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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County
Honorable J.C. Nicholson, Jr., Trial Judge
Honorable Deadra L. Jefferson, Post-Conviction Relief Judge

Appellate Case No. 2023-001759

Hank E. Hawes, #361739,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Whether the PCR court erred in finding that appellate counsel was not ineffective where they failed to consult with Petitioner about whether to petition this Court to review the Court of Appeals' decision or inform Petitioner of his right to file a *pro se* petition, where the Court of Appeals found that the trial court erred in allowing the admission of in-life photographs of the decedent but that the error was harmless?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

Whether the post-conviction relief court properly determined Petitioner failed to establish appellate counsel was constitutionally ineffective where Petitioner has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review?

STATEMENT OF THE CASE

Petitioner Hank E. Hawes is presently confined in the South Carolina Department of Corrections serving a life sentence following his conviction for the murder of his ex-girlfriend. During its October 2011 term, the Richland County Grand Jury indicted Petitioner for Murder (2011-GS-40-5012). Petitioner was represented by then Richland County Chief Public Defender Doug Strickler, Assistant Public Defender E. Fielding Pringle, and Assistant Public Defender Megan A. Eigenbrot. On October 6–16, 2014, Petitioner, alongside counsels, proceeded to a jury trial before the Honorable J.C. Nicholson, Jr., then circuit court judge. The jury convicted Petitioner as indicted. Judge Nicholson sentenced Petitioner to life imprisonment.

Petitioner sought direct appellate review and was represented on appeal by Nicholas A. Charles, Esquire (appellate counsel), of Nelson Mullins Riley & Scarborough, LLP. On appeal, Petitioner argued the following:

I. The Trial Court erred by allowing the introduction of unnecessary and prejudicial photographic evidence used by the prosecution in closing arguments to arouse the passion and prejudice of the jury.
II. The Trial Court erred by permitting the State to recall Mr. Hawes to the stand solely to elicit impeachable testimony that would permit the State to call witnesses to testify about prior acts that would otherwise be inadmissible.
III. The Trial Court erred by permitting the State to introduce other impermissible testimony of Mr. Hawes' purported prior bad acts.
IV. The Trial Court erred by refusing to recuse the Fifth Circuit Solicitor's office from prosecuting a case in which two material witnesses of the alleged crime were an assistant solicitor and her husband.

The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by published opinion. State v. Hawes, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018). On March 29, 2018, both the State and Petitioner filed petitions for rehearing. On May 24, 2018, the South Carolina Court of Appeals denied both petitions for rehearing by filed Order. The Remittitur was returned to the lower court on July 3, 2018.

Petitioner then sought post-conviction relief by filing a *pro se* application on March 6, 2019, alleging ineffective assistance of trial counsel for failing to investigate and develop defenses and failing to make objections. On July 9, 2023, Petitioner, through counsel, amended his allegations to include:

1. Ineffective Assistance of Appellate Counsel
   a. Appellate Counsel failed to file a Petition for Certiorari with the South Carolina Supreme Court or to inform Applicant of his right to do so.

An evidentiary hearing into the matter convened on July 19, 2023, before the Honorable Deadra L. Jefferson, circuit court judge. Jonathan D. Waller, Esquire, represented Petitioner. Petitioner testified on his behalf. Richland County Chief Public Defender E. Fielding Pringle and Nicholas A. Charles, Esquire, also testified. Petitioner proceeded forward on all pled allegations. The post-conviction relief court denied relief and dismissed the application with prejudice by order filed October 12, 2023. In the Order of Dismissal, the post-conviction relief court found Petitioner failed to overcome his burden in proving appellate counsel was deficient, and appellate counsel reasoned why he did not seek a petition for writ of certiorari with the South Carolina Supreme Court because it would have been fruitless. The post-conviction relief court further found that Petitioner had no right to effective assistance of counsel on discretionary review, so his allegation failed as a matter of law.

STATEMENT OF THE FACTS

Petitioner admitted at trial that he killed Jennifer Wilson (the Victim) in her home in Richland County in the early morning hours of August 28, 2011. Petitioner testified he acted in self-defense. (App. p. 1077, l. 10 – p. 1098, l. 9; p. 1162, l. 20 – p. 1163, l. 1). Defense counsel argued that the evidence demonstrated self-defense and/or supported the lesser offense of voluntary manslaughter. (App. p. 1326, ll. 9–17). The jury, finding the State had shown malice beyond a reasonable doubt, convicted Petitioner of murder upon hearing the following evidence:

The Victim's neighbor, Kelly Smith, testified that he woke up at approximately 2:29 am to the sounds of screaming and physical violence coming from the bedroom area of the Victim's home. He testified that he "heard screaming and physical violence," and he "recognized [the Victim's] voice immediately" but did not hear another voice. (App. p. 268, l. 5 – p. 269, l. 4). He testified he could feel the energy of the attack, "it literally, was a violent situation. [The Victim's] scream was she was being harmed." (App. p. 269, ll. 9–11). He then noticed a pause, movement to the hallway progressing into the kitchen area, then:

> … there was a second wave of more aggressive, just brutal, carnal instant violence. And I could physically feel the vibration in my bedroom from what was coming from the other room. … I could hear what sounded like a table slamming against the wall, like her body being thrown against the wall.

