

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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CERTIORARI TO RICHLAND COUNTY  
Deadra L. Jefferson, Circuit Court Judge

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Hank E. Hawes, Petitioner

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-001759

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BRIEF OF PETITIONER

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## **STATEMENT OF ISSUE ON APPEAL**

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

## **STATEMENT OF THE CASE**

Petitioner, Hank Hawes, was indicted by the Richland County Grand Jury on October 5, 2011, for the murder of Jennifer Wilson. App. 1670. Petitioner was tried before the Honorable J.C. Nicholson, Jr., and a jury from October 6 – 16, 2014. App. 13. The jury found Petitioner guilty as charged and the court sentenced him to life imprisonment. App. 1389, ll. 12 – 17; App. 1400, l. 23 – 1401, l. 2.

Several gruesome photographs of Wilson at the crime scene were entered into evidence over objection. A video showing the crime scene—State's Exhibit 398—which showed Wilson's deceased and partially nude body was entered into evidence over objection. App. 616, l. 19 – 619, l. 6. Several autopsy photographs were entered into evidence and shown to the jury over objection. App. 903, l. 12 – 905, l. 23; App. 973, l. 14 – 974, l. 10. Finally, the trial court also admitted two pictures of Wilson while she was still alive at a birthday party prior to her death over the objection of Petitioner's trial counsel. App. 348, l. 24 – 350, l. 5.

One attendee at the trial had such a visceral reaction to the graphic evidence that he had an outburst resulting in the judge sentencing him to six months in jail for contempt. App. 1176, ll. 16 – 22. The judge later reduced the man's sentence to four days but banned him from entering the

courthouse for the remainder of the trial. App. 1180, ll. 8 – 16. The man apologized and attributed his actions to the graphic evidence that was presented. App. 1181, ll. 2 – 5.

In its closing argument, the State showed a picture of Wilson while she was still alive juxtaposed with a picture of her deceased body which prompted some of the jurors to cry. App. 1383, l. 19 – 1385, l. 23. The solicitor showed the pictures to the jury while arguing, essentially, “this is how he found her; and this is how he left her.” App. 1364, l. 12 – 1365, l. 7; App. 1383, ll. 19 – 24.

On direct appeal, Petitioner was represented by Nicholas Charles and Matt Bogan of Nelson Mullins, and Robert Dudek of Appellate Defense. App. 1580, ll. 18 – 25. Matt Bogan filed the briefs on Petitioner’s behalf. App. 1403 – 1436; App. 1490 – 1506. Mr. Charles represented Petitioner at the oral argument. App. 1581, ll. 16 – 22. Petitioner’s appellate attorneys raised four issues in his direct appeal including whether the trial court erred in the admission of the gruesome photographic evidence of Wilson and the in-life photographs of her. App. 1417 – 1420.

This Court found that appellate counsel abandoned the objections to the crime scene video and the autopsy photographs. App. 1511. This Court found that appellate counsel failed to argue against the admissibility of the video and autopsy photographs in their opening brief, and they also failed to designate these exhibits or include them in the record on appeal. App. 1512. Having concluded that appellate counsel abandoned those arguments, this Court did not consider them.

This Court concluded that the introduction of the graphic crime scene photographs was not an abuse of discretion because the trial court correctly concluded that the probative value of the photographs outweighed their prejudicial effect. App. 1514. However, this Court, relying on *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), concluded that the admission of the in-life

photographs taken of Wilson before she was killed was error. App. 1515. Finding the error harmless, this Court affirmed. App. 1515.

Petitioner and the State both filed petitions for rehearing. App. 1526 – 1539. In their petition for rehearing, appellate counsel did not ask this Court to reconsider its decision about whether they abandoned the objections made to the crime scene video and autopsy photographs but instead simply stated they disputed that finding in a footnote. App. 1527, fn. 1. Petitioner’s appellate counsel did argue that this Court failed to analyze the prejudice inflicted on Petitioner by way of the juxtaposition of the in-life photographs with the deceased photographs. App. 1526 – 1530. This Court denied both petitions for rehearing. App. 1540. Neither Petitioner nor the State filed a petition for a writ of certiorari with the Supreme Court.

