STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Georgetown County

Honorable George C. James, Circuit Court Judge

RECEIVED

DEC 17 2018

S.C. SUPREME COURT

VLADIMIR W. PANTOVICH,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2017-000280

BRIEF OF RESPONDENT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 3

ARGUMENT

Where the State conceded during the PCR hearing that appellate counsel, who filed an Anders brief, failed to raise a preserved issue on appeal, ample evidence supports the PCR judge's findings that respondent had a reasonable probability of success of having his case reversed because the trial judge's failure to give a charge on good character left the jury without any framework on how to consider the character evidence presented during the trial 4

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 5

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) 6

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) 3

Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) 4

Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) 4, 6

Pantovich v. State, Op. No. 2015-MO-052 (Aug. 26, 2015) 5

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 3, 7

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 3, 15, 16

Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) 15

State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982) 14

State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000) 15

State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924). 16

State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010) 6, 15, 16

State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001) 6

Strickland v. Washington, 466 U.S. 668 (1984) 5, 15

Rules

Rule 59(e), SCRCP 2, 4, 6

Rule 405, SCRE 12

STATE'S QUESTION PRESENTED

Did the PCR court err as a matter of law by finding appellate counsel was ineffective for failing to raise and argue the trial court's failure to issue a jury instruction on good character during the trial of Respondent, who readily admitted to killing the victim and was arrested while transporting the victim's badly-beaten and unrecognizable body in the trunk of his car to an out-of-state location for disposal before it could be found by authorities?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Where the State conceded during the PCR hearing that appellate counsel, who filed an Anders brief, failed to raise a preserved issue on appeal, does any evidence support the PCR judge's findings that respondent had a reasonable probability of success of having his case reversed because the trial judge's failure to give a charge on good character left the jury without any framework on how to consider the character evidence presented during the trial?

STATEMENT

Respondent agrees with petitioner's statement of the case, but would add that after then-Judge James entered his written Order granting post-conviction relief, the State declined to file a motion pursuant to Rule 59(e), SCRCP prior, to instituting the current appeal.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Where the State conceded during the PCR hearing that appellate counsel, who filed an Anders brief, failed to raise a preserved issue on appeal, ample evidence supports the PCR judge's findings that respondent had a reasonable probability of success of having his case reversed because the trial judge's failure to give a charge on good character left the jury without any framework on how to consider the character evidence presented during the trial.

Introduction

After multiple rounds of briefing, the State cannot point to any place in the record where its argument on appeal that the good character charge is unconstitutional is even arguably preserved. Br. Pet. at 23-24. The State claims that the issue on appeal is the "fundamental validity" of the good character charge, but nowhere in then-Judge James' PCR Order is the State's new argument on appeal that a good character charge is an unconstitutional charge on the facts addressed. In order to reach the State's new argument, this Court would have to overrule Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007), because the State declined to file a Rule 59(e), motion. The Court would then have to overrule the recently decided Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017), which reaffirmed Marlar. Both of these cases were decided by this Court at the urging of the State, but here, the State asks this Court to cast aside the same rules it urged were so important for PCR applicants. Addressing the only issue that was before the PCR court, the standard of review controls and the PCR judge correctly recognized that the evidence presented a jury question and had the error been raised on appeal, would have required reversal.

The Issue Before the PCR Court

This Court remanded the case to the PCR judge after he originally held that a PCR applicant cannot prevail on an ineffective assistance of appellate counsel claim unless he can show an irregularity in the Court of Appeals' Anders v. California, 386 U.S. 738 (1967), procedure. Pantovich v. State, Op. No. 2015-MO-052 (Aug. 26, 2015). App. 771. At the subsequent PCR hearing, no dispute existed between the parties as to the issue before the court. App. 778, l. 13 – 779, l. 10. PCR counsel said the only issue was ineffective assistance of appellate counsel and that the State stipulated the issue was preserved at trial. App. 778, l. 17 – 779, l. 10. The PCR judge asked the Attorney General if she agreed that was the issue and she replied, "Yes, Your Honor. We would agree." App. 779, ll. 8 – 10.

The PCR court then heard extensive argument from both parties regarding the failure to raise the issue of a good character charge on appeal. App. 780, l. 6 – 814, l. 15. The thrust of the argument and the PCR judge's questions revolved around the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). App. 780, l. 6 – 814, l. 15. The PCR judge asked how the good character charge affected the jury's analysis of self-defense. App. 787, l. 8 – 789, l. 8.