(App. p. 269, ll. 13–22).

He then heard the Victim, for the last time, yelling "no, no, no" and pleading for her life. (App. p. 269, l. 24 – p. 270, l. 1). Mr. Smith knew Petitioner from Petitioner's romantic relationship with the Victim. He also knew the relationship had turned "rocky." (App. p. 262, l. 8). Mr. Smith testified he called 911. (App. p. 271, l. 1–9). Though he did not become involved then, Mr. Smith had assumed the officers talked to "[the Victim] and Hank." (App. p. 274, ll. 4–11). Later that

morning, at approximately 7:45 am, Mr. Smith left his home and noticed Petitioner's vehicle, a Range Rover, in the driveway along with the Victim's car and his car. (App. p. 274, ll. 21–25).

An officer had responded, having been called at 2:41 am. He arrived at approximately 2:47 am, and backup arrived a few minutes later. (App. p. 295, l. 17 – p. 296, l. 5; p. 297, ll. 20–21). However, the lights in the Victim's home were off, and after hearing and seeing nothing out of the ordinary and having no cause to enter the house, the officers only stayed outside briefly and then left. (App. p. 296, l. 11 – p. 299, l. 25). They noted a Range Rover with two other cars in the back. (App. p. 298, ll. 5–12).

Inside the darkened home, Petitioner had unclothed the Victim, washed her body, and placed her body on the couch in the living area. (App. p. 1089, ll. 12-17; p. 1101, l. 7 – p. 1104, l. 23). Petitioner cut his wrists yet collected blood in a bag. (App. p. 1137, l. 2 – p. 1139, l. 7). Petitioner stayed in the home for hours, calling an ex-girlfriend, Stacy Newsom (Ms. Newsome). The first call was at 2:37 am. (App. p. 552, ll. 10–12). Petitioner was crying and upset and sometimes would keep the connection even though nothing was said. (App. p. 551, l. 11 – p. 552, l. 21). Petitioner eventually left and drove a short distance to his home. Another of the Victim's neighbors, Mr. Eric Ashton, testified that he saw Petitioner leave that morning, driving his automobile in an odd way – with his forearms instead of hands. (App. p. 307, l. 15 – p. 308, l. 8). At 8:48 that morning, Petitioner searched the internet for defense attorneys. (App. p. 720, l. 15 – p. 463, l. 3).

Around 10:00 am, Petitioner called another ex-girlfriend, Kimberly Williams (Ms. Williams), and confided that he could be charged with murder. Petitioner stated he had contacted an attorney and needed $25,000.00 for representation. Ms. Williams advised she did not have that amount of money. Further, Petitioner said he had acted in self-defense, though no one would

believe him. Petitioner also stated that he had tried to commit suicide by slitting his wrists. Ms. Williams advised him to seek medical attention. (App. p. 474, l. 2 – p. 475, l. 1).

Petitioner called Ms. Newsom again later in the morning, and she advised him to call EMS if he was not feeling well. (App. p. 552, l. 18 – p. 556, l. 6).

Eventually, Petitioner spoke to well-known defense attorney Jack B. Swerling (Mr. Swerling). Mr. Swerling testified that, with Petitioner's permission, Mr. Swerling placed a 911 call to the City of Columbia Police Department reporting a possible murder. (App. p. 214, l. 23 – p. 216, l. 22).

During the time Mr. Swerling was reporting the murder, Petitioner had called 911 for help, reporting he had cut his wrists. An officer was dispatched at 11:45 am to meet EMS at the scene. (App. p. 569, ll. 7–12). Robin Haselden with Richland County EMS testified Petitioner's clothes were wet, his cuts were not bleeding, and there "was no blood noted on him anywhere." (App. p. 574, l. 21 – p. 575, l. 10). An emergency room doctor, Dr. John Robinson, treated Petitioner. Petitioner would not answer questions. The doctor noted a concern that Petitioner "was being deceptive" about self-inflicted wounds or had some type of amnesia from trauma; however, that "was inconsistent with the fact that he was alert and oriented with everything else." He determined the wounds were self-inflicted, not life-threatening, and nothing accounted for the "amnesia" he appeared to present. He released Petitioner into the custody of officers who had arrived at the hospital. (App. p. 586, l. 16 – p. 592, l. 21).

