appellate decision and deciding whether to petition for rehearing.[6]

With regard to the letter sent to Folkes following the dismissal of his direct appeal, both parties agree the letter did not meet professional standards. (ECF Nos. 31 at 3; 32 at 6.) Folkes asserts that he received ineffective assistance of counsel under *Strickland* as a result of the letter.[7] Although the letter, which contains many errors, may demonstrate deficient

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granting certiorari]."

[6] If Folkes was able to successfully prove deficiency, he would also need to prove prejudice. Based on the undersigned's review of the direct appeal claim, it does not appear that there is a reasonable probability that, but for Dudek's errors, the result of the proceeding would have been different.

In his direct appeal, Folkes argued that the trial court should have charged the jury that the absence of malice is not an element of ABHAN. (Dkt. No. 14-1 at 460–69.) The trial court did not specifically instruct the jury as such, but the trial court did instruct that "[a]ssault and battery of a high and aggravated nature includes all of the elements of assault and battery with intent to kill except express malice." (*Id.* at 420.)

The court of appeals denied the direct appeal citing state law that the absence of malice is not a required element of the ABHAN but also that a charge is sufficient if it covers the applicable law as a whole. (Dkt. No. 14-1 at 90.) Because the wording of the jury instructions in Folkes' case did not establish the absence of malice as an element of ABHAN, the trial court did not need to correct the charge by specifically charging that the absence of malice was not an element of ABHAN. The undersigned sees no reasonable probability that the result of the proceeding would have been different had appellate counsel petitioned for rehearing.

[7] Folkes relies upon a line of cases in the Fourth Circuit, noting that "'[b]ased on Fourth Circuit

representation, the question of whether Folkes received ineffective assistance of counsel in that respect reframes the issue ruled upon by the PCR court. (*See* Dkt. No. 1-1 at 7, 10.) The undersigned is constrained by the issues that were properly raised to and ruled upon by the PCR court.

Based on the above reasoning, the undersigned recommends the Warden's motion for summary judgment as to Ground Three be granted.

Certificate of Appealability

If the Warden's summary judgment motion is granted, the District Judge will need to decide whether to issue a certificate of appealability. *See* Rule 11(a), Rules Governing § 2254 Cases. A certificate may be issued only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been denied on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) (citation and quotation marks omitted). The Court has previously denied a certificate of appealability as to Grounds One, Two, and Four through Twenty-Two. The undersigned does not see a basis for issuing a certificate as to remaining Ground Three.

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precedent, the failure of an attorney to inform his client of the right to file a petition for writ of certiorari and to file a petition if requested by his client constitutes ineffective assistance of counsel under both prongs of *Strickland*.'" (ECF No. 32 at 5 (quoting *Moton v. United States*, No. 2:15cv458, 2016 WL 1732736, at *3 (E.D. Va. Apr. 28, 2016))). Upon closer inspection of the Fourth Circuit cases, it appears that the duty the court ascribes to appellate counsel stems from the Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of the Criminal Justice Act of 1964, Part VI (B)(2) ("CJA Plan"). *See Proffitt v. United States*, 549 F.2d 910, 912–13 (4th Cir. 1976). But the CJA Plan is not applicable to state counsel, and Folkes has not identified any similar duty imposed by South Carolina state law. Thus, his reliance on the Fourth Circuit cases is not persuasive.

CONCLUSION

For the above reasons, the undersigned recommends the Court grant the Warden's motion, dismiss this case with prejudice, and decline to issue a certificate of appealability.

IT IS SO RECOMMENDED.

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

December 8, 2020
Charleston, South Carolina

The parties' attention is directed to the **important notice** on the next page.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Clinton Folkes, #216506 Petitioner, vs. Warden Nelsen, Respondent.	)	Civil Action No. 2:19-0760-RMG **ORDER**

By separate Orders, this Court granted summary judgment regarding Grounds 1-2 and 4-22 of Petitioner's Petition for Habeas Corpus, denied summary judgment without prejudice on Ground 3, and appointed Petitioner counsel to address issues remaining before the Court. In denying without prejudice summary judgment regarding Ground 3, the Court noted that there were substantial issues raised by that Ground that were not adequately briefed by Respondent and Petitioner, then acting *pro se*.

The Court hereby sets the following briefing schedule regarding Ground 3:

1. Respondent is to file a supplemental brief in support of its motion for summary judgment and in opposition to Petitioner's habeas petition on or before March 13, 2020;
2. Petitioner is to file a supplemental brief in support of his habeas petition and in opposition to the motion for summary judgment 30 days thereafter; and
3. Respondent may, but is not required, to file a reply within 15 days after Petitioner's supplemental brief.

In an effort to provide some guidance to the parties and their counsel regarding issues of concern, the Court has set forth below a series of issues and questions which should be addressed by Petitioner and Respondent in the supplemental briefs to be submitted in this matter. The Court does not presume to limit the parties only to these issues and questions, but expects them to be addressed in the course of presenting supplemental briefs to the Court with appropriate references to the record and legal authorities:

A. Did an attorney acting on behalf of Petitioner review the decision of the South Carolina Court of Appeals of September 24, 2010 and make a determination whether a petition for rehearing should be filed? If the answer is in the affirmative, identify that attorney.

B. Did an attorney acting on behalf of Petitioner consult with him regarding whether a petition for rehearing should be filed following the decision of the South Carolina Court of Appeals of September 24, 2010? If the answer is in the affirmative, identify that attorney.

C. Were the decisions whether to file a request for rehearing and a petition for certiorari following the decision of the South Carolina Court of Appeals of September 24, 2010 critical stages of the criminal proceedings?

D. If no attorney acting on behalf of the Petitioner (i) reviewed the decision of the South Carolina Court of Appeals, (ii) made a decision whether a request for rehearing should be made, or (iii) consulted with Petitioner regarding his right to seek rehearing due to an attorney assignment error within the offices of his court appointed appellate counsel, would such failures, individually or collectively,

constitute the actual or constructive denial of appellate counsel and/or constitute ineffective assistance of counsel?

E. If the Court were to determine that Petitioner was actually or constructively denied counsel at a critical stage of the criminal proceeding, would prejudice be presumed without the necessity of Petitioner showing actual prejudice or a likelihood of prevailing on appeal?

F. The letter sent to Petitioner of September 28, 2010 (Dkt. No. 14-2 at 253) states that Petitioner's Writ of Certiorari had been denied, the court had granted his attorney her petition to be relieved, and Petitioner had exhausted his state court remedies. Does that communication meet professional standards of competence and reasonableness? Was that communication sent by an attorney acting on behalf of the Petitioner?

G. If the Court were to determine that Petitioner was denied his right to counsel at a critical stage of the criminal proceeding and that he had *per se* suffered prejudice as a result, what would be the appropriate remedy? Would reinstating Petitioner's right to seek rehearing to the South Carolina Court of Appeals and, if necessary, to petition for certiorari, provide him his appropriate constitutional remedy?

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

February 12, 2020
Charleston, South Carolina

that certain claims were not preserved for federal habeas review. Therefore, a Certificate of Appealability is denied regarding Grounds 1-2 and 4-22.

V. Conclusion

For the foregoing reasons, Court **ADOPTS IN PART and DECLINES TO ADOPT IN PART** the R & R (Dkt. No. 19) as the order of the Court. The Court **GRANTS** Respondent's motion for summary judgment (Dkt. No. 15) as to Grounds 1-2 and 4-22. A Certificate of Appealability is **DENIED** as to these Grounds. The Court **DENIES WITHOUT PREJUDICE** Respondent's motion for summary judgment as to Ground 3.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

February 12, 2020
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Clinton Folkes, # 216506, Petitioner, v. Warden Nelsen, Respondent.	Civil Action No. 2:19-0760-RMG **ORDER AND OPINION**

Before the Court is the Report and Recommendation ("R & R") of the Magistrate Judge (Dkt. No. 19) recommending that the Court grant Respondent's motion for summary judgment (Dkt. No. 15) on Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Court adopts in part and declines to adopt in part the R & R as the order of the Court. Respondent's motion for summary judgment is granted as to Grounds 1-2 and 4-22. Respondent's motion for summary judgment is denied without prejudice as to Ground 3 to allow for appointment of counsel and further briefing on issues raised by this Ground.

I. Background

Petitioner Clinton Folkes proceeds *pro se* to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is incarcerated on a term of life imprisonment without possibility of parole. In 2008, he was tried in the Richland County Court of General Sessions and found guilty of assault and battery with intent to kill. The conviction stemmed from a July 2007 physical fight during which Petitioner cut a man in the neck with a knife and was heard at the time, by witnesses who testified at trial, to have said, "I should have killed you[.]" (Dkt. No. 14-1 at 245, 247, 436.) The Warden has moved for summary judgment on Petitioner's § 2254 motion, to which Petitioner

responded in opposition. The Magistrate Judge recommends that the Warden be granted summary judgment.

II. Legal Standard

A. Review of R & R

The Magistrate Judge makes a recommendation to the Court that has no presumptive weight and the responsibility to make a final determination remains with the Court. *See, e.g.*, *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Where there are specific objections to the R & R, the Court "makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* In the absence of objections, the Court reviews the R & R to "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note; *see also Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983) ("In the absence of objection . . . we do not believe that it requires any explanation.").

B. Motion for Summary Judgment

Summary judgment is appropriate if a party "shows that there is no genuine dispute as to any material fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In other words, summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987). "In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party." *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996). The movant has the initial burden of demonstrating that there is no genuine

issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, to survive summary judgment the respondent must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, "[c]onclusory or speculative allegations do not suffice, nor does a 'mere scintilla of evidence'" in support of the non-moving party's case. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (quoting *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 287 (4th Cir. 1999)).

C. Federal Habeas Relief Pursuant to 28 U.S.C. § 2254

A state prisoner who challenges matters "adjudicated on the merits in State court" can obtain federal habeas relief only if he shows that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" 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). When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). The state court's application is unreasonable if it is "objectively unreasonable, not merely wrong." *White v. Woodall*, 572 U.S. 415, 419 (2014). Meaning, the state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The state court's determination is presumed correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The state court's decision "must be granted a deference and latitude that are not in operation" when the case

is considered on direct review. *Harrington*, 562 U.S. at 101. This is because habeas corpus in federal court exists only to "guard against extreme malfunctions in the state criminal justice systems." *Id.* at 102 (citation and internal quotation marks omitted). Accordingly, pursuant to 28 U.S.C. § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. *Harrington*, 562 U.S. at 102. "If this standard is difficult to meet, that is because it was meant to be." *Id.*

Before the petitioner may pursue federal habeas relief to this standard, he must first exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). The petitioner "must present his claims to the state's highest court," *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (abrogated on other grounds by *United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011)), which requires the petitioner to have "fairly present[ed] to the state court both the operative facts and the controlling legal principles associated with each claim." *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks omitted). A federal habeas court should not review the merits of claims that would be found to be procedurally defaulted or barred under independent and adequate state procedural rules. *Lawrence v. Banker*, 517 F.3d 700, 714 (4th Cir. 2008). Rather, for a procedurally defaulted claim to be properly considered by the federal habeas court, the petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

III. Discussion

Petitioner's § 2254 petition raises four grounds for relief, each on the basis of "ineffective assistance of counsel" or "judicial error." (Dkt. No. 1.) Some of these habeas grounds then cite to

Petitioner's application for post-conviction relief ("PCR"). The original application for PCR similarly raised "ineffective assistance of counsel" and "judicial error" as its two grounds for relief. (Dkt. No. 14-1 at 492.) In support of these PCR grounds, Petitioner alleged that "1) counsel failed to call key witnesses for the defense; 2) that counsel failed to properly investigate a defense presented by the applicant; and that 3) counsel failed to object to the use of a knife in the courtroom (State's 25) that was not even used in the crime (pg. 108). See State v. McDonald; 4) counsel failed to object to other issues, like closing argument from solicitors, see State v. Simmons" and that "the court failed to inform him of his right to put up a defense without him having to testify, only that he could remain silent." (Dkt. No. 14-1 at 496.) Petitioner later filed an amended application for PCR that alleged twenty-one additional grounds for relief relating to ineffective assistance of trial counsel. (*See* Dkt. No. 14-2 at 314-17.) The PCR court conducted a two-day evidentiary hearing (Tr. at Dkt. No. 14-2 at 44-251), after which it dismissed the application for PCR in a forty-six-page written order (Dkt. No. 14-2 at 313-58). Petitioner appealed the order of dismissal (Dkt. No. 14-2 at 359) and petitioned for a writ of certiorari (Dkt. No. 14-4), which the South Carolina Court of Appeals denied. (Dkt. No. 14-6.)

A petitioner may demonstrate ineffective assistance of counsel by showing the attorney's work was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it was unreasonable under the circumstances of the case and the then-prevailing professional norms. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Kimmelman*, 477 U.S. at 384. The *Strickland* test for ineffective assistance of counsel is, therefore

highly deferential to the attorney. The standard for § 2254 relief is itself highly deferential to the state court. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). As a result, when the state court adjudicated an ineffective assistance claim on its merits, the § 2254 district court's review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The district court's focus is "not whether counsel's actions were reasonable," but rather "whether there is any reasonable argument that [the petitioner's] counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

The analysis is notably different, however, if the claim establishes that the defendant was denied the "actual or constructive" assistance of counsel at a critical stage of the criminal proceeding. This extends to the denial of counsel on appeal. Under such circumstances, the normal presumption of the regularity of state proceedings is cast in doubt and there is a presumption of prejudice without the necessity of showing a likelihood of success. *Smith v. Robbins*, 528 U.S. 259, 286 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *United States v. Poindexter*, 492 F.3d 263, 268 (4th Cir. 2007). Further, there is a "constitutionally imposed duty to consult with the defendant about an appeal" if "a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)." *Roe*, 528 U.S. at 480.

After careful review of the R & R, Petitioner's objection to it[1], and the record on summary judgment—including affording Petitioner's submissions an appropriately liberal construction for

[1] The extended deadline by which Petitioner was to file objections to the R & R was December 5, 2019. On December 9, 2019, the district court received a letter from Petitioner dated "12/4/2019" stating his legal mail was being returned to the court. (Dkt. No. 21.) However, the R & R was returned to the district court as "inmate refused, 11/22/19." (Dkt. No. 22.) In an abundance of caution, the Court extended the objection deadline to January 3, 2020 and re-mailed the R & R to Petitioner. (Dkt. No. 23.) Petitioner filed objections to the R & R. (Dkt. No. 25.) He then moved

a *pro se* litigant, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) and construing the facts to the nonmovant's benefit—the Court finds that the Magistrate Judge correctly concluded that Respondent should be granted summary judgment regarding Grounds 1-2 and 4-22. The Magistrate Judge comprehensively addressed the grounds in turn, analyzing for each both the merits and risk of procedural default against the voluminous record of trial, appellate, PCR and certiorari arguments and decisions, including the trial and PCR evidentiary hearing transcripts. The Court finds no clear error on the face of the Magistrate Judge's finding that Petitioner has not satisfied the doubly deferential *Strickland* habeas standard and did not preserve certain grounds for habeas review. For these reasons, the Warden's motion for summary judgment regarding Grounds 1-2 and Grounds 4-22 is granted and Petitioner's motion for § 2254 habeas relief is denied as to those Grounds.

The record before the Court raises questions regarding Ground 3 that the Court finds have not been adequately addressed by the briefing of the Respondent and the Petitioner acting *pro se*. These include questions concerning whether Petitioner was actually or constructively denied counsel from the time of the decision of the South Carolina Court of Appeals on the direct appeal until the time expired for petitioning for rehearing—a necessary step if review was to be sought by certiorari before the South Carolina Supreme Court. Further, the record raises a question concerning whether Petitioner received proper consultation on his appeal rights from an attorney following the decision of the South Carolina Court of Appeals.

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for an extension to again object, which the Court granted. (Dkt. No. 27.) No additional objections were filed.

The Court denies without prejudice Respondent's motion for summary judgment regarding Ground 3. By separate orders, the Court will appoint counsel for Petitioner and provide the parties a new briefing schedule and guidance regarding the issues that need to be addressed.

IV. Certificate of Appealability

The governing law provides:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253; *see also* Rule 1(b) Governing Section 2254 Cases in the United States District Courts ("The district court may apply any or all of these rules to a habeas corpus petition not covered by [28 U.S.C. § 2254]."). A petitioner may satisfy this standard by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). "[T]o secure a certificate of appealability on claims that the district court denied pursuant to procedural grounds, [the petitioner] must demonstrate both (1) that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Rose v. Lee*, 252 F.2d 676, 684 (4th Cir. 2001) (internal quotation marks omitted).

