STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

VLADIMIR WALT PANTOVICH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001433

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR Court erred in (1) requiring Petitioner to show an irregularity in the Court's Anders review procedure in order to establish the prejudice prong of ineffective assistance of appellate counsel, and (2) ruling that Petitioner was not prejudiced by appellate counsel's filing of an Anders brief rather than a merits brief on a preserved issue, the failure to give a good character instruction, that would likely have been successful on appeal if fully briefed?

STATEMENT

Procedural History

On April 5, 2006, Petitioner Vladimir Walt Pantovich was indicted by the Georgetown County Grand Jury for the murder of Shelia McPherson on or about March 7, 2006. App. 686 - 687.

On February 4-8, 2008, Petitioner appeared before the Honorable Benjamin H. Culbertson and was tried by a jury for the offense listed in the indictment. Petitioner was represented by Stuart Axelrod and Chris Castro, and the State was represented by Assistant Solicitor William Bryan. App. 1. During the charge conference, Petitioner requested that the Trial Court charge No. 19: Good Character of Defendant. App. 550, 21 – 552, 23. The solicitor did not object to the inclusion of some good character charge, but requested that court give a "more balanced" charge on character. App. 551, 12-25. The trial judge refused to give the requested charge, stating "I think the charges I've got adequately covers everything." App. 552, 5-8. The trial judge made the requested instruction a court's exhibit, stating "They're to preserve the record. That'll show that you requested that those charges be made and I denied that motion." App. 552, 10-13. There is no dispute on error preservation. App. 680 n.3 (Order of Dismissal).

The jury found Petitioner guilty of voluntary manslaughter. App. 609, 5-10. Judge Culbertson sentenced Petitioner to eighteen years imprisonment. App. 614, 3-5.

On direct appeal, former Chief Appellate Defender Joseph Savitz filed an Anders[1] Brief on behalf of Petitioner on October 7, 2009. Supp. App. 1-10. The appeal was summarily dismissed on June 8, 2011 pursuant to the Anders procedure. Supp. App. 11.

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Application for Post-Conviction Relief and Evidentiary Hearing

On June 22, 2012, Petitioner filed his Application for Post-Conviction Relief. App. 622 – 628. The State filed its Return on September 26, 2012. App. 629 – 632. An evidentiary hearing was held before the Honorable George C. James on March 21, 2014. Petitioner was represented by Tristan Shaffer and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 633. The only witness was trial counsel, Stuart Axelrod. App. 635 – 663.

Petitioner waived his allegations of ineffective assistance of trial counsel and focused solely on the ineffectiveness of appellate counsel for failing to raise a preserved issue of the Trial Court's denial of requested jury instructions. App. 636, 2 – 637, 8. The State stipulated that the request for the jury charge was preserved for appellate review. App. 639, 6 – 640, 1; App. 666 – 669 (PCR Court's Ex. 1); App. 680 n.3; see App. 552, 5-23. Trial counsel testified that Petitioner was charged with the murder of his girlfriend following an argument during which she attacked him and he defended himself with a baseball bat. App. 640, 9-20. Trial counsel called several witnesses to testify regarding Petitioner's good character. App. 642, 25 – 644, 4. These witnesses included Andy Seifert, a friend of Petitioner and former neighbor of Petitioner and the victim, who testified that Petitioner is "very nice, very respectable, hard-working, great with kids, my kids loved him." She also testified that she had never seen Petitioner hit the victim or act violently toward anyone else. App. 494, 16 – 497, 23. Christine McCune, a bartender to and friend of Petitioner, also testified, stating "Walter [Petitioner] is a wonderful man. He is kind, caring. My family loves him. My daughter has known him since she was a little girl and think he's wonderful." She also testified to that she has never seen Petitioner lose his temper or act in a violent manner toward the victim or anyone else. App. 507, 13 – 510, 5. Maureen Moans, a former neighbor of Petitioner and the victim and close friend of the victim, testified that she never saw Petitioner act violently toward the