Officer Hudson testified the Police Department had responded to the Victim's home at approximately 11:30 am because of Mr. Swerling's report. (App. p. 227, ll. 15–23). The officers noted blood on the rear entry. The Victim's neighbor was out and also advised of the sounds of violence he had reported earlier that morning. (App. p. 219, ll. 18–25). The officers entered the

home at the back and were met with a bloody scene in the kitchen. (App. p. 222, ll. 1–4). Upon further investigation, the officers found the Victim's body on the living room couch, covered, except for one portion of one arm, by a "blanket" (later described as a comforter). (App. p. 224, l. 9 – p. 225, l. 25; p. 237, ll. 2–4). Officer Hudson testified that upon moving the "blanket":

> I observed the victim with multiple stab wounds, the front area (indicating) over her body, and she was unclothed, naked. And her hair seemed to be like it was wet, but sort of dry. … No signs of life.

(App. p. 226, ll. 3–8).

EMS was called at 11:33 am and arrived at 11:51 am. (App. p. 245, ll. 4–5). EMS pronounced the Victim dead at the scene. (App. p. 226, ll. 18–22; p. 237, l. 2 – p. 243, l. 16). Though the scene was exceptionally bloody, there was little blood on the comforter that had covered the body. (App. p. 237, ll. 11–24). In fact, the body appeared to have been cleaned and showered, apart from one smear of blood near the neck that had "a curved angle to it like the body had been wiped." (App. p. 238, ll. 8–19). However, EMS noted multiple "straight cuts, stab wounds," and bruising along the neck wound. (App. p. 238, l. 19 – p. 239, l. 17).

The pathologist who performed the autopsy would note multiple defense wounds on the Victim's hands; blunt force trauma to her head ("at least three blows"); cuts, bruises on arms and legs, lip and chin injury; twelve stab wounds; eleven slashes; and, one bite mark. The cause of death was blood loss from the stab wound, with the neck wound most likely being the fatal wound. However, the sum total of her wounds was fatal. The pathologist opined she would have died within approximately two minutes. (App. p. 969, ll. 5–23; p. 971, l. 14 – p. 972, l. 6; p. 979, l. 22 – p. 1005, l. 23). He testified it was a brutal homicide. (App. p. 1006, ll. 16–19).

The hospital examination for Petitioner, as discussed above, noted only his self-inflicted wounds. While in custody, officers found only one small mark on one of Petitioner's fingers. (App.

p. 646, l. 5 – p. 647, l. 20; p. 33 [State's Exhibits 297, 298, 300, 301, 302, 303, and 304]; see also p. 1162, ll. 9–17).

Petitioner opted to testify in his defense that the Victim was the aggressor, and though he remembered little else, it was clearly her fault. (See App. p. 1077, l. 10 – p. 1086, l. 9; p. 1162, l. 20 – p. 1163, l. 1). The cross-examination uncovered a series of implausible assertions by Petitioner when considering the forensic evidence and other testimony. For example, Petitioner claimed the Victim had a large knife, but no large knife was found. Petitioner claimed his shirt "may have been damaged" during the fight, and buttons were pulled off, but no buttons were found. Petitioner claimed she had on a top at the time of the violence, but no top was recovered with any stab wound tears. Petitioner had collected his blood in an insulated bag not to get it on the carpet, and yet his blood was on the scene. (See App. p. 1114, l. 20 – p. 1162, l. 24).

In addition to her neighbor, Mr. Smith, several friends testified to the rocky relationship the Victim shared with Petitioner and the fact that she was frightened. The Victim's friend, Janelle Bonder (Ms. Bonder), testified that she knew about the relationship starting in February 2011. Ms. Bonder further testified that she saw a change in her friend. The Victim had become anxious, her health seemed to be poor, and "she had been terrified" during the months before her murder. The Victim demonstrated this during a SKYPE call when Petitioner "arrived at the house," and she became upset. (See App. p. 317, l. 11 – p. 319, l. 24).

At a dinner party at another friend's home on August 14, 2011, that friend, David Virtue (Mr. Virtue), testified the two were together but "seldom on the same side of the room or part of the house during that evening." Mr. Virtue also testified that the Victim had confided in him over the summer that she was attempting to withdraw from Petitioner and end the relationship. (App. p. 328, l. 18 – p. 331, l. 2).