Here, the legal standard for the issuance of a certificate of appealability has not been met regarding Grounds 1-2 and 4-22 because a reasonable jurist would not find it debatable that Petitioner has not satisfied the deferential *Strickland* standard in the context of habeas relief, nor

that certain claims were not preserved for federal habeas review. Therefore, a Certificate of Appealability is denied regarding Grounds 1-2 and 4-22.

V. Conclusion

For the foregoing reasons, Court **ADOPTS IN PART and DECLINES TO ADOPT IN PART** the R & R (Dkt. No. 19) as the order of the Court. The Court **GRANTS** Respondent's motion for summary judgment (Dkt. No. 15) as to Grounds 1-2 and 4-22. A Certificate of Appealability is **DENIED** as to these Grounds. The Court **DENIES WITHOUT PREJUDICE** Respondent's motion for summary judgment as to Ground 3.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

February 12, 2020
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Clinton Folkes, # 216506, Petitioner, v. Warden Nelsen, Respondent.	Case No. 2:19-cv-760-RMG-MGB **REPORT AND RECOMMENDATION**

Clinton Folkes, a *pro se* state prisoner, seeks habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) The Warden seeks summary judgment. (Dkt. No. 15.) Under 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to review the motion and submit a recommendation to the District Judge. For the following reasons, the undersigned recommends granting the Warden's motion and dismissing this case with prejudice.

BACKGROUND

Folkes is serving life in prison without the possibility of parole for assault and battery with intent to kill ("ABWIK"). (Dkt. No. 14-1 at 433, 436.) His imprisonment is the product of a July 2007 fight he started at Finlay Park in Columbia, South Carolina. In the fight, he slashed the victim's arm and neck with a knife. (*Id.* at 118.)

Folkes was part of a group of homeless people who spent time at the park. (Dkt. No. 14-1 at 155–56, 238.) Other members of that group included Karem Jones, Tiffany Briggs, James Reddick, Jerome Patrick, and Retalia Green. (*Id.* at 83, 131, 159, 180, 233.) They all knew Folkes; Briggs dated him until a couple of days before the fight. (*Id.* at 89–90, 132–33, 159, 180, 234.). All five saw the fight; one participated in it.

Jones was that participant. According to Jones, he was speaking with Briggs when suddenly Folkes approached them. (Dkt. No. 14-1 at 92–93.) Noticeably drunk, Folkes was hostile, demanding to know why Jones and Briggs were talking and threatening to "f--- [Jones] up." (*Id.* at 93–96.) Jones told Folkes to get away from him. (*Id.* at 95.) Folkes threw a beer bottle at Jones but missed. (*Id.* at 97.) He then punched Jones in the eye. (*Id.*) Jones responded by hitting Folkes twice. (*Id.* at 97–98.) As Folkes fell from the blows, he grabbed Jones' shirt and pulled Jones down on top of him. (*Id.* at 98.) They tussled on the ground for a moment, and then someone told Jones he was bleeding from his neck. (*Id.*) Jones got up and saw that Folkes had a knife. (*Id.* at 100, 107–08.) Folkes said, "I'm going to f---ing kill you." (*Id.* at 100.) Jones ran to a phone booth and called 911. (*Id.* at 100–01.)

The other four witnesses' accounts corroborate Jones'. Each one saw Folkes approach Jones and start the fight by throwing the first punch; Reddick and Patrick also saw Folkes throw the beer at Jones. (Dkt. No. 14-1 at 138, 139, 141, 172, 199, 210, 212, 240.) All four saw the two men struggling on the ground, followed by Folkes reaching up and cutting Jones' neck with a knife. (*Id.* at 138, 173, 200–01, 241–42.) Still watching as Jones ran to the phone booth, Reddick, Patrick, and Green heard Folkes say he should have killed Jones. (*Id.* at 169, 213, 244.)

Police arrived shortly after the incident. They quickly found Folkes nearby and arrested him. (Dkt. No. 14-1 at 285–87.) Jones was taken to an emergency room. (*Id.* at 110.)

Trial and Direct Appeal

The State charged Folkes with ABWIK. (Dkt. No. 14-2 at 534.) It then served Folkes with a notice that, because he had two prior ABWIK convictions, he would serve life without parole if convicted this third time. (*See* Dkt. No. 14-1 at 440–41.) Although the prosecutor initially refused to discuss a potential plea deal, she later made Folkes three offers. (Dkt. No. 14-2 at 656–57.) Folkes declined them all. (*Id.* at 658–59.)

The case went to trial in July 2008. (Dkt. No. 14-1 at 1.) Jones, Briggs, Reddick, Patrick, and Green all appeared for the State, testifying to their accounts of the altercation and identifying Folkes in court as the person who attacked Jones. (*Id.* at 115, 146, 170, 231, 250.) The State also called several police officers involved in the case, as well as a medical expert. (*Id.* at 265–324, 338–72.) Folkes did not present a defense case. (*See id.* at 378.)

After closing arguments, the trial court charged the jury. (Dkt. No. 14-1 at 406–21.) Among other things, it told the jury they had three verdict options: find Folkes guilty of ABWIK, find him guilty of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), or find him not guilty at all. (*Id.* at 419.) The court also explained the elements of those two crimes and then told the jury ABHAN "includes all the elements of [ABWIK] except express malice. In addition, the State must prove beyond a reasonable doubt an aggravating circumstance." (*Id.* at 413–18 (quoted language at 417).) After the charge, Folkes' lead trial counsel asked the court to instruct the jury that the absence of malice is not an element of ABHAN and thus the jury could find Folkes acted with malice and still find him guilty of ABHAN, rather than ABWIK. (*Id.* at 422–23.) The trial court declined. (*Id.* at 423.)

During their deliberations, the jury asked the court "What is the difference between [ABWIK] and [ABHAN]?" (Dkt. No. 14-1 at 424.) The court repeated its instructions on those two crimes, again concluding with the charge that ABHAN "includes all of elements of [ABWIK] except malice aforethought. In addition, the State must prove beyond a reasonable doubt the aggravating circumstances." (*Id.* at 425–30 (quoted language at 430).)

The jury found Folkes guilty of ABWIK. (Dkt. No. 14-1 at 433.) Because Folkes had two prior ABWIK convictions, the trial court sentenced him to life without parole. (*Id.* at 468.)

Folkes appealed, arguing the trial court improperly refused to charge the jury that absence of malice is not an element of ABHAN. (Dkt. No. 14-1 at 449–67.) The state Court of Appeals affirmed in an unpublished decision. (*Id.* at 484–85.) Folkes did not seek further review.

Post-Conviction Relief ("PCR") Proceedings

In October 2010, Folkes filed an application for post-conviction relief in state court, asserting over twenty claims of ineffective assistance of trial and appellate counsel. (Dkt. No. 14-1 at 487–92; Dkt. No. 14-2 at 501–04, 526–29.)

The PCR court held a two-day hearing in July and September 2014. (Dkt. No. 14-2 at 541.) Folkes testified and called five witnesses: his appellate lawyer and her supervisor; his two trial lawyers; and a police officer involved in his post-arrest booking at the jail. (*Id.* at 542.)

In January 2016, the PCR court issued a lengthy order denying Folkes' claims. (Dkt. No. 14-1 at 808–53.) Folkes petitioned for certiorari, challenging the PCR court's denial of fourteen of his claims. (Dkt. No. 14-2 at 854; Dkt. No. 14-4.)[1] The state Supreme Court transferred the case to the Court of Appeals, which summarily denied the petition in October 2018. (Dkt. No. 14-5 at 5; Dkt. No. 14-6.)

PROCEDURAL HISTORY

Folkes filed his habeas petition on March 11, 2019. (Dkt. No. 1-3.) In the petition itself, he summarily claims ineffective assistance of counsel and "judicial error." (Dkt. No. 1 at 5.)

[1] As the rules governing § 2254 cases require, the Warden has provided the Court records from the state-court proceedings. *See* Rule 5(c)–(d), Rules Governing § 2254 Cases. However, the records for the PCR appeal are incomplete. Although the Warden submitted Folkes' original certiorari petition (*see* Dkt. No. 14-4), the South Carolina Appellate Case Management System's web site shows that later, Folkes filed an amended petition, the State filed a return, and then Folkes filed a reply. https://ctrack.sccourts.org/public/caseView.do?csIID=61547, *last visited* Nov. 8, 2019). The Warden did not provide any of those documents. Although this Court can take judicial notice of those records, *see Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980), it was the Warden's responsibility to provide this Court all PCR appellate briefs. Rule 5(d), Rules Governing § 2254 Cases. Upon review, however, Folkes' later filings did not change the issues he raised, or the arguments he made, in his original brief. *See also* Mot. for Leave to File Am. Pet. for Writ. of Cert., *Folkes v. State*, No. 2016-000415 (S.C. Ct. App. Mar. 14, 2017). Thus, the Warden's omission does not prevent this Court from conducting meaningful habeas review.

However, to explain those grounds, Folkes directs the reader to several attachments, including portions of his PCR certiorari petition and portions of a brief he filed with the PCR court addressing the claims he asserted in that court. (*See id.*) Thus, it appears Folkes is raising here all twenty-two of his PCR claims. Folkes asks this Court to vacate his conviction and sentence and grant him a new trial. (*Id.* at 15.)

The Warden has moved for summary judgment. (Dkt. No. 15.) Folkes has filed a response (Dkt. No. 18), making this matter ripe for adjudication.

LEGAL STANDARD

Habeas corpus in federal court exists to "guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citation and internal quotation marks omitted). Federal habeas is neither an alternative to state-court relief nor an additional chance to appeal erroneous state-court rulings. *See id.* That preference for, and deference to, state courts is borne out in the various constraints placed on federal courts. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (stating § 2254 "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases"); *see also Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (stating § 2254 "reflect[s] a presumption that state courts know and follow the law" (citation and internal quotation marks omitted)).

For instance, state prisoners who challenge matters "adjudicated on the merits in State court" cannot get relief in federal court unless they show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" announced by the Supreme Court or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). That means a state court's ruling must be "so lacking in justification that there was an error well understood and

comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Federal courts must also defer to state courts' factual determinations, which are presumed correct until the prisoner rebuts that presumption with clear and convincing evidence. § 2254(e)(1).

Before state prisoners may try to clear those high hurdles, two rules steer them to first pursue all relief available in state court. *See* § 2254(b)(1). The first, known as exhaustion of remedies, requires a prisoner to present his claims to the highest state court with jurisdiction to decide them. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010). A federal court cannot grant a prisoner's habeas petition until he exhausts his state-court remedies. § 2254(b)(1), (c). The second rule, called procedural default, comes into play when a prisoner failed to present a claim to the state courts at the appropriate time and has no means of doing so now. *Stewart*, 701 F. Supp. 2d at 790. Federal courts may not consider a procedurally defaulted claim unless the prisoner shows either that he has cause for defaulting and that the alleged violation of federal law prejudiced him or that not addressing the claim would be a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The ultimate issue in this case is, of course, whether Folkes should receive habeas relief under these standards. However, the Warden's summary judgment motion presents narrower questions. Summary judgment is appropriate only if the moving party shows that "there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Rule 12, Rules Governing § 2254 Cases (stating courts may apply in habeas cases any of the Federal Rules of Civil Procedure to the extent they are not inconsistent with statutes or the § 2254 rules). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse

party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Viewing the habeas rules through the lens of Rule 56, the Court has three questions to answer at this juncture:

(1) Are there genuine issues of fact as to whether Folkes' claims are properly before the Court?
(2) Are there genuine issues of fact as to the merits of Folkes' claims?
(3) If the answer to either (or both) of the first two questions is "no," is the Warden entitled to judgment as a matter of law?

In answering those questions, the undersigned has carefully considered the record before the Court and has liberally construed the materials Folkes has submitted. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

DISCUSSION

As mentioned, Folkes is asserting twenty-two claims. In each, he alleges ineffective assistance of counsel, either at trial or in the direct appeal.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A petitioner proves ineffective assistance by showing his attorney's performance was deficient and prejudiced him. *Id.* at 687. An attorney's performance is deficient if it was unreasonable under the circumstances of the case and under then-prevailing professional norms. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Kimmelman*, 477 U.S. at 384.

Strickland is highly deferential to counsel, and § 2254(d) is highly deferential to state courts. *Harrington*, 562 U.S. at 105. That means when a state court has adjudicated an ineffective-assistance claim on the merits, this Court's review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In other words, the question becomes "not whether counsel's actions were reasonable," but "whether there is any reasonable argument that [Folkes'] counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.[2] Thus, although Folkes has framed his claims purely as ones of ineffective assistance, the undersigned has liberally construed them as alleging the PCR court's rulings do not withstand § 2254(d) scrutiny.

The Warden argues none of Folkes' grounds merits the granting of habeas. (Dkt. No. 14 at 1.) The Warden also asserts that eight of the grounds—Six, Seven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, and Twenty-Two—are procedurally defaulted. (*Id.* at 13, 14, 19, 20–21, 23, 29.) For the reasons below, the undersigned agrees with the Warden.

I. Grounds One and Two

Folkes' first two grounds involve the elements of ABHAN and ABWIK, as well as the difference between those crimes. South Carolina defines ABWIK as an unlawful act of a violent nature to another person with malice aforethought, either express or implied, and intent to kill. *E.g.*, *State v. Coleman*, 536 S.E.2d 387, 389 (S.C. Ct. App. 2000) (citations omitted). ABHAN is an unlawful act of violent injury accompanied by circumstances of aggravation. *Id.* (citation omitted). "[T]he absence of malice is not a required element of the offense of ABHAN, and the

[2] Subsection 2254(d)'s standards are to be applied to the decision from the highest state court to decide the claim at issue on the merits. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Where, as here, the highest state court rules summarily, the federal habeas court should "look through" that unexplained decision to the last state-court decision that provides a relevant rationale, and "should then presume that the unexplained decision adopted the same reasoning." *Id.* In this case, the PCR court was the only one to issue a reasoned decision on Folkes' claims. As neither party contends the Court of Appeals denied certiorari on different reasoning than what the PCR court provided, the undersigned has used the PCR court's reasoning to analyze the merits of Folkes' claims.

fact that a defendant acts with malice does not preclude a finding of ABHAN." *State v. Tyler*, 560 S.E.2d 888, 890 (S.C. 2002).

In her closing argument, the prosecutor argued Folkes was guilty of ABWIK, not ABHAN. (Dkt. No. 14-2 at 387–89.) At one point, she told the jury, "What is in dispute today is whether there was malice aforethought, express or implied. And that's going to be the difference between" ABHAN and ABWIK. (*Id.* at 389.) She also said the jury had to find Folkes guilty of ABWIK, not ABHAN, if they determined he acted with malice. (*Id.* at 388.)

In PCR, Folkes asserted trial counsel was ineffective for not objecting to those statements. (Dkt. No. 14-2 at 526.) The PCR court disagreed. (*Id.* at 827–30.) Analyzing the law of ABWIK and ABHAN, it concluded that "the crucial difference between ABWIK and ABHAN when ABHAN is charged as a lesser[-]included offense is whether the defendant acted with malice." (*Id.* at 829.) Consequently, the court found the prosecutor stated South Carolina law accurately. (*Id.* at 829, 830.) Because an objection to the prosecutor's statements would have been overruled, lead trial counsel's decision not to object was reasonable and did not prejudice Folkes. (*Id.* at 827, 829, 830.) The court therefore denied the claim.

Folkes challenges the PCR court's rulings. To prevail, however, he would need to disprove their central premise: that the prosecutor stated the law correctly. This Court's limited scope of review prevents this Court from deciding that issue for itself; the PCR court's analysis of South Carolina law is binding on this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *Thomas v. Davis*, 192 F.3d 445, 449 n.1 (4th Cir. 1999). Consequently, Folkes' claims must be analyzed against the backdrop of the PCR court's unreviewable conclusion about state law. Given that, the undersigned cannot conclude the PCR court's decision was anything but reasonable. *Cf. Rice v. Pate*, No. 4:14-cv-185-TLW-TER, 2014 WL 8335449, at *9 (D.S.C. Oct. 6, 2014) (finding PCR court reasonably found counsel was not ineffective for failing to raise an

argument that had no merit under state law), *report and recommendation adopted*, 2015 WL 1400070 (D.S.C. Mar. 26, 2015).

II. Ground Three

After the state Court of Appeals affirmed on direct appeal, Folkes' appellate counsel did not file a rehearing petition. Folkes faulted her in PCR, claiming her failure to seek rehearing prevented him from petitioning the state Supreme Court for certiorari. (Dkt. No. 14-2 at 3.)