victim or anyone else and gave him a nickname of "the gentle giant." App. 511, 3 – 516, 2. Debbie Crisman, a former girlfriend and friend of Petitioner, testified that "Walt [Petitioner] was kind, caring. If anybody, any of his friends ever needed anything he would do anything in his power to try and help them." She also testified that she has never been afraid of Petitioner and has never seen him be violent. App. 517, 5 – 522, 1. Tammy Jean Eschman, a former neighbor of Petitioner and the victim, who testified that "Walt [Petitioner] has a heart of gold. He's never been anything but gentlemanly and nice to me. He's a good person. I couldn't have anything bad to say about him." She also testified that though the victim would throw things at Petitioner on a continual basis, she never saw Petitioner throw anything back and never saw him act violent. She testified that Petitioner stayed with the victim "because he loved her and he wanted to help her." App. 524, 5 – 529, 18.

The State attempted to undermine this good character evidence by presenting rebuttal testimony of Petitioner's ex-girlfriend, with whom he has two children in common, who alleged that Petitioner was violent toward her during their relationship. App. 537, 10 – 545, 1. Both trial counsel and the solicitor also discussed Petitioner's character in their closing arguments. The solicitor tried to focus the jury on the testimony of the rebuttal witness in an effort to refute the characterization of Petitioner as a "gentle giant." App. 547, 12-18; App. 573, 18 – 574, 16. Trial counsel summarized the character testimony of the witnesses, arguing that they corroborate Petitioner's position and they "had no reason to come forward but to speak the truth." App. 563, 14-16; App. 564, 1 – 565, 17. Trial counsel testified at the PCR hearing that he believed that had the requested instruction been given, that he would have won the trial. App. 645, 5-13.

PCR counsel argued that appellate counsel was ineffective in filing an Anders brief on a Melendez-Diaz[2] claim of Confrontation Clause violations rather filing a merits brief on the preserved jury instruction issue. App. 650, 2 – 14. The discussion of the jury charges before the PCR Court focused on proposed charge No. 19, which states:

> An accused, when charged with a crime, has the right of proving his general good character. He may introduce evidence of his good character which is inconsistent with the crime charged against him.
>
> Evidence of the general good character of the accused is for the purpose of showing the improbability that the defendant would have committed the crime charged. The good character of the accused is like all other evidence in the case and is entitled to such effect and weight as you, the jury, may determine.
>
> Good character evidence alone may create a reasonable doubt as to the commission of the crime charged. Thus, under some circumstances, a person might be entitled to a verdict of not guilty when his good reputation is taken into consideration even though a verdict of guilty might be authorized without the evidence of good character.

App. 666 (PCR Court's Ex. 1, p. 1). PCR counsel argued that charge No. 19 was applicable due to the character evidence presented, including Petitioner's previously calm reaction when the victim would attack him which would make it unlikely that the victim's attack on Petitioner just before her death rendered him incapable of cool reflection. App. 650, 23 – 651, 6. This would negate the "heat of passion" element of voluntary manslaughter such that the jury would have likely found that Petitioner acted in self-defense.[3] App. 651, 1-6. PCR counsel further argued that because the Court

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[2] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009).

[3] The PCR judge pointed out that a jury finding that Petitioner did not act in heat of passion could conversely lead to a finding of the greater offense of murder. App. 651, 7-14. However, such seems unlikely in this case where the jury did not find the requisite malice to convict Petitioner of murder.

of Appeals does not make a ruling on the merits following its Anders review, Petitioner's only remedy to a disagreement with the "no merits finding" is through PCR. App. 653, 25 – 654, 8. PCR Counsel argued that any presumption of the validity of the Anders review would be overcome by the PCR court's assessment that the jury instruction issue was meritorious and would have been successful had it been raised in a merits brief. App. 661, 25 – 662, 22. In sum, PCR counsel argued that there was substantial good character evidence presented at trial, a good character charge was requested but not made, the attorneys both argued character in closing, appellate counsel did not brief the good character charge issue despite it being properly preserved, and had the issue been fully briefed it would likely have been successful on appeal.

