

No. 22-5545

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IN THE SUPREME COURT OF THE UNITED STATES

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CLINTON FOLKES,

*Petitioner-Appellee*

v.

CHARLES WILLIAMS, JR., WARDEN,

*Respondent-Appellant.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FROM THE FOURTH CIRCUIT

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**BRIEF IN OPPOSITION**

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**PETITIONER'S QUESTIONS PRESENTED**

1. Whether a criminal defendant's right to counsel on direct appeal attaches throughout the period when the appellate court has jurisdiction over the case.
2. Whether an indigent defendant is denied his right to counsel under the Sixth Amendment when the State appoints an attorney to represent him on appeal but then, without the defendant's knowledge, replaces that attorney with a non-lawyer who (i) fraudulently represents herself to be an attorney and (ii) provides the defendant with incorrect information regarding his legal rights and available remedies, and thereby causes the defendant to forfeit his right to seek further judicial review.

### **LIST OF PARTIES**

Respondent agrees with Petitioner Folkes that the caption generally reflects the parties to the proceeding; however, on or about August 20, 2021, Folkes was relocated to Perry Correctional Institution from Broad River Correctional Institution. Pursuant to Supreme Court Rule 35(3), Respondent has listed Charles Williams, Jr., Warden of Perry Correctional Institution, as the correct party warden in this matter.

### **STATEMENT OF RELATED PROCEEDINGS**

*Folkes v. Nelsen*, 34 F.4th 258 (4th Cir. 2022) (rehearing denied June 7, 2022) (appeal from district court reversing the grant of relief)

*Folkes v. Nelsen*, No. CV 2:19-0760-RMG, 2021 WL 62577 (D.S.C. Jan. 7, 2021), *rev'd and remanded*, 34 F.4th 258 (4th Cir. 2022)(habeas petition granted).

*Clinton Folkes v. State of South Carolina*, 2016-000415, South Carolina Court of Appeals. Judgment entered October 16, 2018 (referred petition for certiorari denied)

*Clinton Folkes v. State of South Carolina*, 2010-CP-40-7500, Court of Common Pleas for Richland County, South Carolina. Judgment entered January 14, 2016 (PCR denied).

*State of South Carolina v. Clinton Folkes*, 2010-UP-420, 2010 WL 10080232 South Carolina Court of Appeals. Judgment entered September 24, 2010 (affirmed).

*State of South Carolina v. Clinton Folkes*, 2007-GS-40-6654, Court of General Sessions for Richland County, South Carolina. Judgment entered July 9, 2008 (conviction for Assault and Battery with Intent to Kill).

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## **JURISDICTIONAL STATEMENT**

The Fourth Circuit entered its opinion reversing the grant of habeas relief on May 10, 2022. The Court of Appeals denied Folkes timely petition for rehearing *en banc* on June 7, 2022. The petition was timely filed on September 6, 2022. Folkes invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

### **A. Introduction**

Petitioner Folkes sought federal habeas relief on the ground that appellate counsel was ineffective under *Strickland* for failing to file a petition for rehearing after his conviction was affirmed by the South Carolina Court of Appeals. The District Court *sua sponte* expanded the scope of Folkes' stated claim and granted § 2254 relief on the basis that counsel failed to notify Folkes of the adverse decision and failed to consult with Folkes regarding a petition for rehearing. The Fourth Circuit Court of Appeals correctly reversed, finding that the District Court exceeded the framework of AEDPA review by granting relief for a claim not raised, and further found that the district court's legal reasoning in granting relief was not supported by clearly established law of this Court.

### **B. Procedural History**

#### *State Court Proceedings*

Folkes was indicted for assault and battery with intent to kill (ABWIK) in 2007 and proceeded to a jury trial on July 7-9, 2008. (JA 615-16). The State put forth its case that Folkes picked a fight with another man in a public park, during which he used a knife to slit the man's neck and arm. (JA 233-35). The jury found him guilty as charged. Pursuant to South Carolina's "three strike" rule, the trial court sentenced him to life without parole as a result of Folkes' two prior ABWIK convictions. (JA 599; JA 606-07; 612).