Appellate counsel testified at the PCR hearing. (*See* Dkt. No. 14-2 at 576–96.) When she represented Folkes, she practiced at the state appellate defense office, which handles criminal appeals for the indigent. (*See id.* at 577–78.) She resigned while Folkes' appeal was pending; the Court of Appeals issued its opinion ten days after she left. (*Id.* at 547, 577–78.) Appellate counsel testified that, had she stayed at appellate defense, she "certainly" would have petitioned for rehearing and certiorari. (*Id.* at 578.) "I thought it was a winner. I thought it was clear error. I thought it was reversible." (*Id.* at 578–79.)

The office's chief appellate defender testified as well. (*See* Dkt. No. 14-2 at 546–76.) He testified that, when Folkes' appellate counsel quit, Folkes' case became his responsibility. (*Id.* at 554–55.) He could not recall if, when the Court of Appeals issued its opinion, he read the opinion, reviewed Folkes' file, or assessed whether he should seek rehearing and certiorari. (*Id.* at 555–56.) However, he disagreed with the Court of Appeals' ruling, and he "wish[ed]" that rehearing and certiorari had been pursued. (*Id.* at 572.)

The PCR court denied the claim. (Dkt. No. 14-2 at 830–33.) It based its conclusion on the state Supreme Court's ruling in *Douglas v. State* that, in criminal cases, appellate counsel has no duty to pursue rehearing or certiorari after the Court of Appeals issues an adverse decision. 631 S.E.2d 542, 543 (S.C. 2006). (Dkt. No. 14-2 at 831, 833.) The PCR court reasoned that

because the appellate lawyers had no duty to seek rehearing, their failure to do so was not deficient and did not prejudice Folkes. (*Id.* at 833.)

The appellate attorneys' testimony makes the undersigned hesitant to accept the PCR court's no-prejudice finding. Admittedly, the mere filing of petitions for rehearing and certiorari would not have guaranteed further appellate review, let alone reversal. On the other hand, two seasoned appellate attorneys testified that the Court of Appeals' opinion was wrong and that Folkes' case was a good candidate for certiorari. While their assessments of the appeal are not binding, they also are not easily dismissed.

Nevertheless, the PCR court's denial of the claim was reasonable. *See Gill v. Mecusker*, 633 F.3d 1272, 1292 (11th Cir. 2011) (stating § 2254(d)(1) directs federal habeas courts to "focus[] on the result, not on the reasoning that led to the result"). The Constitution does not guarantee assistance of counsel in the pursuit of discretionary appellate review. *See Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam) (no Sixth Amendment right to counsel in pursuing discretionary appeal); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (no Fourteenth Amendment right to counsel when pursuing discretionary appeal). Rehearing at the state Court of Appeals is discretionary. *Williamson v. Middleton*, 681 S.E.2d 867, 869 (S.C. 2009) (per curiam). Consequently, "there is no constitutional right to counsel in seeking a rehearing" at the state Court of Appeals. *Allison v. Bodison*, No. 8:08-cv-2415-HMH, 2009 WL 2524691, at *26 (D.S.C. Aug. 14, 2009); *see also Cabbagestalk v. McFadden*, No. 5:14-cv-3771-RMG, 2015 WL 4077211, at *36 (D.S.C. July 1, 2015) (finding PCR court reasonably denied ineffective-assistance claim of failure to seek rehearing; petitioner had no right to counsel for that discretionary review). Thus, appellate counsels' failure to seek rehearing could not serve as the basis for relief, in the PCR court or here. The undersigned recommends denying this claim.

III. Ground Four

Folkes did not present a defense at trial. (*See* Dkt. No. 14-1 at 372–73.) In PCR, he alleged trial counsel failed to inform him that, even if he declined to testify in his own defense, he still had a right to present other evidence. (Dkt. No. 14-2 at 526.) At the hearing, Folkes claimed he would have testified in his own defense if trial counsel had explained the risks and benefits of testifying. (*Id.* at 730–31.)

The PCR court did not find Folkes' allegations credible, instead believing trial counsel's PCR hearing testimony. (Dkt. No. 14-2 at 833–34.) Lead trial counsel testified he explained to Folkes not only his right to testify but also the potential benefits and drawbacks of Folkes taking the stand. (*Id.* at 611–12, 660, 661–62, 833.) Counsel told Folkes that testifying would help his case and that he would try to prevent the State from impeaching Folkes with some of his prior criminal convictions. (*Id.* at 611.) But according to counsel, Folkes made up his mind well before trial that he did not want to testify. (*Id.* at 660, 833.) In light of that, trial counsel made the tactical decision to not put up any defense witnesses; the marginal benefit Folkes might get from potential defense witnesses' testimony would come at the cost of losing the right to give the final closing argument—a right South Carolina law gave to defendants who presented no case. (*Id.* at 612, 661–62, 833–34.) Nevertheless, counsel did tell Folkes that he had the right to put up a defense case even if he did not personally testify. (*Id.* at 612, 833.) Based on all that testimony, the PCR court found trial counsel did not perform deficiently. (*Id.* at 833–34.)

The PCR court also found Folkes failed to show any prejudice from counsel's purported failure. (Dkt. No. 14-2 at 834.) At the PCR hearing, Folkes testified he wanted the jury to hear evidence that he had a job and a place to live on the day of the fight. (*Id.* at 796.) The PCR court found those issues were "collateral . . . at best." (*Id.* at 834.)

The undersigned sees nothing unreasonable in the PCR court's decision. Lead trial counsel's testimony directly contradicted the main premises of Folkes' claim—that is, counsel testified he did the things Folkes accused him of not doing. The PCR court's finding that counsel's testimony was credible is presumed correct. *See Merzbacher v. Shearin*, 706 F.3d 356, 367 (4th Cir. 2013). As Folkes has given this Court nothing to rebut that presumption, counsel's testimony amply supports the PCR court's ruling. The undersigned therefore recommends denying this ground.

IV. Ground Five

At trial, the State called Patrick, who was Folkes' friend. (Dkt. No. 14-1 at 180.) In his direct examination, he testified about roofing work he used to perform with Folkes. (*Id.* at 187–89, 190–91.) Patrick told the jury he and Folkes used special knives on the job, but Folkes sometimes carried his knife with him after work; before Folkes got that knife, he kept a straight razor with him. (*Id.* at 189–90.) Trial counsel did not object to that testimony. (*See id.*)

In PCR, Folkes argued counsel was ineffective for not objecting to testimony that "bore no logical relevance to the . . . case and constituted evidence of prior bad acts." (Dkt. No. 14-2 at 526.) Lead trial counsel testified he did not object because Patrick was so soft-spoken that the jury likely did not hear his testimony; indeed, just after Patrick made the statement, the trial court directed him to speak up. (*Id.* at 614; Dkt. No. 14-1 at 190.) Counsel thought objecting would only draw unwanted attention to testimony the jury probably did not hear. (Dkt. No. 14-2 at 614.)

The PCR court denied the claim. (Dkt. No. 14-2 at 835.) It found no reasonable possibility that the testimony had any impact on the case. (*Id.*) "Numerous witnesses testified that they saw [Folkes] with a knife at the park on the day of the incident." (*Id.*) Given the "overwhelming and uncontroverted testimony that he was indeed armed with a knife on the day

in question," the PCR court could not find Patrick's testimony prejudicial under *Strickland*. (*Id.*) The court declined to address whether trial counsel performed deficiently. (*See id.* at 835–36.)

The undersigned sees no reason to disturb the PCR court's ruling. To be sure, Patrick's testimony might have been objectionable propensity evidence. However, the danger of propensity evidence is its power to make the jury reach the wrong conclusion about whether the defendant did the thing he is accused of doing. *See Michelson v. United States*, 335 U.S. 469, 475–76 (1948). Here, the testimony about Folkes' propensity to carry knives related to the issue of whether Folkes used a knife in the fight. As the PCR court pointed out, the jury had ample independent evidence that Folkes did just that. That independent evidence eliminated the potential for the jury to be influenced by a potentially impermissible propensity inference. Consequently, there was no reasonable probability that Patrick's testimony prejudiced the case. The PCR court therefore reasonably denied this claim. The undersigned recommends this Court do so as well.

V. Grounds Six and Seven

In an email sent while Folkes was awaiting trial, the prosecutor told Folkes' lawyers that "this case is a mandatory LWOP, so I can't make a[plea] offer." (Dkt. No. 14-2 at 366.) In PCR, Folkes asserted trial counsel was ineffective for neither challenging the prosecutor's position nor investigating whether what she wrote was true. (Dkt. No. 14-2 at 526–27.)

At the PCR hearing, lead trial counsel testified that, despite the prosecutor's email, he nevertheless negotiated with her. (Dkt. No. 14-2 at 618, 650–52.) She made plea offers on three occasions: ten years, twenty years, and fifteen years. (*Id.* at 650–52, 656–57, 764–65.) Counsel presented all three offers to Folkes, who rejected them. (*Id.* at 658–59.) Counsel's case notes, which corroborated his testimony, were entered as PCR exhibits. (*Id.* at 764–65.)

Relying on lead trial counsel's testimony and notes, the PCR court found that trial counsel were not deficient. (Dkt. No 14-2 at 836–37.) It did not address the prejudice prong of *Strickland*. (*See id.*)

A. Procedural Default

Folkes did not raise these grounds in his PCR appeal. Issues not presented at the appropriate time to a state's highest court are procedurally defaulted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Thus, these grounds are defaulted.

As discussed below, several other of Folkes' grounds are procedurally defaulted for the same reason—he did not raise them in the PCR appeal. Others are defaulted because the PCR court never ruled upon them in its order, and Folkes never made a motion asking the court to address them. Folkes has not asserted that he has cause and prejudice excusing any of the defaults or that declining to address any of them would be a miscarriage of justice. The undersigned therefore recommends not addressing the merits of Ground Six, Ground Seven, or any other procedurally defaulted ground. However, in case the Court determines that any defaulted ground should be addressed, the undersigned has analyzed the merits of every defaulted claim.

B. Merits

The PCR court's decision was appropriate. Contrary to Folkes' assertions, trial counsel challenged the prosecution's no-offer position by obtaining several plea offers, each with far less time than life without parole. Although Folkes rejected every offer, counsel's conduct was nonetheless effective. The PCR court therefore properly denied these two claims.

VI. Ground Eight

Before the State presented its last witness, the trial court held a charge conference. (Dkt. No. 14-1 at 325–37.) Because malice is an element of ABWIK, the court said it would define

malice to the jury and explain how malice could be inferred. (*Id.* at 326–27.) At Folkes' counsel's request, the court then agreed to charge ABHAN as a lesser-included offense. (*Id.* at 335–37.) Counsel also asked the court to instruct the jury that, under *Tyler*, absence of malice is not an element of ABHAN. (*Id.* at 329–33.) After some discussion with counsel and the prosecutor, the court said it would read *Tyler* and then make a decision. (*Id.* at 333.)

Also during trial, Folkes' attorneys filed a written request to charge. (Dkt. No. 14-2 at 756–57.) The written request included the proposed instruction that absence of malice is not one of ABHAN's elements. (Dkt. No. 14-1 at 422–23.) In the request, counsel also asked the court to tell them, before closing arguments, which of the proposed instructions it was using and which ones it was rejecting. (Dkt. No. 14-2 at 756–57.) However, the court never indicated whether it would give the absence-of-malice charge counsel requested.

During his closing argument, Folkes' lead trial counsel told the jury the court was "going to instruct [them] that the absence of malice is not an element of" ABHAN. (Dkt. No. 14-1 at 404.) The court, however, never gave such an instruction. After closing arguments, the court said that, during a break in the charge conference, it read *Tyler* and then decided not to give the requested instruction. (*Id.* at 423.)

In PCR, Folkes asserted lead trial counsel was ineffective for telling the jury the court would instruct them about absence of malice without first determining that the trial court would actually give the instruction. (Dkt. No. 14-2 at 527.) At the hearing, PCR counsel noted his written request for the court to tell him in advance if it was refusing to give any of his requested instructions. (*Id.* at 622.) Counsel testified the combination of his request and the court's silence led him to assume the court would tell the jury absence of malice is not an ABHAN element. (*Id.*)

The PCR court denied the claim for lack of prejudice. (Dkt. No. 14-2 at 837–38.) It found that both trial counsel and the prosecutor told the jury "that the judge would instruct them on the correct law and that any argument from either counsel was not evidence to be considered. Additionally, the trial court instructed the jury to only apply the law as instructed during its charge." (*Id.* at 838.) Based on that, the court could not find counsel's incorrect prediction about the jury charge might have affected the case. (*Id.*) It therefore denied the claim without addressing whether counsel's prediction was deficient. (*See id.*)

The rejection of the claim was reasonable. Folkes' theory of prejudice for this claim was that counsel's mistaken prediction "exacerbated the prejudice arising from his failure to object to the state's improper closing arguments." (Dkt. No. 14-4 at 35.) In other words, Folkes premised his claim on Grounds One and Two having merit. As explained above, however, the PCR court rejected the central premise of those claims, finding the solicitor said nothing wrong. If those statements were not erroneous, there was no harm for trial counsel's mistaken prediction to exacerbate. Moreover, as the PCR court noted, the trial judge told the jury he was their "sole and only instructor of the law." (Dkt. No. 14-1 at 413.) The jury was required to "accept as correct" the court's charges and apply them to the evidence. (*Id.*) "[J]uries are presumed to follow the court's instructions." *CSX Transp. v. Hensley*, 556 U.S. 838, 841 (2009) (per curiam). As nothing in the record rebuts that presumption, the jury presumably followed the trial court's instruction to listen to only its explanation of the law. Because doing that necessarily required the jury to ignore counsel's inaccurate prediction, it is unlikely that the statement affected the case. Thus, the undersigned recommends finding the PCR court reasonably denied Ground Eight.

VII. Ground Nine

After the fight, eyewitnesses Green and Patrick helped police search for Folkes and the knife. (Dkt. No. 14-1 at 246–47.) In that search, Green found a shirt in a trashcan at the park. (*Id.* at 247.) The police took it as evidence and had it analyzed. The law enforcement laboratory found no DNA or blood on it. (*Id.* at 295–97.) However, Jones and the eyewitnesses to the fight testified Folkes was wearing the shirt during the fight. (*Id.* at 102–03, 247–48.) The trial court admitted the shirt into evidence. (*Id.* at 104.)

In PCR, Folkes faulted lead trial counsel for not highlighting the lack of blood or DNA in his closing argument. (Dkt. No. 14-2 at 527.) At the PCR hearing, lead trial counsel testified he *did* point out the lack of blood in his closing. (Dkt. No. 14-1 at 405; Dkt. No. 14-2 at 626.) He acknowledged, however, that he did not mention the lack of DNA evidence. (Dkt. No. 14-2 at 626.) Although he did not recall he omitted that point, he testified it was inconsequential because witnesses who knew Folkes testified they saw him attack Jones; moreover, counsel felt the issue was minor and not worth emphasizing to the jury. (*Id.* at 626, 629–30.) He also testified that, to the extent Jones' attacker's identity could have been in question, it was sufficient to point out the shirt had no blood on it. (*Id.* at 626, 629.)

Relying on that testimony, the PCR court denied the claim. (Dkt. No. 14-2 at 838–39.) Agreeing with counsel's assessment of the DNA issue, the court found that mentioning lack of DNA would not have changed the trial's outcome. (*Id.* at 839.) The court therefore denied the claim for lack of prejudice. (*Id.*)

The PCR court's decision was legally and factually appropriate. Contrary to Folkes' assertion, counsel noted the shirt's lack of blood during his closing argument. (Dkt. No. 14-1 at 404–05.) Folkes cannot fault counsel for doing the very thing Folkes wanted him to do. As to the lack of DNA, the undersigned agrees with the PCR court's no-prejudice finding. Although

the witnesses to the attack testified Jones' assailant was wearing that shirt, they also testified that they knew Folkes well and that he was Jones' assailant. The presence or absence of Folkes' DNA on the shirt was thus unlikely to make a difference to the jury. The undersigned recommends denying this ground.

VIII. Ground Ten

During the charge conference, trial counsel conceded Folkes could not claim self-defense because he started the fight. (Dkt. No. 14-1 at 330.) Folkes asserted in PCR that he had a colorable self-defense claim, and trial counsel was ineffective for not pursuing it. (Dkt. No. 14-2 at 527.)

The PCR court disagreed. (*Id.* at 839–41.) The court began noting that, in South Carolina, one of the elements of self-defense is that the defendant "was without fault in bringing about the difficulty." (*Id.* at 840.) The court then found the trial record contained no evidence of this element; rather, all evidence relevant to that issue showed Folkes started the fight. (*Id.* at 841.) For that reason, the PCR court found counsel did not perform deficiently by passing on self-defense. (*Id.*) It also found Folkes failed to prove prejudice because he did not submit any evidence that, if produced at trial, would have supported a self-defense jury charge. (*Id.*) Without such evidence, the trial court would have denied a request for a self-defense instruction. (*Id.*)

A. Procedural Default

Folkes did not appeal the PCR court's ruling. Consequently, Ground Ten is defaulted and the Court should not address it.

