

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
Roger M. Young, Circuit Court Judge  
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**S.C. Supreme Court**

JOSE LUIS G. HERNANDEZ ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002061  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## ISSUES PRESENTED

- I. Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether Petitioner was entitled to a directed verdict when the evidence conclusively proved that Petitioner was entrapped?
- II. Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether the Trial Court erred in giving the jury a confusing and contradictory charge on entrapment when the Trial Court instructed the jury that the State had to prove beyond a reasonable doubt that Petitioner was *not* predisposed to commit the crime?
- III. Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether the Trial Court erred in failing to instruct the jury that Petitioner only had the burden to produce “*more than a scintilla of evidence*” that he was induced, tricked, or incited to commit a crime which he would not have committed before the burden shifted to the State to prove beyond a reasonable doubt that Petitioner was predisposed to commit the crime?
- IV. Whether the PCR court erred in finding that appellate counsel provided effective assistance of counsel where appellate counsel did not raise on appeal the preserved issue of whether the Trial Court erred in refusing to charge the jury that “evidence of good character and good reputation may in and of itself create a doubt as to guilt?”

## STATEMENT

### **Indictments**

On January 9, 2007, Petitioner Jose Luis G. Hernandez was indicted by the Charleston County Grand Jury for (1) one count of trafficking cocaine in excess of two hundred (200) grams but less than four hundred (400) grams; and (2) possession with intent to distribute (“PWID”) within proximity of a school. App. 17, ll. 4-9; 408-409.

### **Trial and Guilty Verdict**

Petitioner was tried before the Honorable R. Markley Dennis, Jr. and a jury on March 3-4, 2008. App. 1; 130. Petitioner was represented by Andrew D. Grimes and Benjamin C. Lewis, and the State was represented by Assistant Solicitors Julie G. Cardillo and Stephanie Bianco. App. 1.

At the close of the trial, the jury found Petitioner guilty as indicted for trafficking cocaine. App. 264, ll. 14-20. The jury was hung on the second charge of PWID within proximity of a school, and the State ultimately dismissed this charge. App. 263, l. 20 – 264, l. 2; 270, ll. 15-19. Judge Dennis sentenced Petitioner to a term of twenty-five (25) years. App. 278, ll. 1-4.

### **Direct Appeal**

A timely Notice of Intent to Appeal was submitted on Petitioner’s behalf to the South Carolina Court of Appeals. A brief pursuant to Anders v. California, 386 U.S. 738 (1967) was filed by the Office of Appellate Defense on or around January 21, 2009. On February 13, 2009, Tricia A. Blanchette filed a Motion for Substitution of Counsel and Substitution of Brief of Appellant. On March 19, 2009, the Court of Appeals granted Petitioner’s Motion. App. 284.

Ms. Blanchette filed an Appellant's Brief on Petitioner's behalf and raised two issues: (1) whether the Trial Court erred by failing to grant a directed verdict of not guilty when the evidence conclusively proved that Petitioner was entrapped; and (2) whether the Trial Court erred by giving the jury an improper instruction on the defense of entrapment. App. 280-294.

On January 26, 2011, the Court of Appeals filed its unpublished opinion affirming Petitioner's conviction, holding that both issues raised were not preserved for review. App. 319-322.

**Application for Post-Conviction Relief, Evidentiary Hearing, and Order of Dismissal**

Petitioner filed his application for post-conviction relief ("PCR") on April 21, 2011. App. 323-330. The State filed its Return on August 24, 2011. App. 331-336.

An evidentiary hearing was held before the Honorable Roger M. Young, Sr. on December 4, 2012. Mark A. Peper represented Petitioner, and the State was represented by Assistant Attorney General Ashleigh R. Wilson. App. 337. Both Petitioner and his trial attorney, Andrew Grimes, testified at the hearing. App. 339-390. Judge Young orally denied Petitioner's PCR application at the conclusion of the hearing, followed by a written Order of Dismissal filed on December 27, 2012. App. 394, l. 11 – 395, l. 8; 397-407.

This petition for writ of certiorari follows.