The State argued at the PCR hearing that charge No. 19 was not proper in Petitioner's case and did not result in any prejudice to Petitioner because there was no question that he committed the act itself. App. 655, 4-25. The State also noted the difficulty in showing prejudice when appellate counsel follows the judicially set forth Anders procedure. However, the State conceded that there is no *per se* rule that the filing of an Anders brief prohibits a finding of ineffective assistance of appellate counsel. App. 657, 2-10. But, the State still contended that so long as the Anders procedure was complied with, there is a "presumption of regularity." App. 658, 4-7.

Order of Dismissal

On June 16, 2014, Judge James issued an Order of Dismissal denying Petitioner's application for post-conviction relief. Judge James found that Petitioner did not prove ineffective assistance of counsel, even assuming *arguendo* that appellate counsel was deficient, because Petitioner did not show that he was prejudiced by appellate counsel's performance. The PCR Court found that Petitioner failed to meet his burden of showing prejudice because he did not show any irregularity in the Anders procedure. App. 679. Additionally, Jude James explicitly rejected the

State's argument that any error was harmless despite appellate counsel's deficiency and any prejudice to Petitioner, finding that the evidence of Petitioner's guilt was not overwhelming. App. 679 – 680.

This petition for writ of certiorari follows.

ARGUMENT

The PCR Court erred in (1) requiring Petitioner to show an irregularity in the Court's Anders review procedure in order to establish the prejudice prong of ineffective assistance of appellate counsel, and (2) ruling that Petitioner was not prejudiced by appellate counsel's filing of an Anders brief rather than a merits brief on a preserved issue, the failure to give a good character instruction, that would likely have been successful on appeal if fully briefed.

Appellate counsel was ineffective in filing an Anders brief rather than filing a brief on the highly meritorious issue of the Trial Court's failure to give a good character jury instruction where ample evidence of Petitioner's good character was presented, the request for a good character instruction was preserved, and Petitioner would likely have been granted a new trial were the charge issue fully briefed. The State conceded at the PCR hearing that the request for this instruction was preserved for appellate review, as the PCR Court agreed. App. 680 n.3. Appellate counsel was deficient because a reasonably competent attorney would have found that the jury instruction issue warranted a merits brief. The PCR Court assumed appellate counsel's deficiency *arguendo* and denied Petitioner's relief based on its findings regarding prejudice. App. 679 – 680. The PCR Court applied an unprecedented requirement that Petitioner prove some irregularity in the Anders procedure to show prejudice. App. 679 – 682. However, the case law clearly states that even in the context of the Anders procedure, the Strickland[4] test applies. See Smith v. Robbins, 528 U.S. 259 (2000). Thus, Petitioner established prejudice by showing that had the jury instruction issue been included in a merits brief, there is a reasonable probability that he would have prevailed on his appeal.

[4] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Standard of Review Where Appellate Counsel Files No-Merits Brief

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether 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.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668). This same test applies when analyzing a claim of ineffective assistance of appellate counsel. Bennett v. State, 383 S.C. 303, 680 S.E.2d 273 (2009).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), the United States Supreme Court announced a constitutionally sufficient framework for appeals where appellate counsel for an

indigent defendant finds that there is no meritorious issue for appeal.[5] If appellate counsel determines after a "conscientious examination" of his client's case that an appeal would be frivolous:

> He should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to **anything in the record that might arguably support the appeal.** A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Anders, 386 U.S. at 744, 87 S.Ct. at 1400 (emphasis added). The purpose of this procedure is to ensure that indigent defendants are "afforded ... that advocacy which a nonindigent defendant is able to obtain." Id. at 745, 87 S.Ct. at 1400.

In Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746 (2000), the United States Supreme Court, reviewing a grant of habeas corpus relief, remanded the case for a proper evaluation of appellate counsel's alleged ineffectiveness for filing a no-merits brief. [6] In its instructions on

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[5] Prior to the Anders decision, California's practice was to merely file a "no-merit letter" with the appellate court asserting counsel's bald conclusion that the appeal was not meritorious. Anders, 386 U.S. at 739-43. In finding this practice insufficient, the Supreme Court stated: "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity." Id. at 744.

