STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

VLADIMIR W. PANTOVICH,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-000280

Appeal from Georgetown County

Honorable George C. James, Circuit Court Judge

Opinion No. 27915

RETURN TO PETITION FOR REHEARING

Litigators (and especially mediators) frequently observe that a good settlement makes neither side happy. Perhaps this aphorism also applies to the Court's decision in this case. Respondent Pantovich despairs that the Court modified the good character charge. The State despairs because it must retry Pantovich before a jury that will receive instruction from the trial judge on how to assess Pantovich's substantial good character evidence. The State's petition should be denied.

In its petition, the State leans heavily on Lockhart v. Fretwell, 506 U.S. 364 (1993), a United States Supreme Court decision analyzing federal habeas decisions that does not alter the

result in this case. As pointed out by Justice Thomas in his concurrence, the law relied upon by the defendant in Fretwell was simply never binding law in his jurisdiction, Arkansas. Fretwell, 506 U.S. at 375-76. The defendant was prosecuted in Arkansas state court. Id. at 366-67. The claimed ineffectiveness was of trial counsel, not appellate counsel. Id. Trial counsel supposedly should have made an objection based on Eighth Circuit precedent. Id. As Justice Thomas pointed out, Eighth Circuit precedent was not binding on the Arkansas Supreme Court and was never controlling law in the defendant's case. Id. at 375-76. As Justice O'Connor pointed out, the Arkansas Supreme Court specifically rejected the Eighth Circuit's analysis. Id. at 374. By the time the defendant got to federal habeas, the Eighth Circuit had reversed its own precedent. Id. at 366-68.

The defendant in Fretwell therefore claimed he was entitled to reversal of his death sentence based on a proposition that was never the law in his case and was ultimately rejected by every court to consider his case. Unlike Fretwell, the good character charge was binding law both during Pantovich's trial and during his appeal. State v. Lee-Grigg, 387 S.C. 310, 692 S.E.2d 895 (2010). The State's analogy to Fretwell fails because this Court is *nil ultra* when it comes to South Carolina law, not a federal district court nor a federal court of appeals. The proposition sought by Pantovich was binding law based on this Court's decisions.

Ignored by the State in its petition, but not this Court, was the degree to which the law, as it existed at the time, affected the way Pantovich's case was tried. The failure here was appellate counsel's, not trial counsel's. Pantovich's trial counsel knew that he needed evidence of good character to support the self-defense theory precisely because of the nature of the killing. Pantovich's trial counsel had the right to rely on precedent as it existed at the time to formulate his trial strategy. Trial counsel did so and used multiple character witnesses and asked for the

good character charge, which was improperly rejected. As this Court correctly noted, Pantovich did not even receive the good character charge to which the State agreed and which remains good law after this decision. The State claims that the jury's acquittal of Pantovich for murder makes the error harmless, but self-defense is also a complete defense to voluntary manslaughter. The Court's decision properly declines to weigh the evidence and leaves that function where it belongs—in the hands of a properly instructed jury.

Finally, the State's petition also completely ignores that the issue it raises on appeal was never raised below. The Attorney General never made its novel constitutional argument during the PCR hearing and the PCR Court did not address the constitutional argument in its Order. At oral argument, the State conceded that its constitutional argument was not raised to the PCR Court, but argued that it needed to be addressed on appeal so that in the event of a retrial, the circuit court would know what to charge. "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). Having overcome the procedural bar and gotten the result on the law it wants, the State now wants to pretend the procedural bar does not exist. The State's petition for rehearing should be denied.

Respectfully Submitted,

DAVID ALEXANDER
Appellate Defender

This 29th day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Vladimir W. Pantovich, #326633, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 29th day of August, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 29th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.