## STATEMENT OF FACTS

### **Relevant facts from trial**

In November 2005, Steven Lasaine (hereinafter “CI”), was arrested by the Mount Pleasant Police Department on a series of drug charges. App. 104, l. 13-23; 111, l. 1 – 112, l. 25. As a result, the CI was taken to jail. App. 112, ll. 23-25.<sup>1</sup> Thereafter, the CI began assisting the Mount Pleasant Police Department with undercover operations. Specifically, on August 7, 2006, the CI met with Detective Hembree of the Mount Pleasant Police Department and contacted Petitioner. App. 68, l. 25 – 71, l. 25; 73, ll. 16-21. As a result of the contact made by the CI, Petitioner met the CI and Detective Hembree in the Food Lion parking lot on Long Point Road in Mount Pleasant. Upon arrival, Petitioner joined the CI and Detective Hembree in their vehicle, which was under video surveillance. App. 70, l. 14 – 74, l. 7.

While on the stand, Detective Hembree testified to the contents of several phone conversations conducted by Petitioner while in the undercover vehicle. App. 79, ll. 3 – 24. Even though Detective Hembree only heard one end of the Spanish conversation and admittedly did not speak Spanish himself and only knew “small bits of Spanish,” he testified that Petitioner was directing the individuals delivering the drugs to the Food Lion location. App. 79, ll. 8-24. Thereafter, the individuals arrived and delivered the drugs at issue to Detective Hembree. App. 87, l. 17- 89, l. 13. The price for the drugs was to be \$6300.00. App. 99, ll. 19-22. The drugs delivered were later determined to be 252.28 grams of cocaine. App. 145, l, 21 – 146, l. 22.

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<sup>1</sup> In February 2007, the CI pled guilty to trafficking cocaine between twenty-eight (28) to one hundred (100) grams and received a twelve (12) year sentence. His charge of trafficking cocaine in excess of one hundred (100) grams was dismissed. App. 112, l. 20 – 113, l. 25; 203, ll. 8-12.

Petitioner took the stand at trial in his defense. App. 155. Petitioner testified that he was thirty-four years old and had never been convicted of a crime. App. 158, ll. 17-22. He owned his own business called "Painting Mix Framing Renovation" and provided construction services such as painting, framing and remodeling. App. 162, ll. 4-8.

About a year prior to the incident, Petitioner met the CI. The CI was able to refer construction jobs to Petitioner for a small commission. App. 164, l. 23 – 166, l. 13. Petitioner testified that about five months after meeting the CI, the CI began telling Petitioner that he could make good money selling drugs. App. 3-19. Even though the CI propositioned him several times, Petitioner repeatedly refused to sell drugs for the CI. App. 162, l. 15 – 170, l. 3.

Petitioner testified that on August 7, 2006, the CI called him and promised him a \$20,000.00 remodeling job if Petitioner would help set up this drug deal. App. 185, l. 13 – 186, l. 12; 202, ll. 9-16. Petitioner testified the CI told him if he did not help with the drug deal, then the CI would no longer refer any construction jobs to Petitioner. Petitioner said he was broke and worried about money to pay his rent and bills. Petitioner was worried that he would no longer be able to find work if he did not go along with the CI. App. 186, ll. 1-22.

Petitioner admitted that he contacted an individual for the CI regarding the drug purchase. App. 187, l. 4 – 188, l. 6. Petitioner explained that the CI kept calling him and told him to meet him at the Food Lion parking lot so the CI could show him the site for the remodeling job. App. 188, ll. 7-25. Petitioner further explained that he did not know

several of the individuals that arrived at the scene with the requested drugs. App. 184, ll. 3-18.

After the conclusion of Petitioner's case, the Trial Court agreed to charge the jury on entrapment. App. 208, ll. 14-15. During the course of the jury's deliberations, the jury returned with the following question: "Does entrapment apply to the second indictment of proximity?" App. 258, ll. 15-18; 261, ll. 13-14. The Trial Court responded to the jury: "Entrapment applies to both offenses equally." App. 256, ll. 14-15. After the jury returned a guilty verdict on the trafficking indictment and informed the Trial Court that it was hung on the proximity charge, defense counsel renewed his motion for a directed verdict. App. 263, l. 20 – 264, l. 2; 264, ll. 14-20; 269, ll. 13-14. Thereafter, the Trial Court remarked that with respect to the remaining proximity charge "entrapment is a slam dunk for where the officer set up the deal", and the State decided to dismiss the proximity charge. App. 269, ll. 20 – 270, l. 19.

