STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas



The Honorable George C. James Jr., Circuit Court Judge

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Appellate Case No. 2014-001433

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Vladimir Walt Pantovich, .....Petitioner,

v.

State of South Carolina, .....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Did the post-conviction relief judge properly find Petitioner failed to demonstrate appellate counsel ineffective for filing an Anders brief instead of a merits brief addressing the trial judge's refusal to give a good character instruction where Petitioner failed to demonstrate the court of appeals overlooked a preserved issue, and where overwhelming evidence of Petitioner's guilt supports a conclusion there were no meritorious issues to Petitioner's appeal.

## STATEMENT OF THE CASE

In April 2006, the Georgetown County Grand Jury indicted Petitioner for murder. (App. p. 686-87). Stuart M. Axelrod, Esquire ("trial counsel"), represented Petitioner. (App. p. 1). On February 4, 2008, Petitioner proceeded to trial before the Honorable Benjamin H. Culbertson ("the trial judge") and a jury. (App. p. 1). On February 8, 2008, the jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter. (App. p. 609, lines 5-10). The trial judge sentenced Petitioner to eighteen years imprisonment. (App. p. 614, lines 3-5).

Joseph L. Savitz III, Esquire ("appellate counsel"), of the Office of Appellate Defense, perfected Applicant's direct appeal with the filing of an Anders[1] brief. (Supp. App. p. 1) The South Carolina Court of Appeals dismissed Applicant's appeal on June 8, 2011. State v. Pantovich, Op. No. 2011-UP-275 (S.C. Ct. App. filed June 8, 2011).

Petitioner filed an application for post-conviction relief on August 5, 2010. (App. p. 622). The Honorable George C. James Jr. ("the post-conviction relief judge") convened a hearing on the application on March 21, 2014. (App. p. 633). Tristan M. Shaffer represented Petitioner. (App. p. 633). The post-conviction relief judge denied relief in an order dated May 16, 2014, and filed June 16, 2014. (App. p. 675).

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

## ARGUMENT

### I. The post-conviction relief judge properly found Petitioner failed to meet his burden to demonstrate ineffective assistance of appellate counsel.

Petitioner argues appellate counsel was ineffective for failing to argue on appeal that the trial judge erred in refusing to give an instruction on Petitioner's good character. Specifically, Petitioner argues the court of appeals would have reversed Petitioner's conviction if appellate counsel had briefed this issue instead of submitting an Anders brief. However, the court of appeal's review of the record in this case would have included a review of the charge conference where trial counsel preserved the issue of the trial judge's refusal to give a good character charge. Therefore, Respondent contends the post-conviction relief judge did not err in denying relief on this ground.

In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), this Court outlined the Anders procedure as follows:

> "[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal."

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. Thus, the Anders procedure requires the court of appeals to independently review the entire trial record before determining there is no merit to the appeal.

A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the court of appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C.

395, 111 S.E.2d 669 (1959); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918)). Accordingly, this Court must presume the court of appeals reviewed the issue of the trial judge's refusal to issue trial counsel's requested jury instructions[2] before dismissing Applicant's direct appeal. See also McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). The court of appeals is required to make an independent determination that preserved issues do not warrant a new trial, and its compliance with the Anders procedure here creates a presumption of regularity.

Petitioner argues requiring him to rebut a presumption of regularity creates an insurmountable obstacle to showing prejudice. However, as the plaintiff in a civil action, Petitioner has the burden to demonstrate he is entitled to relief. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). In Pringle, the appellant challenged the validity of his indictment. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Normally, "[i]nvestigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence." State v. Whitted, 279 S.C. 260, 262, 305 S.E.2d 245, 246 (1983) (citing Ex parte McLeod: In Re Cannon, 272 S.C. 373, 252 S.E.2d 126 (1979)), overruled on other grounds by State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). However, at Pringle's post-conviction

[2] Both parties stipulated trial counsel properly preserved the challenge to the trial judge's charge. See State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) (objection to a judge's charge is preserved where there is an on-the-record opportunity for discussion).

relief hearing, there was testimony by the foreman of the grand jury[3] regarding the indictment process, in spite of the privileged nature of grand jury proceedings. Pringle, 287 S.C. at 411, 339 S.E.2d at 128. Here, no one prevented Petitioner from attempting to uncover some testimony regarding the court of appeals' Anders process. However, Petitioner did not attempt to present evidence to rebut the presumption of regularity.[4] Petitioner's argument that he can only "identify a preserved issue and argue its merits" is not sufficient to overcome the requirement that he present evidence to support his arguments. His mere allegation of ineffectiveness is not sufficient to carry his burden of proof. Cf. Dawkins v. Fields, 354 S.C. 58, 70-71, 580 S.E.2d 433, 439 (2003) ("Respondents are not permitted to simply rest on the allegations in their complaint, especially where, as here, the majority of the factual allegations are conclusory in nature."). While Respondent acknowledges the potential difficulty in meeting this burden, the mere fact Petitioner believes this issue warrants reversal is not sufficient to overcome a presumption the court of appeals complied with the Anders procedure established by this Court.