The State argued the facts of the case meant that respondent could not prevail, despite the failure to raise the concededly preserved issue. App. 789, l. 12 – 797, l. 25. The State argued respondent's statements and the autopsy evidence showed meant that the chances to create reasonable doubt on self-defense "cannot be rehabilitated by a good character charge, especially when considering the other elements of self-defense. App. 796, ll. 19 – 25. The State also floated the idea that perhaps appellate counsel had a strategic reason for filing a no-merits Anders brief, a theory that was quickly shot down by the PCR judge. App. 798, l. 18 – 800, l. 15.

The theory that was not offered at the PCR hearing is the one it raises for the first time in its petition for certiorari—that the longstanding good character charge approved by this Court as recently as 2010 is unconstitutional.[1] App. 776 – 814, l. 15. State's Pet. Cert. at 10-16. State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). "[A] party may not argue one ground at trial and an alternate ground on appeal." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 215 (2001). At no point during the PCR hearing did the State argue the charge was unconstitutional. App. 776 – 814, l. 15. "Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). The PCR court did not address the State's novel theory in its Order. App. 816-23. The State did not file a Rule 59(e) motion, and its failure to do so waives its ability to argue its constitutional issue on appeal. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007). Simply stated, the State's opportunity to raise its constitutional argument was waived and this Court should not address it.

The PCR Court's Order

The issue that is preserved is whether the PCR court correctly found that appellate counsel's failure to raise the good character charge on appeal constituted prejudicial ineffective assistance. App. 816-23. The PCR judge correctly realized that the evidence below presented a jury issue on self-defense. App. 816-23. The court found that evidence regarding respondent's character was introduced during the trial and, had they been properly charged, the jury would have considered this evidence along with the evidence of self-defense. App. 816-23. These

[1] Important to this Court's retrospective analysis is the fact the good character charge was requested by trial counsel in 2008, **two years before** this Court again approved the charge in Lee-Grigg.

findings by the PCR court are entitled to great deference and there is ample evidence to support them. See Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

The Evidence at Trial

The State knew from the beginning that it would be trying a self-defense case. App. 168, l. 21 – 169, l. 6. The State told the jury in its opening statement they would hear from respondent's son and respondent told him that he had been attacked by his girlfriend, Sheila McPherson ("McPherson"). App. 168, l. 21 – 169, l. 6. Respondent also told the jury about his self-defense case in his opening statement. App. 173, l. 11 – 174, l. 12. Respondent told the jury they would hear about the illegal drugs in McPherson's system. App. 173, ll. 10 – 174, l. 12. Respondent also set up the argument that he could defend himself from McPherson "until she could not attack him anymore" to counter the State's excessive force argument. App. 174, ll. 5 – 12. Defense counsel told the jury they would hear that specific self-defense charge from the trial judge and the court gave the charge at the conclusion of the case. App. 174, ll. 5 – 12. App. 597, ll. 15 – 19.

The State called respondent's son, Marco Pantovich ("Marco"), as its first witness. App. 176, ll. 22 – 23. Marco got a call from respondent at 10:10 PM. App. 178, ll. 2 – 4. Respondent told his son he killed McPherson. App. 178, ll. 2 – 4. McPherson was on pills and drinking. App. 189, ll. 18 – 20. Respondent said he got into an argument with McPherson and when he tried to call the police, "she yanked the phone cord out, and she grabbed a fire poker and started swinging and the next thing you know he got the bat and struck her with it." App. 178, l. 18 – 179, l. 2. Respondent told his son he did not know whether he should call the police and turn himself in or kill himself. App. 190, ll. 17 – 25. Marco testified that knowing his dad, these events surprised him. App. 191, ll. 17 – 19.

Marco, a volunteer firefighter, called the police. App. 183, l. 3 – 21. App. 176, ll. 9 – 13. He gave the police a description of respondent's car and his phone number. App. 183, ll. 3 – 21. App. 183, l. 22 – 172, l. 1. Marco told the officers that McPherson's body was in the trunk of respondent's car. App. 209, l. 22 – 210, l. 5.