#### **Relevant facts from PCR Hearing**

Petitioner testified that he had a hard time speaking and understanding English. App. 342, ll. 14-19. He said the State originally offered him a plea deal of fifteen (15) years, but that he turned it down because he did not understand the offer and thought it was for fifty (50) years. App. 342, l. 23 – 343, l. 11. The State then offered him an eighteen (18) year plea deal but Petitioner rejected this offer because he would have had to serve the sentence day by day and admit that he was guilty. App. 351, l. 1 – 352, l. 4. He further testified that his trial attorney told him that he could accept the eighteen years or just "pray for the best" and take a chance at trial of either being convicted and receiving twenty-five years or being found not guilty and walking away. App. 360, l. 24 – 361, l. 5.

Petitioner said he filed an appeal, but that his trial attorney had not preserved the issues raised for appeal. App. 355, l. 25 – 356, l. 14.

Andrew Grimes, Petitioner’s trial attorney, testified that he thought he had properly objected to the issues raised on appeal, but that the “Court of Appeals said no, I didn’t, so I can’t argue with them.” App. 379, ll. 7-17.

At the conclusion of the hearing, Judge Young orally denied Petitioner’s PCR application and remarked, “And as far as any trial mistakes went, well, I really don’t think there were any, because it doesn’t sound like Mr. Grimes – while he may have failed to preserve a particular ground, according to the Court of Appeals, there is no evidence that this would have changed the outcome of the trial in any way. I think that was a slight error, but there is still no evidence that would have made any difference in the outcome of the trial, so I find that Mr. Grimes’s testimony on that was certainly more compelling and believable than the Applicant’s and would therefore deny the application for post-conviction relief.” App. 394, l. 22 – 395, l. 8.

### **Order of Dismissal**

In Judge Young’s Order of Dismissal, Judge Young stated that Petitioner’s trial attorney “felt that any issues regarding the entrapment defense [were] properly preserved for appeal.” App. 404. Judge Young found “there is no evidence that the proper preservation of the issue for appeal would have changed the outcome of the trial.” Id.

Judge Young also found that with respect to Petitioner’s claims in his application that appellate counsel was ineffective, that appellate counsel was not ineffective in only briefing issues that were not preserved for appeal and not raising other preserved issues to the Court of Appeals. App. 405-406.

## ARGUMENT

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

**I. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether Petitioner was entitled to a directed verdict when the evidence conclusively proved that Petitioner was entrapped.**

Petitioner's trial attorney was ineffective in failing to raise the defense of entrapment to the Trial Court in support of his directed verdict motion. Had Petitioner's trial attorney properly preserved this issue for appeal, Petitioner would have been entitled to a directed verdict.

It is well established that entrapment is an affirmative defense, which places the burden on a defendant to show that he was induced, tricked or incited to commit a crime that he would not have otherwise committed. See State v. Johnson, 295 S.C. 215, 367 S.E.2d 700 (1988). “The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the

burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime.” United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998). Therefore, an entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). The United States Supreme Court has explained the underlying rationale as follows:

When the criminal design originates, not with the accused, but it is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound policy from prosecution therefor.

Sorrells v. United States, 287 U.S. 435, 445 (1932).

In the instant case, the Trial Court determined that Petitioner met the burden of proof for a jury instruction to be given on the affirmative defense of entrapment. App. 208, ll. 14-15. Petitioner’s appellate counsel argued on appeal that Petitioner was not only entitled to a charge on the defense of entrapment, but was entitled to a directed verdict of not guilty where the evidence conclusively proved that Petitioner was entrapped. App. 287. The Court of Appeals, however, held that this issue was not preserved for appeal where Petitioner’s trial attorney did not raise the defense of entrapment in support of his directed verdict motion. The Court of Appeals therefore did not reach the merits of this issue. App. 320-321. Had Petitioner’s trial attorney properly preserved this directed verdict argument for review, Petitioner submits that he would be entitled to a directed verdict of not guilty where there is no dispute that Petitioner was entrapped.

