No. 22-5545

In the Supreme Court of the United States

CLINTON FOLKES,
PETITIONER

v.

CHARLES WILLIAMS, JR., WARDEN,
RESPONDENT

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's primary argument for denying review is that the AEDPA bars review of the merits of the questions presented. This argument fails because Petitioner's claim was squarely presented to, but never decided by, the South Carolina state court. Respondent's remaining arguments – that Petitioner was not in fact abandoned by appointed appellate counsel; that the Petition misstates the arguments presented to the South Carolina Court of Appeals; and that South Carolina's laws on appellate procedure somehow limits this Court's ability to grant habeas relief – are equally meritless.

I. The AEDPA Does Not Preclude of the Merits of Petitioner's Claim.

Respondent's primary argument for denying the petition is the assertion that the district court erroneously applied AEDPA review. (Opp. 9). In particular, Respondent argues that the PCR court's denial of Respondent's ineffective assistance of counsel for failing to file a petition for rehearing - on the grounds that, under this Court's decision in *Wainwright v. Torna,* 455 U.S. 586 (1982), there is no constitutional right to assistance of counsel after direct appeal – is a determination on the merits that was neither (i) contrary to nor involved an unreasonable application of clearly established federal law as established by this Court nor (ii) based on an unreasonable determination of the facts in light of the evidence presented to it and, thus, according to Respondent, Folkes' claim was not subject to habeas review in federal court. *See* 28 U.S.C. § 2254(d). (Opp. 10-12). Nonetheless, these procedural bars do not apply to claims that were fairly presented to a state court but

not adjudicated by it. *E.g., Cone v. Bell*, 556 U.S. 449 (2009); *Wiggins v. Smith*, 539 U.S. 510 (2003).

As Judge Wynn explains in his dissent, that is precisely what occurred here. Fairly read, the facts and argument supporting Folkes' failure to consult claim were, in Judge Wynn's words, "squarely presented to the state court within Ground 3 of Folkes's petition," (App. 61). Further, the PCR court's "notable lack of analysis" of Folkes' failure-to-consult claim, combined with the PCR court's repeated reference to only a failure-to-file, shows it "never decided the failure-to-consult issue at all." (App. 68-69, 176-179, 193-196).

As Judge Wynn also stated, "[f]or similar reasons, the failure-to-consult argument was also properly before the district court . . . because 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." (App. 62.)

Accordingly, the merits of Folkes' failure to consult claim were properly considered by the District Court and are properly presented for review by this Court, as well.

II. Respondent's Argument that Petitioner Was Not Abandoned by Appellate Counsel Contradicts the Findings of the District Court and Has No Support in the Record.

The District Court found that Petitioner had been abandoned by counsel, stating:

> 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.

(App. 98). Further, the District Court stated:

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

(App. 99-100).

Respondent does not dispute any of these underlying facts but nonetheless asserts that the evidence in the record "do[es] 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." (Opp. 15). However, the only support that Respondent musters for this remarkable assertion is the observation that Ms. Robinson's supervisor, Robert Dudek, generally reviewed the opinions in Ms. Robinson's cases, although, as even Respondent acknowledges, Dudek "could not independently remember doing so in this case." *Id.*

The District Court correctly rejected this same speculation that "Dudek *may* have conducted such a review" as "inconsistent with his testimony that he had no recollection of conducting such a determination and regretted that no petition for rehearing had been filed." (App. 94) (italics in original). In sum, Respondent's assertion that Folkes was not in fact abandoned by his appellate counsel has no support whatsoever in the record.

In an apparent attempt to show that Folkes was not prejudiced by the abandonment, Respondent also makes the remarkable suggestion that the South Carolina Court of Appeals would not have allowed him to file a *pro se* petition for rehearing. However, the only case that Respondent cites for this proposition, *Douglas v. State*, 369 S.C. 213, 631 S.E.2d 542 (2006), holds only that appellate counsel has no duty to pursue such a petition; it says nothing about whether a defendant may file such a petition if the defendant has no such appellate counsel. Indeed, no South Carolina judicial opinion, rule, or statute contains such a prohibition, and if any did, that prohibition would be unconstitutional. The Fourteenth Amendment's Due Process Clause guarantees state prisoners "reasonable access to the courts" against

state action, both in federal courts and state courts. *Ex parte Hull*, 312 U.S. 546, 549 (1941); *White v. Ragen*, 324 U.S. 760, 762 n.1 (1945). As this Court held in *Bounds v. Smith,* 430 U.S. 817, 821 (1977), "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." This right of access to the courts "is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). *See also Ex parte Hull,* 312 U.S. at 549 (striking down regulation prohibiting prisoners from filing petitions for habeas corpus unless those petitions are found to be "properly drawn" by a parole board investigator).

III. Respondent Misstates Folkes' Arguments to the South Carolina Court of Appeals.

Respondent incorrectly asserts that Folkes has misrepresented to the Court his arguments in his direct appeal. Specifically, Respondent claims Folkes did not argue in his direct appeal that the state trial court erroneously charged the jury that the absence of malice was an element of ABHAN. (Opp. 15-16). However, Respondent's argument ignores Folkes' brief on direct appeal, which makes this precise argument. (JA 632-635) ("The judge's instructions clearly indicated that the jury would have to find that appellant did not act with malice before reaching an ABHAN verdict. Thus, the judge effectively instructed the jury that the absence of malice is a required element of ABHAN."). Folkes' appellate brief also properly cited *Hill v. State*, 350 S.C. 465, 470, 567 S.E.2d 847, 850 (2002) ("There is no question that

an ABHAN charge…including absence of malice or legal provocation as an element would be erroneous…").[1]

Respondent's argument is apparently derived from a single sentence in the South Carolina Court of Appeals' opinion: "…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)." (App. 218). However, as explained above, that sentence reflects a misapprehension of Folkes' argument on appeal. And indeed, that misapprehension, which is the basis for the South Carolina Court of Appeals' decision denying Folkes' appeal, is precisely the error that could have been corrected in response to the timely filing of a petition for rehearing. *See* Rule 221, SCACR.

IV. This Case Presents an Excellent Opportunity to Resolve the Circuit Split Identified in the Petition and to Address the Categorical Difference Between Abandonment by Counsel and Mere Ineffective Assistance of Counsel.

Respondent's assertion that this case does not present an adequate vehicle to address the issues presented is based primarily on Respondent's argument that consideration of the merits of those issues is barred by the AEDPA. (Opp. 16-17). This argument fails for the reasons set forth in Section I, above.

Respondent's second argument against review is that relief is what he describes as a "jurisdictional impossibility." (Opp. 17). Specifically, Respondent

[1] The issue of the trial court's definition of ABHAN in terms of absence of malice (*i.e.*, making it an element) was also discussed at length at Folkes' PCR hearing. (JA 704-706, 731).

asserts that the South Carolina appellate courts lack jurisdiction to recall a remittitur in order to restore an opportunity for discretionary review and that this Court therefore could not order Folkes' release unless they did so. Unsurprisingly, Respondent cites no authority for this supposed limitation on this Court's authority. To the contrary, Section 2243 gives the federal courts broad authority in a habeas case to fashion a remedy "as law and justice require." 28 U.S.C. § 2243.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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December 27, 2022
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