[6] In Robbins, the United States Supreme Court evaluated California's response to Anders, which is a procedure set forth in People v. Wende, 600 P.2d 1071 (Cal. 1979). Robbins, 528 U.S. 259 (2000). The Supreme Court found California's Wende procedure sufficient even though it differed from the "prophylactic framework" set forth in Anders. Id. at 272-76. In finding such, the Supreme Court noted its "established practice, rooted in federalism, of allowing the States

remand, the Supreme Court advised that the Strickland test should be applied to Robbins' claim that appellate counsel was ineffective in failing to file a merits brief. 528 U.S. at 285. The Robbins Court stated:

> [Appellant] must first show that his counsel was objectively unreasonable, in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [appellant] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Id. The Court noted that the sufficiency of counsel's performance does not have to be addressed first, as it may often be easier to dispose of an ineffectiveness claim on the ground of lack of prejudice. Id. at 286 n. 14. Additionally, contrary to the Ninth Circuit Court of Appeal's finding, the Supreme Court stated that where the claim is ineffectiveness of counsel, there is no presumption of prejudice. Id. at 286-87. A presumption of prejudice applies only where counsel was denied altogether, there was State interference with counsel, or counsel had a conflict of interest. Id.

The Court recognized that appellate counsel is not required to raise every non-frivolous claim and may instead "select from among them in order to maximize the likelihood of success on appeal." Id. at 288. Despite this, the Court acknowledged that it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim. Id. In fact, the Court stated that it is easier to satisfy the first part of Strickland where appellate counsel filed a no

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wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." Id. at 273. The Court also noted their prior express disclaimer of any rulemaking authority for the states in the area of indigent criminal appeals and cited to several cases reflective of the state's substantial discretion. Id. at 273-76.

merits brief, as opposed to where the claim is based on appellate counsel briefing the wrong issue(s). Id. This is because to establish appellate counsel's deficient performance, "it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief."[7] Id. However, the prejudice analysis remains the same. Id.

In Bennett v. State, 383 S.C. 303, 309-10, 680 S.E.2d 273, 276 (2009), this Court applied Robbins in its analysis of Bennett's claim that appellate counsel was ineffective for filing an Anders brief rather than filing a merits brief on a Confrontation Clause issue concerning admission of out-of-court statements made by Bennett's wife. Bennett was convicted of assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, and first-degree burglary. 383 S.C. at 307, 680 S.E.2d at 274-75. Bennett and his wife, Ms. Bennett, were drinking at the home of a friend when he became violent toward Ms. Bennett and was ejected from the home. Id. at 306, 680 S.E.2d at 274. Bennett returned later and severely beat the homeowner, Mr. Garland. Id. Testimony included a third party recounting Ms. Bennett's statements during the attack and a detective reading into the record the statement that he took from Ms. Bennett. Id. Appellate counsel filed an Anders brief on an unrelated issue. Id. at 307 n.2, 680 S.E.2d at 275 n.2. This Court found that the even assuming counsel's performance was deficient, there was no prejudice to Bennett because "Ms. Bennett's out-of-court statements admitted at trial were cumulative evidence and not necessary to prove Respondent's guilt." Id. at 310, 680 S.E.2d

[7] This language should dispel any notion that ineffective assistance of appellate counsel cannot be found subsequent to the filing of an Anders brief. Though such a finding will certainly be rare, it is not impossible. See Robbins, 528 U.S. at 287 ("[I]n most cases in which a defendant' appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous.").

at 276. Thus, Bennett failed to prove that had the issue been briefed by appellate counsel, the result of the proceeding would have been different. Id. at 309-10, 680 S.E.2d at 276.