Regarding the first element of government inducement, the following was shown at trial:

1. The CI was arrested for a series of drug charges (including trafficking), taken to jail, worked as a confidential informant, had a number of charges dismissed and entered a plea for twelve years. App. 104, ll. 13-23; 111, l. 1 – 113, l. 25; 203, ll. 8-12.
2. Pursuant to Detective Hembree, the CI made a call to Petitioner and directed him to the Food Lion parking lot. App. 73, ll. 12-21.
3. No calls were monitored between the CI and Petitioner prior to the incident date nor were any phone records obtained by law enforcement. App. 115, l. 25 – 116, l. 17.
4. Petitioner owned his own company and knew the CI as a result of legitimate remodeling contracts. App. 162, l. 4 – 166, l. 13.
5. Petitioner was promised a \$20,000.00 remodeling job if he made a phone call to obtain drugs for the CI. The CI also threatened to no longer refer jobs to Petitioner unless he participated in this drug deal. App. 185, l. 13 – 187, l. 15.
6. The CI had previously asked him to sell drugs, and Petitioner had previously refused those repeated requests. App. 166, l. 24 – 170, l. 3.
7. Petitioner had no record of being convicted for any drug-related crime. App. 158, ll. 21-22.

Although a confidential informant is not a law enforcement officer, where he acts at the behest of an officer, his actions may amount to governmental trickery or persuasion. Johnson at 216 n. 1, 367 S.E.2d at 701 n. 1. Where the CI was working in conjunction with law enforcement, his promise to Petitioner of a \$20,000 remodeling contract constitutes governmental inducement.

As to the second element of predisposition, Petitioner did not have any previous drug convictions nor had he previously been connected to any drug investigations. Defense counsel noted that a search warrant was executed at Petitioner's residence and

no drug evidence was found. App. 220, l. 21 – 221, l. 14. It is also clear from Petitioner’s testimony that he knew the CI as a result of remodeling work his construction company had been contracted to complete. During sentencing, the Trial Court made the following comments: “I don’t think you are a big time drug dealer. Mr. Hembree had some evidence otherwise, and I respect him, but I don’t think you are... I don’t think you are an evil man. I think you succumbed to some pressures that a lot of us succumb to.” App. 276, l. 6 – 277, l. 2.

In Johnson, the South Carolina Supreme Court held: “The issue of whether or not the defense of entrapment has been established is usually a question of fact for the jury unless there is undisputed evidence and only one reasonable conclusion can be reached.” 295 S.C. at 217, 367 S.E.2d at 701. Petitioner submits that the Trial Court was presented clear evidence regarding Petitioner’s lack of predisposition and government inducement from which only one conclusion could be reached.

This case is not unlike the United States Supreme Court’s opinion in Sherman v. United States, 356 U.S. 369 (1958) where the Court held the evidence established as a matter of law that the defendant was entrapped. In that case, a government informant met the defendant at a doctor’s office where both were apparently being treated to be cured of a narcotics addiction. The two men saw each other occasionally at the doctor’s office or the pharmacy to have their prescriptions filled and eventually had conversations about their experiences in overcoming their narcotics addictions. Finally, the informant asked the defendant if he knew of a good source of narcotics because he was not responding to treatment. The defendant at first tried to avoid the issue, but after repeated requests, predicated on the informant’s presumed suffering, the defendant acquiesced and

obtained and sold the informant drugs. After several sales, the informant informed law enforcement that he had another seller for them. Law enforcement then observed the defendant sell drugs to the informant on three separate occasions. Id. at 371.

Concluding that it was “patently clear” that the defendant was induced by the informant, the Court observed there was no evidence that the defendant was in the drug trade and that when the defendant’s apartment was searched after his arrest, no narcotics were found. Id. at 375. The Court also stated that a previous nine-year-old drug sale conviction and a five-year-old drug possession conviction were insufficient to prove that the defendant had a “readiness to sell narcotics at the time [the informant] approached him.” Id. In overturning the defendant’s conviction, the Court made the following remarks:

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.

Id. at 376.

The CI in this case preyed on Petitioner’s weak financial situation and threatened to no longer refer construction work to Petitioner unless he participated in the drug transaction. The CI then set up the time and place for the transaction. Petitioner was an innocent party with no predisposition to commit such a crime until the CI, working on behalf of law enforcement, enticed him into committing this crime.

In fact, the Trial Court did reach the conclusion that Petitioner was entrapped, yet failed to direct a verdict of not guilty. After the case was submitted to the jury, the jury requested that the Trial Court clarify if the entrapment defense applied to both charges. App. 258, ll. 15-18; 261, ll. 13-15. Before the jury returned to the courtroom, the Trial Court told the parties, “It’s [entrapment] either a complete defense or there is no defense. And that’s going to be my instruction, yes, it applies to both charges.” App. 258, ll. 20-22. When the jury returned to the courtroom, the Trial Court instructed the jury: “Entrapment applies to both offenses equally.” App. 261, ll. 13-15.

