

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
The Honorable George C. James, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No: 2017-000280

VLADIMIR PANTOVICH,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

SECOND SUPPLEMENTAL APPENDIX

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SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
In The Court of Common PleasHonorable George C. James, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-22-0635

Vladimir W. Pantovich,
#326633,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal, dated May 16, 2014 of the Honorable George C. James, Jr., filed June 16, 2014 and received by Petitioner on June 23, 2014.

RECEIVED

June 27, 2014

JUN 30 2014

S.C. SUPREME COURT
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SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY
In The Court of Common PleasHonorable George C. James, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-22-0635

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#326633,

Petitioner,

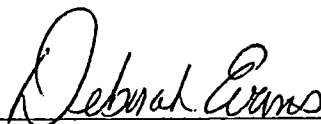
v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Vladimir W. Pantovich, #326633,) Case No. 2012-CP-22-635
))

Applicant,)
))

v.)
))

State of South Carolina,)
))

Respondent.)
))

ORDER OF DISMISSAL

FILED
GEORGETOWN COUNTY, S.C.
2014 JUN 16 PM 3:54
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 22, 2012. Respondent made a timely Return on or about September 25, 2012. The Court convened an evidentiary hearing into the matter on March 21, 2014, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Stuart M. Axelrod, Esquire, testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and exhibits introduced at the hearing. Counsel for Applicant and Respondent also submitted memoranda in support of their respective positions. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In April 2006, the

Georgetown County Grand Jury indicted Applicant for murder (2006-GS-22-126). Stuart M. Axelrod, Esquire ("trial counsel"), represented Applicant. On February 4, 2008, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On February 8, 2008, the jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Culbertson sentenced Applicant to fourteen (14) years imprisonment.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire ("appellate counsel"), of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. 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). The remittitur was returned to the circuit court on June 28, 2011.

II. ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel (Trial & Appellate)"
 - a. "Counsel failed to use adversarial skills *Estelle v. Smith* 541 U.S. 454 (1981) 6th amendment right"
2. "No Expert Testimony to rebut States Experts (Fundament Fairness)"
 - a. "Counsel failed to provide Expert witness to testify (*Van Dolen*) (Rule 702)"

At the PCR hearing, Applicant proceeded on only an allegation of ineffective assistance of appellate counsel for failure to file a merits brief arguing the trial court erred by refusing to instruct the jury on the good character evidence defense.

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Trial counsel testified his theory of the case was Applicant struck the victim with a baseball bat in self-defense. He further testified everyone he interviewed indicated Applicant was not a violent person. Trial counsel testified he had no defense other than the self-defense theory because of the size disparity between Applicant and the victim. He also recalled the victim had a history of fighting with Applicant. Trial counsel identified Applicant's Exhibit One as three (3) proposed jury charges he submitted to the trial judge. One charge (Charge #19) addressed the Applicant's good character. Two other charges (Charges #24 & #25) dealt with the victim's reputation and propensity for violence. Trial counsel testified none of his proposed charges were issued by the trial judge. He further testified there was no State v. Green² charge in the judge's instructions. However, on cross-examination trial counsel testified the trial judge did include instructions on the victim's prior history of physical abuse, her prior difficulties with Applicant, her reputation as a violent person, and her intoxication.

² State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982) (discussing charge on defendant's good character).

B. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. An allegation of ineffective



assistance of appellate counsel requires an applicant show appellate counsel failed to raise a viable issue on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990)). The applicant must also prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

The Court finds Applicant failed to meet his burden of proof regarding his allegation of ineffective assistance of appellate counsel. Even assuming, *arguendo*, appellate counsel was deficient in failing to brief the trial judge's refusal to include Applicant's requested charges, Applicant has not shown how he was prejudiced by appellate counsel's performance. Specifically, the Court find the trial judge adequately covered Applicant's Charges #24 and #25 in his instructions to the jury. (Trial Tr. 581:12-582:22).

Regarding Charge #19, the good character instruction, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it found no reversible error in the trial judge's instructions. To show prejudice in this regard, Applicant must also show an irregularity in the Court of Appeals' Anders procedure to be entitled to a new trial. 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 finds 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.

The Court find Applicant has not proven there was an irregularity in the Court of Appeals' Anders procedure such that he would be entitled to a new trial. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), the South Carolina Supreme 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. 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 this preserved³ issue before dismissing Applicant's direct appeal. See 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.

³ Counsel for both Applicant and Respondent 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).

Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). The Court is not persuaded by Applicant's argument that a dismissal pursuant to Anders is procedurally distinct from an affirmation pursuant to a merits brief.⁴ Under either scenario, the Court of Appeals is required to make an independent determination that preserved issues do not warrant a new trial. A dismissal simply means the court reviewed all issues, not simply those counsel believes are meritorious. The end result in either scenario is that the Court of Appeals finds the defendant is not entitled to relief. Therefore, the Court of Appeals' compliance with the Anders procedure here creates a presumption of regularity, which the Court finds has not been rebutted by Applicant.

Furthermore, the United States Supreme Court has indicated applicants face a difficult burden to prove prejudice in cases where counsel has filed an Anders brief. Smith v. Robbins, 528 U.S. 259, 287 (2000) ("[I]n most cases in which a defendant's appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous."). The burden is high because "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 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); see also McHam, 404 S.C. at 475, 746 S.E.2d at 46 (Court of Appeals reviews all preserved issues for merit). Trial counsel clearly requested and was denied the inclusion of the character charge in a pre-charge

⁴ While a dismissal pursuant to the Anders procedure may not technically be a dismissal "on the merits," State v. Lyles, 381 S.C. 442, 444-45, 673 S.E.2d 811, 813 (2009), such a distinction is not relevant in the context of an ineffective assistance of counsel claim. The standard here is whether, but for counsel's failure, Applicant would have prevailed on appeal. In that context, there is no distinction between a review of a merits brief and a review of an Anders brief.

conference, and the trial judge went as far as to say the issue was preserved for the record. (Trial Tr. 536:21-538:25). The discussion regarding the character charge is clearly apparent from the face of the transcript. Applicant has presented no evidence to support a theory this issue was overlooked by the Court of Appeals. Therefore, this Court must presume the Court of Appeals' compliance with the Anders procedure included a review of this issue. Thus, Applicant was not prejudiced by appellate counsel's decision to file an Anders brief.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf.



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June 26, 2014

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Vladimir Pantovich v. State of South Carolina
Case No.: 2012-CP-22-0635

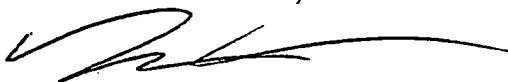
RECEIVED**JUN 30 2014****S.C. SUPREME COURT**

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,



Tristan M. Shaffer

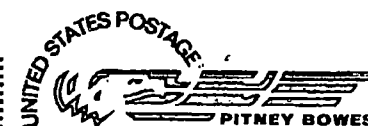
TMS/dke

cc: Joshua L. Thomas, Esquire
Georgetown County Clerk of Court
Kimberly McCall
Vladimir Pantovich

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& ASSOCIATES
ATTORNEYS AT LAW

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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FEB - 6 2015

S.C. 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

LAURA R. BAER
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ATTORNEY FOR PETITIONER

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The PCR Court erred in (1) requiring Petitioner to show an irregularity in the Court's <u>Anders</u> 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 <u>Anders</u> 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	9
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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 Anders¹ 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-Diaz² 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

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, Judge 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 Strickland⁴ 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

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

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's 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 Robbins'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 be 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. Burriess, 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 Petitioner's 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 Atkins¹¹ 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

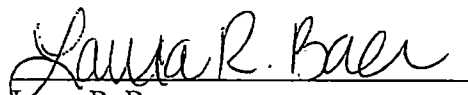
¹¹ State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987).

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

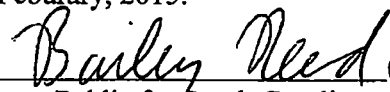
CERTIFICATE OF SERVICE

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 February, 2015.

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

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED

The Honorable George C. James Jr., Circuit Court Judge MAY 26 2015

Appellate Case No. 2014-001433

S.C. Supreme Court

Vladimir Walt Pantovich, ...Petitioner,

v.

State of South Carolina, ...Respondent.

**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 Anders¹ 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 instructions² 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 jury³ 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-defense⁶ 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 relief 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

Certiorari to Georgetown County

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

RECEIVED

MAY 26 2015

VLADIMIR W. PANTOVICH,

Petitioner, S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

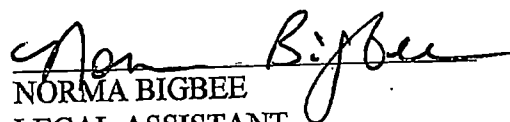
Respondent.

CERTIFICATE OF SERVICE

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 in the 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

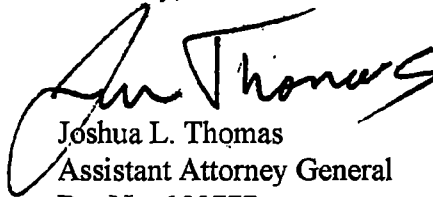
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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)

RECEIVED

JUN - 5 2015

S.C. Supreme Court

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

REPLY TO STATE'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

- I. **Petitioner would have been successful on appeal had a merits brief addressing the trial judge's refusal to give a good character instruction been filed where he introduced evidence of his good character at trial, the State conceded that the failure to charge was properly preserved, and the PCR court properly found that the evidence of Petitioner's guilt was *not* overwhelming.**

Petitioner raised the following issue in his Petition for Writ of Certiorari: Whether the PCR Court erred in (1) requiring Petitioner to show an irregularity in the Court's Anders¹ 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?