Petitioner filed his PCR application on March 6, 2019. App. 1542 – 1549. The State filed its Return on June 10, 2019. App. 1550 – 1561. Petitioner was appointed PCR Counsel, Jonathan Waller, who filed an amended PCR application on July 19, 2023. App. 1562. In the amended PCR application, Petitioner made claims of ineffective assistance of appellate counsel for their failure to petition the Supreme Court for a writ of certiorari and for failing to inform Petitioner of his right to seek such review. App. 1562.

An evidentiary hearing was held on July 19, 2023, before the Honorable Deadra L. Jefferson. App. 1575. Petitioner was represented by Jonathan Waller and the State was represented by Russ Barlow. App. 1575. Petitioner, Nicholas Charles, and Fielding Pringle all testified at the hearing. App. 1576.

Mr. Charles testified that, during his time at Nelson Mullins, Petitioner’s appeal “was the only one that [he] had primary responsibility for handling.” App. 1580, ll. 6 – 17. Nelson Mullins had a relationship with Appellate Defense where attorneys at Nelson Mullins would handle some

of Appellate Defense's appeals. App. 1580, ll. 18 – 25. Mr. Charles explained that this was why Robert Dudek was listed on all the court filings even though his involvement with the appeal was "minimal." App. 1581, ll. 2 – 8. Mr. Charles believed that communication with the client regarding the appeal remained the responsibility of Appellate Defense. App. 1581, ll. 9 – 15.

Despite having testified that he had primary responsibility of handling Petitioner's direct appeal, Mr. Charles indicated that he only became involved in Petitioner's appeal two weeks before the oral argument. App. 1581, ll. 16 – 22. Mr. Charles was not involved in drafting the initial briefs, final briefs, or compiling the record on appeal. App. 1581, l. 23 – 1582, l. 2.

After this Court affirmed Petitioner's convictions, Mr. Charles filed a petition for rehearing because "[i]t's a prerequisite to file a cert petition." App. 1582, ll. 10 – 21. After the petition for rehearing was denied, Mr. Charles did not file a petition for certiorari. He testified: "I felt that we had won on the only winnable issue, which was the issue of photographs of the victim earlier in the night she was killed when she was at a birthday party. This Court held that the trial court erred by admitting those photographs, but found the error harmless in light of the overwhelming evidence of Mr. Hawes' guilt." App. 1583, ll. 11 – 20. In reaching this decision, Mr. Charles testified that he consulted with both Mr. Bogan and Mr. Dudek but that he did not have any communication with Petitioner about it. App. 1584, l. 8 – 1585, l. 9. The PCR judge asked Mr. Charles if he believed he was required to consult Petitioner about filing a petition for certiorari to which Mr. Charles responded that he believed that was the responsibility of Appellate Defense. App. 1586, ll. 12 – 24.

The State filed a Return to Petitioner's amended PCR application after the PCR hearing with the judge's permission. App. 1563 – 1573. The State attached the closing letter sent to Petitioner by Robert Dudek. In the letter, Mr. Dudek enclosed a copy of this Court's decision and

wrote: “Your attorney, Matt Bogan, does not think certiorari is warranted and will be closing your case along with this letter.” App. 1574. The letter went on to advise Petitioner that he had one year to file a PCR application. The letter did not advise Petitioner that he could pursue a petition for a writ of certiorari before filing a PCR application. App. 1574.

The PCR court denied Petitioner’s claim of ineffective assistance of appellate counsel finding that the closing letter explained to Petitioner that his attorneys would not file a petition for certiorari and further explained the PCR and habeas process. App. 1668. The court relied on *Douglas v. State*, 369 S.C. 213, 631 S.E.2d 542 (2006), *Wainwright v. Torna*, 455 U.S. 586 (1982), and *State v. Clinkscales*, 318 S.C. 513 (1995) in determining that Petitioner had no right to effective assistance of counsel in pursuing a petition for a writ of certiorari. App. 1668.