Following the additional instruction, the jury informed the Trial Court that they had reached a verdict on one charge, and the Trial Court entered the jury’s verdict on the trafficking charge. App. 262, l. 4 – 269, l. 19. The jury was sent back out to deliberate, and the Trial Court commented on the proximity charge, as follows:

Entrapment is a slam dunk for where the officer set up the deal. That could be easily construed to be entrapment, that you brought him into this spot and you created it by putting it within a half mile of it. So I don’t have any problem with that being – that to me is probably as close to following the law as I can think of.

App. 269, l. 22 – 270, l. 4. As a result of the Trial Court’s comments, the State dismissed the proximity charge. App. 270, ll. 15-19.

As stated above, an entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2004). Clearly, the Trial Court found that both elements were met since he commented that entrapment was a “slam dunk” on the proximity charge. Pursuant to the Trial Court’s own instruction, “Entrapment applies to both offenses equally.” App. 261,

ll. 13-15. Unfortunately, the Trial Court failed to heed his own instruction and did not apply the entrapment defense to the trafficking charge “equally.”

The Trial Court’s finding of entrapment as to the proximity charge required a finding of entrapment as to the trafficking charge as well. Petitioner’s trafficking conviction would have been reversed on appeal where the evidence conclusively proved that Petitioner was entrapped had Petitioner’s trial attorney properly moved for a directed verdict. Therefore, Petitioner respectfully requests this Court to reverse the PCR court’s denial of post-conviction relief where the PCR court ruled that “there is no evidence that the proper preservation of this issue for appeal would have changed the outcome of the trial” and grant Petitioner a directed verdict of not guilty. App. 404.

**II. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether the Trial Court erred in giving the jury a confusing and contradictory charge on entrapment when the Trial Court instructed the jury that the State had to prove beyond a reasonable doubt that Petitioner was *not* predisposed to commit the crime.**

On appeal, Petitioner’s appellate counsel contended that the Trial Court erred in misstating the State’s burden of proof regarding the predisposition prong of the defense of entrapment during its jury instruction. App. 290-292, 321.

During the jury instruction, the Trial Court stated:

“[A person] pleading entrapment has the burden of showing that the person was induced, tricked or incited to commit a crime which the person would not have committed. If such evidence is produced and introduced, then you must then look to the [S]tate to prove beyond a reasonable doubt that he was *not predisposed*. That he *was otherwise not predisposed* to commit this crime.

App. 246, l. 25 – 247, l. 7 (emphasis added).

In United States v. Sligh, 142 F.3d 761, 762 (4th Cir. 1998), the court set forth the law to be charged on the defense of entrapment, as follows:

The defendant has the initial burden to produce more than a scintilla of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to the commit the crime.

See State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (2004).

Petitioner's appellate counsel first argued on appeal that the Trial Court "made a devastating error" by improperly instructing the jury that "[i]f such evidence is produced and introduced, then you must then look to the [S]tate to prove beyond a reasonable doubt that *he was not predisposed. That he was otherwise not predisposed to commit this crime.*" App. 247, ll. 3-7 (emphasis added). By informing the jury that the State had to prove that Petitioner was not predisposed to commit a crime, the Trial Court clearly misstated the correct and current law in this State regarding the predisposition prong. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (observing a trial judge is required to charge only the current and correct state law); State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 392 (2002) (same).

Although the Trial Court referenced in later parts of his jury charge that the State was required to prove beyond a reasonable doubt that Petitioner was predisposed to commit the crime without inducement, the Trial Court never informed the jury that the first part of his charge was wrong. App. 247, ll. 17-23. "Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion." State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by*, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) and Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Petitioner's trial attorney did not object to the Trial Court's contradictory charge, and the jury was left with a charge that told them the State had the burden of proving both that Petitioner was not predisposed to commit the crime and that he was predisposed to commit the crime. The Trial Court's confusing and erroneous charge prejudiced Petitioner where the jury may have thought that the State only needed to prove that Petitioner was not predisposed to commit the crime. See Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011) (reversing and remanding for a new trial where the jury instructions given by the trial court had the potential to confuse the jury); Beckham v. Sun News, 289 S.C. 28, 344 S.E.2d 603 (1986) (reversing confusing jury charge as to burden of proof in a libel action involving public official); Brown v. Smalls, 325 S.C. 547, 553-56, 481 S.E.2d 444, 447-449 (Ct. App. 1997) (holding jury instructions regarding children and standard of care inaccurately stated the law resulting in a confusing jury instruction which required reversal).