As more fully discussed in the Petition for Writ of Certiorari, this case is about the PCR court's application of the incorrect standard of review to Petitioner's allegation of ineffective assistance of appellate counsel. The Order of Dismissal reflects the PCR court's belief that there is a presumption of regularity in the Anders procedure that must be rebutted by the applicant through the showing of some irregularity. App. 679 – 682. However, in Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 764 (2000), the United States Supreme Court held that “the proper standard for evaluating [a] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland.”² See also Bennett v. State, 383 S.C. 303, 309 n.6, 680 S.E.2d 273, 276 n.6 (2009) (stating that even where appellate counsel filed an *Anders* brief, “when analyzing a claim of ineffective assistance of appellate counsel, we apply the *Strickland* test”).

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

² Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

While the Robbins opinion includes the statement “[w]e 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,” that statement related to the court’s rejection of the appellant’s argument for presumed prejudice. Id. at 284-89, 120 S.Ct. at 763-66. A complete reading of Robbins reveals that there is no additional hurdle for an applicant to overcome because their appellate attorney filed a no-merits brief. Rather, the Robbins court instructed that in applying the Strickland standard on remand:

Respondent 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 Robbins 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. at 285, 120 S.Ct. at 764. Thus, the PCR judge made an error of law in requiring that Petitioner “must also show an irregularity in the Court of Appeals’ Anders procedure to be entitled to a new trial” and present evidence that a meritorious issue “was overlooked by the Court of Appeals.” App. 679; App. 682. This error of law alone warrants certiorari.

There is no requirement in the applicable case law that the applicant present evidence regarding a court’s confidential review of a case following the filing of a no-merits brief. Unlike Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986), which involved testimony of the foreman of the grand jury, if this Court adopts the position of the PCR court and the State, the testimony of the three appellate judges who conducted the Anders review would be required at the PCR hearing. This unprecedented requirement is unnecessary given the clear mandate that the Strickland test be used to evaluate ineffectiveness regardless of whether appellate counsel filed a merits brief or an Anders brief. See Smith v. Robbins 528 U.S. 259, 287-88, 120 S.Ct. 746, 765-66 (2000). The Petitioner needed to prove deficient performance by showing that appellate

counsel Savitz's failure to discover and brief the character charge issue was objectively unreasonable. This was shown through the stipulation that the issue was preserved and the volume of case law regarding the trial court's duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence. App. 639, 6 – 640, 1; App. 680 n.3; State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits *reversible error* if it fails to give a requested charge on an issue raised by the evidence." (emphasis added)). Petitioner also needed to show "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." Robbins, 528 U.S. at 285, 120 S.Ct. at 764. This State's precedent makes clear that the failure to provide any instruction to the jury on the character evidence presented, when requested, requires reversal of the conviction and a new trial. See State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000). Thus, Petitioner met his burden of proof under both prongs of Strickland. No testimony was needed regarding the Court of Appeals' Anders review in order to meet this burden. See In re Whetstone, 354 S.C. 213, 580 S.E.2d 447 (2003) (holding that absent a critical, relevant reason otherwise, judges should not be called to testify regarding matters from a case over which they previously presided).

In its Return, filed May 26, 2015, the State argues that there are two additional sustaining grounds appearing in the record based upon which this Court should affirm the Order of Dismissal. See Rule 220(c), SCACR. Both of these arguments are without merit.

The State asserts that the 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, i.e. that Petitioner failed to demonstrate that he was prejudiced by appellate counsel's failure to brief the issue. The State argues both that the character evidence was not relevant to Petitioner's claim of self-defense and that any error in the failure to give the requested instruction was harmless.

To the extent that the State argues "harmless error," this contention was specifically rejected by the PCR court when it found that the evidence against Petitioner was not overwhelming. In its Order of Dismissal, the court wrote:

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 finds 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 (emphasis added). The State did not file a cross-appeal regarding this finding and should not be allowed to dispute it in its Return. See Sanders v. S.C. Dept. of Corrections, 379 S.C. 411, 418, 665 S.E.2d 231, 234 (Ct. App. 2008) (citing Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct.App.1999) (holding a lower court's finding was the law of the case because respondent failed to cross appeal the issue)); Rule 203(c), SCACR (detailing the proper procedure for filing a cross appeal). Rather, the PCR court's finding of a lack of overwhelming evidence of guilty must stand.

Nonetheless, a prejudice analysis in this case must be resolved in Petitioner's favor. See Cert. Pet. 18 – 24. The State attempts, unsuccessfully, to distinguish this case from State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000), and State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). In Harrison, the South Carolina Court of Appeals noted:

Indubitably, a defendant may introduce evidence of his good character. Generally, **where requested and there is evidence of good character, a defendant 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. 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.

343 S.C. at 170, 539 S.E.2d at 73 (emphasis added). The court **reversed**, having first found that “[t]he trial court erred in failing to give the requested charge where the issue relating to Harrison’s good character and reputation was raised by the evidence.” 343 S.C. at 173, 539 S.E.2d at 75. It then rejected the State’s contention that the error was harmless in light of the evidence at trial. The court instead found that the jury may have reached a different verdict had it been properly “instructed 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” and that the State did not present overwhelming evidence of Harrison’s possession of cocaine. Id. at 173-75, 539 S.E.2d at 75-76.

In Lee-Grigg, the State conceded that “[b]ecause Lee-Grigg presented evidence of good character and requested that the jury be charged on its use of that evidence, the trial court erred when it refused to give such a charge.” 387 S.C. at 317, 692 S.E.2d at 898. However, the State again argued “that the error was harmless because the evidence presented at trial conclusively established Lee-Grigg’s guilt.” Id. This Court disagreed, finding that the dispositive issue raised by her defense was whether she “believed in good faith that she was authorized to apply for reimbursement.” Id. Thus, the character evidence admitted was relevant to the jury’s evaluation of the defendant’s credibility and culpability, but the jury was without any instruction and thus unaware of how it could consider that evidence. Id. Accordingly, the failure to charge could not

be harmless and required reversal. *Id.* Thus, though neither Harrison nor Lee-Grigg involved a claim of self-defense, the analysis contained in both cases establishes that where evidence of a defendant's good character and good reputation is admitted, the jury must be instructed how such evidence can be considered in its analysis of the defendant's guilt.

The Harrison court distinguished State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982), because "Green admitted his presence and participation in the charged crime and, from the whole record, his guilt was conclusively established." 343 S.C. at 175, 539 S.E.2d at 76. It further stated "[u]nlike Green, the paucity of evidence of Harrison's guilt is glaring." *Id.* Green involved a trial for armed robbery in which this Court found that the defendant "admitted his presence and participation in the robbery and from the whole record his guilt is conclusively established." Thus, unlike the present case, Green did involve any absolute defense to which the character evidence would have been relevant.

Contrary to the State's assertion, the record does not "conclusively establish[] Petitioner committed voluntary manslaughter."³ The State cites to the facts that Petitioner caused the death of the victim by hitting her with a baseball bat and her blood was in Petitioner's house. That evidence is consistent with Petitioner's admission that he wielded the bat that caused the victim's death, but it does not prove that he acted in a sudden heat of passion rather than in self-defense. See Solomon v. State, 347 S.C. 635, 640, 557 S.E.2d 666, 669 (2001) (Toal, C.J., dissenting) ("A jury is required to presume that an accused is innocent until he is proven guilty. A defendant's admission of the underlying facts of the crime does not necessarily represent an admission by the defendant that

³ At Petitioner's trial, 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, ll. 12-25. Additionally, the solicitor made no objection to the court's self-defense charge in this case. App. 593, l. 9 – 597, l. 19; App. 584, ll. 23-25.

he acted criminally or culpably. In fact, the defendant in this case plead not guilty, thereby placing the burden on the state to prove each and every element of the crime beyond a reasonable doubt.”). Additionally, Petitioner’s arrest on his way to his son’s home in North Carolina with the victim’s body in the trunk of his car is not dispositive. App. 438, ll. 1-25; 469, l. 8 – 470, l. 2; see State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (finding that defendant was entitled to a charge on self-defense despite his being found in Texas with his girlfriend’s dead body in the trunk of his car where he made a statement to police that it was “either her or me” and testified that in the preceding weeks the victim “had been acting jealous, following him, and had told him that if she ever caught him with another woman it was ‘going to be messy’”).

In the present case, the character evidence presented was relevant to Petitioner’s self-defense claim. See State v. Surbaugh, 737 S.E.2d 240, 254-57 (W.Va. 2012) (granting new trial for murder where defendant argued self-defense and good character and the trial court gave “no guidance to the jury via specific instruction or by the general charge on how to interpret evidence of good character”); State v. Banks, 664 S.E.2d 355, 358-59 (N.C. App. 2008) (granting new trial for first-degree murder and felonious discharge of a firearm where lower court precluded testimony of defendant’s character as a peaceful and law-abiding person in support of his assertion of self-defense); State v. Squire, 364 S.E.2d 354 (N.C. 1988) (granting new trial for murder where the trial court limited defendant’s presentation of character evidence, which “might have weighed heavily in the jury’s determination of whether the defendant acted in self-defense”). Petitioner’s character for peacefulness, including his prior peaceful reaction to aggression from the victim make it less likely that he was incapable of cool reflection, as required to prove voluntary manslaughter, but rather acted in self-defense.

Because Petitioner presented evidence of his good character, which was relevant to his claim of self-defense, it was error for the trial court to refuse to instruct the jury regarding how it could evaluate that evidence in its assessment of defendant's guilt or innocence. Thus, the PCR court erred in finding that Petitioner was not prejudiced by appellate counsel's decision to file an Anders brief where the overlooked charge issue was likely to be successful on appeal. As more fully discussed in the Petition for Writ of Certiorari, the PCR court's requirement that the applicant "rebut the presumption of regularity in the Court of Appeals' Anders review" in order to show prejudice was an error of law. Petitioner met his burden of proof and is accordingly entitled to reversal of the PCR court's denial and dismissal of his PCR application and a new trial.