In Bennett, this Court again recognized that appellate counsel is not required to raise every non-frivolous claim. Id. at 309, 680 S.E.2d at 276 (citing Robbins, 528 U.S. at 288). It was further noted that even in the context of the Anders procedure, ineffective assistance of appellate counsel requires application of the Strickland test. Id. at 309 n.6, 680 S.E.2d at 276 n.6 (citing Robbins, 528 U.S. at 288). Notably, there was no discussion in Bennett of any presumption against appellate counsel's deficiency or presumption against prejudice due to the filing of the Anders brief. Id. at 309-10. Instead, this Court assumed appellate counsel's deficiency *arguendo*[8] and determined prejudice based on the merits of the purportedly overlooked appellate argument. Id.

The PCR Court here seems to extrapolate Robbins to mean that there is a rebuttable presumption against prejudice, requiring "Applicant [to] also show an irregularity in the Court of Appeals' Anders procedure to be entitled to a new trial." The PCR Court cited **no authority** in support of this requirement. App. 679. What likely confused the PCR Court is the Supreme Court's statement in Robbins: "We thus presume that the result of the proceedings on appeal is reliable, and we require Robbins to prove the presumption incorrect in his particular case." 528 U.S. at 287. However, this statement followed the Court's rejection of Robbin's argument that he was entitled to a presumption of prejudice. Id. Additionally, after discussing the actual-prejudice prong of Strickland, the Robbins court referenced the "strong presumption of

[8] Similarly, the PCR Court here assumed appellate counsel's deficiency *arguendo* and proceeded to a discussion of prejudice. However, the PCR Court differed from Bennett in that it applied a presumption against prejudice based on the Anders review.

reliability" in judicial proceedings that a defendant is required to overcome, citing to Strickland. Id. This discussion again related to Robbin's argument that prejudice should be presumed if he could satisfy the first prong of Strickland in the context of a no merits brief. Id. at 286. The Strickland court's reference to the reliability of judicial proceedings was more fully stated:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. **In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.**

Strickland, 466 U.S. at 696 (emphasis added). The only presumption discussed in Strickland that an appellant need overcome is the presumption that counsel's conduct is reasonable. Id. at 689-90. Moreover, the Robbins Court explicitly stated that when applying the Strickland test where appellate counsel files a no merits brief, "the prejudice analysis will be the same." 528 U.S. at 288.

An additional requirement that Petitioner rebut the "presumption of regularity" where appellate counsel filed an Anders brief and the appellate court dismisses the appeal without further briefing is an insurmountable obstacle to a showing of prejudice. Though the Court of Appeals' finding that there is no meritorious issue to warrant briefing will often be correct, it is not dispositive. See 528 U.S. at 287 (noting that in most, but not all, cases where an appeal is found frivolous pursuant to a valid state procedure, the appeal is in fact frivolous). The present case is an example of the rare instance in which you will find a highly meritorious issue

preserved for appellate review that was not briefed by appellate counsel and of which no further briefing was ordered by the Court. To require Petitioner to not only prove that he had meritorious appellate issue but to provide evidence as to why or how the issue was overlooked in the Anders process is to place a burden upon him nowhere required in the law and which he cannot possibly carry. As discussed at the PCR hearing, the PCR Court is not going to hear testimony from the staff attorney or appellate judges that performed the Anders regarding why they found that the issue was not meritorious, which would the only means of presenting an irregularity in their review. App. 658, 8-18. This Court would not likely look fondly at a practice of calling appellate judges or their staff to testify at PCR hearings regarding their internal review of Anders briefs. Thus, the Petitioner is left to do what he did here, identify a preserved issue and argue its merits to the PCR Court.[9] There is no special higher standard for showing prejudice because appellate counsel filed an Anders brief. See Robbins, 528 U.S. at 287-88. Rather, in assessing prejudice, the PCR Court must evaluate whether there was a reasonable likelihood of success on appeal had the jury instruction issue been briefed for the appellate court. Id. at 285.

