THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
In the Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2013-001143
Opinion No. 27562
Heard February 3, 2015 - Filed August 12, 2015

ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS

The State ..... Petitioner,

vs.

Francis Larmand, ... Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Francis Larmand respectfully requests that this Court rehear this matter to correct the following errors and omissions:

1. This Court stated a standard of review as being "there was substantial circumstantial evidence from which the jury could infer Respondent's guilt." *State v. Larmand*, Op. № 27562 (S.C.Sup.Ct. Re-filed December 23, 2015)(Shearouse Adv.Sh. № 50 at___). This

Court failed to identify the substantial circumstantial evidence upon which the Court relied upon. By finding as a matter of fact that the explanation of Francis Larmand to be plausible, the Court has in found the jury was trying to decide between two plausible explanations and as such, the State has not met its burden of proof.

2. This Court improperly interpreted *Holland v. United States,* 348 U.S. 121 as holding that the case rejects "the contention that circumstantial evidence must exclude every reasonable hypothesis but that of guilt" when the case only held such a charge need not be given to a jury.

January 6th, 2016

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

In reviewing the facts of this case, this Court has appeared to abandon the principle that a review of circumstantial evidence cases should be made objectively looking for substantial evidence of guilt. Instead, the Court appears to review the facts in this case to determine if there are any facts which the jury believed that could arguably support an inference of guilt. While the Court listed 13 factors to be considered, neither individually nor collectively

do those 13 factors amount to substantial circumstantial evidence to prove the guilt that Mr. Larmand entered into an agreement with Mr. Lermire to assault Ryan Lochbaum. One of the factors is inconsistent with the facts listed in the opinion. For example, the Court found that Mr. Larmand and Leo Lemire had gone to the former stadium of the Charlotte Knights to conduct a "mystery shopper" call. Knights stadium is slightly less than 20 miles from the residence of Mr. Lochbaum.[1] Thus, in keeping with the facts of the opinion, Mr. Larmand and Mr. Lemire had to travel only 20 miles to the residence of Ryan Lochbaum. The fact that they drove that short distance unannounced is not substantial evidence of a premeditated plan to assault Mr. Lachbaum.

The wearing of all black clothing is not proof of a premeditated intent to assault when Mr. Larmand presented himself to Mr. Lauchbaum and his associates. As he was not trying to keep from being seen by all present, the color of his clothing is simply not relevant. Parking a vehicle a quarter of a mile away is not indicative of a premeditated attempt to beat Mr. Lachbaum. Parking a vehicle that far away actually impedes a get away if there were an alleged planned attack. In addition, from a quarter of a mile away Mr. Lemire would not be able to determine if Mr. Larmand would be able to get Mr. Lochbaum alone. Both men would then have to run a quarter of a mile to retrieve their vehicle in order to make a getaway. The fact that Mr. Larmand broke off arguing with Mr. Lochbaum is as equally susceptible of his being surprised at the appearance of Mr. Lemire as any other explanation. While one witness did testify that Mr. Larmand was pushing Mr. Lochbaum, Mr. Lochbaum denied that Mr. Larmand ever touched him

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[1] *See* Google Earth, directions from Knights Stadium, Fort Mill, SC to Gentle Breeze Lane, Rock Hill, SC. Visited August 21, 2015

before Mr. Lemire appeared. Rec. On App. At 106, ll 18-20; 142, ll 12-14; 143, ll506. All the 13 factors establish is that the two men rode together to the residence of Mr. Lochbaum. The factors do not establish substantial circumstantial evidence of a premeditated agreement to harm Mr. Lochbaum. There is not a scintilla of evidence that Mr. Larmand knew Mr. Lemire had a firearm. At best, this is an assumption based upon the fact that Mr. Lemire had a firearm.