Folkes sought to appeal his conviction to the South Carolina Court of Appeals. Folkes was represented by appointed appellate counsel, Celia Robinson, with the South Carolina Commission on Indigent Defense (SCCID). Folkes argued on appeal that the trial court erred in failing to instruct the jury that the absence of malice is not an element of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). (JA 626-36). The South Carolina Court of Appeals affirmed Folkes' conviction and sentence by unpublished per curiam opinion on September 24, 2010. (PET.APP. 217). A Petition for Rehearing was not filed in Folkes' case and the remittitur was issued on October 18, 2010. (JA 657).

On October 26, 2010, Folkes filed his initial application for post-conviction relief (PCR) in state court. (JA 658). Folkes was assigned PCR counsel who ultimately filed a second amended application asserting twenty-two grounds of ineffective assistance of trial and appellate counsel. (JA 679-82; 842). Relevant here, Folkes' third claim for relief (hereinafter referred to as "Ground Three") asserts:

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.

(JA 679). The PCR court held an evidentiary hearing in July and September 2014. (JA 686). Pertinent PCR evidentiary hearing testimony demonstrated that just ten days prior to the issuance of the South Carolina Court of Appeals opinion, Celia Robinson left SCCID for other employment. (JA 692; 695-696). Given the short time between Ms. Robinson's departure and the date of the opinion, responsibility for this case fell to her supervisor, Robert Dudek. (JA 699-700). Mr. Dudek explained that

when the South Carolina Court of Appeals affirms a conviction, the decision to seek further review is left exclusively to the professional judgment of the attorney handling the case at the Commission on Indigent Defense.<sup>1</sup> (JA 716). Mr. Dudek also testified that the South Carolina Court of Appeals does not accept *pro se* petitions for rehearing following representation by SCCID. (JA 698-699).

Mr. Dudek recalled reviewing judicial opinions on Ms. Robinson's cases as they were received. (JA 713-714). Although he had no independent recollection of this particular case after four years had passed, Mr. Dudek explained that "doesn't mean that I didn't do it. I don't recall it." (JA 701). The record also demonstrates that an SCCID paralegal signed Ms. Robinson's name to an incorrect SCCID form letter and mailed the letter to Folkes on behalf of Celia Robinson, all without her knowledge. The letter incorrectly referenced the enclosed document as the dismissal of a petition for writ of certiorari, and incorrectly informed Folkes that he had exhausted his state appellate remedies. (JA 693-694; 698).

The state PCR court denied relief by written order on January 14, 2016. (PET.APP. 171). Regarding Ground Three, the PCR court held that there is "no constitutional right to the effective assistance of counsel when seeking discretionary appellate review." (PET.APP. 195). In support of its analysis, the court specifically cited *Ross v. Moffitt*, 417 U.S. 600 (1974) and *Wainwright v. Torna*, 455 U.S. 586 (1982). Additionally, the court concluded that Folkes "cannot establish deficiency of

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<sup>1</sup> The practice is in accordance with guidance from the Supreme Court of South Carolina. See *Douglas v. State*, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (S.C. 2006).

counsel or prejudice as to this allegation." (PET.APP. 196). Although Folkes appealed the decision, certiorari was denied. (PET.APP. 170).

#### *Federal Court Proceedings*

After being denied collateral relief in state court, Folkes sought a federal writ of habeas corpus. (JA 7-37). Initially proceeding *pro se*, he raised the same twenty-two claims that were rejected in state court. (JA 28-30). The federal magistrate recommended that all twenty-two claims be dismissed. (PET.APP. 137-169). With respect to Ground Three, the magistrate found the PCR court's denial of relief reasonable, and in reliance upon *Wainwright* and *Ross* noted that "[t]he Constitution does not guarantee assistance of counsel in the pursuit of discretionary appellate review." (PET.APP. at 147).

The district court declined to adopt the magistrate's recommendation on this claim.<sup>2</sup> (JA 104-12). Instead, it appointed counsel and directed the parties to provide additional briefing. (PET.APP. 128; 123-125). After the parties did so, the magistrate again recommended that the claim be dismissed. (PET.APP. 106-123). She noted that the United States Supreme Court has recognized a constitutional right to counsel on an initial, direct appeal to which the accused is entitled as a matter of right. (PET.APP. 119). However, in *Ross* the Court refused to extend that right to discretionary appeals. (PET.APP. 119-120). The magistrate further noted the Supreme Court has not specifically ruled 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

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<sup>2</sup> The district court did adopt the magistrate's recommendation to dismiss the remaining twenty-one claims. (JA 104).

right. (PET.APP. 118). As such, the state PCR court's decision was neither contrary to, nor involved an unreasonable application of, Supreme Court precedent. (PET.APP. 121). Additionally, the magistrate believed that even if it were clear that Folkes had a right to effective assistance of counsel in filing a petition for rehearing, he failed to establish deficiency of counsel and prejudice under *Strickland*. (PET.APP. 121-122).