The Victim had remained friends with a former boyfriend, Drew Kabbe (Mr. Kabbe), and they communicated pretty frequently. Mr. Kabbe testified that he spoke to her the night of August 27, 2011/early morning of August 28, 2011. The Victim was in a good mood and happy after returning home from a birthday party. However, the Victim had previously told Mr. Kabbe about Petitioner, though they usually did not, by agreement, discuss their romantic relationships. The Victim told Mr. Kabbe "[s]he was frightened of him." Mr. Kabbe heard her arrive safely home the night of the party before their telephone conversation ended. (App. p. 374, l. 14 – p. 377, l. 15).

Other friends testified, consistent with his testimony that on the night before the early morning hour murder, the Victim attended two birthday parties and appeared to be in a happy mood, enjoying herself. (See App. p. 344, l. 12 – p. 347, l. 18; p. 354, ll. 1–7).

Another friend, Tasha Laman (Ms. Laman), also heard the Victim express and/or demonstrate distress over the relationship. Ms. Laman advised the Victim to go to a counselor. (App. p. 485, l. 15 – p. 488, l. 4). Ms. Laman also testified that the Victim had confided that Petitioner had threatened to "ruin her life." (App. p. 500, l. 23 – p. 501, l. 1; p. 511, ll. 5–18). Ms. Laman, like Ms. Bonder, similarly noticed a loss of weight and anxiousness in the Victim. (App. p. 501, ll. 9–19). Ms. Laman testified that the Victim went to counseling and couples counseling on at least one occasion. (App. p. 514, ll. 7–12). Ms. Laman testified that the Victim "was very nervous after talking with Ms. Stewart and Ms. Stewart telling her this was a classic case of domestic violence," and, further, that the Victim intended to break the relationship with Petitioner. (App. p. 513, ll. 1–7).

The Victim's counselor, Jamme Stewart (Ms. Stewart), testified that she was very concerned about a new relationship that quickly turned to "constant contact" and that Petitioner had "threatened to expose something embarrassing about her" should she break the relationship.

(App. p. 521, ll. 8–14). Ms. Stewart responded that she did have reservations about domestic violence. (App. p. 522, l. 25 – p. 523, l. 12). Ms. Stewart testified that the Victim did not want to stay in the relationship but had difficulty making the break. Ms. Stewart noted the Victim was concerned about Petitioner's constant contact and jealousy. (App. p. 526, l. 12–24). The Victim was killed just four days later. (App. p. 527, ll. 13–17).

A series of text messages between Petitioner and the Victim showed a back-and-forth relationship, turning accusatory and threatening toward the Victim. (See, for example, App. p. 806, l. 1 – p. 807, l. 25; p. 862, l. 25 – p. 863, l. 3). The Victim's messages reflect both a fear of him and her confusion about him. (See, for example, App. p. 806, l. 4 – p. 807, l. 10). The last call to the Victim from Petitioner was at 2:14 am. The next call was at 2:37 am to Ms. Newsom. (App. p. 718, ll. 7–23). The murder occurred in that brief time. (App. p. 268, l. 5 – p. 270, l. 1).

Petitioner's phone records also reflected contacts with multiple other women. (See App. p. 831, l. 3 – p. 850, l. 25; p. 866, l. 10 – p. 867, l. 25). In fact, Petitioner was planning to meet a woman matched to him through a dating website on August 28th, according to a text message sent on August 27th. (App. p. 1013, l. 20 – p. 1018, l. 7). Also, on the night of the murder, Petitioner was happy and outgoing and expressed that he was excited about "getting back together with his girlfriend." (App. p. 1025, l. 3 – p. 1028, l. 7).

In sum, the jury was asked to consider the varied stories and a variety of evidence. As noted above, after due consideration, the jury found Petitioner guilty of murder.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish appellate counsel was constitutionally ineffective where Petitioner has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review.

On appeal, Petitioner asserts the post-conviction relief court erred in finding appellate counsel was not ineffective where they failed to consult with Petitioner about whether to seek discretionary review of the Court of Appeals decision. Specifically, Petitioner contends that 1) "appellate attorneys have, at a minimum, a duty to consult with their clients about filing a petition for a writ of certiorari after an adverse decision by an intermediate appellate court" and 2) "even if the appellate attorney has decided in his own professional judgment that a petition is not warranted and that he will not file a petition on his client's behalf, he has a duty to advise his client that the client may continue to pursue the appeal *pro se*, or with retained counsel." (PWC p. 12). However, the post-conviction relief court properly determined Petitioner failed to establish appellate counsel was constitutionally ineffective where Petitioner has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review. Therefore, this Court should deny certiorari as to this issue.