Police in North Carolina set up surveillance near Marco's house. App. 211, ll. 6 – 15. At approximately 6:00 AM, the police spotted respondent's car and stopped it. App. 212, ll. 10 – 15. App. 220, ll. 19 – 23. The police took respondent out of the car at gunpoint. App. 214, l. 3 – 215, l. 3. They handcuffed him while he was on the ground. App. 214, l. 21 – 215, l. 10. Respondent complied with their commands. App. 215, ll. 7 – 10. They arrested him and put him in the back of the patrol car. App. 215, ll. 14 – 22. Respondent told the police, "Tell my son he did the right thing." App. 220, l. 24 – 221, l. 19. He then stated, "I just lost it, man." App. 221, ll. 24 – 25. The police opened the trunk of respondent's car and found McPherson's body wrapped in a blanket and a baseball bat. App. 223, ll. 10 – 19.

When respondent was booked a few hours later, a news crew asked him questions. App. 225, l. 2 – 226, l. 13. Respondent told the reporters, "I can't take it no more," and that McPherson was on drugs including morphine. App. 226, l. 23 – 227, l. 6. He said he loved her. App. 227, ll. 15 – 16. Respondent expressed remorse and when a reporter asked him if McPherson ever had him "locked up," respondent replied, "many times." App. 227, ll. 2 – 6. Respondent had scratches on his arms and hands when he was arrested. App. 260, l. 20 – 263, l. 19.

The police got a warrant and searched respondent's house. App. 277, l. 22 – 278, l. 2. A rug had a large bloodstain. App. 277, ll. 9 – 20. App. 278, ll. 10 – 15. The jury found other bloodstains throughout the house. App. 279, l. 18 – 280, l. 1. They collected the fire poker.

App. 282, ll. 6 – 16. It was broken and in two pieces, but was not broken in the attack. App. 456, ll. 1 – 4. App. 283, ll. 21 – 23. App. 284, ll. 11 – 13. The police did not find any blood on the fire poker. App. 329, ll. 6 – 9. SLED found only enough DNA on the fire poker to exclude McPherson and respondent as contributors. App. 330, ll. 6 – 13.

The State's case relied primarily on the autopsy and the pathologist's testimony regarding the number of blows to McPherson's body. App. 339, l. 8 – 349, l. 15. The pathologist testified about the injuries caused by blunt force trauma received by McPherson. App. 339, l. 8 – 349, l. 15. She received blows to her head, back, side, and arms. App. 339, l. 8 – 349, l. 15.

The pathologist also testified about the drugs in McPherson's system. App. 376, l. 15 – 389, l. 6. McPherson had alcohol in her system. App. 388, ll. 7 – 389, l. 14. She had cocaine and its byproduct in her system. App. 384, l. 8 – 385, l. 24. She had marijuana in her system. App. 386, l. 23 – 387, l. 24. McPherson had methadone, used to treat recovering heroin addicts, in her system. App. 377, ll. 16 – 19. She had cough syrup and ephedrine/pseudoephedrine in her system. App. 377, ll. 22 – 25. App. 365, ll. 4 – 16. She had medications used for treatment of depression and schizophrenia in her system. App. 377, ll. 4 – 15. Defense counsel rightly called McPherson "a walking drug cocktail" in closing argument. App. 560, ll. 22 – 23.

<u>*Respondent Testified he Acted in Self-Defense*</u>

Respondent emigrated from Yugoslavia and became an American citizen. App. 416, ll. 1 – 15. He worked construction and owned his own businesses in Virginia and then in South Carolina. App. 416, ll. 6 – 18. He first met McPherson in Myrtle Beach in 2001. App. 417, ll. 21 – 25. In 2001, they only dated for three months. App. 418, ll. 5 – 11.

In 2004, respondent and McPherson began dating again and he moved in with her. App. 418, l. 18 – 419, l. 6. McPherson's attitude changed. App. 419, ll. 14 – 22. McPherson began

using drugs and men half her age began "calling all different hours" and getting pills from her. App. 406, ll. 1 – 15. App. 423, ll. 5 – 19. During this period they lived together, she would verbally abuse respondent and throw things at him. App. 420, l. 16 – 421, l. 14. She slapped him in the face and broke his glasses. App. 422, ll. 1 – 4. She repeatedly spit in respondent's face. App. 421, ll. 15 – 25. Despite the physical abuse, respondent did not retaliate. App. 424, ll. 5 – 7. He moved into his own place after living with her for approximately a year. App. 424, ll. 8 – 21.