### **STANDARD OF REVIEW**

On a petition for a writ of certiorari to review the denial of an application for post-conviction relief, this Court defers to the “PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Questions of law, on the other hand, are review de novo with no deference given to the PCR court. *Id.*

## ARGUMENT

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

This Court should hold that an appellate attorney is ineffective when he fails to consult with his client about filing a petition for certiorari after receiving an unfavorable ruling in this Court in his direct appeal, or fails to advise the client that he has a right to file such a petition on his own, even if appellate counsel decides that he will not seek certiorari on the client's behalf. This is an important and recurring issue in criminal appeals without a clear answer from this Court, or the Supreme Court.

There is no question that trial counsel has a duty to consult a defendant about whether he wishes to appeal in at least two contexts: (1) when there is reason to think a rational defendant would want to appeal; and (2) the defendant has reasonably conveyed to counsel his desire to appeal. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). And while the Supreme Court in *Wainwright v. Torna*, 455 U.S. 586 (1982) rejected a claim of ineffective assistance of appellate counsel for the failure to *file* a discretionary appeal, this case presents this Court with a question similar to that in *Flores-Ortega* which remains unanswered in South Carolina—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.

In addition to having a constitutional right to assistance of counsel at trial, criminal defendants also have a constitutional right to assistance of counsel on appeal. *See Douglas v. California*, 372 U.S. 353, 357 (1963) (“where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor”). The Supreme Court was later asked to extend the holding of *Douglas* to require appointed counsel in discretionary appeals such as petitions for writs of certiorari to state supreme courts or petitions to the Supreme Court of the United States. In *Ross v. Moffitt*, 417 U.S. 600, 610-12 (1974), the Supreme Court declined to do so, instead holding that neither the Due Process Clause nor the Equal Protection Clause requires a state to provide a criminal defendant with appointed counsel in discretionary appeals.

Eleven years after the Supreme Court decided *Ross*, it extended its holding in *Douglas* to make clear that a criminal defendant has a constitutional right to the effective assistance of counsel on appeals as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (“A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney”); *see also McCoy v. Ct. of Appeals of Wis.*, 486 U.S. 429, 436 (1988) (where “a convicted defendant elects to appeal, he retains the Sixth Amendment right to representation by competent counsel”).

To prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 668).

In *Folkes v. Nelsen*, 34 F.4th 258 (4th Cir. 2022), the Fourth Circuit considered whether Folkes’ appellate attorneys were ineffective for failing to file a petition for rehearing in this Court. The failure to file the petition for rehearing deprived Folkes of the ability to seek certiorari in the Supreme Court of South Carolina. The district court granted Folkes relief on a slightly different basis. The district court found that appellate counsel was ineffective for their failure to timely *advise* Folkes of the adverse decision by this Court and of his right to seek further review.<sup>1</sup> *Id.* at 266.

In a split decision, the Fourth Circuit reversed, holding that “the Supreme Court has held that no ineffective assistance of counsel claim can arise based on conduct relating to discretionary, subsequent appeals.” *Id.* at 263. The majority opinion criticized the dissent for improperly drawing on principles that are applicable in the filing of an initial appeal and applying those principles to discretionary appeals. *Id.* at 272. The *Folkes* majority first concluded that there is no right to effective appellate counsel in the filing of a petition for rehearing or certiorari and therefore

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<sup>1</sup> The district court also granted Folkes relief because he had been sent a closing letter that bore the forged signature of an attorney and contained several inaccurate statements about the procedural posture of his case. *Folkes*, 34 F.4th at 262-63.

reasoned that there is also no duty on appellate counsel to consult with the defendant about seeking such discretionary review. *Id.* at 278.

The dissent in *Folkes* pointed out that “whether the duty to consult—in this case to notify and advise a defendant of an adverse appellate decision and his remaining recourses—constitutes part of a direct appeal or the first step of a discretionary appeal, remains an open and debated question.” *Id.* at 297 (Wynn, J. dissenting). Judge Wynn pointed to the Sixth Circuit’s decision in *Smith v. Ohio Dep’t of Rehab. & Corr.*, 463 F.3d 426, 432-33 (CA6 2006). In *Smith* 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. “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.” *Smith*, 463 F.3d at 432-33.

In relying on *Smith*, Judge Wynn wrote in his dissent that an appellate attorney’s duty to his client “encompasses notifying a defendant of the outcome of a proceeding and advising the client about the existence of further appeals.” *Folkes*, 34 F.4th at 298. Judge Wynn continued:

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.