II. There is no presumption of a valid strategic reason for the filing of an Anders brief, which should be filed only in those cases where appellate counsel finds from the record that an appeal would be frivolous, such that appellate counsel's testimony was not necessary at the PCR hearing.

The State asserts that this Court should affirm the denial of post-conviction relief because "Petitioner failed to present testimony from appellate counsel to rebut the presumption appellate counsel made a strategic decision to file an Anders brief." Ordinarily, "appellate counsel has no duty to raise every non-frivolous issue presented by the record and must be allowed to exercise reasonable professional judgment." State v. Roberts, 364 S.C. 583, 589, 614 S.E.2d 626, 629 (2005) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983)). Recognizing this, in Smith v. Robbins the United States Supreme Court nonetheless acknowledged that it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim and that it is actually easier to satisfy the first part of Strickland where appellate counsel filed a no merits brief, stating:

It is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel

because his counsel, although filing a merits brief, failed to raise a particular claim. **It will likely be easier to do so.** In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. See, e.g., *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"). **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, rather than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present.** In both cases, however, the prejudice analysis will be the same.

528 U.S. at 287-88, 120 S.Ct. at 765-66 (emphasis added).

Notably, in its discussion of the proper framework for evaluation of a ineffectiveness of appellate counsel for failing to file a merits brief, the *Robbins* court stated that an 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." *Id.* at 285, 120 S.Ct. at 764. Markedly absent from the court's discussion was any presumption of strategy in filing an *Anders* brief, likely because **no such strategic reason exists**. Both the ethical rules and the *Anders* opinion make clear that if appellate counsel recognized a meritorious issue, that issue should be briefed. The *Anders* procedure is specifically reserved for those instances where appellate counsel determines after a "conscientious examination" of his client's case that an appeal would be frivolous. 386 U.S. at 744, 87 S.Ct. at 1400. This procedure was put into place because "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." *Id.*

Here, where the record makes clear that the jury instruction issue was preserved for appellate review, which the State conceded at the PCR hearing, there was no question that counsel's failure to discover the charge issue was unreasonable. App. 680 n.3. As discussed in the Petition for Writ of Certiorari and supra, the jury instruction issue was not only not frivolous, it was **very** likely to result in successful direct appeal had it been properly raised and briefed. Thus, appellate counsel's testimony at the PCR hearing was not necessary to prove ineffectiveness. Further, even had appellate counsel testified at the PCR hearing, such testimony would not be controlling in the face of the record that showed the properly preserved jury charge issue and the body of case law regarding its meritorious nature. There can be no strategic reason not to raise and brief an issue likely to prevail on appeal.

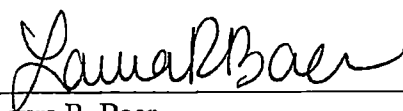
Therefore, neither "alternate sustaining ground" proposed by the State merits affirmance of the denial of Petitioner's PCR application. While it is a rare circumstance where both appellate counsel and the court will miss a meritorious issue in their review, it is not an impossibility. As discussed supra, the framework for applying the Strickland test in an Anders case such as this, announced in Robbins and adopted by this court in Bennett, requires a similar showing of deficient conduct by appellant counsel and resulting prejudice. The applicant must (1) "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;" and (2) "show a **reasonable probability** that, but for his counsel's unreasonable failure to file a merits brief, he **would have prevailed on his appeal**." 528 U.S. at 285, 120 S.Ct. at 764 (emphasis added). Notably neither prong requires a showing of any irregularity in the Anders procedure employed in the face of controlling precedent by the PCR court. Thus,

Petitioner met his burden of proof and is accordingly entitled to reversal of the PCR court's denial and dismissal of his PCR application and a new trial.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Vladimir Walt Pantovich respectfully requests this Court grant certiorari to allow full briefing on the issue raised in his Petition.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 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 reply to state's return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Vladimir W. Pantovich, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 5th day of June, 2015.



Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of June, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Vladimir W. Pantovich, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-001433

Appeal From Georgetown County
The Honorable George C. James, Jr., Circuit Court Judge

Memorandum Opinion No. 2015-MO-052
Submitted August 19, 2015 – Filed August 26, 2015

REVERSED AND REMANDED

Appellate Defender Laura Ruth Baer, of Columbia, for
Petitioner.

Attorney General Alan Wilson and Assistant Attorney
General Joshua L. Thomas, of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). We grant the petition, dispense with further briefing, reverse the order of the PCR judge, and remand the matter for a decision in accordance with this opinion.

Petitioner alleged appellate counsel was ineffective in filing an *Anders*¹ brief that did not raise the issue of whether the trial judge erred in refusing petitioner's request to charge the jury on his good character. In deciding appellate counsel was not ineffective, the PCR judge found petitioner was not prejudiced "because the Court of Appeals' dismissal [of the appeal] indicates it found no reversible error in the trial judge's instructions." The judge found that, in order to show prejudice, petitioner had to show "an irregularity in the Court of Appeals' *Anders* procedure." The PCR judge specifically found there was **not** overwhelming evidence of petitioner's guilt. Instead, his decision was based solely on his finding that petitioner failed "to rebut the presumption of regularity in the Court of Appeals' *Anders* review."

In order to show prejudice from appellate counsel's performance when an *Anders* brief is filed, the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), should be applied. *Smith v. Robbins*, 528 U.S. 259 (2000) (even if appellate counsel believes an appeal is without merit and files an *Anders* brief, the appellant may have been entitled to a merits brief, and the challenge to appellate counsel's performance should be reviewed under *Strickland*); *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009) (even where an *Anders* brief is filed, when analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test). *Strickland* holds a PCR applicant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To prove appellate counsel was ineffective, the applicant must show appellate counsel's performance was deficient and, but for appellate counsel's errors, the result of the appeal would have been different. *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001).

The PCR judge erred in finding there was a rebuttable presumption that the Court of Appeals reviewed every potential appellate issue and determined them to be without merit when conducting an *Anders* review and that there is a requirement that a PCR applicant show there was an irregularity in the Court of Appeals' *Anders* review. Accordingly, we reverse the order of the PCR judge and remand the matter for consideration of petitioner's allegation of ineffective assistance of appellate counsel under the proper standard.

REVERSED AND REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

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

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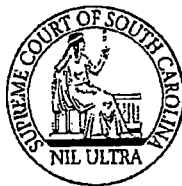
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REVERSED AND REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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September 11, 2015

The Honorable Alma Y. White
PO Box 479
Georgetown SC 29442-0479

REMITTITUR

Re: Vladimir W. Pantovich v. State
Lower Court Case No. 2012CP2200635
Appellate Case No. 2014-001433

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Daniel E. Shearouse
BS

CLERK

cc:

Joshua L. Thomas, Esquire
Laura Ruth Baer, Esquire

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Georgetown	)	2012-CP-22-00635
	)	
Vladimir Pantovich,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

May 4, 2016
Sumter, South Carolina

BEFORE:

THE HONORABLE GEORGE C. JAMES, JR., JUDGE.

APPEARANCES:

TRISTAN SHAFFER, ESQ.
Attorney for the Applicant

JESSICA KINARD, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T SINDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: All right. We're on the record now in
2 Vladimir Pantovich vs. the State of South Carolina,
3 2012-CP-22-635.

4 Does the State waive any venue issues?

5 MS. KINARD: Yes, Your Honor, no issues.

6 THE COURT: Does the Applicant?

7 MR. SHAFFER: Yes, Your Honor.

8 THE COURT: All right. Of course, this is in front
9 of me on remand from the Supreme Court to -- specifically
10 quoting from the order, "Consider the petitioner's
11 allegation of ineffective assistance of appellate counsel
12 under the proper standard".

13 Okay. I have the transcript. I recall the basic
14 facts. First of all, I want Mr. Shaffer, if he would
15 please, to put on the record the specific allegations of
16 ineffective assistance of counsel.

17 MR. SHAFFER: Thank you, Your Honor. The allegation
18 that we're here for is ineffective assistance of appellate
19 counsel for not raising the issue on appeal related to the
20 State v. Green or the State v. Grigg charge that was
21 requested at the end of the trial.

22 I believe that during the previous hearing we had --
23 the State had essentially stipulated that it was preserved
24 in the record.

25 THE COURT: All right.

1 MR. SHAFFER: So I think that the only issue we're
2 here on is simply whether or not that would have been
3 ineffective assistance of counsel for him not to have
4 raised and preserved the issue.

5 THE COURT: All right. Any other issues that you
6 want covered today?

7 MR. SHAFFER: No, Your Honor.

8 THE COURT: Okay. I'll be -- Ms. Kinard, do you
9 agree that that is the issue?

10 MS. KINARD: Yes, Your Honor. We would agree.

11 THE COURT: All right. You can present your argument
12 or present any witnesses you think are appropriate.

13 MR. SHAFFER: Thank you, Your Honor. I believe that
14 after speaking with the State, I believe that we were
15 going to incorporate the previous record which would have
16 been Mr. Axelrod's testimony and the trial transcript into
17 the record here today to avoid having to testify.

18 THE COURT: Okay.

19 MS. KINARD: That --

20 THE COURT: Does anyone have a copy of the last
21 hearing transcript?

22 MR. SHAFFER: I do, Your Honor.

23 THE COURT: Okay.

24 MS. KINARD: You have a copy, as well, Your Honor.
25 The original PCR hearing transcript should have been on

1 top.

2 THE COURT: Yes, okay.

3 MS. KINARD: Okay.

4 THE COURT: Thank you.

5 MS. KINARD: I --

6 THE COURT: All right. I remember paraphrasing or
7 maybe -- I don't think I quoted his testimony in the other
8 order, but I assume that the State agrees that Mr. Axlerod
9 need not testify again.

10 MS. KINARD: Yes, Your Honor, specifically since he
11 was trial counsel, and this issue is only referring to
12 appellate counsel.