B. Merits

As with Grounds One and Two, the PCR court's resolution of this claim turned on an application of state law: whether there was any evidence at trial that satisfied South Carolina

law's elements of self-defense. This Court could not grant Folkes relief on Ground Ten without first finding that state-law decision was wrong. As that is beyond this Court's province, *see Estelle*, 502 U.S. at 67–68, the PCR court's application of South Carolina law effectively prevents this Court from disturbing the PCR court's ultimate ruling on the claim. Thus, if the Court addresses this claim on the merits, it should deny the claim.

IX. Ground Eleven

Robert McCracken was one of the police officers who responded to Jones' 911 call. (Dkt. No. 14-1 at 300.) He testified at trial that when he was dispatched to the scene, he "was told someone was cut severely." (*Id.*) Folkes asserted in PCR that trial counsel should have objected to McCracken's testimony because it was hearsay. (Dkt. No. 14-2 at 527.)

The PCR court denied the claim. (Dkt. No. 14-2 at 841–42.) Without addressing whether counsel performed deficiently, it found the omission did not prejudice Folkes. (*Id.* at 842.) The court pointed out that, on cross-examination of the State's medical expert, trial counsel got the expert to concede Jones' wounds were not severe. (*Id.*) Further, the PCR court noted, counsel highlighted that concession to the jury during closing argument. (*Id.*) Because counsel elicited testimony from an important witness dispelling any notion that Jones' wounds were severe, Folkes suffered no prejudice from McCracken telling the jury what a dispatcher said to him. (*Id.*)

The PCR court's decision was reasonable. The State's expert testified that when emergency room patients present with wounds, the severity of their trauma is assessed and given a rating; Jones received the least serious rating on the scale. (Dkt. No. 14-1 at 356–59.) The expert also acknowledged that the cut on Jones' neck did not penetrate any arteries or veins, or Jones' throat. (*Id.* at 363.) Trial counsel's cross-examination thus demonstrated that, despite one of the cuts being to Jones' neck, the wounds were not life-threatening. As the PCR court

recognized, a medical expert's explanation of how Jones' wounds were not serious almost certainly would have carried more weight with the jury than McCracken telling them what a dispatcher relayed to him in the heat of the moment. This ground should be denied.

X. Ground Twelve

When police arrested Folkes, they took a beer bottle and put it in their evidence room. (Dkt. No. 14-1 at 309.) Somehow, the bottle broke while in the police department's possession. (*Id.*) Nevertheless, it was admitted into evidence as purportedly the bottle Folkes threw at Jones. (*See id.* at 309–10.)

In PCR, Folkes faulted trial counsel for not objecting to the bottle's admission. (Dkt. No. 14-2 at 527.) He asserted it was improper to admit the bottle because it had been broken, preventing the jury from meaningfully examining it, and because the State could not prove what brand of beer had been in it. (*Id.*) The PCR court, however, rejected those arguments. (*Id.* at 842.) First, contrary to Folkes' assertion, trial counsel *did* object to the bottle's admission on the basis that it was broken; the trial court overruled the objection. (*Id.*) Second, although counsel did not make an argument about the inability to identify the brand of beer, the PCR court found there was "no conceivable likelihood that the type of beer had any impact on [Folkes'] case." (*Id.*) The PCR court therefore denied the claim. (*Id.*)

A. Procedural Default

Folkes did not appeal the PCR court's ruling on this ground. Consequently, Ground Twelve is defaulted and the Court should not address it.

B. Merits

The undersigned sees nothing problematic in the PCR court's ruling. As that court pointed out, trial counsel objected to the bottle being admitted, as it was no longer in the same condition as when the police seized it. (Dkt. No. 14-1 at 309–10.) The trial court overruled that

objection. (*Id.* at 310.) That trial counsel did what Folkes alleged they did not do undercuts that portion of Folkes' claim. As for the brand of beer, the undersigned agrees with the PCR court: that issue was immaterial. If the Court reaches the merits of the claim, it should deny the claim.

XI. Grounds Thirteen, Fourteen, and Fifteen

One of the State's trial exhibits was Folkes' backpack, which police took from him during his arrest. (Dkt. No. 14-1 at 322–24.) According to Folkes, when was taken to jail, officers directed him to remove the clothes he was wearing. (Dkt. No. 14-2 at 526–27.) At some point after that, the clothes were put in the backpack, underneath a sleeping bag. (*Id.*)

In PCR, Folkes argued that trial counsel should have objected to the backpack being admitted with the clothes inside it, as that did not accurately illustrate the pack's contents when he had it. (Dkt. No. 14-2 at 527.) He also argued counsel should have called David Battiste, a police officer involved in Folkes' booking, to testify that he put the clothes in the backpack. (*Id.*) Finally, and similarly, Folkes argued counsel was ineffective for not establishing that the clothes in the bag were what he was wearing during the fight and that Folkes did not hide them in there under the sleeping bag. (*Id.*) Battiste testified at the PCR hearing, saying he only vaguely remembered Folkes' case. (*Id.* at 596–605.)

The PCR court denied all three claims. (Dkt. No. 14-2 at 843–85.) Without addressing counsel's performance, the court found Folkes failed to prove prejudice on any of the claims. (*Id.*) In addition to discussing evidence specific to each claim, the court found all three claims failed because the question of whether Folkes changed clothes after the attack was collateral. (*Id.*) The clothing, the PCR court explained, was relevant to the attacker's identity; because several people who knew Folkes testified they watched him attack Jones with a knife, identity was a non-issue. (*Id.*) Consequently, any inference the jury might have drawn about the

circumstances surrounding Folkes changing his clothes was not reasonably likely to have affected the case's outcome. (*Id.*)

A. Procedural Default

Folkes did not appeal the PCR court's rulings on any of these three claims. Consequently, they are defaulted and the Court should not address them.

B. Merits

The record demonstrates the PCR court reasonably denied the claims. As the PCR court pointed out, whether Folkes changed clothes between the attack and his arrest was irrelevant. As previously discussed, five people who knew Folkes, including his recent ex-girlfriend, testified they saw him wound Jones. In addition, Folkes did not present any direct evidence showing the police put the clothes in the bag. Although Battiste testified at the PCR hearing that he recalled instructing Folkes to remove some clothes, he did not remember what happened to those clothes. (Dkt. No. 14-2 at 598–600.) Folkes' failure to establish the main factual premise of his claims makes the PCR court's denial of them all the more appropiate. The undersigned thus recommends denying these grounds even if the Court reaches their merits.

XII. Ground Sixteen

The State also introduced another backpack into evidence. (Dkt. No. 14-1 at 244–45.) The State had it admitted after Green testified it was the bag Folkes had with him during the altercation. (*Id.* at 244.) Later in the trial, however, the State realized that backpack actually belonged to Jones. (*Id.* at 391.) In her closing argument, the prosecutor clarified to the jury that the backpack belonged to Jones, while the other backpack she had introduced belonged to Folkes. (*Id.*)

Despite that clarification, Folkes asserted in PCR that the clothes he was wearing when he was arrested were later placed into Jones' backpack. (Dkt. No. 14-2 at 526.) He claimed trial

counsel performed ineffectively by not proving that at trial. (*Id.*) The PCR court denied that claim. (*Id.* at 845–46.) After noting the claim was inconsistent with Grounds Thirteen, Fourteen, and Fifteen, the court found there was no evidence that Folkes' clothes were ever in Jones' backpack. (*Id.*) It then found that, as with those preceding three claims, counsel's alleged conduct could not have prejudiced Folkes; because there was overwhelming eyewitness evidence that Folkes cut Jones, what might have happened to his clothes after the fact was unlikely to impact the case. (*Id.*)

A. Procedural Default

Folkes did not appeal the PCR court's ruling on this ground. Consequently, Ground Sixteen is defaulted and the Court should not address it.

B. Merits

The undersigned sees no merit to this ground. As the PCR court noted, Folkes offered no evidence that his clothes were in that backpack, and he failed to explain how having the clothes there might have affected his trial. Even if the Court reaches the merits, the undersigned still recommends denying this ground.

XIII. Ground Seventeen

At trial, Jones described the knife Folkes used to slash him. (Dkt. No. 14-1 at 107–08.) The prosecutor then showed Jones a knife that she had marked for identification as a demonstrative exhibit and that she acknowledged was not the knife from the fight. (*Id.* at 108.) Jones testified the knife was "very, very similar" to the one Folkes used in the fight. (*Id.*) The knife was not admitted into evidence.

In PCR, Folkes alleged counsel was ineffective for not objecting to the prosecutor displaying the knife during Jones' direct examination. (Dkt. No. 14-2 at 792–93.) The PCR court denied the claim. (*Id.* at 846–47.) It reasoned that because Jones testified the knife so

closely resembled what Folkes used in the fight, any objection to its demonstrative use would have been overruled. (*Id.*)

The undersigned sees no basis for rejecting that ruling. In PCR, Folkes argued trial counsel should have objected to the display of the knife because it was irrelevant and calculated to inflame the jury's passions. (Dkt. No. 14-2 at 794.) Relevance and unfair prejudice are issues of South Carolina evidence law. *See* S.C. R. Evid. 401, 403. Folkes' argument, then, helps explain the PCR court's decision: by saying the objections would have been overruled, the PCR implied it found the demonstrative use of the knife permissible under state evidence law. That means this Court could not upend the PCR court's ruling without going behind that court's evidentiary determination. As discussed above, this Court may not do that. Because this Court must accept the PCR court's decision that the objections would have been futile, trial counsel's failure to object cannot be characterized as ineffective. *See Rice*, 2014 WL 8335449, at *9. The undersigned therefore recommends denying this claim.

XIV. Grounds Eighteen and Nineteen

In Folkes' view, the State depicted him to the jury as a homeless, unemployed drunk. (Dkt. No. 14-2 at 796.) But according to Folkes, he was employed during the week preceding the incident and had worked eight hours just before he went to the park that afternoon. (*Id.* at 528.) Folkes asserted in PCR that trial counsel should have introduced evidence of him working, as it would have rebutted the State's evidence that he showed up to the park drunk. (*Id.* at 528.) Similarly, Folkes claimed trial counsel was ineffective for not presenting evidence that he had been living in a motel before the incident. (*Id.*)

During the PCR hearing, lead trial counsel testified he investigated whether Folkes worked on the day of the fight and whether he had been living in a motel. (Dkt. No. 14-2 at 644–48, 668.) He further testified he made a tactical decision to not try to prove those facts; under a

state procedural rule in place at that time, he would get to go last in closing arguments if he did not present a defense case. (*Id.* at 646, 647.) Counsel felt it was better to go last at closing than to present facts that, in his view, were not important. (*Id.*)

The PCR court relied on that testimony to deny Folkes' claims. (Dkt. No. 14-2 at 847–49.) It found counsel made a "strategic and well-reasoned decision" to not pursue the issues at trial after investigating them. (*Id.* at 847–48.) Citing the proposition that counsel generally may not be found ineffective for making informed strategic decisions, the court ruled counsel performed professionally. (*Id.* at 848–49.) Additionally, it concluded Folkes' living arrangement and employment were collateral matters, and thus counsel's decision not to prove them did not prejudice him. (*Id.*)

The undersigned finds the PCR court's decisions reasonable. Before addressing any of Folkes' specific grounds, the court began its legal analysis by reciting ineffective-assistance principles. (*See* Dkt. No. 14-2 at 825–26.) In that recitation, the court noted it had to be deferential to counsel's decisions and presume counsel performed reasonably. (*Id.* at 825.) Immediately after that, it cited two state Supreme Court cases for the proposition that "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." (*Id.* (case citations omitted).) When the PCR court later denied Grounds Eighteen and Nineteen, it referred back to that "valid reason" language. (*Id.* at 847, 848). By doing that, the PCR court indicated it faithfully followed *Strickland* in assessing counsel's performance, determining not only that counsel made a strategic decision (that is, a decision made after an appropriate investigation) but also that counsel's choice was reasonable. *Cf. Boseman v. Bazzle*, 364 F. App'x 796, 806 (4th Cir. 2010) (holding district court erred in finding PCR court's use of the same "valid reason" proposition was an improper application of *Strickland*; PCR court's order sufficiently indicated the court followed

Strickland's performance-prong standards). Thus, the PCR court did not inappropriately apply *Strickland* in assessing trial counsel's performance. And nothing in the record shows the PCR court's assessment of the facts relating to counsel's performance was unreasonable. Because the record supports the PCR court's determinations that counsel performed adequately, the undersigned recommends denying these two grounds.

XV. Ground Twenty

In her closing argument, the prosecutor made the following statement:

> What did [Folkes] do when he left? As he's going out he tries to conceal his shirt, possible evidence. He doesn't know I guess what's on that shirt, but he knows he can be identified from it, throws it in a trashcan, takes off his shirt, changes his clothes. Clothes which are kept in that backpack are kept in that area down there that he's walking up trying to leave the park. Who knows where he got them, but he changed his clothes.

Dkt. No. 14-1 at 394.) In PCR, Folkes asserted this statement included facts that were not in evidence, so trial counsel should have objected to it. (Dkt. No. 14-2 at 528.)

The PCR court rejected Folkes' claim. (Dkt. No. 14-2 at 849–50.) Without addressing whether counsel performed deficiently, the court ruled counsel's alleged error was not prejudicial. (*Id.*) It again found that because Folkes' identity was not disputed, what clothes he wore during or after the attack was a collateral matter. (*Id.*) Moreover, the court found, the prosecutor's statements were based on trial testimony and inferences that could reasonably be drawn from it. (*Id.* at 850.) Thus, the PCR court concluded, counsel did not prejudice Folkes by failing to make a meritless objection. (*Id.*)

The court's decision withstands § 2254(d). A prosecutor may base her closing argument on "the record evidence and the reasonable inferences therefrom." *State v. New*, 526 S.E.2d 237, 240 (S.C. Ct. App. 1999). At trial, the State presented evidence that (1) the shirt Folkes wore during the fight was found in a trashcan (Dkt. No. 14-1 at 247); (2) Folkes had a backpack with

him during and after the fight (*Id.* at 244, 324); (3) homeless people kept their belongings in the park (*Id.* at 304); (4) Folkes had been homeless and spent time in that park (*Id.* at 131); and (5) Folkes was wearing clothes when he was arrested (*Id.* at 288, 758). That evidence supports the prosecutor's argument. Thus, as the PCR court found, counsel was not ineffective because the objection Folkes wanted would have been unfounded. *See Smith v. Padula*, 444 F. Supp. 2d 531, 539 (D.S.C. 2006) ("[T]rial counsel cannot be ineffective for failing to make a meritless[,] futile objection."). The undersigned recommends denying this ground.

XVI. Ground Twenty-One

In the direct appeal, appellate counsel focused on the trial court's refusal to give the ABHAN absence-of-malice charge trial counsel requested. (Dkt. No. 14-1 at 452.) She did not raise a separate claim challenging the jury charges on ABHAN that the trial court provided. In PCR, Folkes argued appellate counsel should have done so. (Dkt. No. 14-2 at 528.) At the PCR hearing, appellate counsel admitted she did not make the charges given a separate issue; instead, she "pushed" that and the failure to give the requested instruction "all together in one issue." (Dkt. No. 14-1 at 579–80.)

The PCR court ruled Folkes did not prove either deficient performance or prejudice on this claim. (*Id.* at 850–52.) As to performance, the PCR court found appellate counsel acted appropriately by raising "three stronger, meritorious issues" for Folkes in the direct appeal. (*Id.* at 852.) As to prejudice, the court found there was no reasonable likelihood that, had appellate counsel separately challenged the ABHAN instructions in the appeal, she would have prevailed. (*Id.*) The PCR court therefore denied Folkes' claim. (*Id.*)

The PCR court conducted its analysis inside a legal framework that defers strongly to appellate counsel's issue selections. Appellate lawyers have no duty to raise every meritorious issue on appeal. *E.g.*, *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Their choice to not raise an

issue cannot be quickly second-guessed; rather, that choice is presumed to be effective. *See id.* at 754. In most cases, a prisoner can rebut that presumption "only when ignored issues are clearly stronger than those presented." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

The PCR court's weighing of the potential claims' various strengths is problematic.[3] The PCR court stated appellate counsel raised three issues in the direct appeal; actually, she raised just one, and it was closely related to the issue Folkes says she should have raised. (Dkt. No. 14-1 at 452.) Although the court's error may have been typographical, rather than analytical, the undersigned is nevertheless hesitant to resolve this claim on the performance prong of *Strickland*.