If the same standard of review had been applied in *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004) this Court would have affirmed the conviction. Among the facts in that case were: 1. The defendant and the victim knew each other and had a sexual relationship. 2. The defendant was in the area at the time of the murder. 3. The defendant was known to carry a gun. 4. The fingerprint of the defendant was found on a cup in the BMW owed by the victim. 5. The defendant fled the area shortly after the shooting. 6. The BMW belonging to the victim was found about 10 miles of the home of the defendant's father in Tennessee. Those facts were deemed not to be sufficient to convict because they were not substantial circumstantial evidence. The facts against Mr. Larmand to prove that he had a premeditated agreement with Mr. Lermire to attack Mr. Lochbaum pale in comparison to facts against Mr. Arnold.

In *State v. Hernandez,* 382 S.C. 620, 677 S.E.2d 603(2009) this Court reversed the conviction of three defendants who were the driver and two passengers in a Ryder Rental truck following a Thunderbird and a tractor trailer on a back dirt road in Saluda County. The tractor trailer contained 900 pounds of marijuana. The Ryder truck was empty. The State also produced evidence that the defendants had rented the Ryder truck the day before the incident and spent the night before in a nearby motel. Logic and common sense would tell anyone that the driver of the Ryder truck and the two passengers were there to help off load the marijuana. The

jury certainly thought so. But this Court in keeping with the requirement that circumstantial evidence must be substantial, held that being present down a dirt road in rural county with a tractor trailer carrying 900 pounds of marijuana was not sufficient to convict.[2] *Hernendez* and *Arnold* both present very suspicious facts that a jury could use to convict them. But because this Court recognized that the standard of review is "substantial circumstantial evidence" the evidence was not sufficient to convict. This Court did not recognize a deferential standard of review but in fact recognized that substantial circumstantial evidence requires more than having two plausible theories, one of guilt and one of innocence. If the two theories are plausible, then the evidence is simply not substantial. This Court has found that the theory of the defendant is plausible but has not explained why the theory of the state is substantially more plausible to sustain the conviction.

This Court also misinterpreted the holding of *Holland v. United States,* 348 U.S. 121 (1954). All *Holland* holds is that a court is not required to charge a jury that the government must prove the case to the exclusion of every other reasonable doubt. *Holland* holds, however,

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[2] In the case the court made this statement "The traditional circumstantial evidence charge provides that when the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless: Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). Although in *State v. Cherry,* 361 S.C. 588, 606 S.E.2d 475 (2004) the Court abandoned this charge and held that it may confuse a jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless illustrates the lack of evidence against Petitioners." *Herendez,* 382 S.C. at 625, 667 S.E.2d at 625. Such a standard of review in this case would result in affirming the decision of the Court of Appeals.

that a trial court and an appellate court must review a circumstantial evidence case differently. As the Court said "When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." *Id.* at 135. The Court further said "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Id.* at 129. Thus, *Holland* cautions appellate court to use a heightened review. Whether the standard of review be "substantial circumstantial evidence" or the "to the exclusion of every other reasonable hypothesis" the effect is the same. When the evidence, after viewing all credibility issues in favor of the state, viewed as a whole creates two reasonable inferences one consistent with innocence and the other guilt, the State has not produced substantial circumstantial evidence. Substantial Circumstantial evidence is certainly more than a 51% chance of being right. *See also U.S. v. Spradlen*, 662 F.2d 724 (11th Cir. 1981) ("When reviewing the sufficiency of the evidence supporting a criminal conviction, the standard of review is whether, viewing the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence.")

CONCLUSION

For the foregoing reasons, this Court should rehear this matter and issue an opinion finding the State did not produce substantial circumstantial evidence to sustain the conviction of the Francis Larmand and affirm the decision of the South Carolina Court of Appeals.

January 6, 2015

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the secretary for C. Rauch Wise, Attorney for the Respondent in the above entitled case. That on January 6, 2016, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing and Memorandum in Support of Petition for Rehearing in the above case addressed to Deborah R.J. Shupe, Office of the Attorney General, P.O. Box 115549, Columbia, SC, 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 6 day
of January, 2016.

Mary Anne Hartin (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22