13 THE COURT: Right. Okay, and I got it.

14 MS. KINARD: Just for the record, it was not the
15 State's understanding we would be incorporating the entire
16 transcript as part of the record.

17 THE COURT: Transcript of what?

18 MS. KINARD: Of, I'm sorry, the PCR hearing. I don't
19 know if that will make a difference. When Mr. Shaffer
20 asked that, I thought he would be referring to it in
21 pieces as necessary rather than incorporating the whole
22 transcript, but of course, I'll leave that to your
23 discretion as to what that should be.

24 THE COURT: Well, you do agree that the State
25 acknowledged at the last hearing that the issue had been

1 preserved?

2 MS. KINARD: Absolutely.

3 THE COURT: Okay. So the transcript itself is 31
4 pages. I don't see any harm in incorporating the whole
5 thing. Do you see any harm in that?

6 MS. KINARD: No, sir, not necessarily. I just did
7 not really -- I just want to make that clear from my
8 understanding of our discussions.

9 THE COURT: Well, I think that since the issues were
10 framed and I was reversed on the Anders brief ruling that
11 I made that on remand it comes back to me with the
12 transcript intact with leave to any party to present any
13 additional evidence it wants to present.

14 So anything else, Ms. Kinard, before I hear from
15 Mr. Shaffer?

16 MS. KINARD: No, Your Honor. Thank you very much.

17 THE COURT: All right. Mr. Shaffer?

18 MR. SHAFFER: Thank you, Your Honor. Essentially we
19 do not have any additional evidence to put on the record.
20 I would, however, like to make an argument. Because of
21 the fact that the issue was -- was preserved which is
22 agreed upon, and obviously, appellate counsel did not
23 raise it. Instead, he chose to raise an admittedly
24 frivolous issue -- or I guess not frivolous but one with
25 no merit in an Anders brief.

1 Because of that I think that the deficient
2 performance prong at least is met in this case, and I
3 think really what the court should be looking at is
4 whether or not essentially would it have made any
5 difference.

6 If the Court of Appeals would have looked at the Lee
7 Grigg issue, if it would have been raised in the brief in
8 direct appeal would not have required reversal, and I
9 think that's sort of really the scope of what the Court's
10 determination here is, is whether or not this is harmless
11 error.

12 So I guess the Court is sort of sitting in the shoes
13 of the Court of Appeals today in trying to make a
14 determination that is whether or not, you know, as a
15 matter of law this would be harmless error or not.

16 Your Honor, in this case -- and I recognize the fact
17 that the harmless error analysis requires the Court to
18 look pretty much -- pretty in depth into the trial and
19 what was presented at the trial.

20 The evidence that was presented at the trial is the
21 fact that he -- you know, the -- well, I guess the
22 defendant raised the issue of self-defense. That was
23 their defense at trial. It clearly was their defense is
24 what they argued during closing argument. It's what
25 Mr. Axlerod admitted to during the last hearing is his

1 defense.

2 He raised a self-defense claim and also said well,
3 if -- if something comes up, maybe they'll find the lesser
4 included, you know, as a backup position but the
5 self-defense claim was his defense.

6 He presented evidence that in the past she had
7 attacked -- the victim in this case had attacked
8 Mr. Pantovich. She presented testimony regarding that.

9 THE COURT: She -- she had attacked him?

10 MR. SHAFFER: Yes; that's correct. The victim in
11 this case had attacked him, both abused him verbally and
12 also had thrown pots at him and spit at him, as well.
13 There was evidence in the record to support that
14 allegation. There was testimony in there.

15 How did he respond to those previous occasions? He
16 walked away. He tried to diffuse the situation. That was
17 the evidence that was presented; that he is not the kind
18 of person that acts under the heat of passion; that he is
19 not the kind of person that would act -- go into the
20 self-defense claim, would not bring on the difficulty.

21 There is at least three witnesses who testified that
22 they couldn't say anything negative about Mr. Pantovich at
23 all. These people had know him for years. His entire
24 defense was built on the fact that he is not the kind of
25 person that would get involved into a situation were there

1 would be violence. He is not a violent person.

2 Therefore, he would not be the person who would initiate
3 the conduct.

4 He also -- you know, he wouldn't be, you know, the
5 kind of person to act out in a way that is, you know,
6 acting on legal -- or acting on provocation.

7 I don't see how the court could make a determination
8 that a reasonable juror could have said that evidence
9 coupled with a charge might have made a difference.

10 If a juror would have heard that there -- which
11 obviously, the jury heard that they have to -- the State
12 has to prove beyond a reasonable doubt that he didn't act
13 in self-defense.

14 If a juror would have heard your reasonable doubt
15 could be based entirely on the fact that he was just a
16 nice guy, I don't see how that could -- that might not
17 have made a difference which is essentially what the court
18 would be finding.

19 You know, I guess Lee Grigg, the Court of Appeals
20 goes into, you know, what is a harmless error analysis and
21 things like that.

22 THE COURT: Well, they said -- that court said that
23 even though the evidence of her good character was
24 admitted into evidence, that without the charge, there is
25 no way the jury could have known that it could find her

1 not guilty based on her -- on that character evidence. I
2 think that's basically what it said.

3 MR. SHAFFER: That's correct, Your Honor, and I think
4 that similarly the juror in Mr. Pantovich's case, there is
5 no way that they could have known that, you know, they
6 could rely completely and wholly and base their doubt
7 completely and wholly on the fact that he is a nice guy.
8 You know, their doubt -- I'm talking specifically about
9 their doubt about whether or not he acted in self-defense.

10 THE COURT: How do I square that with the fact that
11 they didn't find him guilty of murder which is malice
12 aforethought and instead found him guilty of something
13 that he was provoked?

14 MR. SHAFFER: Well, Your Honor, I think that -- to
15 make a determination based in part on what they didn't
16 find would be an error initially because, obviously, if
17 that was the case, that anytime a lesser included wasn't
18 charged, they would --

19 THE COURT: I see.

20 MR. SHAFFER: There would be no error, but Your
21 Honor, if you look at voluntary manslaughter under South
22 Carolina law and murder, they're not -- they're somewhere
23 in between. It's not voluntary manslaughter or murder.
24 There's actually somewhere in between where a crime can
25 happen where it's not necessarily murder. It's not

1 voluntary manslaughter. It is not involuntary
2 manslaughter.

3 It doesn't completely close off all the gaps because
4 voluntary manslaughter is an imperfect self-defense. I
5 mean, I'm sorry, imperfect lesser included. It is a
6 lesser included that's based off of independent elements.

7 THE COURT: In other words, it's not -- it's a
8 court-created lesser included?

9 MR. SHAFFER: That's correct, Your Honor, and if the
10 court was to say, you know, well they -- they didn't find
11 malice, you know, could they have found somewhere else in
12 that range?

13 They -- I think they could have especially if they
14 would have relied partially on the doubt that was created
15 by the fact that they put this evidence forth.

16 You know, I think they could have at least raised
17 that doubt as to whether or not it would have been
18 self-defense and whether or not it would have necessarily
19 met that element because it might not have met the element
20 of heat of passion if they would have relied basically --
21 based solely on character evidence and its taxonomy.

22 They would have said past conduct. He is not the
23 kind of person that acts violently whenever he is
24 attacked. That would pretty much defeat that claim that
25 he actually got convicted of in voluntary manslaughter,

1 but he said he acted in conformity to that. So I think
2 that --

3 THE COURT: Well, there is no question that he killed
4 her with a baseball bat.

5 MR. SHAFFER: That's correct, Your Honor.

6 THE COURT: So there is no question that he committed
7 some act of violence.

8 MR. SHAFFER: That's correct. The only question
9 would be whether or not -- essentially that he -- he did
10 so in self-defense. I think that that would be the
11 question that would be whether or not a crime was
12 committed.

13 I'm not talking specifically about voluntary
14 manslaughter because I think the voluntary manslaughter as
15 we discussed is sort of independent, but his defense of
16 self-defense relies on whether or not, you know, he
17 brought on the difficulty.

18 THE COURT: Is there any case law anywhere that says
19 that the failure to give a good character charge is -- an
20 incorrect failure to give a good character charge is part
21 and parcel of an analysis of self-defense?

22 MR. SHAFFER: No, Your Honor. I have not found a
23 case. I have not found a case in South Carolina that
24 addresses that. I have looked in South Carolina, Your
25 Honor. I had to look outside the state.

1 THE COURT: In the Lee Grigg forgery case, the good
2 character was squarely on the issue of intent, correct?

3 MR. SHAFFER: That's correct.

4 THE COURT: She would never do anything like that, so
5 it had to be a mistake. Of course, then you read the
6 dissent which is out of bounds for me, but that good
7 character typically -- does it typically go to intent?

8 MR. SHAFFER: I think that certainly the way the
9 cases have addressed it here, it would go toward intent
10 because you know, Lee Grigg obviously addresses it toward
11 intent.

12 In Mr. Pantovich's case, obviously, I think that the
13 intent of whether or not he -- he did something as in, you
14 know, whether or not he would have responded appropriately
15 or not appropriately to violence or provocation from her
16 whenever she attacked him with a fireplace poker which is
17 essentially the evidence in the record, how he responded
18 to that, that's --

19 THE COURT: What you're -- what you're saying,
20 basically, is that absent a good -- with a good character
21 charge, the jury would have been able to conclude that
22 there's no way he would have done this unless it was
23 self-defense?

24 MR. SHAFFER: I think that the -- a reasonable juror
25 could have gone to that or could have found that, but I

1 think that -- it's -- specifically, the good character
2 charge addresses doubt in whether or not your reasonable
3 doubt could be based off of this good character evidence.

4 I think that -- so sort of the inverse of that is not
5 necessarily that they would have found -- there is no way
6 he could have done it, but it's possible that he acted in
7 self-defense based off of his previous dealings and his
8 previous character.

