

**ORIGINAL**

STATE OF SOUTH CAROLINA  
In the Supreme Court

CERTIORARI TO GEORGETOWN COUNTY **RECEIVED**  
Court of Common Pleas  
George C. James, Circuit Court Judge

JAN 07 2019

S.C. SUPREME COURT

Appellate Case No. 2017-000280

Vladimir Pantovich,

Respondent,

v.

State of South Carolina,

Petitioner.

**REPLY BRIEF OF PETITIONER**

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## ARGUMENT IN REPLY

### THE COURT WOULD NOT NEED TO OVERRULE ITS RECENT PRECEDENTS REGARDING ISSUE PRESERVATION IN PCR CASES IN ORDER TO REVIEW *DE NOVO* THE CONSTITUTIONALITY OF THE GOOD CHARACTER CHARGE

Although Pantovich correctly notes authorities to provide for the stringent enforcement of issue preservation rules, he goes one step too far in asserting the Court would have to overrule them in order to reach the issue of the “good character” charge’s constitutionality. The ruling of the lower court provides a sufficient platform for meaningful appellate review, and to whatever extent the principles of issue preservation are not satisfied, the Court can take extraordinary action were necessary to avoid a ruling that is fundamentally contrary to the interests of justice, or perhaps even to avoid a ruling that would be so patently absurd as to undermine confidence in the wisdom of our judicial process.

First and foremost, it must be emphasized that the question of issue preservation **only applies to the constitutional question**. The Court can admittedly avoid the constitutional question by recognizing Pantovich had no real good character to offer, and that his character was irrelevant in light of the *savage beating*, such that the presence or absence of the charge was of no import, as argued in the Brief of Petitioner. That argument was the greater focus of concern at the hearing before the PCR court.

As to the constitutional question, as noted by Pantovich, issue preservation rules may apply to post-conviction relief actions just as they do to any other action. Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017) (“In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.”); see also Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Declining to consider issues raised to, but not ruled upon by the PCR court, where no motion was filed pursuant to Rule 59(e), SCRPC). “[C]onstitutional arguments are no exception to the error preservation rule, and if not raised to

the trial court are deemed waived on appeal.” State v. Carlson, 363 S.C. 586, 596, 611 S.E.2d 283, 288 (Ct. App. 2005) (quoting State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 250 (Ct. App. 2000)).

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the Court] with a platform for meaningful appellate review.” Queen’s Grant II Horiz. Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (citing Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004)). “The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.” Id. The rules are intended to help, support, and respect the role of the circuit courts as an authoritative institution, give circuit judges a chance to resolve an issue before it is presented to the appellate courts, promote judicial economy, and engender fairness within the system. See Hon. Jean H. Toal, Robert A. Muckenfuss, Shalin Vafai, Issues Preservation at Trial: Back to the Basics, 10-Apr S.C. Law. 15 (1999).

Here, the PCR court ruled Pantovich would have prevailed on appeal due to State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). That ruling is sufficient to provide this Court “a platform for meaningful appellate review” under a *de novo* standard and find error in the lower court’s ruling. Addressing the issue now presents no unfairness to Pantovich or to the system— as a pure question of law, there is nothing Pantovich could have offered below that he cannot offer now on appeal. The PCR court’s conclusions would have been offered no deference,<sup>1</sup> as

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<sup>1</sup> Pantovich erroneously argues the contrary, insisting the standard of review is controlling, and that “any evidence” exists to support the grant of relief. In determining prejudice in the context of an ineffective assistance of appellate counsel claim after an Anders brief was filed, the PCR court must step into the shoes of the appellate court and render a ruling of law. Smith v. Robbins, 528 U.S. 259, 285 (2000). Thus, the standard of review of the PCR court is *de novo*. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018); see also Lee-Grigg, 374 S.C. at 398,

the only question before the court is one of *law*: whether or not he would have prevailed on appeal. Judicial economy would be best served by not further delaying an answer to a question of immediate import and relevance to every defense attorney and general sessions court in the state, and has not been unduly delayed by the State's unspecific articulation in the lower court. The PCR court had a chance to address Pantovich's likelihood of prevailing, and relied upon Lee-Grigg, as it arguably had to do lest it attempt to overrule the precedents of a higher court. Only this Court can fix this, and fix this it must, notwithstanding the other grounds for reversal raised in the Brief of Petitioner.

