STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Certiorari to Georgetown County
Court of Common Pleas
George C. James, Circuit Court Judge

Appellate Case No. 2017-000280

Vladimir Pantovich,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR REHEARING

On August 7, 2019, this Court affirmed the PCR court's grant of post-conviction relief upon holding that while the "good character alone" charge Applicant requested at trial was an unconstitutional comment on the facts, Applicant was still entitled to relief due to the retrospective character of analysis under Strickland v. Washington, 466 U.S. 668 (1984). Because this Court's holding regarding retrospective analysis misapplies clearly established federal constitutional law, and because the Court's holding contradicts its own insistence that a jury need not be charged on certain evidence to consider it, Petitioner must respectfully petition for rehearing pursuant to Rules 221(a) and 240, SCACR.

I. PANTOVICH IS NOT ENTITLED TO THE RETROACTIVE BENEFIT OF BAD LAW, AND THE COURT'S INTERPRETATION OF TEAGUE V. LANE WAS EXPLICITLY REJECTED IN LOCKHART V. FRETWELL.

This Court held in part:

> While we agree that [the "good character alone"] charge is improper, we do not reverse given this case's procedural posture. Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to

> an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective *at the time of the alleged error*. Just as we do not require attorneys to be clairvoyant in anticipating changes to the law, we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority as expressed in Lee-Grigg and Green: a jury instruction on good character was warranted when a defendant introduced evidence thereof at trial. We cannot expect our circuit courts to divine future refinements in appellate jurisdiction—only to apply the prevailing law to the facts of a case before them.

Pantovich v. State, Op. No. 27915 (S.C. Sup. Ct. filed Aug. 7, 2019) (Shearhouse Adv. Sh. No. 32 at 47-48) (emphasis original, footnote citations omitted). In support of its conclusion, this Court cites to Teague v. Lane, 489 U.S. 288, 316 (1989) and Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016).

This Court's interpretation of retroactivity and application of Teague was explicitly rejected by the Supreme Court of the United States in Lockhart v. Fretwell, 506 U.S. 364 (1993). In Fretwell, the habeas petitioner sought to vacate his conviction because trial counsel failed to raise an objection pursuant to Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied, 474 U.S. 1013 (1985). The federal district court granted Fretwell's petition, finding trial counsel was ineffective in failing to make the Collins objection, and the Eighth Circuit Court of Appeals affirmed despite the fact that it had overruled Collins two years prior. Fretwell, 506 U.S. at 367-68. The Eighth Circuit reasoned "that since [Fretwell] was entitled to the benefit of Collins at the time of his original sentencing proceeding, it would only 'perpetuate the prejudice caused by the original sixth amendment violation' to resentence him under current law." Fretwell, 506 U.S. at 368.

Chief Justice William Rehnquist, writing for a 7-2 majority, firmly rejected the Eighth Circuit's reasoning. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is

defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Fretwell, 506 U.S. at 369-70 (citing United States v. Cronic, 466 U.S. 648 658 (1984)) (footnote omitted). The Court explained that "[h]ad the trial court chosen to follow Collins, counsel's error would have 'deprived respondent of the chance to have the state court make an error in his favor.'" Id. at 371.

Fretwell specifically contended that such hindsight analysis was inappropriate in determining prejudice, and that the analysis should be determined under the laws existing at the time of trial. Id. The Supreme Court disagreed, explaining:

> We adopted the rule of contemporary assessment of counsel's conduct because a more rigid requirement 'could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.' But the 'prejudice' component of the Strickland test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.

Fretwell, 506 U.S. at 372 (citations omitted).

The Supreme Court then turned to Teague v. Lane, and addressed the dissent's contention (and this Court's holding) that Teague required that the Strickland analysis be conducted strictly under the law in effect at the time of the proceedings being challenged. "[T]his retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on 'the constitutional standards that prevailed at the time the original proceedings took place.'" Fretwell, 506 U.S. at 372 (quoting Teague, 489 U.S. at 306). "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are

shown to be contrary to later decisions." Id. at 372-73 (quoting Butler v. McKellar, 494 U.S. 407, 414 (1990)). The Supreme Court held:

> A federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated: Indeed, the very purpose of his habeas petition is to overturn the judgment. Nor does such a petitioner ordinarily have any claim of reliance on past judicial precedent as a basis for his actions that corresponds to the State's interest described [above]. The result of these differences is that the State will benefit from our Teague decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a "windfall" for the State, but instead is a perfectly logical limitation of Teague to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*

Id. at 373 (latin[1] emphasis original).

