No.

In the Supreme Court of the United States

CLINTON FOLKES,
PETITIONER

v.

KENNETH NELSEN, WARDEN,
RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because Petitioner was indigent, the State of South Carolina appointed an attorney from the South Carolina Commission on Indigent Defense (Celia Robinson) to represent Petitioner on his direct appeal from his South Carolina state court conviction for assault and battery with intent to kill. After briefing concluded, but while the appeal was still pending, Robinson left the Commission without notifying either Petitioner or the appellate court. Ten days thereafter, the South Carolina Court of Appeals issued an opinion affirming Petitioner's conviction. Under South Carolina law, Petitioner had a right to petition for review of that decision by the South Carolina Supreme Court but was required to file a petition for rehearing with the South Carolina Court of Appeals as a prerequisite to doing so. Petitioner did not do so because he was affirmatively misled about his legal rights by a paralegal at the Commission. Specifically, a Commission paralegal posed as attorney Robinson and, without the knowledge or authorization of Robinson or any other Commission attorney, sent a letter to Petitioner on Commission letterhead in which she forged Robinson's signature and falsely told Petitioner that he had exhausted his state court remedies. The questions presented are:

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.

STATEMENT OF RELATED PROCEEDINGS

Clinton Folkes v. Warden Nelsen, 21-6217, U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 10, 2022, rehearing denied June 7, 2022 (reversed).

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Clinton Folkes v. Warden Nelsen, 2:19-cv-00760-RMG, U.S. District Court for the District of South Carolina. Judgment entered January 7, 2021 (habeas petition granted).

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

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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).

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State of South Carolina v. Clinton Folkes, 2008-096806, South Carolina Court of Appeals. Judgment entered September 24, 2010 (affirmed).

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clinton Folkes is currently serving a life sentence, without the possibility of parole, for an assault and battery with intent to kill conviction. Folkes' appointed appellate counsel, Celia Robinson of the South Carolina Commission on Indigent Defense (SCCID) abandoned him during the pendency of his appeal when she left her position at SCCID without informing either Folkes or the appellate court and without arranging for any other attorney to take her place. Robinson's abandonment left Folkes without counsel when the South Carolina Court of Appeals issued an opinion affirming his conviction. A letter issued days later from SCCID, prepared by a paralegal and bearing the forged signature of Robinson, provided incorrect advice on the nature and effect of this opinion and Folkes' rights and options for seeking further review. Because of that incorrect advice from the paralegal acting as Folkes' lawyer, Folkes did not seek further review of the appellate court's decision and, as a result, lost his opportunity to have the South Carolina Supreme Court review his meritorious argument that the trial court had given an erroneous instruction to the jury.

The United States District Court for the District of South Carolina found Folkes received ineffective assistance of appellate counsel and ordered he be given an opportunity to pursue discretionary review to the South Carolina Supreme Court. A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the District Court in a published opinion that conflicts with long-standing precedent of the Sixth Circuit. The Court's intervention is needed to resolve the concrete and

irreconcilable conflict between the Courts of Appeals regarding the terminus of a criminal defendant's Constitutionally-secured right to appellate counsel, and particularly appellate counsel's duty to inform the defendant of the outcome and consequences of his appeal.

OPINIONS BELOW

The June 7, 2022 order of the United States Court of Appeals for the Fourth Circuit is unreported. (App. 1). The May 10, 2022, opinion of the United States Court of Appeals for the Fourth Circuit is reported at 34 F.4d 258. (App. 2-85). The January 7, 2021 order of the District Court for the District of South Carolina granting habeas relief is unreported, but can be found at 2021 WL 62577. (App. 86-105). The December 8, 2020, report and recommendation of the United States magistrate judge is unreported. (App. 106-123). The February 12, 2020, order setting a briefing schedule and issues is unreported. (App. 124-127). The February 12, 2020, order awarding in part and denying in part summary judgment is unreported, but can be found at 2020 WL 728698. (App. 128-136). The November 15, 2019, report and recommendation of the United States magistrate judge is unreported. (App. 137-169). The October 16, 2018 order of the South Carolina Court of Appeals in Folkes' PCR action is unreported. (App. 170). The January 14, 2016, order of the Richland County Court of Common Pleas in Folkes' PCR action is unreported. (App. 171-216). The September 24, 2010 opinion of the South Carolina Court of Appeals in Folkes' appeal of right is unreported, but available at 2010 WL 10080232. (App. 217-218).