The PCR court's no-prejudice finding, however, is well-supported. In their respective briefs on direct appeal, both Folkes' appellate counsel and the State's attorney debated whether the trial court's ABHAN instructions accurately stated the law even though they did not include the language trial counsel requested. (*See* Dkt. No. 14-1 at 461–66, 476–80.) Thus, although appellate counsel did not raise the instructions' correctness as an independent ground for relief, both sides put the issue of the correct elements of ABHAN before the Court of Appeals.

Importantly, the Court of Appeals addressed it as well. The court affirmed through a one-paragraph memorandum decision:

> Clinton C. Folkes was convicted of [ABWIK] and was sentenced to life imprisonment without the possibility of parole. On appeal, Folkes argues the trial court erred in failing to charge the jury the absence of malice is not an element of [ABHAN]. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: *State v. Tyler*, 348 S.C. 526, 530–31, 560 S.E.2d 888, 890 (2002) ("[T]he absence of malice is not a required element of the offense of ABHAN."); *State v. Curry*, 370 S.C. 674, 682, 636 S.E.2d 649, 653 (Ct. App. 2006) ("A charge is sufficient if, when considered as a whole, it covers the law applicable to a case. The substance of the law is what must be charged to a jury, not any particular verbiage.") (internal quotation marks and citations omitted).

[3] The Warden agues the PCR court's assessment is a state-law ruling that this Court may not review. Although the Warden cites Supreme Court cases saying federal habeas courts cannot disturb state court's rulings on state law, he does not cite any cases saying that a post-conviction court's assessment of appellate counsel's issue selection is a question of state law.

(Dkt. No. 14-1 at 485.) Especially since the parties tied their arguments about the omitted charge to the sufficiency of the trial court's ABHAN instructions, the Court of Appeals' quotation of *Curry*—particularly the first quoted sentence—shows it reviewed the instructions and found them, as a whole, appropriate. In other words, although appellate counsel did not make the instructions' correctness a separate issue, the Court of Appeals considered that question in the course of ruling on the closely related issue she did raise. It was thus unlikely that appellate counsel's handling of the appeal prejudiced Folkes.

The absence of prejudice defeats an ineffective-assistance claim. *See Strickland*, 466 U.S. at 697. Thus, although the PCR court's analysis of this claim contained an error (even if, perhaps, just a typo), its ultimate disposition of the claim was not legally or factually unreasonable. The undersigned therefore recommends denying this ground.

XVII. Ground Twenty-Two

Finally, during the PCR hearing, Folkes testified he did not accept the State's plea offers because he was worried doing so would have unintended consequences. (Dkt. No. 14-2 at 729–30.) He was concerned that even if the trial court accepted a negotiated ABWIK plea and sentenced him to the agreed-upon number of years in prison, the state Department of Corrections would nevertheless interpret the sentence as one of life without parole. (*Id.*)

Based on that testimony, Folkes asserted one more claim after the PCR hearing. (Dkt. No. 14-2 at 770.) He alleged that when lead trial counsel presented the State's plea offers to him, counsel failed to explain that pleading guilty under an agreement with a negotiated sentence would not trigger a mandatory life without parole designation. (*Id.*)

The PCR court never addressed this claim in its order. Folkes did not file a motion asking the court to rule on the claim. However, he raised the issue in his PCR certiorari petition. (Dkt. No. 14-4 at 44–47.)

A. Procedural Default

The PCR court never addressed this ground. Instead of filing a motion asking the court to rule upon it, Folkes appealed. Folkes' failure to ask the PCR court to rule on the issue meant it was not preserved for appellate review. *See Marlar v. State*, 653 S.E.2d 266, 266 (S.C. 2007) (per curiam).

B. Merits

Because no state court ever adjudicated this claim on the merits, § 2254(d)'s standard of review would not govern merits review here; rather, the Court's review would be *de novo*. *See Cone v. Bell*, 556 U.S. 449, 472 (2009).[4] However, even under that more generous standard, the undersigned cannot see merit in Folkes' claim. Lead trial counsel testified that when he and Folkes discussed the plea offers, Folkes understood that the offers, if accepted, "would alleviate the life without parole." (Dkt. No. 14-2 at 652.) There was "no ambiguity in [Folkes'] mind," counsel said—Folks "knew" that if he accepted the State's offers, he would be "getting ten or twenty years in prison, not life without parole." (*Id.*)

Although the PCR court made no findings on this issue,[5] it is notable that, every time the court weighed counsel's and Folkes's credibility, it believed counsel over Folkes. Those

[4] The undersigned does not mean to suggest that, if the Court reaches the merits of Ground Twenty-Two, Folkes would be free to submit any evidence on the claim he wants. Rather, even if a claim was never adjudicated on the merits in state court, § 2254 "still restricts the discretion of federal habeas courts to consider new evidence" for that claim. *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). The Court may not consider evidence outside the state-court record unless either (1) the petitioner was not at fault for that evidence's omission from the state proceedings or (2) he satisfies "stringent" criteria laid out in § 2254(e)(2). *Holland v. Jackson*, 542 U.S. 649, 652–53 (2004) (per curiam); *Williams v. Taylor*, 529 U.S. 420, 437 (2000). To meet those criteria, Folkes would have to show his claim relies on either "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence." § 2254(e)(2)(A). He would also need to show that the facts underlying his claim "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254(e)(2)(B). Folkes has not offered any proof or argument satisfying either of § 2254(e)'s options. Thus, if the Court were to reach the merits, it should analyze the claim using only the existing record.

[5] In his summary judgment brief, the Warden states the PCR court found "lead trial counsel more credible than [Folkes]. (Attachment 1, 834)." (Dkt. No. 14 at 31.) The credibility finding the Warden cites related only to

credibility findings tend to support counsel's testimony here, as it is consistent with other things the PCR court found credible. For example, as mentioned in Ground Four, Folkes testified at the PCR hearing that trial counsel did not explain his options for testifying or presenting a defense. The PCR court discredited that testimony, instead believing lead trial counsel's testimony that he did explain those options. Similarly, as noted above, the record shows that trial counsel did several other things Folkes accused him of not doing. The undersigned is thus persuaded that, contrary to Folkes' accusation, a reasonable trier of fact could find only that trial counsel adequately informed Folkes he could avoid a no-parole sentence by accepting the State's plea offers. Consequently, if the Court were to reach the merits of this claim, the undersigned would nevertheless recommend denying it.

XVIII. Certificate of Appealability

If the Warden's summary judgment motion is granted, the District Judge will need to decide whether to issue a certificate of appealability. *See* Rule 11(a), Rules Governing § 2254 Cases. A certificate may be issued only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been denied on the merits, the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003) (citation and quotation marks omitted). Where a petitioner's constitutional claims are dismissed on procedural grounds, the petitioner must show both (1) that jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district

Ground Four. (*See* Dkt. No. 14-2 at 834 (stating lead trial counsel's "testimony *regarding this allegation* should be afforded great weight" (emphasis added)). If the Warden is asserting that credibility finding was intended to apply to Ground Twenty-Two, he is mistaken.

court was correct in its procedural ruling. *Rose v. Lee*, 252 F.3d 676, 684 (4th Cir. 2001). The undersigned does not see a basis for issuing a certificate in this case.

CONCLUSION

For the above reasons, the undersigned recommends the Court grant the Warden's motion, dismiss this case with prejudice, and decline to issue a certificate of appealability.

IT IS SO RECOMMENDED.

November 15, 2019
Charleston, South Carolina

MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

The parties' attention is directed to the **important notice** on the next page.

The South Carolina Court of Appeals

Clinton Folkes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000415

ORDER

This matter is before the court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc:
Tara Dawn Shurling, Esquire
Megan Harrigan Jameson, Esquire
Clinton Folkes
The Honorable L. Casey Manning

FILED
Oct. 16, 2018

808

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Clinton Folkes, #216506, Applicant, v. State of South Carolina, Respondent.	Case No. 2010-CP-40-7500 **ORDER OF DISMISSAL**

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed October 26, 2010. Respondent made its Return on February 8, 2011, requesting an evidentiary hearing be held. An evidentiary hearing was convened July 17, 2014 and September 25, 2014, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the November 2007 term of the Richland County Grand Jury for assault and battery with intent to kill (2007-GS-40-06654). E. Deon O'Neil, Esquire, and Luke Shealey, Esquire of the Richland County Public Defender's Office represented Applicant. The State was represented by Assistant Solicitors Heather Weiss and Andrew Rogers for the Fifth Circuit Solicitor's Office. On July 7-9, 2008, Applicant proceeded to jury trial before the Honorable James R. Barber, III, where he was convicted as indicted. On

July 9, 2008, Judge Barber sentenced Applicant to life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45 based on his prior convictions.

Applicant appealed his conviction and sentence. Appellate Defender M. Celia Robinson of the South Carolina Commission of Indigent Defense-Division of Appellate Defense represented him on this appeal. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Clinton Folkes, 2010-UP-420 (filed September 24, 2010). The Remittitur was sent on October 18, 2010.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel
   a. "Counsel failed to call key witnesses for the defense;"
   b. "Counsel failed to properly investigate presented by applicant;"
   c. "Counsel failed to object to the use of a knife in the courtroom (State's 25) that was not even used in the crime"; and
   d. "Counsel failed to object to other issues, like closing argument from Solicitor See State v. Simmons."
2. Judicial Error
   a. "The court failed to inform him of his right to put up a defense without having to testify, only that he could remain silent."

On March 12, 2014, Applicant filed an amended application alleging the following additional grounds for relief:

> 1. Trial counsel was ineffective for failing to object to a closing argument by the State in which they told the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed.
>
> 2. Trial Counsel was ineffective for failing to object when the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN.
>
> 3. Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the

Applicant of his right to seek certiorari in the Supreme Court of South Carolina.

4. Trial Counsel was ineffective for failing to advise the Applicant of his right to put up a defense regardless of whether he himself testified at his trial.

5. Trial Counsel was ineffective for failing to object to the State introducing testimony concerning other knives alleged to have been carried by the Applicant where said testimony bore no logical relevance to the Applicant's case and constituted evidence of prior bad acts. Trial Tr. p. 190, 11. 5-11.

6. Trial Counsel was ineffective for failing to challenge the position taken by the prosecutor assigned to this case, Heather Weiss, that "this is a mandatory life without parole, so I can't make an offer." Email from Weiss dated November 21, 2007.

7. Trial Counsel provided the Applicant ineffective assistance of counsel when he neglected to investigate Assistant Solicitor Weiss's claim that she could not extend any plea offers in this case due to the Applicant's exposure to a mandatory life without parole sentence.

8. Trial Counsel was ineffective for advising the jury in closing argument that the trial judge was going to instruct [the jury] that the absence of malice is not an element of assault and battery of a high and aggravated nature with determining in advance that the Court would in fact issue such an instruction.

9. Trial Counsel was ineffective for neglecting to remind the jury that, not only was there no blood visible on the shirt the State alleged belonged to the Applicant, but the State's own witness testified that no DNA was found on the shirt when it was analyzed. Trial Tr. p. 295, 1 15-296, 1. 1 and Trial Tr. p. 404, 1.23- p. 405, 1. 7.

10. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel when he conceded that the Applicant was not entitled to advance a claim of self-defense where under a reasonable interpretation of the facts in this case the Applicant had a colorable claim to that defense. Trial Tr. p. 330,11. 8-13.

11. Trial Counsel erred in failing to object to hearsay testimony from Investigator Robert McCracken advising that when he was dispatched to the scene he "was told someone was cut severely." Trial Tr. p. 300, 11. 7-13.

12. Trial Counsel was ineffective for neglecting to argue that State's Exhibit No. 31, a beer bottle seized at the time of the Applicant's arrest, should not be admitted into evidence where the bottle, broken after it was in the possession of law enforcement, was sealed in a bag and could not be examined by the jury, and where the Investigator who identified this exhibit prior to its admission could not positively identify what type of beet the bottle was from. Trial Tr. p. 308, 1. 17- p. 310, 1. 12.

13. Trial Counsel was ineffective for failing to object to the introduction of State's Exhibit No. 32, the tote bag seized from the Applicant at the time of his arrest, where the bag was introduced with clothing in it which was not in the bag at the time it was seized. Trial Tr. p. 323, 1. 24- p. 324, 1. 22.

14. Trial Counsel provided the Applicant ineffective assistance of counsel when he failed to introduce testimony from City of Columbia Police Department Officer Battiste to establish that the clothing packed under the sleeping bag inside of State's Exhibit 32 was in fact placed there by him after the Applicant's clothing was taken from him when he was made to strip and put on detention center uniform at the time he was booked.

15. Trial Counsel was ineffective for failing to establish for the jury that the clothing locked in the bottom of State's Exhibit No. 32 was the clothing the Applicant was wearing at the time of his arrest and had not been hidden by him under the sleeping bag found in that exhibit.

16. Trial Counsel was ineffective for failing to demonstrate that the clothing introduced inside State's Exhibit No. 28, a tote bag, was the same clothing worn by the Applicant in a photograph of the Applicant taken by law enforcement at the scene after he was taken into custody.

17. Trial Counsel was ineffective in failing to object to the use of a knife. State's Exhibit No. 25 for ID only, in their examination of the victim where the knife was not the one used in the incident which led to the Applicant's charge and was identified by the victim as being only similar to the weapon used in this case.

18. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel when he neglected to introduce testimony, and employment records, which would have demonstrated that the Applicant was gainfully employed the week the incident involved in the Applicant's charges occurred, and that he had been at work just prior to going to Finley Park.

19. Trial Counsel erred in failing to obtain motel records which would have proven that at the time of this incident the Applicant had been living in a motel and was not homeless as the State claimed.

20. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence. Trial Tr. p. 394, 11.11-19.

21. Appellate Counsel was ineffective in that she neglected to brief the error of the trial court in overruling the Applicant's objection to the jury instruction, and supplemental charge, given on ABHAN and limited her presentation on direct appeal to the failure of the trial court to issue the specific charge on ABHAN requested by Trial Counsel. Objection at Trial Tr. p. 422, 11. 17-23.

At the evidentiary hearing, Applicant proceeded forward on the twenty-one allegations as set forth in this amended application. In support of his application, he testified on his own behalf and presented testimony from Chief Appellate Defender Robert Dudek, former Appellate Defender M. Celia Robinson, Officer David Battiste, and trial counsels Deon O'Neil and Luke Shealey.

SUMMARY OF EVIDENCE ADDUCED AT TRIAL

On the evening of July 22, 2007, Applicant arrived at Finley Park very intoxicated and looking for a fight. Applicant first approached James Reddick and confronted him, seemingly unhappy with Reddick's hat selection. Applicant pulled a knife and Reddick backed away. Applicant then approached Karem Jones in an aggressive manner. Jones and Applicant were familiar with each other and worked together at Action Labor. Applicant appeared to be angry with Jones for talking to his former girlfriend, Tiffany Briggs, with whom he had recently broken up. Applicant began arguing with Jones and made various threats of physical harm. Applicant held a bottle of beer in a brown paper bag in one hand; he swung out at Jones with this hand and the bottle came out of the bag but did not hit Jones. Applicant then swung his fist and hit Jones in the eye. Jones responded by hitting Applicant twice, once with each hand. Applicant then fell

and Jones either fell on top of him or leaned down over him. Applicant then pulled a knife out and reached out and cut Jones across the throat. Jones also sustained another cut to his throat and one to his arm. Jones testified he feared for his life and thought he was going to die from the neck injury.