9 THE COURT: Okay. All right. I'll come back to you
10 later.

11 Ms. Kinard?

12 MS. KINARD: Thank you, Your Honor. May it please
13 the Court. Before we start talking about the content of
14 the good character charge and how it could have affected
15 the jury, I want to kind of take a step back and talk
16 about whether it was error for the judge not to have given
17 the good character charge.

18 Both the Lee Grigg case and the Green case, I pulled
19 both of those if it would be of any use there. Both of
20 them are referred to in the prior PCR hearing.

21 THE COURT: Do you have a copy of them?

22 MS. KINARD: Yes, Your Honor.

23 THE COURT: I've read those in the last couple of
24 days, but I'll be happy to have extra copies.

25 MS. KINARD: I hand these to opposing counsel, as

1 well.

2 THE COURT: Thank you.

3 MS. KINARD: Thank you. Both of these cases state
4 that it is not reversible error for the court to decide
5 not to give a good character charge. So first of all, I
6 think as a threshold matter is they determine --

7 THE COURT: Well, no. Lee Grigg says it was.

8 MS. KINARD: No error in failing to give a good
9 character charge. Perhaps I -- I read it wrong but --

10 THE COURT: It says -- well, I've got -- the Court of
11 Appeals decision of State vs. Lee Grigg.

12 MS. KINARD: Yes, Your Honor. My apologies. I read
13 that note wrong.

14 THE COURT: Okay. Now, Green was a harmless error
15 case.

16 MS. KINARD: Green was harmless error. My apologies.
17 You're Right. Lee Grigg does say that it's reversible
18 error, but Green says otherwise.

19 Anyway, continuing similar to the Harrison case and
20 the Lee Grigg case were both compared in the prior PCR
21 hearing. Both of those involved good character
22 instruction, and as you just discussed with Mr. Shaffer,
23 those both go to the intent of the crime.

24 So those are the only two cases that I have found
25 where convictions have been reversed because of a no good

1 character instruction, and as stated, they left unanswered
2 questions regarding whether the defendant's behavior
3 formed the elements of the crime and the obvious missing
4 evidence to prevent a finding of overwhelming guilt.

5 Stepping forward --

6 THE COURT: Well, that's where I go back to this.
7 There's no question that he killed her.

8 MS. KINARD: Exactly.

9 THE COURT: There is no question that there's some
10 evidence of an intent to kill her because he did do it
11 quite forcefully.

12 The question of intent, Mr. Shaffer said has kind of
13 got to be blurred because it more goes to whether or not
14 it's possible the jury would have considered that because
15 of his good character he -- and I may be paraphrasing him
16 wrong. He wouldn't have done this unless it was
17 self-defense.

18 MS. KINARD: I understand that's our position and
19 respectfully disagree with Mr. Shaffer's point.

20 He talked about possibility. The standard here is
21 not possibility. It's probability. According to Anderson
22 v. State, the Applicant must show there was a reasonable
23 probability, not possibility, he would have prevailed on
24 appeal, and that's the standard along with Strickland
25 comparatively.

1 The Anderson standard is specific toward ineffective
2 assistance of appellate counsel, and the Strickland
3 standard, of course, went to deficiency. That's pretty
4 much been stipulated, but then we go to prejudice and we
5 have to look and see whether the Applicant was prejudiced
6 by the assistance of appellate counsel.

7 We could go to the facts of the matter regarding
8 self-defense. Good character has no place in a
9 self-defense analysis. To paraphrase the four elements as
10 stated in State v. Goodson, the defendant must be without
11 fault in bringing the difficulties.

12 THE COURT: Okay. Could that not be brought out by
13 good character?

14 MS. KINARD: I don't see how.

15 THE COURT: He is not the kind of guy who would
16 provoke a fight like this, that kind of stuff.

17 MS. KINARD: I suppose but that's -- it's -- good
18 character does not necessarily mean that -- in the terms
19 of the State v. Green charge if I may have just a second
20 to pull that language.

21 (Pause).

22 And I can't find it, but a defendant is generally
23 entitled to a good character instruction when he presents
24 supporting evidence that he cannot show prejudice from the
25 lack of the charge when there is overwhelming evidence of

1 guilt, and that is one of the twists in this case is that
2 you did not find overwhelming evidence of guilt.

3 I interpret from the way the order is written that
4 that is because of the fact he was found guilty of
5 voluntary manslaughter rather than murder.

6 THE COURT: No. The -- my recollection is that my
7 finding of that was based on the fact that there was
8 evidence of self-defense and that was charged to the jury,
9 and that -- not because it was charged but because there
10 was evidence of self-defense that the jury could have
11 acquitted him -- or could have resulting -- or as a result
12 acquitted him of murder and voluntary manslaughter.

13 There is no -- certainly there is overwhelming
14 evidence that he killed her.

15 MS. KINARD: Yes, Your Honor.

16 THE COURT: And what I'm struggling with, and as you
17 can probably tell from all my questions, is how does a
18 good character charge affect a case like this where there
19 is no question that he killed her.

20 For example, in Lee Grigg, there is no question that
21 she submitted -- I don't think there was any question that
22 she submitted duplicate vouchers. There was some huge
23 confusion about it, but there was a good character element
24 as to whether or not she intended to do such a thing or
25 would have ever done anything like that.

1 Here I am asking if that is to be equated with the
2 scenario in this case where he would have never killed a
3 human being unless he was defending himself from death or
4 great bodily injury. That's what my question is.

5 I think you were starting to address it, so I'll be
6 quiet.

7 MS. KINARD: Thank you, Your Honor, I was attempting,
8 yes. Referring back to the four elements of self-defense,
9 he was without fault in bringing the difficulty.

10 I understand what you're saying about how him
11 receiving testimony that he is a generally good person
12 could perhaps speak to that, though I think it is slim.

13 Furthermore, the record conclusively establishes that
14 Petitioner -- excuse me, the Applicant committed voluntary
15 manslaughter. He admitted to his son, to the police, to a
16 news crew, and to the jury that he killed the victim with
17 a baseball bat.

18 You know, her blood was all over his house. Her body
19 was in his car. I mean, he was found fleeing, and some of
20 the testimony and statements he provided -- and I don't
21 want to put words in his mouth, but they were effectively,
22 "I snapped. I shouldn't have done that."

23 And there is testimony from him and statements from
24 him that said this act was out of character. So
25 therefore, I don't think that a good character charge

1 could negate the fact that the Applicant himself said,
2 "This isn't like me."

3 I think that confuses the first element of
4 self-defense, and I don't think that the good character
5 charge could rehabilitate any of that.

6 THE COURT: What pages of the transcript were those
7 pieces of evidence?

8 MS. KINARD: Those are on -- this is in the trial
9 transcript. I'm using the appendix citations which all
10 you --

11 THE COURT: So not -- not the originals, not the
12 original transcript pages?

13 MS. KINARD: Yes, sir, the Bates number pages.

14 THE COURT: All right. Go ahead.

15 MS. KINARD: Page 178, lines two through four; page
16 221, line 25; page 226, line 29 through page 227 line six.

17 THE COURT: 227 line six?

18 MS. KINARD: Yes, sir, over a page, and then page 438
19 lines six through ten. Those are the four citations to
20 where those utterances were made.

21 THE COURT: By him?

22 MS. KINARD: Yes, sir, Your Honor.

23 MR. SHAFFER: Your Honor, just so I know --

24 THE COURT: You -- yes, sir.

25 MR. SHAFFER: Your Honor, I don't actually have the

1 original record or the Bates stamp.

2 THE COURT: All right. We'll get that clear as far
3 as the transcript pages.

4 MR. SHAFFER: Thank you.

5 MS. KINARD: Should I do that now to clarify, Your
6 Honor, so we're good?

7 THE COURT: Page 178 would actually be page 166. I
8 think if you subtract 12 from every page number she gave,
9 Mr. Shaffer. Well, actually no.

10 MS. KINARD: No. Page 221 is page 208.

11 THE COURT: That's right.

12 MS. KINARD: Page 226 is 213.

13 THE COURT: Wait a minute. Let me back up, 226,
14 yeah, 213.

15 MS. KINARD: And then 438 is page 424.

16 THE COURT: That's right.

17 Do you have those, Mr. Shaffer?

18 MR. SHAFFER: Yes, Your Honor. Thank you.

19 MS. KINARD: So basically, for every -- the fact of
20 those utterances, the fact that all of these elements of a
21 crime involving homicide, whatever it ended up being,
22 those all exist.

23 In self-defense, I believe those statements cannot be
24 rehabilitated by a good character charge especially when
25 considering the other elements of self-defense.

1 I believe the character issue may have had basis in a
2 murder examination regarding malice aforethought, but when
3 you take it back to voluntary manslaughter and whether the
4 self-defense charge was adequate, I seriously just don't
5 believe that the good character charge was necessary.

6 Any evidence that fear causes a person to kill in a
7 heat of passion mitigates murder and manslaughter --
8 excuse me, voluntary manslaughter -- I'm sorry, voluntary
9 manslaughter, doesn't justify it.

10 Again, any --

11 THE COURT: Say that again.

12 MS. KINARD: That -- evidence that fear causes a
13 person to kill in the heat of passion mitigates murder to
14 -- excuse me, murder to voluntary manslaughter, but it
15 doesn't justify it. I understand we're not --

16 THE COURT: Is that case law or definition only?

17 MS. KINARD: That's case law, Starnes. I don't --
18 I'll find the citation to that.

19 THE COURT: I'm familiar with that case. I can find
20 it. State v. Starnes?

21 MS. KINARD: Yes, Your Honor.

22 THE COURT: And what does it say again?

23 MS. KINARD: Evidence that fear caused a person to
24 kill in the heat of passion mitigates murder to voluntary
25 manslaughter, but it doesn't justify it.