JURISDICTION

The opinion of the Fourth Circuit Court of Appeals was issued on May 10, 2022, and rehearing denied by order dated June 7, 2022. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387, 392 (1985).

The right of a criminal defendant to counsel at the appellate level is governed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Douglas v. California*, 372 U.S. 353, 355-56 (1963). However, 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).

A petition for a writ of habeas corpus under 28 U.S.C. § 2254 is reviewed under the following standard:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). However, if a state court fails to adjudicate the merits of a claim, then the state court resolution may be reviewed *de novo*, unconstrained by 28 U.S.C. § 2254(d). *E.g. Cone v. Bell,* 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's…claim, federal habeas review is not subject to the deferential standard that applies under AEDPA…Instead, the claim is reviewed *de novo*."); *Wiggins v. Smith*, 539 U.S. 510 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* [*v. Washington,* 466 U.S. 668 (1984)] analysis.").

STATEMENT OF THE CASE

A. Trial, Direct Appeal, and Abandonment by Appellate Counsel

On July 9, 2008, Clinton Folkes was convicted of assault and battery with intent to kill (ABWIK) arising out of a drunken fight at Finlay Park in Columbia, South Carolina. The maximum sentence for this crime, which no longer exists in South Carolina, was twenty years, but the trial court was obliged to sentence Folkes to imprisonment for life, without the possibility of parole, under South Carolina's "three strikes" law.[1] *See* S.C. Code § 17-25-45 ("three strikes" law); S.C. Code § 16-3-620 (Supp. 2003) (former ABWIK statute).

Folkes 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,

[1] Folkes had two prior convictions for ABWIK in 1994. (JA 606-607).

a lesser included offence to ABWIK) was erroneous. (JA[2] 618-638). Particularly, the state court charged the jury that absence of malice was an element of ABHAN. *See 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…"). Folkes' appellate attorney was Celia Robinson of the South Carolina Commission on Indigent Defense (SCCID), who filed the final brief on Folkes' behalf on October 12, 2009. (JA 616-636). Robinson left SCCID on September 14, 2010, and ceased performing her duties to represent Folkes at that time. (JA 776). Neither Robinson nor SCCID informed Folkes that Robinson would no longer be representing him, and Robinson never sought or received leave of court to withdraw as counsel. (JA 148, 775). On September 24, 2010, the South Carolina Court of Appeals issued its opinion, affirming the trial court. (JA 655-656; App. 217-218).

Shortly thereafter, Folkes received a letter from SCCID dated September 28, 2010 that purported to be from Robinson and stated, in relevant part:

> Enclosed is a copy of the Order of the Court of Appeals'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.
>
> There is now a one-year statute of limitations for filing an application for a writ of habeas corpus in federal court.
>
> * * *

[2] Petitioner has retained citations to the Fourth Circuit Joint Appendix (JA) in the event the Court wishes to review the Fourth Circuit's record.

(JA 777). Every statement set forth above was false: this was the opinion in Folkes' direct appeal, no attorney had petitioned to be relieved, Folkes had not exhausted his state court remedies, and Folkes' next avenue of relief was a petition for rehearing before the South Carolina Court of Appeals. The letter purported to bear the signature of Robinson, who, unbeknownst to Folkes, had left the employ of SCCID two weeks before the letter was written. In fact, Robinson neither signed the letter nor authorized it, nor did any other SCCID attorney; rather, an SCCID paralegal, without authorization, impersonated Robinson, forged her signature and sent the letter to Petitioner. (JA 157, 694, 722-723). This was the only communication Folkes received from SCCID until the South Carolina Court of Appeals issued its remittitur (ceding its jurisdiction) on October 18, 2010. (JA 657, 775). During this period of time:

