STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
The Honorable Roger Young. Sr., Circuit Court Judge

Appellate Case No. 2013-002061

JOSE LUIS G. HERNANDEZ,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on his entrapment defense when this issue is not preserved for appellate review and the Petitioner has failed to show that but for counsel's performance the trial court would have directed a verdict of not guilty?

II. Whether the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to preserve for appellate review the issue of whether the trial court erred in giving the jury a confusing and contradictory jury instruction on entrapment when this issue is not preserved for appellate review and the Petitioner has failed to show that the jury instruction given by the trial court was objectionable and warranted reversal on appeal?

III. Whether the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to preserve for appellate review the issue of whether the trial court erred in failing to instruct the jury that the Petitioner only had the burden to produce "more than a scintilla of evidence" showing he was induced to commit the crime when this issue is not preserved for appellate review and the Petitioner has failed to show the entrapment instruction given by the court was improper and that the trial court's failure to give this instruction warranted reversal?

IV. Whether the Petitioner failed to carry his burden of proving appellate counsel was ineffective for failing to raise on appeal 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" when this issue is not preserved for appellate review and the Petitioner has failed to show that had appellate counsel raised this issue he would have prevailed on appeal?

STATEMENT OF THE CASE

The Petitioner was indicted at the January 2007 term of the Charleston County Grand Jury for trafficking cocaine 200-400 grams (2007-GS-10-0056) and possession with intent to distribute cocaine (PWID) within the proximity of a school (2007-GS-10-0057). The Petitioner was caught on video selling a large quantity of cocaine to an undercover officer and a confidential informant on August 7, 2006. The Petitioner proceeded to a jury trial on March 3-4, 2008. He was found guilty of trafficking cocaine. The Petitioner's PWID within the proximity of a school charge was *nolle prossed.* The Honorable R. Markley Dennis sentenced the Petitioner to confinement for twenty-five (25) years.

The Petitioner filed a timely Notice of Appeal. Tricia Blanchette, Esquire, represented the Petitioner. The Court of Appeals affirmed the Petitioner's conviction and sentenced. Sate v. Hernandez, 2011-UP-032 (S.C. Ct. App. January 26, 2011). The Remittitur was issued on April 29, 2011.

The Petitioner subsequently filed an application for post-conviction relief on April 21, 2011 (2011-CP-10-2878). The Respondent filed its Return on August 23, 2011. An evidentiary hearing was convened at the Charleston County Courthouse on December 4, 2012. The Petitioner was present and represented by Mark Peper, Esquire (PCR counsel). The Respondent was represented by Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General. By Order filed December 27, 2012, the Honorable Roger Young, Sr. denied and dismissed the Petitioner's application for post-conviction relief with prejudice. This appeal follows.

ARGUMENT

The Petitioner asserts that the post-conviction relief court erred by finding the Petitioner failed to carry his burden of proving ineffective assistance of both trial and appellate counsel. The Respondent submits the issues raised by the Petitioner on appeal are not preserved or appellate review and there is probative evidence to support the lower court's ruling that trial and appellate counsel provide effective representation. This Court should deny this Petition and affirm the lower court's denial of post-conviction relief.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. The Petitioner's first claim that the lower court erred in finding trial counsel was not ineffective for failing to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on his entrapment defense is not preserved for appellate review and the Petitioner has failed to show but for counsel's performance directed verdict would have been granted.

The Petitioner claims the lower court erred by finding trial counsel was not ineffective for failing to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on the Petitioner's entrapment defense. The Respondent submits this issue is not preserved for appellate review. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011). An issue cannot be raised for the first time on appeal. Id. Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Id.

The Respondent submits the Petitioner failed to raise this issue in his PCR application or during his evidentiary hearing. The Respondent submits the Petitioner's post-conviction relief application is void of any claims regarding counsel's alleged failure to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on his entrapment defense. The Petitioner listed the following as the basis for his application:

1. Ineffective assistance of trial counsel.
    a. Failure to advise applicant of plea offer in a timely manner.
    b. Failure to properly prepare and investigate.
    c. Failure to properly raise an entrapment argument.
2. Ineffective assistance of appellate counsel.
3. Violation of 14th amendment of the U.S. Constitution.