To whatever extent Chief Justice Rhenquist's opinion was not clear, Justice Sandra Day O'Connor further emphasized the correct interpretation of Strickland and Teague in her concurring opinion. "Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." Fretwell at 374.

Altogether, the United States Supreme Court's opinion in Fretwell reaches the only reasonable answer to the question of whether a convicted person is entitled to the benefit of since-overturned precedent during a collateral attack: he or she is not so entitled. Otherwise, the effort to review the effectiveness of counsel risks achieving not the end of "fundamental fairness" for which it exists, but the contrary: "arbitrariness, whimsy, caprice, nullification, and the like." Fretwell at 373 (quoting Strickland, 466 U.S. at 695). It avoids the absurd outcome that a convicted person may achieve a new trial because he did not receive a jury instruction he requested, but which he was not entitled to.

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[1] When the reason for a law ceases, the law itself ceases.

The Court's opinion here papers over the "strange result" Fretwell would prevent, and condemned by Justice Few's vociferous dissent, by noting that the State agreed at trial to a more general charge on good character. The Court's observation fails to justify its holding for a few reasons.

First, by virtue of the State's position, Pantovich was extended the opportunity to enjoy a general good character charge minus the "good character alone" portion, but insisted upon the complete charge requested. (Appx. 551-52). Pantovich never expressed any interest in the more mundane "this evidence is evidence, and you, the jury, may use it" (paraphrasing) charge to which the State acquiesced. "Since the only relief he seeks is that to which he is not entitled, it is not incumbent upon this court to pass upon what relief, if any, he might, perchance, be entitled to." Gilstrap v. State, 252 S.C. 625, 628, 168 S.E.2d 88, 90 (1969) (quoting Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968)). Pantovich has *never* asked for anything less than the "good character alone" charge rejected by the trial court, implicitly rejected by the Court of Appeals, and now rejected by this Court, and he cannot now prevail upon the State's acquiescence to a more suitable charge when he never took up the State's offer at trial.

Second, as noted by the undersigned in arguments before the Court, the State acquiesced to the charge because of its blandly inoffensive and unimportant nature—the State would needlessly create conflict by objecting to a charge that tautologically states that "evidence is evidence." Such a charge is as plain as sliced white bread, and it is difficult to ascertain how Pantovich would have been prejudiced by its absence, especially where—as repeatedly emphasized—the jury acquitted him of murder and convicted him of the voluntary manslaughter that could only be sustained upon a belief of Pantovich's own testimony and the character witnesses advanced.

Third, the Court's stated desire to avoid finding error in the PCR court's ruling, lest the PCR court be held to be necessarily clairvoyant, both (1) punishes the trial court's evident clairvoyance in rejecting the charge requested, and (2) runs contrary to numerous recent findings of trial court error based upon new holdings to overturn or abrogate long-standing precedents, then applied retroactively rather than prospectively. As to the second point, see e.g. State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (reversing and remanding for a new trial where the trial court instructed the jury that a victim's testimony need not be corroborated to sustain a conviction, despite State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006)); State v. Burdette, Op. No. 27910 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31 at 8) (reversing and remanding for a new trial where the trial court instructed the jury on the inference of malice from the use of a deadly weapon, despite Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016); State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013); State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); and many, many more); State v. Cross, Op. No. 27903 (S.C. Sup. Ct. filed July 24, 2019) (Shearhouse Adv. Sh. No. 30 at 33) (reversing and remanding for a new trial where the trial court denied a motion to bifurcate, despite Chubb v. State, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991) and State v. Benton, 338 S.C. 151, 153, 526 S.E.2d 228, 229 (2000)). This Court cannot reasonably in one breath vacate convictions based on new holdings of law, in contexts where the standard of review requires an abuse of discretion, and in another refuse to uphold a conviction because doing so would be based on a new holding of law, in a context where the standard of review is *de novo*.

Altogether this Court's opinion falls into the trap cautioned against in Strickland, into a strictly mechanical analysis that loses sight of the ultimate focus of the whole inquiry: the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at

696. The Court's opinion forgets the prejudice beyond "prejudice": "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." Id. By his own testimony *alone*, Vladimir Pantovich brutally beat Sheila McPherson to death with a baseball bat, wrapped her corpse in a blanket, tied it up with a rope, dumped it in the trunk of his car, and fled the state to bury her where she would never be found. The jury's conclusion is reliable, and the Court's opinion vacating it upon the barest of unjustified technicalities strains faith in the system to produce just results. The Court should reconsider its decision, and amend its opinion to be consistent with Fretwell, reverse the PCR court's ruling, and affirm Pantovich's conviction for voluntary manslaughter.