The district court disagreed with the magistrate's analysis. It held that the existence of a constitutional right to counsel in filing a petition for rehearing was not the sole issue presented. If it were, "the PCR court and Respondent would be correct." (PET.APP. 101). According to the district court, the state PCR adjudication failed to address appellate counsel's duties after an adverse decision is issued by the appellate court. (PET.APP. 101). In analyzing that issue, the district court recognized "that there has been considerable debate among federal courts regarding what actions of appellate counsel fall within the proceedings of direct state court review" as opposed to discretionary review. (PET.APP. 101). Nevertheless, the court found "persuasive" the Sixth Circuit's decision in *Smith v. Ohio Dep't. of Rehab. & Corr.*, 463 F.3d 426 (6th Cir. 2007). (PET.APP. 102).

In addition to finding that Folkes had a constitutional right to effective assistance of counsel after the adverse decision from the South Carolina Court of Appeals, the district court found that counsel was deficient under *Strickland* in failing to advise Folkes of the adverse decision and his right to seek further appellate review. (PET.APP. 98). Additionally, the court found prejudice because Folkes would

have sought discretionary review, if not for appellate counsel's failures. (PET.APP. 100-101).

Having found Folkes was entitled to habeas relief under *Strickland*, the district court crafted a remedy. It ordered that Folkes "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." (PET.APP. 104).

Respondent appealed this order to the Fourth Circuit Court of Appeals. In a divided panel, the Fourth Circuit reversed the decision of the district court in its May 10, 2022 published opinion. (PET.APP. 2-85). In review of the district court's order, the Court of Appeals reached three separate holdings: 1) the district court erred in its application of AEDPA review of state decisions by *sua sponte* expanding the claim presented by Folkes in his federal habeas petition, and granting relief on grounds that were not properly before the court; 2) the district court correctly concluded that Folkes failed to satisfy his burden for relief on the grounds that were explicitly raised to the federal court; and 3) even if the district court's expanded interpretation of Ground Three had been raised by Folkes, it would not entitle him to federal habeas relief because ineffective assistance of counsel claims cannot arise from conduct relating to discretionary appeals.

Judge Wynn dissented from the majority in this matter. Judge Wynn concluded that while the state post-conviction relief court's findings as to "ineffective assistance for failing to file a petition for rehearing" is not a contrary to or an

unreasonable application of federal, such is not the sole issue presented for federal habeas review. Judge Wynn found that Folkes' ineffective assistance claim necessarily incorporated consideration of duties to advise and consult after an adverse decision, and concluded that Folkes was abandoned by counsel without notice in relation to these duties. (PET.APP. 51). Subsequently, Folkes' Petition for Rehearing *en banc* was denied by Order dated June 7, 2022.(PET.APP. 1).

Petitioner now seeks certiorari to the Fourth Circuit Court of Appeals.

#### **STATEMENT OF FACTS**

On July 22, 2007, Folkes initiated a dispute with a former roofing coworker while at Finlay Park in downtown Columbia, South Carolina. Folkes escalated the dispute by pulling out a "hawk blade" knife from his back pocket.<sup>3</sup> Upon seeing the knife, the man raised his hands, backed off, and walked away. (JA 329-331; 336; 448).

Shortly thereafter Folkes saw his ex-girlfriend talking to another acquaintance, Karem Jones. Folkes initiated a dispute with Jones. (JA 262). The dispute turned violent when Folkes punched Jones in the eye, and Jones responded by punching Folkes and knocking him to the ground. (JA 263-264). Folkes then pulled out his knife and slashed Jones's throat and arm. Jones ran for help after realizing that blood was pouring from his neck. (JA 266; 307-08; 334-335). As he ran away, Folkes yelled that he was going to kill him. (JA 266). The police arrived soon after and arrested Folkes near the park. (JA 449; 454).