- No attorney informed Folkes of the Court of Appeals' opinion.
- No attorney advised Folkes of the effect of the Court of Appeals' opinion.
- No attorney advised Folkes he had further state court remedies.
- No attorney advised Folkes he could seek further review before the South Carolina Supreme Court.
- No attorney advised Folkes a petition for rehearing was necessary to pursue further review before the South Carolina Supreme Court. *See* Rule 242(c), SCACR ("A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals."); Rule 242(d)(2) ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall

be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

B. State Post-Conviction Relief Application

On October 26, 2010, Folkes filed a *pro se* PCR application in the Richland County, South Carolina, Court of Common Pleas. (JA 658-663). This application was amended twice; the second amendment, filed with the assistance of counsel, contained the following (third) ground for relief: "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).

On July 17, 2014 and September 25, 2014, the Court of Common Pleas for Richland County, South Carolina, held an evidentiary hearing regarding Folkes' application. (JA 686-775). The evidence at the hearing included testimony regarding Folkes' attorney's departure, his lack of subsequent legal representation, and the September 28, 2010 letter. (App. 53-54). In addition, Robinson testified that, had she not already left SCCID, she would have petitioned for rehearing at the South Carolina Court of Appeals and for certiorari in the South Carolina Supreme Court. (JA 723-725; App. 53-55). In an Order of Dismissal dated January 14, 2016, the Court of Common Pleas referred to this evidence but did not make any factual findings. (App. 193). Rather, the Court denied Folkes' PCR application on the grounds that "an individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review," (App. 195) (citing *Wainwright v. Torna,* 455

U.S. 586 (1982)), and that, in this instance, any further review would have been discretionary, as, under South Carolina law, "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." (App. 195-196).

Folkes timely petitioned the South Carolina Supreme Court for a writ of certiorari to review the PCR decision. In Folkes' petition, he specifically noted he was "erroneously advised" by the September 28, 2010, letter. (JA 857). The South Carolina Supreme Court referred this petition to the Court of Appeals, which denied the petition by order dated October 16, 2018. (JA 882-887; App. 170).

C. Federal Petition for a Writ of Habeas Corpus

On March 13, 2019, Folkes filed at the United States District Court for the District of South Carolina a *pro se* petition for habeas corpus under 28 U.S.C. § 2254, which was referred to District Judge Richard Gergel. (JA 7-21). The third ground for relief in this petition was identical to the third ground he asserted in his second amended state PCR application. (JA 28, 679; App. 8). The Respondent moved for summary judgment on Folkes' petition, to which Folkes responded in opposition. (JA 3, 38-69). On February 12, 2020, the District Court granted summary judgment as to all of Folkes' grounds except ground three, finding:

> 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.

(App. 134). On the same day, the District Court followed this order with an order appointing the undersigned as counsel, and with another order (Briefing Order) setting a briefing schedule to address several issues, including whether Folkes had been actually or constructively denied counsel by Robinson's actions and whether the September 28, 2010, letter was sent by an attorney. (App. 125-126). No party objected to this new briefing regime.

Pursuant to the Briefing Order, Respondent filed a brief in support of summary judgment on March 13, 2020, Folkes filed his brief in support on April 9, 2020, and Respondent filed a reply on April 24, 2020. The matter was referred to a magistrate judge, who on December 8, 2020, issued a report and recommendation, *inter alia*, expressing concern over Respondent "not squarely confronting" whether a failure to "review, decide, or consult" regarding a petition for rehearing would constitute denial of appellate counsel or ineffective assistance of counsel. (App. 115). Nevertheless, the magistrate judge recommended summary judgment be granted as to Folkes' third ground for relief. (App. 117-122).

On December 13, 2020, Folkes objected to this report and recommendation, noting, *inter alia*, Respondent failed to address the issue of abandonment under *United States v. Cronic*, 466 U.S. 648 (1984); the magistrate judge failed to consider *Maples v. Thomas*, 565 U.S. 266 (2012), an analogous procedural default case involving abandonment; and the magistrate judge misapplied *Douglas v. California*,

372 U.S. 353 (1963) by prematurely ending a defendant's right to representation on appeal. (JA 136-142). Respondent did not respond to Folkes' objection.