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, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

However, 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) (holding there is no Sixth Amendment right to counsel in pursuing discretionary appeal); see also Ross v. Moffitt, 417 U.S. 600 (1974) (finding there is 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) (finding Sixth Amendment right to counsel "extends only to the first right of appeal"). This Court has explicitly 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." Douglas v. State, 369 S.C. 213, 215-16, 631 S.E.2d 542, 543-44 (2006).

At the evidentiary hearing, appellate counsel testified that he made the strategic decision not to file a petition for writ of certiorari based on the win of one of the issues, and he also did not believe the remaining issues had merit. (App. pp. 1583–1584). Appellate counsel testified that it was standard practice to send a letter regarding the decision to a client; however, he could not remember if his firm or South Carolina Indigent Defense sent the letter. (App. pp. 1584–1585). On direct examination by the post-conviction relief court, appellate counsel testified that it was his decision not to file the petition. Petitioner also testified that he probably received some kind of notification but he did not recall if or when he did receive it. (App. pp. 1585–1586).

In its Order of Dismissal, the post-conviction relief court, citing Douglas, Wainwright, Moffitt, and Clinkscales, found appellate counsel had no duty to petition this Court for discretionary review and, more importantly, that Petitioner had no right to appellate review from this Court following his full and complete review by the Court of Appeals. (App. pp. 1667–1668). Additionally, the post-conviction relief court found appellate counsel reasoned why he did not seek the petition and that even if appellate counsel had not provided a reason, "that precedent in South

Carolina precludes [Petitioner's] claim and it fails as a matter of law." (App. p. 1668). These rulings are supported by the record and are legally correct.

In Petitioner's request for relief, he seeks clarification from this Court as to "whether appellate counsel has a *duty to consult* a defendant about whether he wishes to seek discretionary review, and if the lawyer and defendant disagree, whether appellate counsel has a *duty to advise* the defendant that he may seek discretionary review *pro se*." (PWC pp. 8–9). However, in a split decision, the Fourth Circuit Court of Appeals in Folkes held the following:

> ". . . 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, 120 S.Ct. 1029. 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.' "

Folkes v. Nelsen, 34 F.4th 258, 277 (4th Cir. 2022).[1] As Petitioner readily concedes, the Folkes court has provided the guidance he now seeks. (PWC p. 9, fn 3).

Furthermore, this Court has previously provided the guidance Petitioner seeks in Douglas v. State, *supra*. In Douglas, this Court held the following:

> We decline to impose a duty on appellate counsel to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal. 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

[1] Petitioner highlights that this Court granted Folkes' petition for a common law writ of certiorari to consider whether 1) Folkes' conviction should be vacated because he was abandoned by appellate counsel at a critical stage, and 2) the trial court's ABHAN instruction was erroneous. While any reliance by Petitioner that this Court's decision to take up Folkes' petition for a common law writ is misguided and not applicable to Petitioner's case, nevertheless, following briefing and oral argument, this Court denied Folkes relief by unpublished memorandum opinion. Folkes v. Williams, Op. No. 2024-MO-021 (S.C. filed October 2, 2024).

> the State's appellate backlog. 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*.

Douglas, 369 S.C. at 215–216, 631 S.E.2d at 543 (emphasis added). Simply put, appellate attorneys have no duty, even when requested by clients, to pursue discretionary review, and there is no constitutional right to discretionary review.

Essentially, in Petitioner's request for relief, Petitioner not only asks this Court to recognize the constitutional right to counsel beyond the first right of appeal, but Petitioner also requests that this Court establish standards by which a reviewing court can assess the effectiveness of counsel in their representation. Petitioner's request directly conflicts with Strickland, where the Strickland Court held that "specific guidelines are not appropriate" and "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." Strickland, 466 U.S. at 688–690; cf. State v. Beaty, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018) ("[T]his Court does not have the power to adopt new rules of procedure for future trials by writing opinions to decide cases . . ." and "the South Carolina Constitution limits this Court's power to promulgate rules governing practice and procedure in the courts of this State.").

Based on the foregoing, appellate attorneys cannot be ineffective beyond the first right of appeal—meaning there is no constitutional right to effective assistance of counsel beyond the issuance of the opinion by the South Carolina Court of Appeals. In the instant case, Petitioner received his constitutionally protected right of first appeal with the full assistance of counsel. Petitioner was not entitled to the effective assistance of counsel beyond the issuance of the opinion by the South Carolina Court of Appeals. Petitioner's claims have been fully and fairly examined

by the post-conviction relief court, and its findings on the issue before this Court are supported by the record and the law. Therefore, certiorari should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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