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<sup>3</sup> A hawk blade knife has a hooked blade. (JA 327). Multiple witnesses testified to using this type of knife on metal roofing projects. (JA 327-28, 355-56).

At trial, five eyewitnesses testified that Folkes started the fight and cut Jones in the neck. (JA 261-63, 305-06, 331-33, 364-66, 406-09). Each one knew Folkes. (JA 256, 298, 328, 353, 400). Additionally, the emergency room physician who treated Jones explained that the knife cut missed Jones' jugular vein by only a few millimeters. (JA 518). Folkes' defense attorney asked for and received a jury charge on the lesser included offense of ABHAN. (JA 544, 583-84). He also asked that the jury instructions include a provision that "the absence of malice is not an element" of the lesser included offense. (JA 498). Although the trial court charged the lesser included offense, it declined to include the additional instruction. (JA 589). Through appointed counsel, Celia Robinson, Folkes appealed the trial court's refusal of the additional instruction, but the Court of Appeals affirmed his conviction by an unpublished per curiam opinion.

#### **REASONS FOR DENYING THE PETITION**

Certiorari should primarily be denied because the Fourth Circuit properly corrected the district court's erroneous application of AEDPA review and grant of § 2254 relief. The district court erred under AEDPA by essentially rewriting the allegation(s) set forth in Ground Three, granting relief on allegations not raised to and ruled upon by the state court, and finding error by the state court despite the absence of clearly established federal law guaranteeing a right to counsel after an adverse opinion in a defendant's first appeal. Neither the state court record nor existing precedent of this Court support the district court's holding. The Fourth Circuit aptly reversed and certiorari should be denied.

**I. THE FOURTH CIRCUIT CORRECTLY FOUND THAT AEDPA STANDARDS OF REVIEW DEMANDED REVERSAL.**

a. AEDPA review of Folkes' grounds plainly set forth in the petition do not establish a basis for relief.

Notwithstanding the *sua sponte* expansion of Ground Three by the district court (*infra*), the Fourth Circuit was correct in finding no error on the part of the district court for affirming the denial of relief on the grounds *plainly* set forth by Folkes. Even the district court conceded that Folkes was not entitled to relief for counsel's alleged failure to file a petition for rehearing. (PET.APP. 101). As this Court set forth in *Wainwright v. Torna*, there is no constitutional right to counsel for discretionary appellate review. *Id.*, 455 U.S. 856, 857-88 (1982). Therefore, claims of ineffective assistance of counsel for actions or inactions pertaining to discretionary appellate review are not a cognizable basis for relief.

Every court that has ruled upon Folkes' claim of "ineffective assistance of counsel for failing to file a petition for rehearing" has rightfully found *Wainwright* as controlling authority on the matter: a petition for rehearing after a ruling on a defendant's first appeal as a matter of right is a discretionary appeal and no constitutional rights to counsel attach. The foundation of this case rests upon the proper application of AEDPA review, and under AEDPA review, the ruling of the state court is not unreasonable if reasonable jurists could disagree as to the proper application of clearly established federal law. Here reasonable jurists have consistently *agreed* in the application of *Wainwright* to this case – no court has found Folke's stated Ground Three claim meritorious. As articulated by this Court, that is

“the only question that matters.” *Shinn v. Kayer*, 592 U.S. \_\_\_, 141 S. Ct. 517, 526 (2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 102, (2011)). As such the PCR court’s holding withstands AEDPA deferential review and the grant of habeas relief was rightly reversed by the Fourth Circuit.

- b. AEDPA review of the district court’s inappropriately expanded claims likewise does not demonstrate a basis for relief, as *Wainwright* and *Ross* are controlling precedent.

The Fourth Circuit correctly held, *in arguendo*, that even if the district court’s rewriting of Ground Three to include duties to inform and consult, were to be considered, existing precedent demonstrates that a constitutional right to counsel does not attach to these duties. *Wainwright* and *Ross* are controlling precedent on the matter, and certiorari is not needed to address the underlying legal issue created by the district court in its departure from AEDPA limitations.