A few months after this break-up, they again began seeing each other casually. App. 425, ll. 5 – 19. McPherson told respondent things would be different if she moved in with him because they would no longer be living in her trailer park. App. 425, l. 20 – 426, l. 2. After a month and a half, McPherson again started abusing pills. App. 426, ll. 15 – 20. Respondent described McPherson: "She had pill for everything, pill for up, pill for down, pill for sleep, pill for everything." App. 426, ll. 15 – 20. The pills turned her into "something evil." App. 426, ll. 21 – 25. Respondent also believed she was abusing crack cocaine, a belief that was confirmed by the toxicology report. App. 427, ll. 9 – 12. App. 384, l. 8 – 385, l. 24.

The physical abuse by McPherson resumed and she slapped him and spit in his face according to her mood. App. 427, ll. 15 – 25. Appellant never retaliated physically. App. 428, ll. 6 – 14.

Several days before her death, McPherson and respondent got into an argument at a construction job site. App. 428, l. 15 – 430, l. 12. Respondent corrected a mistake she made and McPherson shot him the bird then drove off in her van. App. 429, l. 17 – 430, l. 12. Respondent did not see McPherson for several days. App. 430, ll. 13 – 20. McPherson eventually called and asked if she could return home, but respondent told McPherson he was ending their relationship.

App. 430, l. 19 – 431, l. 20. McPherson was intoxicated during the call. App. 431, ll. 4 – 20. She drove to his house, parked by his garage, and slept in her van. App. 431, ll. 21 – 25.

The next day, when respondent came home from work, McPherson "was just laying on the couch like nothing happened." App. 432, l. 19 – 434, l. 2. Respondent told her to leave and McPherson responded that she would move out soon. App. 434, ll. 3 – 10. McPherson then took out some marijuana and respondent told her not the smoke in his house and to leave. App. 420, ll. 11 – 21. He tried to call the police, but she unplugged the phone. App. 434, ll. 22 – 25. McPherson picked up a fireplace poker and poked a hole in the tray respondent was using to eat his dinner. App. 435, ll. 3 – 11.

They began to argue and McPherson "was really red in the face" and her voice was strangely deep. App. 436, ll. 5 – 10. McPherson attacked respondent several times with the poker until she had him backed into a corner. App. 436, l. 15 – 437, l. 17. She swung the poker at respondent and he was afraid for his life. App. 437, l. 20 – 438, l. 10. While trying to protect himself, respondent grabbed a baseball bat and hit McPherson. App. 438, ll. 1 – 10. Respondent remembered hitting McPherson while she was laying on the ground. App. 438, ll. 5 – 10.

Respondent's Character Witnesses, the State's Attempts to Prevent their Testimony, and the State Calls a Character Witness in Reply

Contradicting the State's argument in its petition, the solicitor obviously believed respondent's character witnesses were prejudicial to his case because he tried to prevent their testimony. App. 490, l. 2 – 492, l. 21. Before respondent's character witnesses took the stand, the State made a motion in limine to exclude their testimony. App. 490, l. 2 – 492, l. 18. He said his investigator had spoken "to five people on the witness list and I think they got about maybe two sentences of admissible testimony between all five witnesses." App. 488, l. 21 – 49, l. 4.

During his initial argument on his motion in limine, he first characterized respondent's witnesses as attacking McPherson's character. App. 490, l. 2 – 492, l. 18. He ultimately asked "that the defense counsel instruct their witnesses not to testify to inadmissible and character evidence that is not an issue in this case." App. 491, l. 17 – 492, l. 1. The trial judge told the solicitor he would need to make contemporaneous objections. App. 492, ll. 19 – 20.

Andy Seifert was respondent's first character witness and she had known him for thirteen years. App. 495, ll. 9 – 16. The "stay-at-home mom" described respondent as "very nice, very respectable, hard-working, great with kids, my kids loved him, that's pretty much it." App. 495, ll. 1 – 22. Even though she had seen McPherson scream expletives and throw things at respondent, she had never seen respondent act violently towards McPherson. App. 483, ll. 6 – 21. She never saw respondent act violently towards anyone. App. 497, ll. 22 – 23.