Additionally, the Court *has* taken extraordinary action and set aside issue preservation requirements in a PCR where their stringent and technical enforcement "would be fundamentally (contrary to the interests of justice." Simmons v. State, 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016); see also McCullough v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) ("Although the error was not raised to and rule on by the PCR judge, we find it necessary to vacate the order and remand this matter to the circuit court to issue an order addressing its decision to dismiss [the PCR applicant's] second application as successive."). Such extraordinary action must be granted sparingly and be reserved for the rarest of cases. Simmons, 416 S.C. at 593, 788 S.E.2d at 225.

Outside of the issue preservation context, and in particular in the statutory interpretation context, the Courts have preserved the intentions of and public faith in government by avoiding interpretations of law which lead to absurd results. See, e.g. Duke Energy Corp. v. South

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649 S.E.2d at 46 ("In criminal cases, an appellate court sits to review errors of law only"). If anything is entitled to deference, it is the original trial court's conclusion that its prepared charge adequately covered everything. (Appx. 552, ll. 5-13); see Lee-Grigg, 374 S.C. at 398, 649 S.E.2d at 46 ("On appeal, we are limited to determining whether the trial court abused its discretion. The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reverse absent a prejudicial abuse of discretion.").

Carolina Dept. of Rev., 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (“[R]egardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly.”); In re Timothy C.M., 348 S.C. 653, 656, 560 S.E.2d 452, (Ct. App. 2002) (“Our goal in construing statutes is to prevent an interpretation that would lead to a result that is plainly absurd.”).

Where the Court in Simmons granted the extraordinary action of remanding to the PCR court for further proceedings, it did so because “making findings of fact *de novo* would be contrary to this appellate setting.” 416 S.C. at 593, 788 S.E.2d at 225. Here, such a remand would be inappropriate, as the State calls upon the Court to only make a dispositive finding of *law*, such that it may properly make a finding *de novo*. See Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018) (“We review questions of law *de novo*, with no deference to trial courts.”).

Extraordinary action, with a mind to the interests of justice and avoiding an absurd result, would not necessitate overruling Marlar or Mangal, as argued by Pantovich. Notwithstanding the possibility the Court may reverse and the State prevail on another ground, the Court cannot avoid making *some* ruling on the constitutionality of the “good character” charge without reaching the absurd result, as was touched upon in the Brief of Petitioner. (BOP at 23-24). The Court cannot sustain relief without reaching the conclusion that the charge proposed is valid under the law, and it cannot do that without addressing the constitutional argument presented. As set forth in the Brief of Petitioner, no trial court can give the “good character” charge. An attempt to avoid the constitutional question would do little but leave circuit courts in the lurch with an ambiguous holding such that they do not know if they can give the charge or, in the

alternative, an absurd outcome where circuit courts cannot give the charge, but Pantovich gets a new trial anyway because he did not get the charge.<sup>2</sup> Though it is true the State did not utter the word “unconstitutional” below, or that Lee-Grigg and its forebears were fundamentally unsound, the constitutionality of the charge is so pregnant and evident an issue that the Court cannot now grant Pantovich a new trial and look the other way without imposing upon the circuit courts needless frustration and confusion, in not only this but many other cases. Mangal does not demand such an outcome, but rather provides the court the modicum of flexibility necessary to avoid outcomes that do little more than sew confusion and injustice into the justice system.

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<sup>2</sup> Alternately the Court could somehow affirmatively hold the charge is constitutional. The State cannot find a basis for arguing as much. Even Pantovich doesn't bring himself to argue the charge is constitutional, but conspicuously takes the highway bypass around the question, arguing the issue is not preserved and that the Court should just stick with Lee-Grigg.

**CONCLUSION**

For the foregoing reasons, as well as those set forth in the State's "Brief of Petitioner," the Court should reverse the grant of post-conviction relief.

Respectfully submitted,


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, 2019

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Certiorari to Georgetown County  
Court of Common Pleas

The Honorable George C. James, Post-Conviction Relief Judge

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VLADIMIR PANTOVICH,

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**CERTIFICATE OF SERVICE**

---

I, Johnny E. James Jr., certify that I have today serve the Petitioner's **Reply Brief of Petitioner** upon Respondent by courier to:

**David Alexander, Esquire**  
**1330 Lady Street, Suite 401**  
**Columbia, SC 29201**

I further certify that all parties required by Rule to be served have been served. This 7<sup>th</sup> day of January, 2019.



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