Applicant then jumped up and screamed "I'm going to fucking kill you" while charging Jones. Jones ran into a phone booth and called the police. Several witnesses approached Jones and assisted with his wounds. Applicant then struck Briggs in the back and fled the scene, throwing the shirt he was wearing in the trashcan on his way out of the park. Law enforcement arrived shortly thereafter and took witness statements from several bystanders, including Briggs. Briggs identified Applicant as the assailant and provided a description of him. Law enforcement found Applicant nearby a short time later and arrested him. Jones was taken by ambulance to Richland Memorial Hospital, where his wounds were treated and he was admitted. While at the hospital, Jones spoke with investigators and identified Applicant as his assailant. Jones was released from the hospital the following evening.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from Chief Appellate Defender Robert Dudek, former Appellate Defender M. Celia Robinson, Officer David Battiste, and trial counsels Deon O'Neil and Luke Shealey. Chief Appellate Defender Robert Dudek testified first. He testified that he has been with the Division of Appellate Defense for over twenty-four years and that he became chief of the division in 2009. He testified that he has handled over 2,400 appeals personally. Dudek testified that he did not handle Applicant's appeal, which was assigned to Appellate Defender Celia Robinson. He testified that he has not read the transcript of Applicant's trial and has no knowledge of Applicant's case. He testified that Robinson left the

division on September 14, 2010. He testified that the South Carolina Court of Appeals' decision affirming Applicant's conviction and sentence was issued on September 24, 2010, after Robinson had left the office. He testified that the opinion from the Court of Appeals is a very brief, unpublished summary opinion citing only a few cases. He testified that he does not recall assigning another attorney to handle Applicant's case after Robinson left the office and is unsure if he personally reviewed the Court of Appeals decision. However, he testified he does recall reviewing Robinson's opinions as they arrived following her departure. He testified that he had no recollection as to whether he decided not to petition for rehearing and ultimately for certiorari to the South Carolina Supreme Court in Applicant's case. He testified that he does not petition for rehearing and certiorari on every case where he is unsuccessful and estimated he files petitions in approximately sixty percent of the cases he loses. He testified that the Supreme Court grants certiorari in a very small amount of cases, which he estimated to be between ten to fifteen percent. He testified that certiorari is more likely to be granted from published Court of Appeals opinions, unlike Applicant's unpublished opinion. He testified that he does not agree with the Court of Appeals' decision in Applicant's case but acknowledged that this is often the case. He testified that his office is unsuccessful on a vast majority of appeals due to the high burden an appellant faces. He testified that his job is "probably one of the hardest jobs in the world" because of this. He testified that it is solely the attorney of record's decision to decide to petition for rehearing and certiorari and that the Court no longer accepts *pro se* petitions.

He testified that he had no independent knowledge of a September 28, 2010, letter sent to Applicant from the division purportedly signed by Robinson. He testified that Robinson had left the office on the date the letter was written and that it was likely signed by her paralegal. He testified that there is no office policy allowing non-attorneys to sign on behalf of attorneys. He

testified that the letter is a form letter that is traditionally sent to applicants who have been unsuccessful on their PCR appeals and was sent to Applicant in error. He testified that the letter provides erroneous information to Applicant that his petition for certiorari has been denied and counsel has been relieved. He testified that Robinson was the first attorney to leave the office while he was division chief and there was no procedure in place to ensure that correct procedures were followed when an attorney left. He testified that since Applicant's case, procedures and safeguards have been put in place to ensure that attorneys review opinions and make a decision as to whether to petition for rehearing and certiorari when the assigned attorney has left the office.

Following Dudek's testimony, Applicant's appellate counsel Celia Robinson testified. She testified that she was an appellate defender at the Division of Appellate Defense for approximately three years and that she left the office in 2010. She testified that she was no longer at the division when the Court of Appeals issued its opinion in Applicant's case. She testified that she did not sign the September 28, 2010, letter sent to Applicant and that the handwriting appeared to belong to her former paralegal. She testified that she was not contacted by anyone at the Division of Appellate Defense regarding Applicant's case and conceded that she did not follow-up with the division regarding Applicant's case or any of her other pending cases. She testified that she does not know if any of her cases were reviewed after she left the division or what happened to her pending cases. She testified that she did not make a decision as to whether to seek certiorari in Applicant's case but would have petitioned for rehearing and certiorari if she had still been at the office. She testified that she thought Applicant's case was a "winner" and should have been reversed by the Court of Appeals. She elaborated that she believed the trial court's jury instructions on ABWIK and ABHAN were in error and properly preserved for

appellate review. However, she acknowledged that she was successful at the Court of Appeals "very infrequently" and that a vast majority of convictions are upheld on appeal, even when she believes there is a meritorious ground for reversal.

Next, Applicant called Officer David Battiste from the Columbia Police Department. Battiste testified that he vaguely recalled his involvement in Applicant's case and that he could not recognize Applicant. He testified that he did recall being the officer who took Applicant to the Alvin S. Glenn Detention Center following his arrest. He testified that he took all of Applicant's clothing and shoes at the direction of the investigating officer. He could not recall if Applicant had a bag or any other items with him when he was taken into custody. He testified that he took Applicant's clothing to the property room at the detention center and logged the items individually. He could not recall what he did next with the clothing. Battiste recognized his handwriting on the inventory tag to one of the bags, which indicated a sleeping bag was inside of it, but he has no independent recollection of inventorying the bag or what else was inside, if anything. He testified that he has no recollection as to what Applicant was wearing when he was arrested.

Trial counsel Deon O'Neil testified next. He testified that he was appointed to represent Applicant during his tenure at the Richland County Public Defender's Office. He testified that he was not the first public defender assigned to Applicant's case and had taken over representation when Applicant's former attorney left the office. He testified that he asked fellow public defender Luke Shealey to act as second chair a few months prior to Applicant's July 2008 trial. He testified that previous counsel had investigated Applicant's prior charges to establish that he was properly eligible for LWOP. He testified that he argued to the jury that the wounds the

victim received were not serious and his client should not be convicted of ABWIK based on such minor injuries.

Regarding Applicant's first and second allegations, he testified that he did not object to the State's closing argument regarding the difference between ABWIK and ABHAN being an absence of malice because he generally tries to reserve his objections during closing arguments to egregious violations and he did not believe this argument to be egregious. He also testified that he did not object because he had the final closing argument and could instead respond to the State's argument in his own closing. He testified that it was his position at the time of trial that the jury could still convict Applicant of the lesser included offense of ABHAN if malice existed, which he argued to the trial court unsuccessfully. He elaborated that he submitted a jury instruction to the trial court stating that it was not necessary for the jury to find absence of malice to convict Applicant of the lesser included offense but the trial court refused to charge it.

Regarding allegation number four, O'Neil testified that he discussed Applicant's right to testify with him, as well as the benefits and drawbacks to him taking the stand in his defense. He testified that he advised Applicant that he could be impeached with some of his prior offenses but that he would move to exclude some offenses as unduly prejudicial. He testified that he explained to Applicant that even if he did not testify, he could still present other witnesses and evidence. He testified he advised Applicant that if he did not put up any witnesses or present any of his own evidence, he would get to have the final closing argument and the benefits of this. He testified that he advised Applicant it would have been very beneficial to his defense if he testified, but Applicant did not want to take the stand. He testified that he knew a few months before trial that Applicant did not want to testify, as the case was originally called to trial in May then continued until July.

Concerning allegation number five, O'Neil testified that he recalled the State questioning a witness about Applicant carrying other knives and whether Applicant was known to arm himself. He testified that he did not object to this line of questioning because the witness did not give a clear answer and the solicitor was unable to elicit the desired response from the witness. He elaborated that the witness was extremely soft spoken and the jury could not hear what she was saying, as evidenced by the trial court asking the witness to speak up during this line of questioning. He testified that he did not object because he did not want to highlight this issue to the jury, particularly in light of the jury not being able to understand the witness' response.

When questioned regarding allegations number six and seven, O'Neil testified that he explored plea deals with the State with the lead prosecutor, Heather Weiss. He testified he received an email dated November 26, 2007, from Weiss, which was forwarded from Applicant's former counsel, where Weiss indicated she could not make any offers because the State was seeking mandatory life without parole (LWOP) based on Applicant's prior record. He testified that he recalled the Fifth Circuit Solicitor's Office typically would not make any offers once LWOP notice had been served, but would generally make offers to a numerical sentence prior to service. He testified that he was not surprised by this email and stance from Weiss, as it was in accordance with their office policy at the time. He elaborated that even after receiving that email he continued negotiating a plea on Applicant's behalf and received three additional offers from Weiss: one for a ten year sentence, one for a twenty year sentence, and one for a fifteen year sentence that came on the eve of trial. He testified that he presented all of these offers to Applicant and explained that if he accepted an offer for a numerical term of years, he would not receive a life sentence. He testified that Applicant turned each offer down, insisting

that he would only accept an offer for a probationary sentence. He testified that he vigorously negotiated for a probationary sentence, but that the State refused to extend such a lenient offer.

Regarding allegation number eight, O'Neil testified that he advised the jury during his closing argument that the trial court was going to instruct the jury that the absence of malice is not an element of ABHAN. He testified he had requested the court give this charge, but had not received a ruling from the court prior to argument. He testified that another one of his requests along with his proposed jury instructions was for a ruling from the court prior to argument if it planned to deny the request. He testified that when he did not receive a denial from the court prior to his argument, the court had agreed to charge his requested instructions.

As to allegation number nine, O'Neil testified that he reminded the jury during his closing argument that no blood was found on Applicant's shirt, but he was unsure as to why he did not tell the jury no DNA was recovered from the shirt. However, he testified that he thinks his argument that no blood was found covered this issue sufficiently. He elaborated that Applicant disputed that the shirt in question, which was found in a trashcan, was even his, despite numerous witnesses testifying it was his. He testified that such an argument regarding DNA would have been irrelevant to Applicant's case, as all the witnesses and victim knew Applicant and identity was not an issue in the case. He testified he does not like to harp on collateral issues of little to no importance because it annoys and frustrates the jury, and the DNA argument likely would have done so since identity was not at issue. Furthermore, he testified that he is not sure if the shirt was ever tested for Applicant's DNA but likely was not tested for DNA because multiple witnesses all testified he was wearing that shirt during the attack.

Regarding allegation number ten that he failed to argue Applicant was entitled to a self-defense charge, O'Neil testified that he agreed with the trial court that Applicant was not entitled

to a self-defense charge because the evidence showed he swung first and initiated the fight. He elaborated that because Applicant refused to take the stand, there was no evidence to combat the victim's allegation that Applicant was the aggressor. He acknowledged that the victim was on top of Applicant when he was cut and the victim was younger, fitter, and larger. He testified that he made this argument to the jury during his closing. However, he stressed that there was no testimony to combat the victim and witness testimony that Applicant was the aggressor because Applicant elected not to testify. He elaborated that if Applicant had testified, he would have requested a self-defense charge.

When questioned regarding allegation number eleven, O'Neil testified that he did not object to the characterization of the victim's injury as a severe cut because he was able to show the injury was actually very minor during the medical testimony. He testified that based on his experience, juries give more significance to medical testimony so he does not think this comment by law enforcement was prejudicial to his client. He expounded that the wound was classified as one level more serious than superficial, making it a very shallow, non-invasive wound. He testified that one of the treating doctors said the wound was "simply superficial" and required copious irrigation.

In response to allegation number twelve about the broken beer bottle, O'Neil testified that he did not think to object to its admissibility based on it being broken based on a lack of brand indication. He testified that Shealey did object based on the bottle being in an altered state, which was overruled by the trial court.

In response to allegations number fifteen and sixteen, O'Neil testified that he discussed what happened to Applicant's clothing when he was arrested with his client. He testified Applicant informed him that law enforcement took all of his clothing when he was arrested. He

testified that he did not move to introduce the clothing Applicant was wearing into evidence because any minimal benefit to be derived would have been significantly outweighed by the loss of the last argument. He testified he inquired with the detention center to see if it had Applicant's clothing and learned the jail did not have the clothing. He testified that he reviewed all the physical evidence with the State prior to trial but is unsure if clothing was included or if he examined it.

Regarding allegation number seventeen, O'Neil testified that the knife was only used for demonstrative purposes and was not introduced into evidence. He testified that he successfully objected to the knife coming into evidence. He testified that the knife used in the demonstration was not the actual knife used to cut the victim, although it was similar to the witness descriptions.

When questioned regarding allegations eighteen and nineteen, O'Neil testified that he had obtained employment records for Applicant showing that he was working at Action Labor prior to his arrest. He testified that the records also showed that he had worked eight hours the day of the incident. He testified that he tried to find a supervisor or other manager who could independently corroborate that Applicant had worked that day or what hour he had worked, but he was unsuccessful because no supervisors recalled seeing Applicant that day. He testified that due to this lack of independent verification, he decided not to introduce the records because they would have been of little value. He elaborated again that identification was not at issue, as all witnesses and the victim knew Applicant. He also testified that any small benefit gleaned from introducing the records would be outweighed by the loss of the last argument. He testified that Applicant also told him that he had been living in a motel prior to his arrest. O'Neil testified he went to the motel and talked to potential witnesses but decided against delving into this. He

elaborated that where Applicant lived was not pertinent to the case and would have distracted from the case theory, as well as cost Applicant the final argument.

Following O'Neil's testimony, Applicant called Luke Shealey to testify. Shealey acted as second-chair on Applicant's case and handled roughly half of the witnesses and argument at trial. He testified that O'Neil asked him to assist a couple of months prior to the trial and that he reviewed all the evidence and discovery material prior to trial. He testified that their initial trial strategy was that Applicant was not involved in the fight, but that the strategy evolved to a goal of showing the jury the injury was minor and did not amount to ABWIK. He testified that he was not involved with preparing the proposed jury instructions. He testified that in hindsight, he would have now objected to the court's jury instructions on ABWIK and ABHAN but acknowledged that O'Neil had requested these jury instructions and the court decline to give the requested charges. He testified that in hindsight, he would have insisted on a ruling from the court regarding the proposed jury instructions prior to closing arguments. He testified this could have avoided O'Neil arguing to the jury that the court would instruct something that was never instructed. He testified he also would have objected to the prosecutor's closing argument regarding ABHAN and ABWIK now in hindsight. He testified that his trial technique regarding closings is to object to everything, regardless of how egregious the error.

Shealey testified he did not recall speaking to Applicant regarding his decision to testify, but indicated that was something O'Neil would have handled. He also testified that O'Neil handled plea negotiations with the State. He testified that he should have objected to testimony regarding Applicant's tendency to carry a knife. He testified that he now thinks it would have been prudent to mention the lack of DNA on Applicant's shirt in closing argument, not just the lack of blood. He conceded he was unsure if the shirt was ever tested for Applicant's DNA. He

theory was that Applicant was not the assailant, but if he were, then it was only a minor injury not warranting an ABWIK conviction. He acknowledged that numerous witnesses all testified that Applicant not only was involved in the fight, but also was the instigator. He acknowledged that James Reddick, a witness to the altercation, testified at trial that Applicant had also pulled a knife on him immediately before the stabbing. He testified he would have moved for a pre-trial immunity hearing if he had the case today.

Applicant testified on his own behalf. He testified that he was advised before trial that he would receive a mandatory life without parole sentence if convicted of ABWIK based on his prior record. He testified he was aware of various plea offers from the State, including the offer for a ten year determinate sentence. He testified that he wanted to plead guilty to the lesser included offense of ABHAN to avoid LWOP. He testified that his attorneys never advised him regarding impeachment with his prior record if he testified or that they would move to exclude the use of his prior convictions similar to this conviction. He testified that he would have been willing to testify in his defense if his attorneys had better explained self-defense to him. He testified that he had not been drinking at all on the day of the incident.

Regarding appellate counsel, Applicant testified that he was never notified that Robinson left the division of appellate defense and was no longer representing him. He testified he was never contacted regarding petitioning for rehearing or certiorari. He testified he would have wanted his attorney to petition for rehearing and certiorari to have his case reviewed by the South Carolina Supreme Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to

testified he also would have objected to the statement from law enforcement dispatch describing the victim's cut as severe. He testified he could not recall whether the defense objected to the knife reenactment but that he should have objected if the knife were a different weapon, particularly a "nastier-looking weapon." He testified that the record reflects the knife used for demonstrative purposes was similar to the weapon described by witnesses. He testified he objected to the introduction of the beer bottle due to its altered state.

Shealey testified that he was aware Applicant worked the day of the incident and that the defense had obtained records showing this. He testified in hindsight that the defense should have introduced these records to combat the State's characterization of Applicant as intoxicated. He testified that he is not sure what time Applicant started working that day or what time he finished working. He testified that he was unsure if the defense tried to obtain any motel records, but that likely would have been a task O'Neil would have handled. He testified motel records would have been useful to combat the State's assertions that Applicant was homeless and stored clothing in Finley Park. He testified he could not recall if Applicant told him that he was living in a motel and not homeless. He acknowledged that whether Applicant was homeless was not the central issue to the case.

Regarding the lack of a self-defense instruction, Shealey testified that now, with seven more years of practicing law and the benefit of hindsight, the defense should have requested a self-defense instruction. He testified that he would have stressed the laws of self-defense to Applicant and how advantageous they could be in his case. He testified that he would have explored the issue of self-defense with Applicant more to see if it was a viable defense. He testified that when he became involved with the case, Applicant had consistently said he was not involved in the incident, not that he acted in self-defense. He testified that this is why the defense

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegation No. 1: Trial counsel was ineffective for failing to object to a closing argument by the State informing the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed

Applicant alleges that trial counsel was ineffective for failing to object to the State's closing argument that the decisive factor between ABWIK and the lesser-included offense of ABHAN is whether malice exists. During its closing argument at Applicant's trial, the State argued the law of ABWIK to the jury and the requisite element of malice. Specifically, the State argued:

> Now I'm going to talk about the actual charge itself. The defendant has been charged with assault and battery with intent to kill. It's actually a misnomer. The law calls it assault and battery with intent to kill. But when it's defined, it does not include a specific intent to kill.
> What the law says, what the judge will instruct you, that although this is the title, what the State must prove beyond a reasonable doubt is that there was an unlawful act of violent physical injury to the person of another with malice aforethought, express or implied. Express or implied malice.
>
> The judge is also going to charge assault and battery of a high and aggravated nature. Ladies and gentlemen, I submit to you that's not what this is. If it's assault and battery of a high and aggravated nature with malice, it's assault and battery with intent to kill.