1 We're not talking about justifiable homicide, but I
2 did just want to bring up the State does recognize the
3 heat of passion and mitigation.

4 THE COURT: Did the defendant in this case ask for a
5 voluntary manslaughter lesser included? Do you remember
6 Mr. Shaffer?

7 MR. SHAFFER: I don't recall, Your Honor.

8 THE COURT: All right. You can continue.

9 MS. KINARD: Yes, sorry. Another element is that the
10 Applicant at the prior PCR hearing failed to present
11 testimony to rebut the presumption that the Anders brief
12 was a strategic tactic. There is a strong presumption
13 that counsel's --

14 THE COURT: All right. You need to -- if you're
15 going to read, you have to slow down.

16 MS. KINARD: I'm sorry. My apologies.

17 THE COURT: I'm not following you there.

18 MS. KINARD: At the prior PCR hearing, there was no
19 testimony provided by Mr. Savitz who wrote the Anders
20 brief. There is a strong presumption that counsel's
21 attention to certain issues at the exclusion of others
22 reflects a trial strategy.

23 THE COURT: Of an appellate strategy?

24 MS. KINARD: Yes, Your Honor. My apologies.

25 The court could have found he failed to meet his

1 burden regarding choosing that strategy, but it would have
2 to overcome a presumption that he made a strategic
3 decision in not briefing the instruction issue.

4 THE COURT: Well, what would his strategy conceivably
5 have been not to brief perhaps a valid issue?

6 MS. KINARD: I can't speak to that, but I don't
7 believe that's my burden either. I believe that's the
8 Applicant's burden.

9 THE COURT: Do you want me to go down the path again
10 of --

11 MS. KINARD: No, sir.

12 THE COURT: -- not granting a PCR based on an Anders
13 brief issue?

14 MS. KINARD: No, sir. That's not my request, and I
15 understand the issue that we have dealt with that. I just
16 want to say an allegation is not sufficient. Proof must
17 be presented, a burden must be met in whichever way that
18 must be attempt by Applicant.

19 THE COURT: Well, doesn't the State usually call
20 trial counsel to testify?

21 MS. KINARD: Yes, Your Honor, and there was -- that
22 was appellate counsel. Trial counsel was called, and
23 there was a discussion between Mr. Thomas and the prior AG
24 and Mr. Shaffer about the potential benefit of
25 Mr. Savitz's testimony.

1 THE COURT: Yes, and I remember they got some kind of
2 email from him saying that he would be happy to present an
3 affidavit or whatever.

4 I think one of them ended up saying that he didn't --
5 that Mr. Savitz said, "I don't know why I didn't brief
6 it." I don't know whether that's in the PCR record or
7 whether somebody told me that in the office.

8 MS. KINARD: I can't speak to that as I was not
9 directly involved. Perhaps Mr. Shaffer can. My
10 understanding was that there was an agreement between both
11 attorneys that Mr. Savitz's testimony would not be
12 beneficial to either side.

13 THE COURT: Is that in the record?

14 MS. KINARD: I do not believe so.

15 THE COURT: Okay. All right. Go ahead.

16 MS. KINARD: Okay. Just to sum up what I've been
17 trying to say is that regardless of the deficiency prong
18 of the Strickland test, the Applicant still has failed to
19 show that the appeal would have likely been different or
20 would have likely been granted but for the actions of
21 appellate counsel.

22 Instead, we still have strong evidence that was
23 admitted and testified to by the Applicant being those
24 citations that I presented earlier.

25 Good character is unlikely to affect the outcome of

1 any appeal because all of the elements of the crime of
2 voluntary manslaughter are met and none rely on character
3 or malice aforethought to satisfy those elements.

4 It's also unlikely to help the presentation of a
5 self-defense defense strategy because the elements don't
6 require a consideration of character, again. That overall
7 is the State's case. I'll be happy to answer any
8 questions.

9 THE COURT: All right. Mr. Shaffer, how about that
10 last point she made -- or one of the last points she made?
11 "Since appellate counsel wasn't called, I have no way of
12 knowing why -- didn't brief or argue the good character
13 charge issue?"

14 MR. SHAFFER: Your Honor, I believe that Mr. Thomas
15 actually said on the record -- I believe you're correct.
16 He said that it would not be beneficial to him, but Your
17 Honor, I actually thought Mr. Savitz would be beneficial
18 to him.

19 I didn't think it was necessary. The reason I didn't
20 think it was necessary, the reason I didn't call him is
21 just out of an abundance of caution is that he had plans
22 to be with a family member who was sick that day and was
23 in Abbeville. That's basically why he didn't appear at
24 the PCR hearing, but I don't think it's necessary because
25 of the fact he filed an Anders brief, you know.

1 THE COURT: Well, what possible reason would
2 appellate counsel -- what strategic reason would appellate
3 counsel ever have not to brief a pertinent issue?

4 MR. SHAFFER: There is none especially if your
5 alternative is to file a meritless brief. There is no
6 reasonable trial -- or reasonable appellate strategy in
7 not briefing a burden at issue.

8 I actually believe that that's a per se valid
9 statement, but that being said that especially considering
10 the fact that his alternative in this case was to file an
11 appeal that he admitted had no merit to it which was
12 basically in his Anders. That's part of what he was doing
13 was saying I have no meritorious issue. I had an arguably
14 meritorious issue.

15 I think that, obviously, that is a statement that is
16 part of the record -- or part of the appellate record
17 which could be seen by this court as admission that
18 Mr. Savitz did not have a valid -- valid issue to raise,
19 but I think that even if the court, you know -- I don't
20 see how there could ever be any valid reason not to raise
21 a reversible issue, Your Honor. I just don't see how that
22 could possibly happen.

23 Your Honor, the State brought up State v. Starnes,
24 and I think there is -- Smith is a case that came out
25 around the same time both addressing voluntary issues. I

1 believe Smith is the name of the other case, but
2 essentially --

3 THE COURT: And those addressed --

4 MR. SHAFFER: They addressed whether or not someone
5 was entitled to a lesser-included offense of voluntary
6 manslaughter.

7 THE COURT: All right.

8 MR. SHAFFER: And I think that there is a -- you know
9 what they're citing it for is sort of -- opposed to an
10 actual holding in that case, because essentially, if I
11 recall correctly, neither of those cases supported that
12 the trial court erred in finding voluntary manslaughter.

13 I think that they both sort of I guess raised the bar
14 from, you know, previous cases. I think there is a case
15 law, Naghten, from ten years ago or so that they raised
16 the bar -- Smith and Starnes both raised the bar for
17 those -- for essentially whether or not you determined
18 something to be voluntary or not. I guess raised the bar
19 is an improper legal term. That's just the way that I
20 viewed them.

21 The statements that he makes, you know, I certainly
22 haven't had a chance to address each one of them in this
23 time period that they're doing an argument, but I still
24 don't think -- I don't see how they could possibly get
25 around the fact that, you know, the defense -- evidence

1 that would have supported the defense -- if you look at
2 the closing argument made by trial counsel, he uses that
3 evidence, that good character evidence, to support his
4 theory for why it's self-defense.

5 You know, he is -- he is arguing hey, he is not kind
6 of person that does this. How could he bring on the
7 difficulty essentially? He doesn't say that essentially,
8 but it's in the same paragraph of what he is talking
9 about. I can direct the Court to it if you'd like. To
10 say 549 through 551.

11 THE COURT: All right. You're talking about the
12 transcript page?

13 MR. SHAFFER: That would be the original transcript
14 page.

15 THE COURT: 549 to 555?

16 MR. SHAFFER: That's correct.

17 THE COURT: All right.

18 MR. SHAFFER: So we're using the small numbers.

19 THE COURT: Okay.

20 MR. SHAFFER: Essentially, Mr. Axelrod is saying, you
21 know, he -- it supports his version of self-defense
22 because it's consistent with it. It's consistent with his
23 prior behavior, but without having charged that to the
24 jury, I don't think that they could have used that
25 evidence or they would have known they could have used

1 that evidence to base their doubt.

2 The reason I'm saying base their doubt is because,
3 obviously, we're looking at it now. We're -- you know, if
4 there is a reasonable probability it would have made a
5 difference, but the lens that you would look through as to
6 whether or not -- you know, evidence would have applied to
7 self-defense is really, you know, would a reasonable juror
8 have found that.

9 In State v. Grigg, I think it would be a harmless
10 beyond a reasonable doubt kind of standard, you know, for
11 the court to say -- if the court was going to essentially
12 find that there was no prejudice that my client -- I think
13 that the court would have to make a finding that it would
14 be beyond a reasonable doubt that there was no prejudice.

15 I certainly think we meet that. I think it would
16 even meet the goal just saying would it have -- could
17 it -- or would it have made a difference? Probably
18 there's reasonable chance that it would have. There's a
19 reasonable probability that it would have because the
20 evidence goes directly to the foundations and the elements
21 of self-defense.

22 THE COURT: Well, let me ask you this: Why didn't
23 Judge Culbertson give the charge? Did he -- just he
24 didn't like Mr. Axelrod's version because I think Mr.
25 Bryant, the prosecutor said, I don't really care if you

1 give it. Just don't give the one he gave. Use the one in
2 Judge Anderson's book.

3 MR. SHAFFER: Your Honor, I --

4 THE COURT: That's what -- that's what the exchange
5 was, as I recall.

6 MR. SHAFFER: I think that they -- they objected to
7 it. To be honest with you, I have no idea why he didn't
8 charge it. You know, Mr. Axlerod during the last hearing
9 said it was basically the charge that was given straight
10 from State v. Green.

11 State v. Green, obviously, was a valid charge. It
12 just wasn't prejudicial to the client. So I mean, I think
13 that, you know, it doesn't really matter essentially why.