On January 7, 2021, the District Court issued an order granting habeas relief on Folkes' third ground, declining to adopt the magistrate judge's recommendation. (App. 86-105). The District Court recognized Folkes' third ground for state PCR relief "assert[ed] 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." (App. 92-93). The District Court found after Robinson's exit:

> [no] licensed attorney assumed the duties of substitute counsel, including most basic duties of appellate counsel of informing [Folkes] 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.
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> * * *
>
> 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.
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> * * *
>
> 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 [Folkes] of the adverse decision and of his right to seek further review under these circumstances falls far short of competent representation.

(App. 98-99). The District Court also took a dim view of the September 28, 2010, letter, finding it constituted the unauthorized practice of law[3] and represented an "additional and independent basis for finding that [Folkes] was denied effective assistance of counsel." (App. 99-100). The District Court also noted Respondent's "unclear" answers to the questions posed in the Briefing Order did not "squarely" address many of issues. (App. 94).

The District Court ordered the following relief:

> …[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…

(App. 104). Warden filed his notice of appeal on February 4, 2021. On March 25, 2021, the District Court, on motion of the Respondent, stayed its relief pending the resolution of the appeal.

After expediting the appeal, the Fourth Circuit entertained oral arguments on September 17, 2021. On May 10, 2022, in a divided opinion, the Fourth Circuit majority, consisting of Circuit Judge G. Steven Agee and District Judge Frank W. Volk (sitting by designation), reversed the District Court. (App. 2-85). The Fourth Circuit majority first found Folkes had not presented the issue of consultation to the District Court, applying a particularly harsh interpretation of § 2254(a) found in *Samples v. Ballard*, 860 F.3d 266, 273 (CA4 2017). (App. 2-22). It then held that even if the issue of representation after the Court of Appeals' opinion was before the court,

[3] Unauthorized practice of law is a felony in South Carolina. S.C. Code § 40-5-310.

the Constitutionally-secured right to counsel ended upon the issuance of an opinion in the first appeal of right. (App. 22-50).

Circuit Judge A. Wynn, Jr. dissented. (App. 51-85). In his dissent, Judge Wynn noted Folkes' petition was filed *pro se*, and the issue of consultation and representation after the Court of Appeals' opinion was repeatedly argued before the state courts, who never adjudicated this issue on its merits. (App. 57-62). Reviewing the issue *de novo*, Judge Wynn, using long-standing precedent of the Sixth Circuit as a guide, found counsel had a "duty to inform the client about the court's resolution of his claim and advise him of his next step for appeal." (App. 51). The dissent also noted:

> 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.

(App. 78) (emphasis in original).

Folkes sought rehearing *en banc* by petition dated May 24, 2022. The Fourth Circuit denied this petition by order dated June 7, 2022. (App. 1).

REASONS FOR GRANTING THE WRIT

I. There is a Circuit Split over Appellate Counsel's Constitutional Duties at the End of an Appeal.

1. The Court long ago established a criminal defendant has a constitutional right to have an appellate lawyer file a brief and support him in presenting his case during his first appeal of right. *See, e.g., Evitts v. Lucey*, 469 U.S. 387 (1985). The Court also long ago established a criminal defendant has no constitutional right to have an appellate lawyer pursue a discretionary appeal. *Wainwright*, 455 U.S. at 587-588. However, the space between *Evitts* and *Wainwright*, at least according to the jurisprudence of the several circuits, is *terra incognita* and requires the attention of the Court. *See, e.g., City & Cty. of S.F. v. Sheehan*, 135 S.Ct. 1765, 1774 (2015) ("certiorari jurisdiction exists to clarify the law."); *see also Folkes*, 34 F.4th at 296 ("[T]his sets out only a floor and ceiling—and what duties may exist in the space between these two parameters is not as settled as the majority suggests.") (Wynn, J., dissenting).