Tr. p. 387-88. The State then argued:

> What is in dispute today is whether there was malice aforethought, express or implied. And that's going to be the difference between assault and battery of a high and aggravated nature and assault and battery with intent to kill.

Tr. p. 389. The State then explained express and implied malice to the jury and argued that it had proven Applicant was guilty of ABWIK based on either express or implied malice. Tr. p. 388-391. Applicant argues that this was an improper statement of the law, that counsel should have objected to this charge, and that counsel's failure to object was ineffective.

This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. Specifically, this Court finds that the State's argument was proper based on the law of South Carolina and any objection by counsel would have been overruled.

The offense of ABWIK is defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007); see State v. Sutton, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000) ("AB[W]IK is an unlawful act of violent nature to the person of another with malice

aforethought, either express or implied. The often cited language to describe AB[W]IK is: if the victim had died from the injury, the defendant would have been guilty of murder. Furthermore, a specific intent is not required to commit ABIK." (citations omitted)). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). The four possible mental states encompassed by malice aforethought are: (1) an intent to kill; (2) an intent to inflict grievous bodily harm; (3) extremely reckless indifference to the value of human life; and (4) an intent to commit a felony. Kinard, 373 S.C. at 503-04, 646 S.E.2d at 169. ABWIK is a general intent crime, demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent. State v. Coleman, 342 SC 172176, 536 S.E.2d 387, 389 (Ct. App. 2000). Malice is "the wrongful intent to injure another and indicates a wicked or depraved spirit intent on wrongdoing." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); See also Foust, 325 S.C. at 16, n. 4, 479 S.E.2d at 52 ("[E]vidence of the character of the means or instrument used, **manner in which it was used**, purpose to be accomplished, **resulting wounds or injuries**, etc., are admissible to show intent with which the assault was committed." (emphasis added)).

Similarly, ABHAN is defined as an unlawful act of violent injury accompanied by circumstances of aggravation. State v. Geiger, 605, 635 S.E.2d 669, 672 (Ct. App. 2006). As an element of ABHAN, circumstances of aggravation include the use of a deadly weapon, intent to commit a felony, and the infliction of serious bodily injury. Id. at 605-606, 635 S.E.2d at 672. Case law in South Carolina has found that absence of malice is not an element of ABHAN. See generally State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); State v. Pilgrim, 320 S.C. 409, 465 S.E.2d 108 (Ct. App. 1995) (Pilgrim I), aff'd as modified State v. Pilgrim, 326 S.C. 24, 482 S.E.2d

562 (1997) (Pilgrim II); State v. Tvler, 348 S.C. 526, 560 S.E.2d 888 (2002); Hill v. State, 350 S.C. 465, 567 S.E.2d 847 (2002). However, in each of these cases, ABHAN was not charged as a lesser included offense of ABWIK, a crucial distinction in Applicant's case.

A defendant is only entitled to an instruction on a lesser included offense when the evidence warrants such an instruction. See State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999) ("A lesser included offense instruction is required only when the evidence warrants such an instruction, and it is not error to refuse to charge a lesser included offense where there is no evidence that the defendant committed the lesser rather than the greater offense."). If the jury finds that the State has proven the requisite elements of the greater offense as indicted rather than the lesser included offense, the jury must convict the defendant of the greater offense. Therefore, when a defendant is indicted for ABWIK and the court charges the jury on the lesser included offense of ABHAN, the jury is compelled to convict him of ABWIK rather than the lesser included offense if it finds the State has proven all elements of ABWIK beyond a reasonable doubt. Accordingly, the only logical deduction is that the crucial difference between ABWIK and ABHAN when ABHAN is charged as a lesser included offense is whether the defendant acted with malice.

In Applicant's case, the State's argument was a proper application of the law and was not objectionable. Counsel acted in accordance with professional norms when he did not object to the argument in question. Also, Applicant cannot establish any prejudice stemming from this allegation, as the argument was proper and any objection from counsel would have been overruled. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 2: Trial Counsel was ineffective for failing to object when the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN

Similar to allegation number 1, Applicant alleges that trial counsel was ineffective for failing to object to the State's closing argument that the jury must find Applicant guilty of ABWIK if they found he acted with malice. As discussed above, this Court finds that this was a proper argument for the State to make to the jury. Accordingly, Applicant cannot establish either deficiency or any resulting prejudice. This allegation must be denied and dismissed with prejudice.

Allegation No. 3: Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina

Applicant alleges that appellate counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals and an eventual Petition for a Writ of Certiorari to the South Carolina Supreme Court. At the evidentiary hearing, Applicant's appellate counsel Celia Robinson testified that she would have petitioned for rehearing at the Court of Appeals and then for certiorari at the Supreme Court but that she had already left the Division of Appellate Defense when the Court of Appeals issued its opinion in Applicant's case. Both she and Chief Appellate Defender Dudek acknowledged that the Court's opinion in Applicant's case was unpublished and summary in nature. Both also acknowledged that it is an attorney's decision, not a defendant's, whether to petition for rehearing and certiorari to the Supreme Court. Both also acknowledged that a review by the Supreme Court would have been discretionary and that Applicant did not have a right for Supreme Court review of his case.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524

S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim . . . the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (D.S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ."). Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues arc clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

An individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review. Wainwright v. Torna, 455 U.S. 586, (1982) (no Sixth Amendment right to counsel in pursuing discretionary appeal); see also Ross v. Moffitt, 417 U.S. 600 (1974) (no Fourteenth Amendment right to counsel when pursuing discretionary appeal after an appeal of right); State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995) (Sixth Amendment right to counsel "extends only to the first right of appeal").

The South Carolina Supreme Court has explicitly held that appellate counsel has no duty "to pursue regrading and or to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal." Douglas v. State, 369 S.C. 213, 215-16, 631 S.E.2d 542, 543-44 (2006). The Court further stated:

> The imposition of such a duty would conflict with this Court's explanation in In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990), that the Court of Appeals was created to reduce the State's appellate backlog." Id. A holding that certiorari must be sought whenever requested would increase this Court's workload by increasing the number of criminal writs of certiorari to the Court of Appeals. This Court "reviews [Court of Appeals] decisions by writ of certiorari only where special reasons justify exercise of that power." Id. We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion. Cf. Jones v. Barnes, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal).

Id.

Applying Douglas and its progeny of cases to this case, this Court finds that this allegation must be denied and dismissed with prejudice. Appellate counsel had no duty to petition for rehearing or to the Supreme Court for discretionary review. Furthermore, Applicant had no right to appellate review from the Supreme Court following his full and complete review by the Court of Appeals. Applicant cannot establish deficiency or prejudice as to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 4: Trial Counsel was ineffective for failing to advise the Applicant of his right to put up a defense regardless of whether he himself testified at his trial

Applicant alleges that trial counsel failed to advise him that he could present a defense irrespective of whether he testified. At the evidentiary hearing, Applicant testified he would have testified on his own behalf if counsel had fully explained self-defense to him and stressed the importance of his testimony to a self-defense claim. O'Neil testified that he discussed Applicant's right to testify with him, as well as the benefits and drawbacks to him taking the stand in his defense. He testified that he advised Applicant that he could be impeached with some of his prior offenses but that he would move to exclude some offenses as unduly prejudicial. He testified that he explained to Applicant that even if he did not testify, he could still present other witnesses and evidence. He testified he advised Applicant that if he did not put up any witnesses or present any of his own evidence, he would get to have the final closing argument and the benefits of this. He testified that he advised Applicant it would have been very beneficial to his defense if he testified, but Applicant did not want to take the stand. He testified that he knew a few months before trial that Applicant did not want to testify, as the case was originally called to trial in May then continued until July. Counsel testified that he made the strategic decision not to put up a defense after Applicant decided not to testify, as any marginal

benefit would be significantly outweighed by the loss of the final argument. After having an opportunity to weigh the credibility of Applicant and O'Neil, this Court finds that O'Neil's testimony regarding this allegation should be afforded great weight. This Court finds that O'Neil fully advised Applicant of his right to testify, his right to remain silent, and his right to put up a defense regardless of whether he testified. This Court also finds that counsel explained the benefits and drawbacks of putting up a defense with Applicant, and then he made a strategic decision not to put up a defense after weighing those benefits and drawbacks. This Court finds that trial counsel's performance was not deficient. See Smith, 386 S.C. at 568, 689 S.E.2d at 633 (holding when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."

Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as the result of Applicant's proceeding would not have been different but for counsel explaining Applicant that he was entitled to put on a defense even if he did not testify. The only evidence that Applicant presented beyond his assertions of self-defense at the evidentiary hearing is that he was not homeless and he was employed, which are both collateral issues at best. Neither would have had any impact on his case. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 5: Trial Counsel was ineffective for failing to object to the State introducing testimony concerning other knives alleged to have been carried by Applicant

Applicant alleges that trial counsel was ineffective for failing to object to testimony regarding Applicant's habit of arming himself with knives. Applicant contends that this testimony "bore no logical relevance to his case" and "constituted evidence of prior bad acts." The particular testimony that Applicant finds problematic was introduced through Jerome

Patrick, a witness for the State who worked with Applicant at Action Labor and witnessed the altercation at the park. See Tr. p. 190 lines 5-11. During Applicant's trial, Patrick testified that he and Applicant were assigned knives at their roofing job and that they used the knives daily. Tr. p. 190. Patrick testified that he left his knives on the job site, but that he had seen Applicant with the knifes outside of work. Tr. p. 190. During this line of questioning, the trial court instructed the witness to speak up.

When questioned regarding this allegation at the evidentiary hearing, O'Neil testified that he did not object to this line of questioning because the witness did not give a clear answer and the solicitor was unable to elicit the desired response from the witness. He elaborated that the witness was extremely soft spoken and the jury could not hear what she was saying, as evidenced by the trial court asking the witness to speak up during this line of questioning. He testified that he did not object because he did not want to highlight this issue to the jury, particularly in light of the jury not being able to hear the witness' response.

This Court finds that this allegation must be denied and dismissed with prejudice, as there is no reasonable likelihood that this testimony had any impact on Applicant's case. Numerous witnesses testified that they saw Applicant with a knife at the park on the day of the incident. The uncontested testimony is that Applicant previously pulled the knife on James Reddick in a threatening manner before eventually using the knife on Jones. Whether Applicant had a habit of carrying his work knives after hours is of no significance in light of the overwhelming and uncontroverted testimony that he was indeed armed with a knife on the day in question. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice. See Strickland 466 U.S. 668 ("A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.")

Allegation No. 6: Trial Counsel was ineffective for failing to challenge the position taken by the prosecutor assigned to this case that she could no extend any plea offers because Applicant was eligible for LWOP

Applicant asserts that trial counsel was ineffective for failing to challenge the prosecuting assistant solicitor's position that she could not extend any plea offers to Applicant because he was eligible for LWOP based on his prior convictions. In support of this allegation, Applicant entered into evidence an email from prosecuting assistant solicitor, Heather Weiss, sent to Applicant's former counsel Kristy Grafton, which was then subsequently forwarded to O'Neil. However, this allegation is sharply refuted by testimony of trial counsels and the case notes entered as an exhibit for Applicant, both which indicate plea negotiations were ongoing after this email and the State made three plea offers to Applicant.

O'Neil testified that he explored plea deals with the State with the lead prosecutor, Heather Weiss. He testified he received an email dated November 26, 2007, from Weiss, forwarded from Applicant's former counsel, where Weiss indicated she could not make any offers because the State was seeking mandatory LWOP based on Applicant's prior record. He testified that he recalled the Fifth Circuit Solicitor's Office typically would not make any offers once LWOP notice had been served but would generally make offers to a numerical sentence prior to service. He testified that he was not surprised by this email and stance from Weiss, as it was in accordance with their office policy at the time. He elaborated that even after receiving that email he continued negotiating a plea on Applicant's behalf and received three additional offers from Weiss: one for a ten year sentence, one for a twenty year sentence, and one for a fifteen year sentence that came on the eve of trial. He testified that he presented all of these

offers to Applicant and explained that if he accepted an offer for a numerical term of years, he would not receive a life sentence. He testified that Applicant turned each offer down, insisting that he would only accept an offer for a probationary sentence. He testified that he vigorously negotiated for a probationary sentence, but the State refused to extend such a lenient offer. O'Neil's case notes, entered into evidence as an exhibit by Applicant, corroborate this testimony.

This Court finds that counsel performed diligently in trying to secure a favorable plea offer for his client, even after receiving the email in question from Weiss. Counsel was able to negotiate three plea offers, one for a little as ten years, which were all rejected by Applicant. Counsel was not derelict in his duties to Applicant in regards to this allegation, which must be denied and dismissed with prejudice.

Allegation No. 7: Trial Counsel was ineffective for neglecting to investigate Weiss' claims that she could not extend any plea offers to Applicant based on his LWOP eligibility

As previously discussed above in allegation number six, this Court finds that Applicant was extended three plea offers after the email in question. Therefore, this allegation is wholly without merit and must be denied and dismissed with prejudice.

Allegation No. 8: Trial counsel was ineffective for advising the jury in closing argument that the trial judge was going to instruct them that the absence of malice is not an element of assault and battery of a high and aggravated nature without determining in advance that the Court would in fact issue such an instruction

Applicant asserts that counsel was ineffective for telling the jury that the trial court would instruct them that the absence of malice was not an element of ABHAN. Applicant also argues that trial counsel was ineffective for making this argument before securing a ruling from the trial court as to whether it would give this charge as requested by trial counsel. O'Neil testified that he advised the jury during his closing argument that the trial court was going to instruct the jury that the absence of malice is not an element of ABHAN. He testified he had requested the court

give this charge but had not received a ruling from the court prior to argument. He testified that another one of his requests along with his proposed jury instructions was for a ruling from the court prior to argument if it planned to deny the request. He testified that when he did not receive a denial from the court prior to his argument, the court had agreed to charge his requested instructions.

This Court finds that this allegation must be denied and dismissed with prejudice, as there is no reasonable likelihood that the result of Applicant's trial would have been different absent this purported deficiency. During closing arguments from the State and Applicant, the jurors were reminded that the judge would instruct them on the correct law to use during deliberations and that any argument from either counsel was not evidence to be considered. Additionally, the trial court instructed the jury to only apply the law as instructed during its charge. The trial court then gave the jurors instruction that was legally sound and correct. Applicant cannot establish any prejudice, and therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 9: Trial counsel was ineffective for failing to remind the jury that no DNA was found on Applicant's shirt

Applicant argues that trial counsel was ineffective for neglecting to remind the jury during his closing argument that no DNA was found on the shirt purportedly worn by Applicant during the assault. Applicant acknowledges that counsel argued to the jury that no blood was found on the shirt despite claims of a serious cut but asserts that counsel was derelict in his duties when he did not also remind the jury that no DNA was found on the shirt.

At the evidentiary hearing, O'Neil testified that he reminded the jury during his closing argument that no blood was found on Applicant's shirt, but he was unsure as to why he did not tell the jury no DNA was recovered from the shirt. However, he testified that he thinks his

argument that no blood was found covered this issue sufficiently. He elaborated that Applicant disputed that the shirt in question was his, despite numerous witnesses testifying that he was wearing it during the attack. He testified that such an argument regarding DNA would have been irrelevant to Applicant's case, as all the witnesses and victim knew Applicant and identity was not an issue in the case. He testified he does not like to harp on collateral issues of little to no importance because it annoys and frustrates the jury, and the DNA argument likely would have done so since identity was not at issue. Furthermore, he testified that he is not sure if the shirt was ever tested for Applicant's DNA but likely was not tested for DNA because multiple witnesses all testified he was wearing that shirt during the attack.

This Court agrees with counsel's assessment and finds that this potential argument to the jury would have had no impact on Applicant's case. This Court finds that Applicant's identity was not at issue and the undisputed testimony showed Applicant was wearing this shirt during the attack and removed it immediately thereafter. Had Applicant elected to testify and asserted that he was not present at the park, not involved in the fight, or even not wearing that shirt, perhaps this argument might have been of some benefit, but that was not the case. This Court finds that the result of the proceeding would not have been different absent this allegation, which must be denied and dismissed with prejudice.