The Court of Appeals would not review and correct this error on appeal, finding that Petitioner's "argument that the trial court erred when it charged the jury that the State had 'to prove beyond a reasonable doubt that he was not predisposed' is a different argument on appeal and is not preserved for our review." App. 321.

Had Petitioner's trial attorney objected to the Trial Court's incorrect and confusing charge on the State's burden of proof on the predisposition prong of the entrapment charge, the charge could have either been corrected by the Trial Court to the jury or if the Trial Court had refused to correct his charge, the error would have been preserved for appellate review and corrected by the Court of Appeals. Therefore, where

Petitioner's counsel was deficient in preserving this error for appeal and Petitioner was prejudiced by this deficiency, Petitioner is entitled to a new trial.

**III. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review whether the Trial Court erred in failing to instruct the jury that Petitioner only had the burden to produce "*more than a scintilla of evidence*" that he was induced, tricked, or incited to commit a crime which he would not have committed before the burden shifted to the State to prove beyond a reasonable doubt that Petitioner was predisposed to commit the crime.**

Petitioner's appellate counsel also contended on appeal that the Trial Court misstated the law on the defense of entrapment when it failed to instruct that he had the burden to prove inducement only by "more than a scintilla of evidence." App. 290-292; 321. In its charge to the jury, the Trial Court stated: "[The person] pleading entrapment has the burden of showing that the person was induced, tricked, or incited to commit a crime which the person would not have committed." App. 246, l. 25 – 247, l. 3.

The Trial Court omitted the standard of proof – that "[t]he defendant has the initial burden to produce *more than a scintilla* of evidence that the government induced him to commit the charged offense, before the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to the commit the crime. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (2004) (emphasis added). Therefore, the jury did not know how much evidence Petitioner needed to show before the jury could consider his defense of entrapment. The only standard of proof the Trial Court mentioned in its entrapment charge was the State's burden of proof beyond a reasonable doubt. App. 246, l. 25 – 248, l. 23. The jury could have thought Petitioner also had to prove beyond a reasonable doubt that he was induced, tricked or incited to commit a crime which he would not have committed.

The Court of Appeals would not consider this issue on appeal, holding:

[Petitioner's] argument that the trial court erred in not charging the jury that he had the burden to prove inducement by "more than a scintilla of evidence" is a different argument on appeal. Moreover, [Petitioner] failed to make a contemporaneous objection regarding the trial court's failure to instruct the jury that [Petitioner] had the burden to prove inducement by "more than a scintilla of evidence." Therefore, we conclude [Petitioner's] argument is barred from appellate review.

App. 322.

Had Petitioner's trial attorney requested the Trial Court to have instructed the jury that the defendant has the initial burden to only produce more than a scintilla of evidence that the government induced him to commit the charged offense, the Trial Court would have been required to have given this charge. Had the Trial Court refused this requested charge, it would have been reversible error on appeal.

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues." State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. Id. at 406, 649 S.E.2d at 50. When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512–13 (2000).

The failure of the Trial Court to include the "more than a scintilla of evidence" standard, and the failure of Petitioner's trial attorney to request it, was prejudicial to

Petitioner where the jury had no idea how much evidence the Petitioner had to show before the jury could consider the defense of entrapment and could conclude that Petitioner had indeed met his burden. Accordingly, in failing to request the Trial Court to charge that Petitioner only had to prove by more than a scintilla of evidence that he was induced, tricked, or incited to commit a crime which he would not have committed, Petitioner's trial counsel rendered deficient performance which prejudiced Petitioner. Petitioner is entitled to a new trial.

**IV. The PCR court erred in finding that appellate counsel provided effective assistance of counsel where appellate counsel did not raise on appeal the preserved issue of whether the Trial Court erred in refusing to charge the jury that "evidence of good character and good reputation may in and of itself create a doubt as to guilt."**

Petitioner requested a jury charge on character, and the Trial Court agreed to give a character charge to the jury. App. 205, ll. 13-16. The Trial Court instructed the jury:

I also instruct you that the defendant has presented evidence of his good reputation and character to show that it would be inconsistent with the defendant committing the crime or crimes charged. The weight you give to that testimony, like all other testimony in the case, is for you to decide in your good judgment. You may consider the testimony of defendant's good character along with all other evidence in decid[ing] whether or not the defendant committed the crime.