At the start of the Petitioner's hearing, PCR counsel stated the Petitioner would be proceeding on the issues raised in his original application. (App. 339:12-19). PCR counsel also never mentioned counsel's alleged failure to preserve for appellate review the issue of whether the Petitioner was entitled to directed verdict based on his entrapment defense during the evidentiary hearing. At the conclusion of the Petitioner's hearing, PCR counsel argued the Petitioner was entitled to a new trial based on counsel's unclear communication with the Petitioner regarding a plea offer (App. 390:21-391:16), failure to call the confidential informant in support of the Petitioner's entrapment defense (App. 391: 17-15), failure to object to and preserve for appellate review testimony from Detective Hembree regarding the Petitioner's prior bad acts (App. 392:1-13), and failure to request a charge on the lesser included offense (App. 392:14-23). The Respondent submits it is clear from the record that this issue is not preserved for appellate review since the Petitioner failed to raise this issue in the lower court.

The Respondent submits this issue was also never ruled on by the PCR court. In order to be preserved, an issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Herron v. Century BMW, 395

S.C 461, 719 S.E.2d 640 (2011). While it appears the PCR Court in its Order made a general finding that "there is no evidence that the proper preservation of the issue for appeal would have changed the outcome of the trial", the PCR Court never ruled on counsel's newly alleged failure to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on his entrapment defense (App. 404).

The Petitioner also failed to file a motion pursuant to South Carolina Rule of Civil Procedure 59(e) to obtain a ruling from the Court on the specific claim that he now raises on appeal. When a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a motion asking the trial court to rule on the issue in order to preserve it for appeal. Cowburn v. Leventis 366 S.C. 20, 619 S.E.2d 437, rehearing denied (Ct. App. 2005). The Respondent submits this Court should not reach the merits of this claim because the issue is being raised for the first time on appeal and, therefore, is not properly preserved for appellate review. The Respondent submits this issue was not raised or ruled on in the lower court.

If this Court is inclined to address the merits of this claim, the Respondent submits the Petitioner has failed to carry his burden of proving that had counsel moved for directed verdict on the basis of his entrapment defense he would have been successful at trial. The Respondent submits there was enough evidence of the Petitioner's guilt to require sending the case to the jury. "When ruling on a motion for directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Furthermore, a defendant is entitled to a directed verdict at the trial level when the State does not produce evidence of the offense charged; however, if the State presents

any evidence at trial which reasonably tends to prove the defendant's guilt, the case must go to the jury. State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (emphasis added).

Entrapment is recognized as a valid defense in this State. State v. Jacobs, 238 S.C. 234, 119 S.E.2d 735 (1961). It is an affirmative defense which necessarily assumes the acts charged were committed. State v. Haulcomb, 260 S.C. 260, 195 S.E.2d 61 (1973). The defense of entrapment is not available to a defendant exhibiting a predisposition to commit a crime independent of governmental inducement and influence. State v. Johnson, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988) (citing Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)). The issue of whether or not the defense of entrapment has been established is ordinarily a question of fact for a jury unless there is undisputed evidence and only one reasonable conclusion can be reached. State v. Johnson, 295 S.C. at 217, 367 S.E.2d at 701.

Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. State v. Jacobs, 238 S.C. 234, 244, 119 S.E.2d 735, 740 (1961). The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Sorrells v. United States, 287 U.S. 435, 441, 53 S. Ct. 210, 212, 77 L. Ed. 413 (1932). "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law abiding into the commission of a crime." Id. at 445, 53 S.C. at 214. The entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition. State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). Predisposition, "the principal element in the defense of entrapment," focuses upon whether the defendant was an "unwary innocent" or,

instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883, 886, 99 L. Ed. 2d 54 (1988).

Entrapment as an affirmative defense imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted. State v. Brown, 362 S.C. at 263, 607 S.E.2d at 95. 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. Id. A defendant is not entitled to an entrapment instruction unless he can meet this initial burden of producing some evidence of government inducement. Id. The trial court may find as a matter of law no entrapment existed, when there is no evidence in the record that if believed by the jury, would show that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready and willing to commit it. Id. In deciding whether the trial court erred in failing to direct a verdict in favor of a defendant in a criminal case, the appellate court must view the testimony in the light most favorable to the State. State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976).