Allegation No. 10: Trial counsel was ineffective for conceding that Applicant was not entitled to a self-defense charge

Applicant avers that trial counsel was ineffective for conceding that he was not entitled to advance a claim of self-defense. He argues that under a "reasonable interpretation of the facts," he had a "colorable claim to [self] defense." This Court disagrees and finds that Applicant was not entitled to a self-defense instruction based on the uncontroverted evidence presented at trial.

At the evidentiary hearing, O'Neil testified that he agreed with the trial court that Applicant was not entitled to a self-defense charge because the evidence showed Applicant swung first and initiated the fight. He elaborated that because Applicant refused to take the stand, there was no evidence to combat the victim's allegation that Applicant was the aggressor. He acknowledged that the victim was on top of Applicant when he was cut and the victim was younger, fitter, and larger. He testified that he made this argument to the jury during his closing. However, he stressed that there was no testimony to combat the victim and witness testimony that Applicant was the aggressor because Applicant elected not to testify. He elaborated that if Applicant had testified, he would have requested a self-defense charge.

Four elements must be present to establish the defense of self-defense in South Carolina. State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). Those required elements are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must either have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury or have actually been in imminent danger; (3) if the defense is based on the belief of imminent danger, the belief must have been the same as one that would have been entertained by a reasonably prudent person of ordinary firmness and courage in the same situation; if the defendant was in actual imminent danger, the circumstances must have been such that would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to prevent serious bodily injury or loss of life; and (4) there was no other probable means of avoiding the danger than to act as the defendant did in the situation. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (citing State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1982)). "It is an axiomatic principle of law that the defense has not been established if any one element is disproven." State v. Bixby, 388 S.C.528, 554, 698 S.E.2d 572, 586 (2010).

Here, the undisputed testimony is that Applicant was the initial aggressor who brought upon the difficulty, thereby disqualifying him from asserting a claim of self-defense. As O'Neil testified, perhaps Applicant could have raised a self-defense claim had he elected to take the stand, but he elected not to do so at his trial. The only evidence presented at the trial squarely established that Applicant was not entitled to a self-defense instruction; therefore, counsel was not deficient for acknowledging this.

Furthermore, there is nothing in the record, either from Applicant's trial or the testimony presented at the evidentiary hearing, to credibly establish that Applicant was acting in self-defense. The record before this Court establishes that Applicant brandished his knife in a threatening manner at James Reddick before eventually provoking a fight with Jones and cutting him in the neck and arm. This Court finds that had counsel requested a self-defense instruction, it would have been denied by the trial court. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 11: Trial counsel was ineffective for failing to object to testimony from Investigator McCracken that dispatch informed him "someone was cut severely"

Applicant asserts that trial counsel should have objected to testimony from State's witness Investigator Robert McCracken that he was informed by dispatch that "someone was cut severely," as this testimony was hearsay. See Tr. p. 300. Applicant argues that this testimony was prejudicial because the cut was not severe, but rather, was quite minor. When questioned regarding this allegation, O'Neil testified that he did not object to the characterization of the victim's injury as a severe cut because he was able to show the injury was actually very minor during the medical testimony. He testified that based on his experience, juries give more significance to medical testimony so he does not think this testimony had any impact on

Applicant's case. He expounded that the wound was classified as slightly more serious than superficial, making it a very shallow, non-invasive wound. He testified that one of the treating doctors said the wound was "simply superficial" and required copious irrigation.

This Court finds that counsel's failure to object to this testimony had no reasonable outcome on Applicant's case, particularly in light of the medical evidence presented. Counsel was able to elicit favorable testimony during the cross-examination of Dr. Steven Fann regarding the lack of severity of Jones' wounds. Additionally, Counsel highlighted this to the jury in his closing argument. Therefore, this Court finds that Applicant has failed to establish any prejudice from this allegation, which must be denied and dismissed with prejudice.

Allegation No. 12: Trial counsel was ineffective for failing to argue that State's Exhibit No. 31 should not be admitted into evidence due to its altered condition.

Applicant argues that counsel should have argued against the introduction of State's Exhibit No. 31, the beer bottle Applicant was drinking during the incident, because it was broken while in the State's custody and therefore the type of beer could not be established. In response to this allegation, O'Neil testified that he did not think to object to its admissibility based on it being broken based on a lack of brand indication. He testified that Shealey did object based on the bottle being in an altered state, which was overruled by the trial court. See Tr. p. 308-310. This Court finds that this allegation is without merit and must be denied, as there is no conceivable likelihood that the type of beer had any impact on Applicant's case. Furthermore, Shealey did object to the introduction of State's Exhibit No. 31 based on its altered condition, which was overruled by the trial court. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation No. 13: Trial counsel was ineffective for failing object to the introduction of State's Exhibit No. 32 on the basis that it had additional items not contained within when it was seized

Applicant alleges that trial counsel was ineffective for failing to object to the introduction of his backpack or tote bag into evidence as State's Exhibit No. 32 on the basis that it contained clothing that was not inside when Applicant and the bag were taken into custody. Applicant asserted that counsel was deficient for failing to inspect the bag prior to trial and cites to transcript pages 323-324 in support of this allegation. Applicant also called Officer Battiste who ultimately testified that he had no independent recollection of Applicant's case and could not recall if the clothing was in the bag at the time of Applicant's arrest or if it was placed inside afterwards. Both O'Neil and Shealey testified that they reviewed the physical evidence prior to Applicant's trial.

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. Applicant was unable to demonstrate that the clothing listed within the bag was placed inside following his arrest, making his claims speculative at best. Additionally, identity was not at issue in the case, as the victim and several witnesses knew Applicant prior to the incident, making whether or not he changed clothing a collateral matter with no significant impact on the case. This Court finds that there is no reasonable likelihood that the result of Applicant's trial would have been different absent this alleged deficiency. Furthermore, both trial counsels testified they reviewed all physical evidence prior to the trial. Therefore, this allegation is denied and dismissed with prejudice.

Allegation No. 14: Trial counsel was ineffective for failing to present testimony from Officer Battiste regarding the clothing in State's Exhibit No. 32

Applicant asserts that trial counsel should have called Officer Battiste to testify as to his clothing being placed into the bag after he was taken into custody. Officer Battiste testified at the

evidentiary hearing. Battiste testified that he vaguely recalls his involvement in Applicant's case and that he could not recognize Applicant. He testified that he did recall being the officer who took Applicant to the Alvin S. Glenn Detention Center following his arrest. He testified that he took all of Applicant's clothing and shoes at the direction of the investigating officer. He could not recall if Applicant had a bag or any other items with him when he was taken into custody. He testified that he took Applicant's clothing to the property room at the detention center and logged the items individually. He could not recall what he did next with the clothing. Battiste recognized his handwriting on the inventory tag to one of the bags, which indicated a sleeping bag was inside of it, but he has no independent recollection of inventorying the bag or what else was inside, if anything. He testified that he has no recollection as to what Applicant was wearing when he was arrested.

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. After listening to Officer Battiste's testimony at the evidentiary hearing, this Court finds that there is no reasonable likelihood that the result of Applicant's trial would have differed if Battiste had testified. Battiste could not recall much of his involvement in Applicant's case, which is reasonable and expected after the passage of time and his rote involvement processing Applicant as he likely has with hundreds of other arrested individuals. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 15: Trial counsel was ineffective for failing to establish that the clothing at the bottom of State's Exhibit No. 32 was not hidden by him

Similar to allegations number 13 and 14, Applicant asserts that trial counsel was ineffective for failing to establish that the clothing in State's Exhibit No. 32 was the clothing he was wearing at the time of his arrest and not hidden there by Applicant following the attack. This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. As previously discussed above, this Court finds that there is no reasonable likelihood that the result of Applicant's trial would have differed if counsel had established that the clothing in the bag was the clothing Applicant was wearing when arrested. Also, there is no credible, probative evidence in the record to establish that the clothing in the bag was taken from Applicant's person and put in the bag, as Applicant asserts. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 16: Trial counsel was ineffective for failing to demonstrate that the clothing inside State's Exhibit No. 28 was the same clothing Applicant was wearing when arrested

Similar to allegations number 13, 14, and 15, Applicant asserts that trial counsel was ineffective for failing to establish that the clothing in State's Exhibit No. 28 was the clothing he was wearing at the time of his arrest and not hidden there by Applicant following the attack. This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court notes the inconsistency in allegations number 15, which alleges the clothing Applicant was wearing were placed inside State's Exhibit No. 32, and this allegation, which argues that those same clothes were put into State's Exhibit No. 28. As previously discussed above, this Court finds that there is no reasonable likelihood that the result

of Applicant's trial would have differed if counsel had established that the clothing in the bag was the clothing Applicant was wearing when arrested. Also, there is no credible, probative evidence in the record to establish that the clothing in the bag was taken from Applicant's person and put in the bag, as Applicant asserts. Furthermore, Applicant's identity was not at issue in his trial, so whether he changed clothes between the attack and his arrest was a collateral issue. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 17: Trial counsel was ineffective for failing to object to the use of an unrelated knife for demonstrative purposes

Applicant asserts that trial counsel was ineffective for failing to object to the use of State's Exhibit No. 25 (for identification only) during a demonstration/reenactment of the attack. O'Neil testified that the knife was only used for demonstrative purposes and was not introduced into evidence. He testified that he successfully objected to the knife coming into evidence. He testified that the knife used in the demonstration was not the actual knife used to cut the victim, although it was similar to the witness descriptions. Shealey testified similarly, adding that he and O'Neil should have objected because it was a "nastier-looking weapon."

This Court finds that Applicant has failed to carry his burden as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel's performance was not deficient, as counsel successfully kept the knife out of evidence following his objection. Furthermore, the knife that was used for demonstrative purposes was similar to the knife described by witnesses, rather than a "nastier-looking weapon" as Shealey speculated after admitting he could not recall the type of weapon used for State's Exhibit No. 25 (for identification only). Applicant cannot show any prejudice, as the knife used for the in-court reenactment matched witness descriptions and any objection to its demonstrative use would have

been overruled. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation No. 18: Trial counsel was ineffective for failing to introduce Applicant's employment records to show he was employed and worked the day of the incident

Applicant asserts that trial counsel was ineffective for failing to introduce Applicant's employment records from Action Labor to show that he was gainfully employed during the weeks leading up to the incident and that Applicant worked a full eight-hour day before the attack. Applicant introduced his employment records from Action Labor into evidence, which were located in counsel's trial file. O'Neil testified that he had obtained employment records for Applicant showing that he was working at Action Labor prior to his arrest. He testified that the records also showed that he had worked eight hours the day of the incident. He testified that he tried to find a supervisor or other manager who could independently corroborate that Applicant had worked that day or what hour he had worked, but he was unsuccessful because no supervisors recalled seeing Applicant that day. He testified that due to this lack of independent verification, he decided not to introduce the records because they would have been of little value. He elaborated again that identification was not at issue, as all witnesses and the victim knew Applicant. He also testified that any small benefit gleaned from introducing the records would be outweighed by the loss of the last argument.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel made a strategic and well-reasoned decision not to introduce these records after diligently obtaining the records and speaking to supervisors at Action Labor. See Smith, 386 S.C.at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517 ("[W]hen counsel

articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")). This Court finds counsel's performance reasonable and in accordance with professional standards. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from this clearly collateral matter. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 19: Trial counsel was ineffective for failing to introduce motel records to show that Applicant was living in a motel and not homeless

Similar to allegation number 18, Applicant asserts that trial counsel was ineffective for failing to introduce motel records to show that he was living in a motel and not homeless when the incident occurred. Applicant did not produce any motel records but instead argued that the motel was no longer in operation, therefore making it difficult to locate any records. O'Neil testified that Applicant told him that he had been living in a motel prior to his arrest. O'Neil testified he went to the motel and talked to potential witnesses but decided against delving into this as it was not pertinent to the case theory. He elaborated that where Applicant lived was not a pertinent to the case and would have distracted from the case theory, as well as cost Applicant the final argument.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that counsel made a strategic and well-reasoned decision not to introduce this evidence regarding the motel after diligently speaking to those working at the motel. See Smith, 386 S.C.at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517 ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")). This Court finds counsel's performance reasonable and in accordance with

professional standards. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from this clearly collateral matter. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 20: Trial counsel was ineffective for failing to object to a portion of the State's closing argument

Applicant argues that counsel was ineffective for failing to object to the following portion of the State's closing argument:

> What did he do when he left? As he's going out he tries to conceal his shirt, possible evidence. He doesn't know I guess what's on that shirt, but he knows he can be identified from it, throws it in a trashcan, takes off his shirt, changes his clothes. Clothes which are kept in that backpack are kept in that area down there that he's walking up trying to leave the park. Who knows where he got them, but he changed his clothes.

Tr. p. 394 lines 11-19. Applicant argues that this portion of the closing argues facts not in the record and should have been objected to by counsel. At the evidentiary hearing, counsel argued that he generally does not object during closing argument unless it is an egregious error so as to not draw attention to any negative issue. He testified that he also tries to respond to the State's closing argument in his final argument immediately after, which is his preferred method over objecting to minor errors or discrepancies in the State's closing.

This Court finds that Applicant has failed to meet his burden of proof as to this allegation, which must be denied and dismissed with prejudice. This Court finds that Applicant cannot establish any resulting prejudice, as this portion of the closing argument was not objectionable and there is no reasonable likelihood that it had an impact on Applicant's case. As previously discussed above, Applicant's identity was not at issue and this and other allegations raised by Applicant pertaining to his clothing are wholly collateral and would have had no

reasonable impact on the outcome of his case. Furthermore, this Court finds that this portion of the closing argument was not objectionable, as it is based on testimony and reasonable inferences to evidence presented at trial. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation No. 21: Appellate counsel was ineffective for failing to brief the issue of the trial court overruling Applicant's objection to its jury instruction and supplemental jury instruction on AHBAN

Applicant alleges that appellate counsel was ineffective for failing to raise on appeal and brief whether the trial court erred in its jury instruction and supplemental jury instruction regarding ABHAN. Applicant asserts that trial counsel properly objected to both charges, thereby preserving the issue for appellate review. At the evidentiary hearing, appellate counsel Robinson testified that she should have raised that issue on appeal and did not provide any reason for not doing so. She did acknowledge that she raised a similar issue in her brief. This Court finds that Applicant has failed to establish his burden of both deficiency of appellate counsel and requisite prejudice entitling him to relief and that this allegation must be denied and dismissed with prejudice.

A defendant is entitled to effective assistance of appellate counsel. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (citing Southerland, 337 S.C. at 615, 524 S.E.2d at 836). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based

on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" Mason, No. 3:06–607–CMC, 2012 WL 5845807 at *1 (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526 (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C.at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

"To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

This Court finds that Applicant has failed to establish the requisite deficiency of appellate counsel or prejudice entitling him to relief. First, this Court finds that Applicant has failed to show that appellate counsel's performance was deficient, where there is no standard requiring

appellate counsel to brief every possible meritorious issue and counsel appropriately raised three stronger, meritorious issues on Applicant's behalf. Second, this Court finds that Applicant has failed to establish prejudice, as there is no reasonable likelihood that he would have prevailed on appeal had this issue been raised.

Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. See Jones, 463 U.S. 745; Smith, 528 U.S. at 288; Tisdale, 357 S.C. 474, 594 S.E.2d 166. In the present case, appellate counsel reviewed the record and determined which issues could be raised based on both preservation and merit. When appellate counsel reviews all possible issues and elects to raise those issues she deems most meritorious, she has performed in accordance with professional standards and is not deficient. Therefore, this Court finds that Applicant has failed to establish both deficiency and prejudice in regards to the allegation that appellate counsel was ineffective for failing to raise this issue in his appeal. This allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule

71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 14 day of Jan., 2016

L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Cordova, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clinton C. Folkes, Appellant.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2010-UP-420
Submitted August 2, 2010 – Filed September 24, 2010

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,

Assistant Attorney General Julie M. Thames, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

PER CURIAM: Clinton C. Folkes was convicted of assault and battery with intent to kill and was sentenced to life imprisonment without the possibility of parole. On appeal, Folkes argues the trial court erred in failing to charge the jury the absence of malice is not an element of assault and battery of a high and aggravated nature (ABHAN). We affirm[1] pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Tyler, 348 S.C. 526, 530-31, 560 S.E.2d 888, 890 (2002) ("[T]he absence of malice is not a required element of the offense of ABHAN."); State v. Curry, 370 S.C. 674, 682, 636 S.E.2d 649, 653 (Ct. App. 2006) ("A charge is sufficient if, when considered as a whole, it covers the law applicable to the case. The substance of the law is what must be charged to the jury, not any particular verbiage.") (internal quotation marks and citations omitted).

AFFIRMED.

FEW, C.J., KONDUROS and LOCKEMY, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.