II. THE COURT'S HARMLESS ERROR ANALYSIS ALL BUT PRESUMES THAT PANTOVICH WAS PREJUDICED BY THE ABSENCE OF A GOOD CHARACTER CHARGE, DESPITE EVIDENCE IN THE RECORD TO SHOW THE JURY CONSIDERED IT AND THIS COURT'S REPEATED INSISTENCE THAT A JURY NEED NOT BE TOLD TO CONSIDER EVIDENCE IN ORDER TO CONSIDER IT.

The Court also rejected the State's argument for harmless error, holding "there was a reasonable probability of success on appeal because the jury could have considered evidence of Pantovich's peaceable character in deciding whether he bought on the difficulty of the incident." While the Court ruled upon the State's argument regarding the appropriateness of good character where the *corpus delicti* is admitted, the Court appears to have assumed away the State's argument that the jury did, in fact, consider Pantovich's character in reaching its verdict.

This Court has over the last decade emphasized its faith in the capacity of juries to consider evidence (in the context of inferences) by way of a simple question and a simple answer: "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course

not.'" State v. Burdette, Op. No. 27910 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv.Sh. No. 31 at 18) (quoting State v. Belcher, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009)). There is no reason to believe that the same principle does not also apply to some extent to evidence generally, as argued in briefing. See Brief of Petitioner at 22-23 ("A jury need not be instructed to consider certain specific evidence where it is properly admitted to them, and where they are properly instructed on the consideration of the evidence as a whole, but rather it may be safely assumed that they will properly use their discretion in consideration of all evidence admitted unless otherwise instructed to limit certain evidence's use."). The Court's holding implicitly assumes the contrary proposition—that juries only consider evidence when told "evidence is evidence"—despite the jury's acquittal of Pantovich for murder and conviction for voluntary manslaughter, where the evidence to support such a conclusion was found in large part in Pantovich's testimony and supporting character witnesses, and despite the closing arguments made by the attorneys regarding the character witnesses. Such an implicit assumption does not mesh with the Court's other recent holdings, previously cited. Either juries are presumed to be closely listening and considering the totality of the validly constructed record before them, or "the jury is deaf, dumb, and blind lest the learned judge pry open their eyes and awake their senses." Brief of Petitioner at 28 (citing Belcher, 385 S.C. at 612, n.9, 685 S.E.2d at 810, n.9). The great whole of American justice rests upon the faith that the jury is listening. See Stockton v. Virginia, 852 F.2d 740, 744 (4th Cir. 1988) ("Our system of criminal justice rests in large measure upon a confidence in conscientious juror deliberations and juror attentiveness."); see also Richardson v. Marsh, 481 U.S. 200, 213 (1987) (Stevens, J., dissenting) ("If we presume, *as we must*, that jurors give their fully and vigorous attention to every witness and each item of

evidence, the very acts of listening and seeing will sometimes lead them down 'the path of inference.'") (emphasis added).

Finally, notwithstanding the Court's prior holding rejecting the idea of a rebuttable presumption that an appellate court properly reviewed all preserved issues when considering an Anders brief, see Pantovich v. State, Op. No. 2015-MO-052 (S.C. Sup. Ct. filed Aug. 26, 2015), the treatment under Anders must represent *some* substance to show that the "good character alone" issue was not the slam dunk issue for reversal which Pantovich insists it would have been in 2011. Presented with the opportunity to review the record in its entirety and request that the parties raise any issues it deemed potentially meritorious, the South Carolina Court of Appeals instead dismissed the appeal.

CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing, and find that because Pantovich is not entitled to the retroactive benefit of now bad law, his grant of post-conviction relief cannot be sustained, and further find that any error is harmless in light of the facts and circumstances of this case.

Respectfully submitted,

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21 August, 2019

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VLADIMIR PANTOVICH,

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

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

David Alexander, Esquire
S.C Commission on Indigent Defense
Comm. On Indigent Defense Appellate Division
Post Office Box 11589
Columbia, South Carolina 29211

This 21st Day of August, 2019.

EVA COOK
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

August 21, 2019

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

RE: **Vladimir W. Pantovich, #326633 v. State of South Carolina**
Appellate Case No. 2017-000280
Lower Court Case No. 2012-CP-22-0635

Dear Mr. Shearouse:

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

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/ec
Enclosures

cc: David Alexander, Esquire