The Respondent submits the Petitioner has failed to carry his burden of proving counsel was deficient for failing to argue his entrapment defense in support of his motion for directed verdict and that counsel's deficiency affected the outcome of his trial proceeding. The Respondent submits even if counsel had argued the Petitioner's entrapment defense in support of his motion for directed verdict, there was still sufficient evidence to send the case to the jury.

At trial, the State presented ample evidence to support its claim that the Petitioner was predisposed to traffic cocaine. The State presented evidence of the following at trial to show the Petitioner's guilt and predisposition to commit the offense charge:

-Petitioner had engaged the confidential informant about his ability to sell him a quantity of cocaine prior to the undercover buy (App. 118:25-119:13).

-Petitioner made several comments which indicated he had prior experience with drug transactions such as "you have to have balls to get away with it, you can't act nervous, you can't act paranoid, if you act nervous things will happen." (App. 120:8-24).

-Petitioner told the undercover officer he had previously been pulled over by a sheriff who searched his vehicle and did not find the drugs hidden behind a load of dirty clothes. (App. 121:1-3).

-Petitioner made statements during the sale that were consistent with upper level drug transaction. (App.121:3-8).

-Petitioner engaged in drug use and conducted business at his house. (App. 121:18-24).

-Petitioner referenced having other folks complete his drug transactions so that buyers would not know he was the guy behind the transaction. (App. 121:25-122:2).

The Respondent submits the State presented sufficient evidence to prove the Petitioner was predisposed to commit the crime and that the case should go to the jury. Evidence was presented by the State that the Petitioner talked about his own prior drug use, selling drugs at his house, driving quantities of drugs in his car, and how to remain calm so as not to alert the suspicions of law enforcements. At the directed verdict stage of the proceeding, the trial judge is concerned with the existence of evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). The Respondent submits it is unlikely counsel's failure to argue for directed verdict on the basis of Petitioner's entrapment defense would have resulted in the court directing a verdict of not guilty. Had counsel made this argument at trial, it is also unlikely the Petitioner's conviction would have been vacated on appeal for the trial court's failure to direct a verdict. Reviewing the evidence in the light most favorable to the State, the Petitioner was not entitled to directed verdict.

The Petitioner also asserts the trial court concluded the Petitioner was entrapped but failed to direct a verdict of not guilty. The Respondent submits the trial judge did not reach the

conclusion that the Petitioner was entrapped. This was a factual question for the jury to determine and they did. They found the Petitioner was not entrapped and returned a guilty verdict. The trial judge did not, and cannot, make such findings of fact.

The Petitioner also argues the trial judge did not apply the entrapment defense equally to both charge in that the trial judge made a finding of entrapment as to the proximity charge. This is not correct. While the trial court certainly questioned how entrapment applied to a proximity charge, and even indicated that entrapment would be a 'slam dunk' if the officer set the place for the deal, the Court did not find the officer set the place for the deal, nor did it find that the Petitioner was entrapped. This discussion occurred only after the jury had returned a verdict of guilty on the trafficking charge and could not reach a verdict on the proximity charge. At that point, the State elected to dismiss the proximity charge. There was no issue with regard to entrapment as it applied to a proximity charge and the trial court did not make any findings in this regard. The Respondent submits counsel's alleged failure to preserve for appellate review the issue of whether the Petitioner was entitled to a directed verdict based on his entrapment defense is not properly preserved for appellate review and the Petitioner has failed to carry her burden of proving counsel's performance was ineffective in this regard.

II. The Petitioner's second claim that the lower court erred in finding trial counsel was not ineffective for failing to preserve for appellate review the issue of whether the trial court erred in giving the jury a confusing and contradictory jury instruction on entrapment is not properly preserved for appellate review and the Petitioner has failed to show that but for counsel's performance the outcome of the Petitioner's trial or direct appeal would have been different.