[9] This may put the PCR Court in the awkward position of, in essence, reviewing both the appellate attorney's decision not to brief the issue and the Court of Appeals' decision not to require any briefing on the issue. However, since the Supreme Court does not review an Anders order, PCR is the only available avenue for a defendant to seek review. See State v. Lyles, 381 S.C. 442 (2009). An appellate court is no more infallible than the appellate attorney whose assessment of the merits it reviews. Thus, as expressed in Strickland, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. If the evidence and argument lead the PCR Court to find that the appellate attorney and the Court of Appeals missed a meritorious issue likely to have been successful were it fully briefed and considered, the remand for a new trial is no more offensive than a favorable decision for Petitioner in other step of the appellate process.

Deficiency of Petitioner's Appellate Counsel

To establish appellate counsel's deficient performance, a Petitioner need only show that there is one nonfrivolous issue warranting a merits brief which would have been found by a reasonably competent attorney. Id. at 288. In the present case, the PCR Court assumed *arguendo* that appellate counsel was deficient in failing to brief the trial judge's refusal to give the requested jury instruction. App. 679; see id. at 286 n. 14 (acknowledging that the sufficiency of counsel's performance does not have to be addressed first because it may be easier to dispose of an ineffectiveness claim on the ground of lack of prejudice). Nonetheless, Petitioner proved appellate counsel's deficiency by showing that counsel "unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them."

As the PCR Court noted in its Order, trial counsel requested and was denied the charge during the charge conference and the trial judge stated on the record that the issue was preserved. App. 681-82; see App. 550, 1 – 552, 25. Moreover, the State conceded preservation of the issue at the PCR hearing. App. 639, 6 – 640, 1; App. 680 n.3. The Order of Dismissal went on to say that "[t]he discussion regarding the character charge is clearly apparent from the face of the transcript." App. 682. Thus, appellate counsel should have discovered the good character charge issue and, because it was preserved and non-frivolous, should have filed a merits brief addressing the issue. See Robbins, 528 U.S. at 288 ("With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonably competent attorney would have found **one** nonfrivolous issue warranting a merits brief.") (emphasis added).

Prejudice to Petitioner

In order to establish prejudice and the likelihood of success on appeal, Petitioner must show that had the requested charge been given, the outcome of the trial would have been different. State v. Jackson, 355 S.C. 568, 572, 586 S.E.2d 562, 564. The South Carolina State Constitution requires judges to charge the law and not matters of fact. S.C. Const. art. V, § 21. To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial. State v. Harrison, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). "The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." Id. at 173-74, 539 S.E.2d at 75 (citing State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999)). A trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App.1996); see also State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (defendant is generally entitled to a requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); State v. West, 138 S.C. 421, 136 S.E. 736 (1927) (it is duty of the trial court to charge the jury as to law which is applicable to facts as brought out in testimony).

The failure of the Trial Court to give any good character charge, including Charge No. 19 requested by Petitioner, was prejudicial and likely to warrant reversal. In the PCR Court's analysis of this charge it focused on the presumption of regularity of the Anders procedure. App. 679 – 682. The PCR Court required Petitioner to prove that the Court of Appeals overlooked this issue, an impossible task as discussed *supra*. Instead, Petitioner needed to present evidence that there was a

reasonable likelihood of success on appeal had the jury instruction issue been briefed, which he did.[10]

In State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000), the Court of Appeals determined that the defendant was entitled to an instruction on his good character and reputation in his trial for possession of cocaine where he presented testimony of his good character. The Harrison Court noted that "[i]ndubitably, a defendant may introduce evidence of his good character." Id. at 170, 539 S.E.2d at 73 (citing State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947)). The Court stated that when a defendant presents evidence of good character and requests a corresponding instruction, he "is **entitled** to an instruction to the effect that evidence of **good character and good reputation may in and of itself create a doubt as to guilt** and should be considered by the jury, along with all the other evidence, in determining the guilt or innocence of the defendant." Id. (emphasis added) (citing State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982)). Though a presumption of innocence attaches regardless of the presentation of character evidence, "such evidence may strengthen the presumption of innocence." State v. Foley, 47 S.E.2d 40, 51 (W. Va. 1948); see also Garst v. United States, 180 F. 339 (1910) ("evidence of good character is proper to be considered by the jury as strengthening the presumption of innocence which exists in his favor"). Thus, a defendant's good character is interwoven with the presumption of innocence. See United States v. Linden Beverage Co., Inc., CRIM. No. 94–122–H, 1996 WL 455845 (W.D.Va. July 11, 1996) ("Given the premium our judicial system places on the