2. The Fourth Circuit dissent correctly recognized the Constitution's right to counsel on appeal extends to the entire appeal, including "inform[ing] the client about the court's resolution of his claim and advis[ing] him of his next step for appeal." *Folkes*, 34 F.4d at 287, n.1 (Wynn, J., dissenting). (App. 51). The dissent was properly guided by the well-settled law of the Sixth Circuit in recognizing this duty. *See Id.* at 298. (App. 75-78). In *Smith v. State of Ohio Department of Rehabilitation and Corrections*, the Sixth Circuit held 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 (CA6 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). Smith has been cited and reaffirmed within the Sixth Circuit. *See Gunner v. Welch*, 749 F.3d 511 (CA6 2014) (extending this ruling in a procedural default context).

3. In contrast, the Second, Fifth, and Ninth Circuits, and the Fourth Circuit majority, employ a blunt instrument: the constitutional right to counsel on appeal ends when the appellate court issues its opinion. *See Pena v. United States*, 534 F.3d 92, 94-96 (CA2 2008); *Moore v. Cockrell*, 313 F.3d 880, 881-82 (CA5 2002); *Miller v. Keeney*, 882 F.2d 1428, 1430-33 (CA9 1989); *Folkes*, *supra.* (App. 2-50).

II. The Fourth Circuit Erred in Holding Appellate Counsel's Duties Ended Upon the Issuance of an Opinion.

1. The position that a criminal client's right to counsel ends when the appellate court pens its opinion runs counter to this Court's precedent. For example, the *Strickland* court held: "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**." *Strickland*, 466 U.S. at 688 (emphasis added). In *Roe v. Flores-Ortega*, the Court noted the 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. 528 U.S. 470, 479 (2000); *cf. 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).

2. The position of the Fourth Circuit majority is also inconsistent with the policies underlying *Strickland* and *Cronic* mandating criminal defendants receive effective representation. If a criminal defendant were no longer entitled to counsel at the moment the appellate opinion issued, he would have no attorney to identify and address prejudicial errors in the opinion. In the event the defendant prevailed in his appeal, he would have no counsel to respond to delaying tactics by the State before the appellate court, such as a baseless motion to stay remittitur/mandate. Finally, if a defendant's right to counsel ended at the penning of his appeal's opinion, then a defendant would never be entitled to counsel to oppose a petition for rehearing advanced by the State or for certiorari to this Court.

Here, Folkes was secretly represented by a non-lawyer, as evidenced by the September 28, 2010, letter from a paralegal bearing Robinson's forged signature. Several circuits have recognized representation by a non-lawyer is tantamount to no representation at all (*i.e.*, a *per se* rule of ineffectiveness). *See United States v. Bergman*, 599 F.3d 1142, 1148 (CA10 2010); *Solina v. United States*, 709 F.2d 160 (CA2 1983); *United States v. Mitchell*, 216 F.3d 1126, 1274 (CADC 2000); *but see Khan*

v. United States, 928 F.3d 1264, 1274 (CA11 2019) (refusing to adopt a *per se* rule of ineffectiveness and applying a *Strickland* analysis).

3. The Fourth Circuit majority ignores the Court's holding that the right of representation on appeal "assure[s] the indigent defendant an adequate opportunity to present his claims fairly **in the context of the State's appellate process**." *Moffitt*, 417 U.S. at 616 (emphasis added). Consideration of South Carolina's appellate process is therefore important to determine if a defendant has received Due Process. South Carolina requires a petition for rehearing before the Court of Appeals in order to finalize the opinion for subsequent discretionary review by the South Carolina Supreme Court. Rule 242(c), SCACR ("A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals."); Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari…"). Such a requirement did not exist in North Carolina when the Court decided *Moffitt* or in Florida when the Court decided *Torna*. South Carolina's appellate rules also do not allow for the Court of Appeals to refuse to consider a petition for rehearing, making it not "discretionary" as understood in this context. *See Ross v. Moffitt*, 417 U.S. 600, 615 (1974) ("discretionary" review can be denied "even though [the court] believes that the decision…was incorrect"). While the Court of Appeals may elect to decide the petition for rehearing without requiring a response, the panel must nonetheless decide the petition. *See* Rule 221(a), SCACR. Finally, the South Carolina Court of

Appeals would not have accepted a *pro se* petition for rehearing. (JA 698-699, 717-718; App. 84). If a defendant's right to counsel on appeal ends when he is in position to pursue discretionary review *pro se*, then in South Carolina that right ends after a petition for rehearing is decided, when his first appeal of right is truly complete.