The Petitioner claims the lower court erred in finding counsel was not ineffective for failing to preserve for appellate review the issue of whether the trial court erred in giving the jury a confusing jury instruction on entrapment. The Respondent submits this issue also is not preserved for appellate review. The Respondent submits the Petitioner failed to raise this claim

in his post-conviction relief application or during his evidentiary hearing. (App. 326, 337-396). The Respondent also submits the record is void of any ruling from the lower court on whether counsel was ineffective for failing to preserve this particular issue for appellate review. (App. 401-405). With the his previous claim, the Petitioner failed to file a motion pursuant to South Caroline Rule of Civil Procedure 59(e) to ensure a specific ruling by the lower court on this issue. The Respondent submits and the record reflects the Petitioner is raising this issue for the first time on appeal. This issue was not raised or ruled on in the lower court. This Court should not reach the merits of this claim because the issue is not properly preserved for appellate review.

If this Court is inclined to address the merits of this claim, the Respondent submits the Petitioner has failed to carry his burden of proving that counsel was ineffective for failing to preserve for appellate review the issue of whether the trial court gave the jury a confusing and contradictory charge on entrapment when it instructed the jury that the State had to prove beyond a reasonable doubt that the Petitioner was not predisposed to commit the crime. The Respondent submits this claim is without merit. The record reflects that counsel objected during trial to the entrapment instruction given to the jury. Counsel argued to the Court that the entrapment instruction given by the trial court shifted the burden of proof to the Petitioner. The Court overruled counsel's objection. (App. 256:2-257:7).

On appeal, the Petitioner argued the trial court erred in misstating the State's burden of proof regarding the predisposition prong of the defense of entrapment during its entrapment jury instruction. (App. 280-294). The Court of Appeals found this issue raised by the Petitioner on appeal was not preserved for appellate review. The Court stated "Hernandez'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). The Court's finding regarding preservation of this issue for appeal made no mention of any failure by counsel to object and preserve the record for review on appeal (App. 321). The Respondent submits trial counsel should not be held ineffective for choosing to make an argument at trial that was different from the argument the Petitioner later chose to raise on appeal.

The Respondent submits further the entrapment jury instruction given during the Petitioner's trial would not have warranted reversal on appeal since when read in its entirety the instruction given by the trial court was proper. While the trial judge did initially misstate what the State was required to prove to defeat the affirmative defense of entrapment, he immediately corrected the mis-statement and repeated the corrected burden several times.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Brown, 362 S.C. 258, 607 S.E.2d 93 (Ct. App. 2006). In South Carolina, a trial judge must "declare the law" to the jury. See S.C. Const. art. V § 17 (1895). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). Jury instructions must be considered as a whole, and if as a whole they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

The following is the entire charge on entrapment given by the trial judge in this case:

> Now, ladies and gentlemen, in this case, the defendant has raised the defense of entrapment. And this is one area where the overall responsibility of the State to prove its case is somewhat modified but very, very limited modification. A very limited modification.
>
> For one pleading entrapment has the burden of showing that that 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 state to prove**

beyond a reasonable doubt that he was not predisposed. That he was otherwise not predisposed to commit the crime.

The crime – to believe – excuse me. Entrapment is shown if the crime was conceived and planned by an officer or someone acting as an agent of law enforcement. That the officer or agent induced, solicited, proposed, initiated, suggested, or persuaded the defendant to commit the crime without the trickery, persuasion or fraud of the officer or agent. And that the defendant would not have committed the crime without the trickery, persuasion, or fraud of the officer or agent.

The State is required to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime without the inducement. Predisposed to commit the crime means that the defendant had the intent, purpose, readiness or willingness to commit the crime without the inducement or persuasion of the officer of agent.

The fact that the officer or agent merely presented opportunities or facilities for the commission of the crime is not entrapment. If you find the defendant had any predisposition without any government inducement and influence to commit the crime, the defense of entrapment would not apply.

In deciding whether the defendant had any predisposition to commit the crime you may consider such evidence as the existing course of criminal conduct by the defendant similar to the crime charged. Also an already formed plan by the defendant to commit the crime, and a willingness to commit the crime charged as shown by the defendant's ready response to the inducement.