This Court's established procedure requires the court of appeals to make an independent assessment of whether there are any preserved issues of merit. See, e.g., McKennedy, 348 S.C. at 279, 559 S.E.2d at 855; McHam, 404 S.C. at 475, 746 S.E.2d at 46. Thus, "it is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the

[3] The opinion in Pringle does not indicate whether the grand jury foreman was a witness for the applicant or the State.

[4] Although the post-conviction relief judge testified he would not have listened to such testimony, Petitioner never gave him the opportunity to make a formal ruling where he did not even attempt to present such testimony.

record." Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010). The Anders procedure requires the court to independently examine the trial proceedings and consider "any errors apparent on the face of the record." Id. at 486-87 (citations omitted). Trial counsel clearly requested and was denied the inclusion of the character charge in a pre-charge conference, and the trial judge went as far as to say the issue was preserved for the record. (App. p. 550, line 21- p. 552, line 25). Because the discussion regarding the character charge is clearly apparent from the face of the transcript, Petitioner's argument the court of appeals must have overlooked this issue is not persuasive.

The post-conviction relief judge properly presumed the court of appeals' compliance with the Anders procedure, as outlined in McKennedy and McHam, supra, included a review of this issue. Because the issue is apparent from the face of the record, evidence supports the post-conviction relief judge's finding Petitioner failed to demonstrate this issues was overlooked by the court of appeals before it dismissed his appeal. See Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (this Court must affirm the circuit court's denial of post-conviction relief when there is any probative evidence to support his findings).

## II. Additional Grounds Appearing in the Record

Respondent submits this Court should affirm the post-conviction relief judge on the following additional grounds. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000) (noting that Rule 220(c), SCACR, allows the Court to "affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.").

### A. Petitioner would not have been successful on appeal even if appellate counsel had filed a merits brief addressing the trial judge's refusal to give a good character instruction.

Petitioner asserts the court of appeals would have given him a new trial had appellate counsel argued the trial judge erred in not issuing a good character instruction. However, Respondent submits the court of appeals would not have overturned Respondent's conviction because exclusion of the good character charge did not affect the jury's verdict. Thus, Petitioner failed to demonstrate he was prejudice by appellate counsel's decision not to brief this issue. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (applicant must show "there is a reasonable probability he would have prevailed on appeal." (citations omitted)) .

While a trial judge is required to issues a good character instruction where a defendant presents character witnesses, the trial judge's failure to give the instruction is still subject to a harmless error analysis. State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335 (1982). 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.[5] Id. Here, the record conclusively establishes Petitioner committed voluntary manslaughter. Petitioner admitted to his son, the police, a television news crew, and the jury that he beat the victim with a baseball bat. (App. p. 178, lines 2-4; p. 221, line 25; p. 226, line 29-p. 227, line 6; p. 438, lines 6-10). The victim's blood covered Petitioner's house. (App. p. 326, line 24-p. 328, line23).

[5] Although the trial judge found there was no overwhelming evidence of guilt, presents this argument to show the post-conviction relief judge could have also found Applicant had not demonstrated prejudice because he failed to show "there is a reasonable probability he would have prevailed on appeal." Anderson, 354 S.C. at 434, 581 S.E.2d at 835. The post-conviction relief judge's finding of no overwhelming evidence of guilt does not prevent this Court from evaluating the trial transcript to determine if the court of appeals could have overturned the conviction based on the arguments raised by Petitioner.

Petitioner was arrested fleeing to North Carolina with the victim's dead body in his trunk. (App. p. 224, lines 12-17). Both the physical and testimonial evidence overwhelmingly support the conclusion Petitioner is guilty of voluntary manslaughter. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." (citations omitted)).

When South Carolina courts have reversed a trial judge's decision to not issue a good character instruction, they did so because the record left a question as to whether the defendant's behavior formed the elements of a crime. In State v. Harrison, 343 S.C. 165, 167, 539 S.E.2d 71, 72 (Ct. App. 2000), the defendant was convicted of simple possession of cocaine. His defense to that charge was he was not in possession of the cocaine, but was merely attempting to possess it. Id. at 174, 539 S.E.2d at 75. The court of appeals held the only evidence to contradict this defense was the testimony of a single officer, which did not equate to overwhelming evidence to excuse the trial judge's failure to issue a good character instruction. Id. at 174-75, 539 S.E.2d at 75-76.