After Siefert left the stand, the solicitor again tried to limit respondent's presentation of his character witnesses. App. 500, l. 16 – 504, l. 23. He asked the trial judge to prevent respondent from asking his witnesses if they had ever seen respondent be violent. App. 500, l. 16 – 501, l. 19. Respondent cited Rule 405, SCRE for the proposition that he could prove character and reputation in the form of opinion testimony. App. 502, ll. 8 – 17. Judge Culbertson pressed the solicitor on the rule and the solicitor withdrew his motion. App. 502, l. 18 – 504, l. 23.

Respondent's next character witness was his bartender and friend of thirteen years, Christine McCune. App. 507, ll. 18 – 25. McCune said respondent was "a wonderful man" and was kind and caring. App. 508, ll. 20 – 24. She saw McPherson verbally abuse respondent, but never saw respondent act violently toward McPherson. App. 509, ll. 5 – 15. App. 509, l. 25 – 510, l. 2. She had never seen respondent lose his temper or become violent with anyone, and this

included ten years' worth of experiences with respondent in Myrtle Beach bars. App. 509, l. 20 – 510, l. 5.

Maureen Moans had known respondent for eight or nine years and called him "the gentle giant." App. 512, ll. 6 – 11. App. 515, ll. 22 – 25. She also lived next door to McPherson in the trailer park. App. 512, ll. 14 – 22. She saw McPherson act violently towards respondent. App. 513, ll. 10 – 12. One occasion, she saw respondent leave their residence with blood on his face from a scratch. App. 514, ll. 6 – 9. She never saw respondent act violently toward McPherson or anyone else. App. 514, ll. 14 – 18.

An ex-girlfriend, Debbie Crisman, testified for respondent. App. 518, ll. 7 – 11. Crisman dated respondent for approximately two years and they remained friends after the relationship ended. App. 518, ll. 7 – 11. She described respondent as kind and caring. App. 518, ll. 12 – 15. Even though she never met McPherson, Crisman received threatening and harassing telephone calls from her. App. 519, l. 17 – 521, l. 15. Respondent was never violent toward Crisman and she was never afraid of him. App. 521, ll. 16 – 23. She never saw him act violently towards anyone. App. 521, l. 24 – 522, l. 1.

Tammy Eschman lived next door to respondent when he lived at McPherson's trailer. App. 524, l. 21 – 525, l. 3. Eschman said respondent had "a heart of gold" and had "never been anything but gentlemanly and nice to me." App. 525, ll. 2 – 7. On one occasion, she saw McPherson hit respondent "up side the head" with a two-by-four, knocking respondent from his chair to the ground. App. 528, l. 8 – 529, l. 2. Even though respondent was angry, he did not threaten and did not touch McPherson. App. 529, ll. 3 – 9. On multiple occasions, she saw McPherson throw "pots, pans, flower pots, anything that wasn't nailed down" at respondent. App. 526, ll. 6 – 18. Eschman never saw respondent throw anything back at McPherson. App.

526, ll. 16 – 20. She saw cuts on respondent's hands and face. App. 527, ll. 3 - 7. The solicitor's objections prevented Eschman from telling the jury what she knew about how respondent sustained these injuries. App. 527, l. 8 – 529, l. 6. She never saw respondent act violently with anyone. App. 529, ll. 15 – 16.

After respondent rested his case, the solicitor saw the need to call his own character witness, the mother of respondent's children, Nanette Ouimette. App. 536, l. 11 – 537, l. 13. The solicitor told the judge that Ouimette "just came down from Connecticut." App. 536, ll. 11 – 16. She testified respondent was not gentle and alleged they had several violent altercations during their relationship. App. 539, l. 9 – 544, l. 6. On cross-examination, she denied that respondent caught her having an affair with respondent's son, Marco. App. 545, ll. 12 – 14. In closing, defense counsel pointed out that the solicitor neglected to call Marco to dispute this point. App. 561, ll. 12 – 18.

The PCR Court Correctly Ruled that Petitioner was Prejudiced by the Failure to Appeal the Good Character Charge

As conceded by the State, the good character charge issue was preserved by trial counsel, but appellate counsel failed to raise it. App. 550, l. 2 – 552, l. 23. App. 779, ll. 8 – 9. The solicitor did not dispute that the good character charge was proper, but asked for a version different than respondent's proffered charge. App. 551, ll. 12 – 21. Respondent argued his charge was correct and cited State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982). App. 552, ll. 1 – 13. The trial judge denied the request to charge and made respondent's requests a court's exhibit to preserve the record. App. 552, ll. 1 – 25.