4. The Fourth Circuit majority also ignores the precedent of the Court regarding construction of *pro se* pleadings. *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The majority exalts form over substance, hearkening to a "primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal." *Wood v. Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.).

5. The Fourth Circuit majority's position finds no support by analogy in the pre-*Douglas* jurisprudence of the Court. In the time before a well-established right to appellate representation, the Court nonetheless protected the rights of indigent criminal defendants to pursue appellate review. *See, e.g., Moffit*, 417 U.S. at 606 (citing cases). The reasoning of the Court's decisions that have considered the right of representation before appellate review equally inform counsel's duties prior to discretionary review. These decisions "…invalidated…financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants." *Moffitt*, 417 U.S. at 606. Put another way: "…a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." *Id.* at 607. These decisions show at the trial level the right to representation did not end at the

verdict, and that a defendant was entitled to a measure of representation prior to his appeal, even if he was not entitled to representation on that appeal.

III. The Terminus of a Criminal Defendant's Right to Appellate Counsel is an Important and Recurring Question.

1. The questions presented in this case are recurring. The Respondent's April 13, 2020, memorandum submitted pursuant to the Briefing Order noted: "a reasonable argument can be made that the right to counsel extends to a petition for rehearing." (App. 115). The magistrate judge also recognized:

> 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* [DSC] Dkt. No. 31 at 7-13.).

(App. 115).

2. The issue of the Constitutional right to counsel after the opinion in the first appeal of right is a perennial topic in circuit and district courts, even in circuits where the issue is supposedly settled. *See, e.g., Jackson v. Johnson*, 217 F.3d 360 (CA5 2000); *Clark v. Johnson*, 227 F.3d 273 (CA5 2000); *Moore v. Cockrell*, 313 F.3d 880 (CA5 2002).

IV. This Case is an Opportune Vehicle for Resolving the Circuit Split.

1. This case presents an ideal vehicle for deciding the terminus of the Constitutionally-secured right to appellate counsel. First, the circuit split is ripe. The positions of the circuits which have taken a position on this issue have ossified and are unlikely to change without the intervention of the Court. Second, Folkes' wrongfully deprived freedom is ultimately at issue. Third, these are pure questions

of law, allowing the Court to define the contours of this important Constitutional right without fact-finding. Fourth, Folkes' case does not pose any danger of mootness, as he is serving a life sentence without the possibility of parole.

V. This Court Should Make Clear, as It Has in the Procedural Default Context, that Abandonment by Appointed Counsel Is Categorically Different Than Mere Ineffective Assistance of Counsel

1. The case of *Maples v. Thomas*, where the habeas petitioner "was disarmed by extraordinary circumstances quite beyond his control[,]" presents the Court with a strikingly similar set of facts to this case. 565 U.S. 266, 289 (2012). In *Maples*, the petitioner's two attorneys of record left their firm and ceased to represent him while his state PCR claim was pending. *Id.* at 270. Neither attorney informed the petitioner of their departure, sought leave of the court to withdraw, or moved for substitution of new counsel. *Id.* at 270-271, 275. Months later, the state court denied the petitioner's claim and sent notice to the supposed 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 Court held the "extraordinary facts" of the petitioner's case demonstrated "cause" 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.*

2. In *Maples*, the Court found there was "cause" to excuse the petitioner's procedural default. *Id.* at 289. Such "cause" has its roots in *Strickland*'s concern for fundamental fairness in habeas proceedings. *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). Because Folkes' appellate counsel's abandonment would have clearly constituted "cause" for procedural default, it likewise represents, at a bare minimum, ineffective assistance of counsel.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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September 6, 2022
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