If you find the defendant was entrapped into committing the crime, then you must return a verdict of not guilty.

Also in determining whether the defendant was predisposed to commit the crime before being approached by the government agent; you may consider the defendant's character and reputation; whether the government initially suggested criminal activity; whether the defendant engaged in activity for profit; the nature of the government's inducement; and any other facts related to predisposition. (App. 246:19-248:23) (emphasis added).

The Respondent submits that while the trial judge mis-spoke at the beginning of the charge, he did correct the mis-statement and repeated the correct charge several times. The bold text is the portion of the charge that the trial judge mis-stated. The Respondent submits the underlined passages are the portions of the charge that correctly state the burden of proof and clarify that the State must prove beyond a reasonable doubt that Appellant was predisposed to commit the crime. The Respondent submits the jury charge, when read as a whole, clearly

instructed the jury that in order to find the Petitioner was entrapped, the State was required to prove that he was predisposed to commit the crime.

The Respondent also submits the trial judge also charged the jury to use their common sense and that common sense dictates that the State would not have to prove that the Petitioner was not predisposed to commit the crime. The entrapment instruction given by the trial court as a whole was a correct statement of law. Even if trial counsel had objected and preserved this issue for appellate review, it is unlikely the instructions as given would have warranted reversal on appeal. The Respondent submits counsel's alleged failure to preserve for appellate review the issue of whether the trial court erred in giving the jury a confusing jury instruction on entrapment is not preserved for appellate review and the Petitioner has failed to carry his burden of proving counsel was ineffective in this regard.

III. The Petitioner's third claim that the lower court erred in finding trial counsel was not ineffective for failing to preserve for appellate review the issue of whether the trial court erred in failing to instruct the jury that the Petitioner only had the burden to produce "more than a scintilla of evidence" showing he was induced to commit the crime is not properly preserved for appellate review and the Petitioner has failed to show that counsel's performance affected the outcome of the Petitioner's trial or direct appeal.

The Petitioner claims the lower court erred in finding counsel was not ineffective for failing to preserve for appellate review the issue of whether the trial court erred in failing to instruct the jury that the Petitioner only had the burden to produce "more than a scintilla of evidence" that he was induced to commit the crime before the burden shifted to the State to prove beyond a reasonable doubt that the Petitioner was predisposed to commit the crime. The Respondent submits this issue is also not preserved for appellate review.

Like the Petitioner's first two claims, the Petitioner failed to raise this claim in his post-conviction relief application or during his evidentiary hearing. (App. 326, 337-396). The Respondent also submits the record is void of any ruling from the lower court on whether

counsel. The Petitioner also failed to carry a motion pursuant to South Caroline Rule of Civil Procedure 59(e) to ensure a specific ruling by the lower court on this issue. The Respondent submits and the record reflects the Petitioner is raising this issue for the first time on appeal. This issue was not raised or ruled on in the lower court. This Court should not reach the merits of this claim because the issue is not properly preserved for appellate review.

If this Court is inclined to address the merits of this claim, the Respondent submits the Petitioner failed to carry his burden of proving that counsel was ineffective for failing to preserve for appellate review the issues of whether the trial court erred in failing to instruct the jury that the Petitioner only had the burden to produce "more than a scintilla of evidence" in support of his entrapment defense. The Respondent submits this claim is without merit.

The Respondent submits that counsel's failure to preserve this issue for appellate review did not affect the outcome of his trial proceeding. It is also unlikely an objection and preservation of this issue for appeal by trial counsel would have resulted in reversal on appeal. The Respondent submits the trial judge's failure to use the specific word "scintilla" did not change the import of the entrapment jury instruction. "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Adkins, 353 S.C. 312, 318-319, 577 S.E.2d 460, 464 (Ct. App. 2003).

The charge, when read as a whole properly instructed jury as to the Petitioner's burden of proof. A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). During the entrapment jury instruction, the trial court instructed the jury that the State had the burden of proving each element of the offense beyond a reasonable doubt. (App. 236:22-238:5). The trial court instructed the jury that "this is one area where the overall responsibility of the State to prove its case is somewhat modified."