In State v. Lee-Grigg, 387 S.C. 310, 314, 692 S.E.2d 895, 897 (2010), the defendant was convicted of forgery. There, the defendant claimed she believed she was authorized to seek reimbursements for certain expenses. Id. at 314-15, 692 S.E.2d at 897. This Court held the trial judge erred in not issuing the good character instruction because the defendant's honesty and trustworthiness were integral to her "good faith" defense. Id. at 317, 692 S.E.2d at 898.

In both Harrison and Lee-Grigg, there was a factual question as to whether each defendant had engaged in the conduct that formed the *corpus delicti* of their crime. In

Harrison, the question was whether the defendant actually completed the act of possessing the drugs. In Lee-Grigg, the question was whether the defendant had intent to commit forgery. If the jury in either case believed the defendant's testimony *in toto*, it would have to find the defendant innocent. In contrast, there is no question in Petitioner's case whether he committed voluntary manslaughter. Petitioner testified his mindset changed immediately before he beat the victim. (App. p. 438, lines 14-23; p. 464, lines 11-20). He also testified he was afraid from the victim's attacks. (App. p. 437, lines 18-25). Petitioner's own testimony supports a conviction for voluntary manslaughter. See State v. Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010) ("Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence."). This testimony, coupled with the overwhelming forensic evidence, make this case is more apposite to Green, where the defendant admitted his participation in the crime. Green, 278 S.C. at 240, 294 S.E.2d at 335.

Furthermore, Petitioner's only defense to his charge was a claim of self-defense. Testimony regarding Petitioner's character had no logical bearing on whether the jury was satisfied he established all four elements of self-defense[6] at the moment he struck the fatal blows. Petitioner's character may have been relevant to whether he murdered the

[6] See State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) ("To establish self-defense the defendant must establish the following elements: 1) the defendant must be without fault in bringing on the difficulty; 2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; 3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life, and; 4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." (citing State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984))).

victim with malice aforethought, but it has no bearing, under these facts, on whether he satisfied each element of self-defense. See Starnes, 388 S.C. at 599, 698 S.E.2d at 609 ("Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it."). In light of the entire record before the Court, Petitioner simply has not shown the trial judge committed reversible error in refusing to issue the good character instruction. Accordingly, this Court should affirm the post-conviction relief judge's denial of relief because the court of appeals would not have overturned Petitioner's conviction even if the good character issues had been briefed.

### B. Petitioner failed to present testimony from appellate counsel to rebut the presumption appellate counsel made a strategic decision to file an Anders brief.

The post-conviction relief judge assumed appellate counsel's deficiency *arguendo*, and specifically ruled on the prejudice prong of the Strickland v. Washington, 466 U.S. 668, 686 (1984), analysis. However, because this Court must entertain a "'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect[,]'" Harrington v. Richter, 562 U.S. 86, 109 (2011), Respondent submits the post-conviction relied judge also could have properly found Petitioner failed to meet his burden to overcome the presumption appellate counsel made a strategic decision to forgo briefing the good character instruction issue. Petitioner bore the burden to show appellate counsel's decision was not reasonable, yet he presented no testimony from appellate counsel. See, e.g., Collins v. State, 686 S.E.2d 305, 308 (Ga. 2009) ("[D]uring the hearing, Collins's appellate counsel did not ask trial counsel about the decision not to call Malcom as a witness, 'and the decision not to do so is therefore

presumed to be a strategic one that does not amount to ineffective assistance.'" (citations omitted)). His mere allegation of ineffectiveness is not sufficient to carry his burden of proof. Cf. Dawkins, 354 S.C at 70-71, 580 S.E.2d at 439 (2003) ("Respondents are not permitted to simply rest on the allegations in their complaint, especially where, as here, the majority of the factual allegations are conclusory in nature."). Therefore, Respondent submits this Court should affirm the post-conviction relief judge's denial of relief because Petitioner failed to present any evidence to rebut the presumption appellate counsel made a strategic decision to submit an Anders brief.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

May 26, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Georgetown County

The Honorable George C. James, Jr., Circuit Court Judge

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VLADIMIR W. PANTOVICH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies inthe United States mail, postage prepaid:

Laura R. Baer, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 26th day of May, 2015.

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 26 2015
S.C. Supreme Court

May 26, 2015

**VIA HAND DELIVERY**
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

*RE:* **Vladimir W. Pantovich v. State of South Carolina**
**Appellate Case No: 2014-001433**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Laura R. Baer, Esquire (2 copies)