App. 248, l. 24 – 249, l. 8.

Immediately following the Trial Court's instructions to the jury, Petitioner's trial attorney objected to the Trial Court's character charge and asserted that under State v. Harrison, 343 S.C. 165, 170, 539 S.E.2d 71, 73 (Ct. App. 2000), a proper character charge includes the language that "evidence of good character and good reputation may in and of itself create a doubt as to guilt." App. 257, ll. 8-22. The Trial Court refused to give the

requested charge, stating “I don’t think that has any greater weight than anything else” and opining “I think that’s a charge on the facts, too.” App. 257, ll. 16-21.

The law has been long established that:

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.

State v. Green, 278 S.C. 239, 240, 294 S.E.2d 335, 335 (1982); see also State v. Lee-Grigg, 387 S.C. 310, 317, 692 S.E.2d 895, 898 (2010).

While the Trial Court did give a character charge in Petitioner’s case, omitting the critical language that “evidence of good character and good reputation may in and of itself create a doubt as to guilt” prejudiced Petitioner because the jury may not have understood how the evidence of Petitioner’s good character could have been used and may not have understood that the evidence of his good character alone was enough to create doubt. The Trial Court’s refusal to give this remaining part of the character charge was reversible error. See Harrison, 343 S.C. at 172, 539 S.E.2d at 74 (“A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence.”).

Petitioner presented evidence that he had been a hard worker since the young age of thirteen when he began work at a factory in Mexico. When he was young, his father became sick and had to be on dialysis and could not work, so Petitioner had to begin working to help support his mother and his seven sisters. Petitioner got married and had four young children. After he moved to the United States, he set up his own company which provided painting, framing, and remodeling services. He made sure he paid his taxes

from the money he earned while working in the United States. He testified that he had never been involved in any drug transaction and had not been convicted for any drug crime. He repeatedly refused the CI's requests to sell drugs until the one day when he became desperate for the \$20,000.00 remodeling job. App. 158, l. 17 – 170, l. 7; 185, l. 13 – 186, l. 22; 190, l. 25 – 191, l. 2; 202, l. 9-16.

It cannot be said beyond a reasonable doubt that the Trial Court's refusal to charge the jury that the "evidence of good character and good reputation may in and of itself create a doubt as to guilt" did not contribute to the jury's verdict. Petitioner could have prevailed on this issue at the Court of Appeals, but appellate counsel did not brief it.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). The question is therefore (1) whether appellate counsel's performance was deficient, and (2) whether Petitioner was prejudiced by appellate counsel's deficient performance.

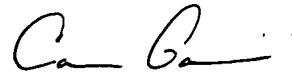
For the reasons set forth above, Petitioner was prejudiced by appellate counsel's failure to raise this preserved issue for appeal. The PCR court's finding that appellate counsel's performance was not deficient is not supported by the evidence. App. 406. Where Petitioner would have been entitled to a new trial had appellate counsel briefed this issue, Petitioner is now entitled to the grant of post-conviction relief and a new trial. See Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (holding appellate counsel

ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal); see also Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002) (holding appellate counsel was deficient in failing to adequately raise or brief issue of prosecutorial retaliation where Court of Appeals would have reversed if counsel had properly argued the issue).

**CONCLUSION**

For the reasons set forth herein, Petitioner Jose Luis G. Hernandez respectfully requests this Court to grant his Petition for Writ of Certiorari and either (1) grant Petitioner a directed verdict; or (2) grant Petitioner a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of May, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
Roger M. Young, Circuit Court Judge

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JOSE LUIS G. HERNANDEZ ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

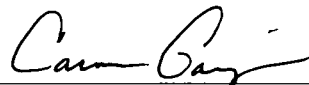
RESPONDENT.

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CERTIFICATE OF SERVICE

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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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jose Luis G. Hernandez #326877, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 20th day of May, 2014.

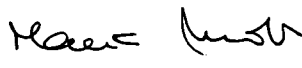


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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day  
of May, 2014.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.