14 THE COURT: Well, I'm just curious.

15 MR. SHAFFER: Your Honor --

16 THE COURT: She argued that she didn't think it was
17 error not to give the charge. She didn't really say why,
18 but she said she didn't think it was -- the judge was
19 correct in not giving the charge. I'm asking why didn't
20 he give it?

21 MR. SHAFFER: Well, Your Honor, I think he erred. I
22 mean, obviously, that's my position, but I -- I really
23 think he just -- you know, it's one of those charges that
24 I would imagine -- and you would know this better than I
25 would probably doesn't come up all that often, you know.

1 At least I haven't seen it in my practice during --
2 doing appeals and things like that. I haven't seen people
3 raise that charge very often -- or raise that issue very
4 often.

5 So quite frankly, I'm not sure if he just, you know,
6 essentially made a mistake, Your Honor.

7 THE COURT: And it is his number 19. It's on page
8 537 where they start talking about it. That's on the
9 transcript, 551 of the appendix.

10 Okay. Judger Verdin's charge book, not Judge
11 Anderson's. He said -- so Mr. Bryan said, "If you don't
12 have another charge, Ervin's has the charge on page 28. I
13 would ask that we use those."

14 Mr. Axlerod said, "It's the same charge. I have
15 State v. Green. It's the same charge. I have the
16 complete charge, and I would like to give them to the
17 jury."

18 Then Judge Culbertson said, "Okay. I have reviewed
19 it. I think the charges I've got adequately cover
20 everything. I'm going to deny your motion." They were
21 marked as Court's Exhibits.

22 It really didn't say why. I'm not -- in the context
23 of this hearing, it's not necessary. I was just curious
24 why he did it.

25 MR. SHAFFER: Your Honor, actually, I think if he is

1 saying my -- my charges adequately cover everything, I
2 think that he is actually making a determination that
3 that, you know, would factually be incorporated into his
4 charge which, obviously, was not. I think that the record
5 speaks for itself on that point, Your Honor.

6 THE COURT: Okay.

7 MR. SHAFFER: Thank you.

8 THE COURT: All right. Anything else?

9 MS. KINARD: Briefly, Your Honor.

10 THE COURT: Ms. Kinard?

11 MS. KINARD: My apologies, briefly. To step back to
12 the beginning of Mr. Shaffer's argument there, we
13 essentially stipulated to deficiency when we come to the
14 two prongs of Strickland. Now, we're looking, I believe,
15 strictly at prejudice.

16 THE COURT: Right.

17 MS. KINARD: And --

18 THE COURT: Well, no. You all stipulated that the...

19 MS. KINARD: That the error was preserved.

20 THE COURT: Error was preserved. Are you stipulating
21 that it was in -- did appellate counsel's performance fall
22 below accepted professional -- professional norms in not
23 arguing?

24 MS. KINARD: Please let me rephrase. No, we cannot
25 stipulate to deficiency per se. We can stipulate for

1 purposes of argument and innuendo that we can argue just
2 the prejudice prong in determining.

3 THE COURT: All right. Okay.

4 MS. KINARD: To the basic points in the term, there
5 is physical and testimonial evidence of guilt of voluntary
6 manslaughter, and the State maintains that good character
7 is not a relative -- or excuse me, relevant consideration
8 in a self-defense case.

9 Mr. Axlerod even testified at the PCR hearing that he
10 thought this was an imperfect self-defense case because it
11 might have started as self-defense but then it had
12 transformed into a killing in the heat of passion.

13 THE COURT: Okay.

14 MS. KINARD: And then lastly you said that I haven't
15 quite described how it can be harmless error to not
16 provide a requested jury charge, and that is covered some
17 in the Lee Grigg case. It all goes back to prejudice.

18 The State maintains that because good character was
19 not presented, Mr. Pantovich was not prejudiced; that
20 regardless of the charges that were given, the jury still
21 had a reasonable probability of finding him guilty of
22 voluntary manslaughter.

23 THE COURT: Well, you said that the defendant did not
24 present evidence of good character in the trial? Is that
25 what you said?

1 MS. KINARD: Oh no, sir. If I said that, I misspoke.
2 I meant that the jury charge was not given regarding good
3 character. Regardless -- even -- excuse me, whether that
4 had been given or not, the jury was still probable in
5 finding it -- I apologize.

6 THE COURT: Okay.

7 MS. KINARD: The jury still had a high probability of
8 finding the defendant guilty of voluntary manslaughter.
9 All of the elements were met. The self-defense charge was
10 incomplete and good character does not weigh into those
11 elements in any substantive way that could have changed
12 the prejudice determination.

13 THE COURT: Okay. Mr. Shaffer, your client
14 understands -- as I'm sure I have covered at the other
15 hearing -- that if he prevails, he will be facing the
16 charges of murder again?

17 MR. SHAFFER: Your Honor, I think he will be
18 acquitted of murder, and I think that raises --

19 THE COURT: That's right. That's right because he
20 was going to plea. What was he sentenced to?

21 MR. SHAFFER: Eighteen, Your Honor.

22 THE COURT: He understands he could be facing, at the
23 least -- if your argument is correct on the murder, that
24 he could be facing a lot more than 18?

25 MR. SHAFFER: Your Honor, yes. And what I explained

1 to him because this actually came up at the last
2 hearing -- actually, not the last hearing. One of the
3 previous times that it got called before that it wasn't
4 Mr. Thomas, but a representative of the State essentially
5 told me hey, well, you know, we're going to trial tax him
6 if he wins on this PCR issue, you know. And I think it
7 was an offhand comment. I didn't think it was
8 intentional.

9 THE COURT: Trial tax him how?

10 MR. SHAFFER: Well, I think the comment was -- the
11 comment actually was, Your Honor -- was, "Yeah, if you
12 think a trial tax is bad, you should see a PCR tax." I
13 think it was an offhand comment. I didn't think it was
14 intentional, but it did make me raise the issue with my
15 client.

16 THE COURT: You're talking about as far as sentencing
17 is concerned?

18 MR. SHAFFER: Yes, Your Honor, because essentially --

19 THE COURT: The prosecutor doesn't have anything to
20 do with sentencing.

21 MR. SHAFFER: And I understand, Your Honor.
22 Essentially, what I advised him -- and I'll tell the
23 Court, is that -- I can't recall the case, the US Supreme
24 Court case I cited to. I can't recall the name of it, but
25 I told him essentially if the Court was going to sentence

1 you over the 18 years, it would have to make specific
2 findings of fact as to why it would justify a sentence
3 where a previous state did not. They can't do it just
4 because of the fact that you had filed -- you had
5 exercised your rights to file a PCR.

6 THE COURT: Oh, certainly not.

7 MR. SHAFFER: I mean...

8 THE COURT: Certainly not, but I don't think there's
9 any case law that supports the proposition that he could
10 never receive a sentence of more than 18 years.

11 MR. SHAFFER: Oh, of course, Your Honor. I
12 understand that.

13 THE COURT: Okay. And I'm not --

14 MR. SHAFFER: Yeah.

15 THE COURT: I would certainly not ever be likely to
16 be the trial judge. It would be simply if I happened to
17 be assigned to Georgetown for that particular week which
18 is remarkably unlikely.

19 MR. SHAFFER: Yes, sir.

20 THE COURT: So I don't know what any other judge
21 would do.

22 Okay. Since it's your proceeding, Mr. Shaffer, do
23 you have any other comments or arguments you'd like to
24 make?

25 MR. SHAFFER: No, Your Honor. I would like to -- if

1 you would give me just one moment, I'm going to talk to my
2 client --

3 THE COURT: Sure.

4 MR. SHAFFER: -- about what you just brought up
5 again.

6 THE COURT: All right.

7 (Pause.)

8 MR. SHAFFER: Your Honor.

9 THE COURT: Yes, sir.

10 MR. SHAFFER: I have an unusual request.

11 THE COURT: Yes, sir.

12 MR. SHAFFER: Could we hold this open for about say
13 15 days, Your Honor, for him to submit an affidavit just
14 to make sure because, you know, we're -- we're three years
15 down the road from where we were.

16 THE COURT: Well, this was two years ago we had this
17 hearing.

18 MR. SHAFFER: Oh, yes, Your Honor. Then we're two
19 years down the road and -- just so he can submit an
20 affidavit, and he is not on the spot right this second
21 to --

22 THE COURT: Yes.

23 MR. SHAFFER: -- make a determination.

24 THE COURT: About whether he wants to go forward?

25 MR. SHAFFER: That's correct.

1 THE COURT: I understand. I don't want to get
2 involved in making any recommendations, but it's
3 typically -- well, not typically. It's always the
4 question that I ask. I would assume that I asked it at
5 the last PCR hearing, but in any event, I'll certainly
6 give you 15 days. I'm going to -- I'm going to still work
7 on it, but I won't rule --

8 MR. SHAFFER: Thank you, Your Honor.

9 THE COURT: -- before 15 days.

10 Any objection to that from the State?

11 MS. KINARD: None, Your Honor.

12 THE COURT: Okay. Anything else, Mr. Shaffer?

13 MR. SHAFFER: Nothing, Your Honor.

14 THE COURT: All right. Thank you very much.

15 MS. KINARD: Thank you, Your Honor.

16 (Whereupon, the proceedings were concluded.)

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1 CERTIFICATE OF REPORTER:

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF GEORGETOWN)

5

6

7 I, Karen Ambroziak, Official Court Reporter for the
8 5th Judicial Circuit of the State of South Carolina, do
9 hereby certify that the foregoing is a true, accurate and
10 complete Transcript of Record of the proceedings had and
11 evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Georgetown County, South Carolina, on the 4th day of May,
14 2016.