[10] Preservation of the jury instruction issue was conceded by the Assistant Attorney General at the PCR hearing. App. 639, 6 – 640, 1. Thus, preservation is not an issue.

presumption of innocence and the burden of proof, substantial, credible evidence that the defendant is a man of good character never should be regarded lightly."

This Court's decision in State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010), is also instructive. Lee-Grigg was the executive director of a shelter for abused women. 387 S.C. at 312, 692 S.E.2d at 896. She was charged with forgery based on a duplicate reimbursement application that she filed for expenses incurred during the transportation of a victim to an out-of-state shelter. Id. at 312-14, 692 S.E.2d at 896-97. The State conceded that the requested good character instruction should have been given, but argued that the error was harmless. Id. at 317, 692 S.E.2d at 898. This Court disagreed, finding that the error was not harmless because the dispositive issue presented was whether Lee-Grigg believed in good faith that she was authorized to apply for reimbursement. Id. This Court noted that "[c]haracter evidence of Lee-Grigg's reputation for honesty and trustworthiness was admitted, but without an instruction the jury was not aware that it could consider this evidence in determining her credibility and her culpability." Id.

Here, in addition to Petitioner's own testimony at trial, five character witnesses testified on Petitioner's behalf. App. 494 – 498; 505 – 519. As set forth *supra*, these witnesses characterized Petitioner as kind, non-violent, and calm in response to the victim's violent outbursts toward him. App. 495, 20-22; App. 497, 15-23; App. 508, 23 – 510, 5; App. 512, 9-11; App. 514, 14-18; App. 515, 19-25; App. 518, 13-15; App. 521, 20 – 522, 1; App. 525, 5-7; App. 526, 13-20; App. 529, 10-18. The State then presented rebuttal testimony of Petitioner's ex-girlfriend, with whom he has two children in common, regarding Petitioner's alleged violent conduct toward her during their relationship. App. 537, 10 – 545, 1. Both trial counsel and the solicitor also discussed Petitioner's character in their closing arguments, including Petitioner's

testimony and that of the character witnesses. App. 547, 12-18; App. 563, 14-16; App. 564, 1 – 565, 17; App. 573, 18 – 574, 16. Thus, like in Lee-Grigg, the good character of Petitioner was put into evidence, and even included in argument to the jury, but the jury was given **no** instruction as to how it could consider the character evidence in its deliberations. See 387 S.C. at 317, 692 S.E.2d at 898. Petitioner's good character should have been considered by the jury in determining whether not he committed the crime charged, murder. See Harrison, 343 S.C. at 171-72, 539 S.E.2d at 74.

The State pointed to State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982), in support of its contention that the failure to give a good character charge was not prejudicial in Petitioner's case. In Green, the defendant admitted his presence and participation in the robbery and the record conclusively established Green's guilt. 278 S.C. at 240, 294 S.E.2d at 335. Thus, this Court found that Green was not prejudiced by the refusal of the trial court to instruct on good character and that any error was harmless. Id. However, the present case is distinguishable from Green because Petitioner presented evidence in support of a claim of self-defense – an absolute defense to murder – and the PCR judge found that the evidence of Petitioner's guilt was not overwhelming.