*Id.* at 300-01.

It is also noteworthy that the Fourth Circuit requires appellate counsel in federal criminal appeals to advise their client of an adverse decision on direct appeal and to advise the client of their right to seek discretionary review. The Fourth Circuit's Criminal Justice Act Plan provides:

Every attorney, including retained counsel, who represents a defendant in this Court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by this Court or the Supreme Court. Where counsel has not been relieved: *If the judgment of this Court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant.*

...

If the appellant requests that a petition for writ of certiorari be filed but *counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw* with this Court wherein counsel requests to be relieved of the responsibility of filing a petition for writ of certiorari. The motion must reflect that a copy was served on the client. If the United States seeks a writ of certiorari to review a judgment of this Court, counsel shall take all necessary steps to oppose the United States' petition.

4th Cir, CJA Plan V, 2 (<https://www.ca4.uscourts.gov/docs/pdfs/cjaplan.pdf?sfvrsn=18>)

(last visited 10/21/2026) (emphasis added).

Our Supreme Court has made clear that there is no duty on appellate counsel to file a petition for rehearing or to file a petition for a writ of certiorari in a direct criminal appeal. *Douglas v. State*, 369 S.C. 213, 631 S.E.2d 542 (2006). However, appellate attorneys do 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 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.

Petitioner's appellate attorneys did not consult with him about the filing of a petition for a writ of certiorari in the Supreme Court after this Court denied their petition for rehearing. App. 1584, l. 8 – 1585, l. 9. They also failed to advise him that he could file a petition on his own or with retained counsel if he so chose.

An additional problem with imposing no requirement on appellate counsel to consult or advise a client about his ability to seek discretionary review on his own is the difficulty in drawing the line at which appellate counsel ceases to represent the appellant. Even if appellate counsel has decided not to seek discretionary review, presumably he remains counsel of record until the remittitur is sent. This problem is compounded by the short timelines for making a decision and the fact that many appellants in criminal cases are incarcerated with limited access to quickly communicate with their attorney.

Even if Petitioner wanted to file a pro se petition for a writ of certiorari, it is unclear whether the Supreme Court would have accepted it because of the prohibition on hybrid representation, i.e., representation that is partially pro se and partially by counsel, at trial or on appeal. *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989); *State v. Sanders*, 269 S.C. 215, 237 S.E.2d 53 (1977). Except in appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Johnson v. State*, 294 S.C. 310 (1988), a criminal defendant is not permitted to file substantive pro se documents unless his attorney is first relieved by the court. *Foster*, 298 S.C. at 307, 379 S.E.2d at 907. So, the only way Petitioner could have filed a pro se petition for a writ of certiorari to review this Court's decision is if his appellate attorneys were relieved first. And it's unclear at what point Petitioner's

appellate attorneys ceased their representation of him—when they mailed the closing letter or when the remittitur was sent.

Lastly, it is difficult to fully understand why appellate counsel did not file a petition for a writ of certiorari in Petitioner’s case on direct appeal. Mr. Charles testified that the reason he filed the petition for rehearing was because it is a prerequisite to filing a cert petition. App. 1582, ll. 10 – 21. Furthermore, they had already convinced this Court that the trial court committed an error by allowing the introduction of the in-life photographs of Wilson. In other words, they were halfway to a reversal. And appellate counsel made persuasive arguments in their petition for rehearing as to this Court’s failure to meaningfully address the extremely prejudicial nature of the juxtaposition of those photographs with photographs of her deceased body. Under these circumstances there can be little doubt that a reasonable appellant would want to pursue further discretionary review of his direct appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

Although appellate counsel may not have been required to *file* a petition for a writ of certiorari, this Court should hold that appellate attorneys have a duty to *consult* their clients about this decision and whether they have a duty to *advise* the client of their right to proceed pro se or with retained counsel.

## **CONCLUSION**

Petitioner respectfully requests this Court reverse the order of the PCR court and allow him the opportunity to file a petition for a writ of certiorari to the Supreme Court to review this Court's decision from his direct appeal. *See Rolan v. State*, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) (finding tailored relief to address the actual prejudice suffered is appropriate).

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This 26th day of October 2026.