The Fourth Circuit majority took great care to respond to Judge Wynn’s dissenting analysis, and by extension, the district court’s holding. In so doing, it demonstrated that the analogized basis for relief under *Flores-Ortega* creating duties to advise and consult, is not appropriate because it articulates transitional duties between a trial and appeal as a matter of right – both are stages where effective counsel is constitutionally guaranteed. (PET.APP. 25-27; 30).

By contrast, Folkes’ supposed duties are only transitional to discretionary appeal and *Wainwright* controls. The Fourth Circuit demonstrated that *Wainwright* avoids the antecedent questions undertaken by *Flores-Ortega*, such as the existence of a duty to consult, because such cannot arise after an adverse appellate court ruling

and the constitution does not impose a duty on counsel to consider discretionary appeals. The Fourth Circuit then resolves the matter entirely by reiterating that this Court has never held appellate counsel bears a constitutional duty to inform a client of an adverse appellate decision and consult with him about discretionary review. As such there is nothing to attribute state court error for contrary or unreasonable application of clearly established federal law.

The Fourth Circuit majority demonstrated the lack of underlying support for the legal analysis and AEDPA analysis undertaken by the district court and dissent. Certiorari should therefore be denied.

**II. THE FOURTH CIRCUIT WAS CORRECT IN HOLDING THAT THE DISTRICT COURT ERRED IN SUA SPONTE EXPANDING THE ALLEGATIONS SET FORTH IN GROUND THREE.**

The Fourth Court was correct in finding reversible error in the district court's rewriting the allegations of Ground Three to include abandonment by counsel in relation to supposed duties of notice and consultation with a client about adverse opinions and options to seek a discretionary appeal. AEDPA review requires proper exhaustion and imposes deferential limitations that a federal court must apply. *Harrington*, 562 U.S. 86, 102–03 (2011) (holding that under AEDPA review a court may only issue a writ in cases where "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents" so as to guard against extreme malfunctions of justice, not "substitute for ordinary error correction through appeal."). Nothing within the district court's Order demonstrated adherence to such limitations.

The boundaries of AEDPA's framework are clear. In consideration of procedure, AEDPA review first requires a petitioner to exhaust his federal law claim by properly presenting it to the highest state court with jurisdiction to decide, and obtaining a review upon the merits. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). In consideration of substance, “[t]o obtain habeas relief on a claim that has been “adjudicated on the merits in state court,” the petitioner must establish that the state court decision was “contrary to, or involved an unreasonable application of” clearly established federal law as decided by this Court. 28 U.S.C § 2254(d). Alternatively, the petitioner can show the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” As the Fourth Circuit points out, the district court failed to conduct its review of Ground Three within this framework.

Expansion of a stated claim for review departs from both the state court's consideration of the stated issues and the established state court record; such is the pivotal purpose of strictly applying the requirements for exhaustion under AEDPA. By expanding the claim, the district court ceased to consider the propriety and reasonableness of the state court ruling and began its own review of unpreserved claims. The Fourth Circuit was correct in finding reversible error for this departure from AEDPA limitations. Moreover, as the majority notes, the state court record shows that Folkes failed to file a motion to reconsider so as to secure rulings on allegations he believes the state court considered too narrowly. This undercuts any argument of Folkes' intent to present a Ground Three claim broader than the clear

text of the allegation. (PET. APP. 20). Indeed, the absence of any such allegations from Folkes until *after* the district court sought supplemental briefing on those topics further undercuts any supposed intention to allege a broader claim. The Fourth Circuit demonstrated that the district court's ruling fails the procedural standards for AEDPA review.

Secondly, the Fourth Circuit correctly found error in the district court and dissent's substantive application of AEDPA review. There is simply no clearly established federal law creating duties to inform and consult after receiving an adverse decision in a defendant's one appeal as a matter of right. Any reliance upon *Flores-Oretga* is done only through weak analogy and would unquestionably fail to satisfy the "clearly established federal law" requirement that is necessary to find error on the part of the state court. The PCR court reasonably applied *Wainwright* and *Ross* in reaching its decision. The fact that the district court and dissent disagree, is by definition, an insufficient basis for federal habeas relief. The Fourth Circuit correctly reversed, and certiorari should be denied.