Appellate counsel filed an Anders brief. App. 688. He raised a hearsay issue about the pathologist's notes and drawings. App. 691. From a trial transcript totaling over six hundred pages, appellate counsel wrote three paragraphs of argument. App. 693.

The State's argument at the PCR hearing notwithstanding, appellate counsel could have no strategic reason for filing an Anders brief. App. 798, l. 18 – 800, l. 15. A strategic reason must be reasonable and valid. Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010). When an appellate lawyer files an Anders brief, he or she tells the Court his client's case is wholly frivolous. Telling the Court the client's case is frivolous obviously is not a valid strategy if the case has a winning issue.

Therefore, as the PCR court recognized, this case hinged on Strickland's prejudice prong. The good character charge requested by respondent is required to be given when a criminal defendant presents evidence of his good character. State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). "A defendant is entitled to a jury instruction regarding evidence of good character and reputation when this type of evidence is presented and the defendant requests the charge." State v. Harrison, 343 S.C. 165, 175, 539 S.E.2d 71, 76 (Ct. App. 2000). As detailed above, respondent presented five character witnesses at his trial. Therefore, he was entitled to the instruction and, had appellate counsel raised the issue, the appellate court would have found error.

The State's argument now is a hybrid of lack of Strickland prejudice, overwhelming evidence of guilt, and harmless error. In a recently issued decision, this Court extensively analyzed Strickland prejudice and overwhelming evidence of guilt. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). This Court clarified that the PCR court "should consider the specific impact counsel's error had on the outcome of the trial." Id. Even where the evidence is

overwhelming, a PCR applicant can still prove prejudice. Id. Where the prejudice flows directly from counsel's error, the overwhelming evidence of guilt must "categorically preclude[] a finding of prejudice." Id.

The PCR court's analysis is in harmony with Smalls. As the PCR court recognized, the prejudice to respondent was on the point most hotly contested at trial—self-defense. Respondent testified he acted in self-defense and received not only a self-defense charge, but a battered spouse charge. App. 595, ll. 12 – 24. All of respondent's five character witnesses testified he was not a violent person and never returned McPherson's violence. The inference the jury could make was that because respondent was not a violent person, his character created reasonable doubt on self-defense, particularly whether he was without fault in bringing on the difficulty. App. 821-22. The prejudice is especially heightened because the State had the burden of **disproving** self-defense beyond a reasonable doubt.

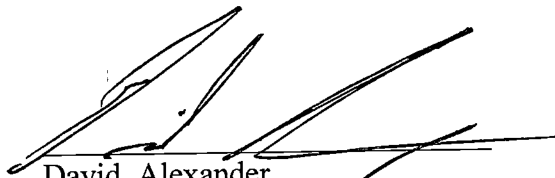
As long ago as 1924, this Court recognized that evidence of good character combined with a proper charge is critically important in self-defense cases. State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924). Hill was a self-defense case. 123 S.E. at 818. This Court approved the trial judge's charge that the jury could take the defendant's good reputation into account in determining whether or not he committed the crime. Id. The Court concluded that evidence of the defendant's good reputation for peace is offered precisely to show the improbability that the defendant "would have committed or did commit the crime charged." Id.

Lee-Grigg demonstrates that failure to give the good character charge continues to be reversible error. Combined with Smalls, the PCR court's conclusion that the failure in this case resulted in specific prejudice to respondent is correct. As shown above, the solicitor made repeated attempts to exclude respondent's character evidence. He believed that respondent's

character evidence was strong enough that he needed to call his own character witness. The solicitor's actions alone demonstrate that respondent's character was crucial to the jury's decision. The PCR court correctly recognized a properly instructed jury needs to decide respondent's case and this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's decision.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Honorable George C. James, Circuit Court Judge

VLADIMIR W. PANTOVICH,

RESPONDENT

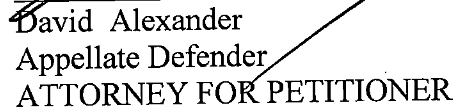
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent have been served on Vladimir W. Pantovich, #326633, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of December, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.