Petitioner's admission that he wielded the bat that caused the victim's death does not alone mean that he committed the crime of murder. In fact, Petitioner was found guilty of voluntary manslaughter rather than murder. Additionally, as the PCR judge pointed out during the hearing, not every homicide is a crime. App. 655, 18-19. In this case, Petitioner presented evidence and argued that his actions neither constituted murder nor manslaughter, but were rather done in self-defense. The jury should have been allowed to consider Petitioner's good character, including his non-violent nature and generally calm response to the victim's violence

toward him, in assessing the probability that Petitioner acted in self-defense rather than in heat of passion or with malice. See Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (defendant did not deny making the reimbursement application, rather she averred that she did so in good faith, a defense to forgery to which the character evidence related). This case is further distinguishable from Green because any error cannot be found harmless where the PCR Court explicitly found that the evidence of Petitioner's guilt was not overwhelming. Specifically, the PCR Court stated in the Order of Dismissal:

> Respondent argued that even if Applicant had shown a deficiency in the procedure, he still cannot prove prejudice because there is overwhelming evidence of Applicant's guilt. See State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335 (1982) (holding that although a defendant is generally entitled to a good character instruction when he presents supporting evidence, he cannot show prejudice from the lack of the charge where there is overwhelming evidence of guilt). However, the Court find there was not overwhelming evidence of Applicant's guilt, and decides this case based on Applicant's failure to rebut the presumption of regularity in the Court of Appeals' Anders review.

App. 679 – 680. The facts of this case are such that Petitioner presented evidence as to good character, requested the proper charge, and the jury should have been instructed as to their ability to consider the good character evidence in determining Petitioners guilt or innocence, particularly with respect to Petitioner's claim of self-defense. See Harrison, 343 S.C. at 170, 539 S.E.2d at 73 ("The good reputation of the accused, if proved, may be taken into consideration by the jury in determining whether or not he committed the crime charged.").

In Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999), appellate counsel was found ineffective for failing to brief a jury charge issue where the trial court refused to give defendant's requested plain meaning charge, which trial counsel preserved for appeal. In applying the Strickland test, this Court noted that reversible error was found in each of its cases

regarding failure to give an Atkins[11] charge if requested. 337 S.C. at 617, 524 S.E.2d at 836. Thus, the Court found it "patent that if counsel had raised the issue on direct appeal, Southerland would have been entitled to a reversal of the sentencing phase of his conviction." Id. As such, this Court held that Southerland met his burden of demonstrating both appellate counsel's deficient performance, and that, but for the deficient performance, the result of his appeal would have been different. Id; see also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (holding defense counsel ineffective because he failed to raise the issue of guardian ad litem's testimony and that issue was a meritorious one which would have entitled petitioner to reversal on direct appeal). For the reasons discussed *supra*, the jury charge requested in the present case should have been raised by appellate counsel on appeal because it would likely have warranted reversal. Therefore, Petitioner was prejudiced by appellate counsel's deficiency.

Petitioner is accordingly entitled to the grant of post-conviction relief because appellate counsel should have filed a merits brief rather than an Anders brief. Appellate counsel was deficient because a reasonably competent attorney would have found the good character charge issue preserved and filed a merits brief raising it. Petitioner was prejudiced by this deficiency because there is a reasonable likelihood that had the failure to give the requested good character charge been fully briefed for the appellate court, Petitioner would have been successful on appeal. Petitioner's likelihood of success if based upon the established case law allowing the admission of good character evidence, which was clearly admitted and argued in the present case; the Petitioner's timely and preserved request for a good character charge, which is necessary for the jury to understand how the character evidence was relevant to their assessment

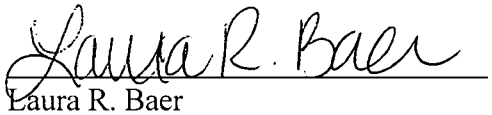
[11] State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987).

of Petitioner's credibility and culpability; and the lack of overwhelming evidence of Petitioner's guilt such that the error in failing to charge on good character was not harmless. Therefore, appellate counsel was ineffective.

CONCLUSION

For the reasons set forth herein, Petitioner Vladimir Walt Pantovich respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

VLADIMIR WALT PANTOVICH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001433

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Vladimir W. Pantovich, #326633, at Macdougall Correctional Institution this 6th day of February, 2015.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of Feburary, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.