(App.246:19-24). The trial court went on to explain that when a defendant relied on entrapment as a defense, he first must show that he was induced, tricked, or incited to commit a crime which he would not have committed. (App. 246:25-247:3). The court then reiterated the State's burden of proof beyond a reasonable doubt. (App. 247:3-7). The Respondent submits the jury was sufficiently made aware of the burden of proof required in the Petitioner's case. The Court's failure to use specific language was not objectionable and would not warrant reversal on appeal.

IV. The Petitioner's fourth claim that the lower court erred in finding appellate counsel was not ineffective when she failed to raise on appeal the 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" is not preserved for appellate review and the Petitioner has failed to show that appellate counsel was ineffective in this regard.

The Petitioner claims the lower court erred in finding appellate counsel was not ineffective for failing to raise on appeal the 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." The Respondent submits this issue is not preserved for appellate review. In the Petitioner's PCR application, he raised the claim of "ineffective assistance of appellate counsel." (App. 326). At the evidentiary hearing, neither the Petitioner nor his PCR counsel made any references to his claim regarding ineffective assistance of appellate counsel. In the Order of Dismissal, the PCR Court made a general finding that appellate counsel was not ineffective "for appealing an issue that was not preserved for review." (App. 406).

The Respondent submits the issue of whether appellate counsel was ineffective for failing on appeal the 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" was never presented to or passed upon by the lower court. The Petitioner should not be allowed to raise a new argument in support of his claim for ineffective assistance of appellate counsel on appeal

that was never argued in the lower court. Arguments not presented to nor ruled upon by the trial court are not preserved for appellate review. The Appellant may not argue a different position on appeal. Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 737 S.E.2d 601 (2013). The Respondent submits and the record reflects the Petitioner is raising this issue for the first time on appeal. This issue was not raised or ruled on in the lower court. This Court should not reach the merits of this claim because the issue is not properly preserved for appellate review.

If this Court is inclined to address the merits of this claim, the Respondent submits the Petitioner failed to carry his burden of proving appellate counsel was ineffective for failing to raise on appeal the 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." A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether

Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

The Respondent submits appellate counsel was not deficient for failing to raise on appeal the 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." Had appellate counsel raised this issue on appeal, it is unlikely this issue would have warranted reversal since the jury was given an instruction on good character and good reputation evidence and the Court's refusal to charge the jury with the specific language suggested by trial counsel did not prejudice the Petitioner and was harmless.

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). However, the refusal to instruct the jury on the issue of good character is not reversible error when such refusal fails to prejudice the appellant. Id.

The record reflects the Court's good character jury instruction was substantially correct and covered the substance of the law regarding the jury's consideration of good character evidence presented by the Petitioner. The Court instructed the jury as follows:

> 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 deciding whether or not the defendant committee the crime. (App. 248:24-249:8).

ALAN WILSON
ATTORNEY GENERAL

October 8, 2014

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

RE: Jose Hernandez, #326877 v. State of South Carolina
Appellate Case No. 2013-002061

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Habeas Corpus to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving the petitioner with this Return to Petition for Writ of Habeas Corpus.

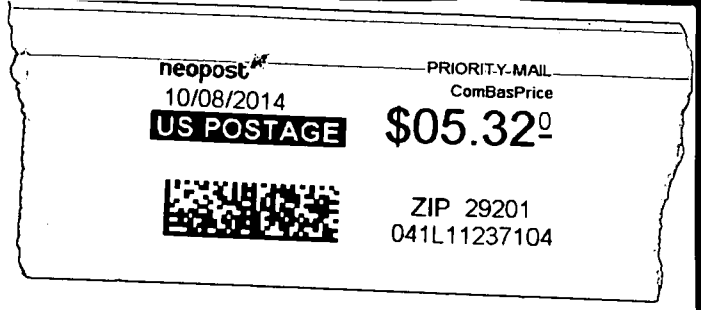
With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Carmen Ganjehansi, Esquire

Ashleigh R. Wilson -
Attorney General's Office
PO Box 11549
Columbia, SC 29211



The Honorable Daniel E. Shearouse
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