**III. ALTERNATIVELY, IF THE REWRITTEN CLAIMS OF GROUND THREE COULD BE CONSIDERED, THE STATE COURT RECORD DOES NOT SUPPORT RELIEF.**

In finding relief warranted, the district court and dissent repeatedly mischaracterized the record. Allegations of counsel's abandonment, a lack of substituted counsel, or the responsibility for Folkes' representation being left to a non-lawyer paralegal are not fairly supported by the record.

Instead, the record fairly demonstrates that upon Ms. Robinson leaving SCCID the responsibility for her cases fell to Robert Dudek. His testimony demonstrates that he did undertake the review of opinions in Ms. Robinson's cases, but simply could not independently remember doing so in this case. (PET.APP. 699-701; 713-714). These facts do not support the district court's and dissent's characterization of this case as one of "abandonment" by counsel, the absence of substituted counsel, or the responsibility of Folkes' representation being left to a non-lawyer. (See PET.APP. 51; 83; 92; 98-99); See *Dunn v. Reeves*, 594 U.S. \_\_, 141 S. Ct. 2405, 2407 (2021) (quoting *Burt v. Titlow*, 571 U.S. 12, 23, (2013) (internal quotation marks and brackets omitted) ("[T]he absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance."").

**IV. PETITIONER MISSTATES THE UNDERLYING LEGAL THEORY FOR WHICH APPELLATE RELIEF WAS SOUGHT IN STATE COURT.**

In his Petition for Writ of Certiorari Folkes asserted that he "appealed his conviction and life sentence on the ground that the trial court's instruction for assault and battery of a high and aggravated nature (ABHAN, lesser included offence to ABWIK) was erroneous. (JA2 618-638). Particularly, the state court charged the jury that absence of malice was an element of ABHAN." Folkes has misstated the record and the underlying issue of the state court appeal, and mistakenly references *Hill v. State*, 350 S.C. 465, 567 S.E.2d 847, 850 (2002) as support for Folkes' arguments on appeal. (Petition, at 5); (PET.APP. 217); (JA 621).

Folkes' issue on appeal claimed error by the trial court for *declining* to instruct the jury that "absence of malice" is *not* an element of ABHAN. (PET.APP. 621). *Hill* merely holds that affirmatively charging "the absence of malice" as an element of ABHAN is in error. *Id.* *Hill* would not support Petitioner's contention that the trial court erred in declining his requested charged and it does not support Petitioner' contention that the underlying issue Folkes wished to seek certiorari on was a meritorious argument. Folkes has rested his argument on misstatements of both law and fact and correction was necessary. See Supreme Court Rule 15(2) ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition").

**V. THIS CASE DOES NOT PRESENT AN ADEQUATE VEHICLE FOR REVIEW OF THE CLAIMS.**

Folkes' petition does not present the Court with an adequate vehicle to address the alleged underlying legal issues raised regarding duties to inform and consult after receipt of an adverse appellate decision. This is primarily so because this case is at its core a redress of the district court's failure to apply AEDPA standards of review – certiorari can and should be denied without even reaching the underlying legal theories Folkes wishes to argue. Folkes, however, seeks to resolve circuit differences. Such is a concession that this case – a proper application of AEDPA standards case – is not well suited for the purpose Folkes is pursuing. *Kernan v. Cuero*, 583 U.S. \_\_, 138 S. Ct. 4, 9 (2017) (quoting *Glebe v. Frost*, 574 U.S. 21, 24, 135 S.Ct. 429, 430, 190 L.Ed.2d 317 (2014) (per curiam ) (quoting 28 U.S.C. § 2254(d)(1)) (for purposes of

AEDPA review “circuit precedent does not constitute ‘clearly established Federal law, as determined by the Supreme Court.’ ”).

However, this case is also problematic in the sense that the faulty district court remedy – wherein Folkes should be released unless his right to discretionary review is restored – runs afoul of the jurisdictional limitations of South Carolina appellate courts in the absence of a timely notice of appeal. See *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 35, 39 (1974)(wherein the right to a belated appeal was established through the appeal of post-conviction relief matters to avoid the jurisdictional limitations in the direct appeal process). Under the circumstances of this case a remittitur cannot simply be recalled so as to restore an opportunity for discretionary review. The district court’s crafted remedy is essentially a jurisdictional impossibility.

### CONCLUSION

For the reasons set forth above, certiorari should be denied.

(Signature block on following page)

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