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17 April 4, 2017

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Karen Ambroziak

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Karen Ambroziak, RPR
Circuit Court Reporter

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23

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STATE OF SOUTH CAROLINA)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Vladimir W. Pantovich, #326633,)

Case No. 2012-CP-22-635

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**ORDER GRANTING
 POST-CONVICTION RELIEF**

FILED
 2017 JAN 11 PM 1:28
 ALMA WHITE
 CLERK
 COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 22, 2012. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. In April 2006, the Georgetown County Grand Jury indicted Applicant for murder (2006-GS-22-126). Stuart M. Axelrod, Esquire ("trial counsel"), represented Applicant. On February 4, 2008, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. On February 8, 2008, the jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Culbertson sentenced Applicant to fourteen (14) years imprisonment.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire ("appellate counsel"), of the Office of Appellate Defense, filed an Anders¹ brief. 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). The direct appeal remittitur was returned to the circuit court on June 28, 2011.

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

On June 22, 2012, Applicant filed the PCR application that gave rise to this action. Respondent made a timely Return on or about September 25, 2012. The Court convened an evidentiary hearing into the matter on March 21, 2014, at the Georgetown County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Although other issues were raised in the PCR application at the PCR hearing, Applicant amended his PCR Application and proceeded on only an allegation of ineffective assistance of appellate counsel for failure to file a merits brief challenging the trial judge's refusal to issue certain jury charges. One of those jury charges was a good character charge based on State v. Green, 278 SC 239, 240, 294 SE2d 335, 335 (1982).

Applicant's trial counsel, Stuart M. Axelrod, Esquire, testified at the first PCR hearing. The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and exhibits introduced at the hearing. Counsel for Applicant and Respondent also submitted memoranda in support of their respective positions.

On June 16, 2014, the Court dismissed Applicant's PCR finding that Applicant failed to overcome the presumption of regularity attached to the Court of Appeal's review of the appellate Counsel's Anders brief. Applicant appealed this order.

On August 19, 2015, the Supreme Court reversed and remanded Applicant's case. Pantovich v. State, 2015-MO-052 (filed August 19, 2015). The Supreme Court found there was not a "rebuttable presumption that the Court of Appeals reviewed every potential appellate issue and determined them to be without merit when conducting an Anders review" on Applicant's case. See id. The Supreme Court remanded the case for a determination based on Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Remittitur was sent on September 14, 2015.

At the request of Applicant and the consent of Respondent and the Honorable William Seals acting as chief administrative judge for the Fifteenth Judicial Circuit, this Court agreed to hear this matter on remand.

On May 2, 2016, the Court convened a hearing on this matter at the Richland County Courthouse.² The Court had before it a copy of the trial transcript, the records of the Georgetown County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. In addition, the first PCR hearing transcript was made part of the record.

For the May 2, 2016 hearing, the State was represented by Jessica E. Kinard, Esquire who argued that Appellate Counsel did not have a duty to raise every possible issue on appeal. In a case such as this where, the State alleged, there was overwhelming evidence of guilt, it argued that Petitioner cannot show that the error was harmful or prejudicial. The State also argued that a good character instruction has no relevance to the analysis of self-defense.

Petitioner argued that Appellate Counsel was ineffective because there was no strategic reason not brief the good character jury charge issue and that, had Appellate Counsel raised this issue, the conviction would likely have been reversed by the Court of Appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code § 17-27-80, the Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court makes the following findings:

² For ease of scheduling, all parties consented to a change of venue for this hearing.

The Test for Determining Ineffective Assistance of Appellate Counsel

In determining if Appellate Counsel was ineffective for failing to raise the good character charge in a merits brief, this Court must apply the Strickland test. Pantovich v. State, 2015-MO-052 (August 19, 2015). "For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance." Bennett v. State, 383 S.C. 303, 307-08, 680 S.E.2d 273, 275 (2009) (citing Strickland). An allegation of ineffective assistance of appellate counsel requires an applicant show appellate counsel failed to raise a viable issue on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990)). The applicant must also prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (other citations omitted).

Application of Strickland to the Present Case

Trial counsel requested a good character charge, but the trial judge denied the request, stating that he thought the charge given covered everything. (Tr. 536, l. 25 – 538 l. 6). Appellate Counsel did not brief the good character charge issue and instead submitted an Anders brief. The issue in this case is whether Appellate Counsel's failure to raise and argue the issue was deficient and, if it was deficient, whether there is a reasonable probability that but for this error, the Applicant's conviction would have been reversed and the matter remanded for a new trial.

For the reasons argued by the Applicant, a good character charge should have been given. It is well-settled that a criminal defendant may introduce evidence of his good character. Applicant's trial counsel did so through multiple witnesses. (Tr. 481, ll. 21-25; 483, ll. 17-23; 494, l. 23 – 496, l. 5; 498, ll. 9-11; 500, l. 14 – 502, l. 2; 507, l. 16 – 508, l. 1; 511, ll. 4-7).

When requested and when there is evidence of good character, a defendant 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. See, e.g., State v. Green, 278 SC 239, 240, 294 S.E.2d 335, 335 (1982); State v. Lee-Grigg, 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007) (reversing the trial court for failure to give a good character evidence charge); State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000) (cert. denied) (reversing drug conviction after the trial court's refusal to charge good character evidence despite the defendant's admission that he attempted to purchase cocaine.); State v. Lyles, 210 S.C. 87, 92, 41 S.E.2d 625, 627 (1947) (finding that the trial court erred in not giving a good character evidence charge but finding that the issue was not preserved).

The State argues that since this was a case of "imperfect self-defense," a good character charge was not warranted. Our Supreme Court has addressed the doctrine of imperfect self-defense in two recent cases, State v. Sams, 410 SC 303, 764 S.E.2d 511 (2014) and State v. Scott, 414 SC 482, 779 S.E.2d 529 (2015). As noted in Sams, "[u]nder the 'imperfect self-defense' doctrine, the crime is reduced from murder to voluntary manslaughter where a defendant had a genuine but unreasonable fear of imminent peril ... and ... although acting in self-defense, was not himself or herself free from blame, as where he or she was the aggressor or used excessive force, although without murderous intent." 40 C.J.S. Homicide §110 (2006), quoted in Sams, 410 SC at 315. However, the Sams Court and the Scott Court observed that the doctrine of imperfect self-defense has not been adopted in South Carolina. Since the doctrine is not recognized in South Carolina, this court respectfully rejects any argument that the instant case was a case of imperfect self-defense; since the doctrine is not recognized, the court must

also reject the State's argument that the Applicant's good character was therefore not relevant to the jury's consideration of self-defense.

The defense presented by the Applicant was that he acted in self-defense. The Court first notes that self-defense can be a defense to voluntary manslaughter, according to our Supreme Court. See State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993). In Hill, the defendant was charged with murder. The murder charge and the lesser offense of voluntary manslaughter were submitted to the jury. The trial judge refused the defendant's request to charge self-defense. The defendant was acquitted of murder but convicted of voluntary manslaughter. The defendant appealed the denial of the self-defense charge and the Supreme Court reversed and remanded for a new trial, holding self-defense should have been charged.

In the instant case, evidence of the Applicant's character and reputation for peacefulness and non-violence was admitted into evidence. Absent a jury instruction on good character, it is reasonable to conclude that the jury was not aware that it could consider the Applicant's good character in determining whether the State had disproven that the Applicant acted in self-defense. The trial transcript clearly reflects that the jury was debating the issue of self-defense when it asked the trial judge during deliberations whether there was "any duty to leave the premises if the residence is both the residence of the victim and the defendant." (Tr. 587, l. 20). Of course, this narrow question from the jury does not mean that the jury was not also reviewing the other factors of self-defense, such as whether Applicant was without fault in bringing on the difficulty. There is a reasonable probability that Applicant would have prevailed on appeal if the good character charge issue had been raised by appellate counsel, as there is ample room for an appellate court to have concluded that a good character charge would have had an impact upon the jury's consideration of the elements of self-defense. In this case for example, there is a



reasonable probability that a good character charge would have impacted the jury's consideration of whether the defendant was without fault in bringing on the difficulty between him and the victim. See discussion in State v. Lee-Grigg, *supra*, 374 S.C. at 417-418.

The State contends that "good character" cannot factor into a self-defense analysis, as evidence of good character cannot rehabilitate a defendant's conduct when there is no question that the defendant killed the victim. For this proposition, the State cites State v. Starnes, 388 S.C. 590, 698 S.E. 2d 604 (2010). In that case, the Supreme Court affirmed the defendant's capital murder conviction, rejecting the defendant's argument that the trial court erred in refusing to charge the jury on voluntary manslaughter. In its discussion on the interplay between self-defense and voluntary manslaughter when the primary charge is murder, the Court reaffirmed that evidence that a defendant killed a victim in the heat of passion—even heat of passion arising from fear—mitigates murder to voluntary manslaughter but does not justify it. The State maintains that under the facts of the instant case, even if a good character charge had been given, there is a high probability that the jury would still have found Applicant guilty of voluntary manslaughter, and that, therefore, there is not a reasonable probability that Applicant would have prevailed on appeal. For the reasons stated above, I respectfully disagree.

CONCLUSION

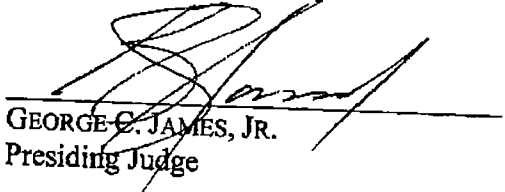
This court concludes that the Applicant has met his burden of proving (1) that appellate counsel's failure to brief the good character charge issue constituted deficient performance and (2) that, but for this deficient performance, the result of the appeal would have been different, as there is a reasonable probability that the Court of Appeals or Supreme Court would have reversed the conviction and remanded for a new trial, because a good character charge may have caused the jury to conclude the State had not disproven self-defense beyond a reasonable doubt.



IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is granted; and
2. The case is remanded to the Georgetown County Court of General Sessions for a new trial.

AND IT IS SO ORDERED this 8 day of January, 2017.



GEORGE C. JAMES, JR.
Presiding Judge

