

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-002423

The State of South Carolina.....Respondent,

v.

David A. LandPetitioner.

PETITION FOR CERTIORARI

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Certificate of Counsel

I hereby certify that a Petition for Rehearing was filed with the South Carolina Court of Appeals on October 11, 2016. This Petition was denied on March 23, 2017.

Statement of the Case

Procedural History

Agents of the State Law Enforcement Division arrested David Austin Land on February 11, 2010 at the home of his grandparents in Greenwood, SC. The agents charged him with three counts of Sexual Exploitation of a Minor Second Degree. The basis for the charge was the fact that agents from SLED accessed a computer using LimeWire, a file sharing program.

On February 10, 2014, the grand jury for Lexington County indicted him on three charges of Sexual Exploitation of a Minor. They alleged he did wilfully and knowingly “distribute, transport, exhibit, received, sell, purchase, exchange, and/or solicit material” in a named file “that contains a visual representation of a minor engaged in sexual activity, as defined by Section 16-15-375(5)” and “is in direct violation of S.C. Code Ann. § 16-15-405(A) of Laws (1975), as amended. Rec. on App. at 2 (Indictment № 2014-GS-32-06004). The indictments are identical except for the specific name of the file and the dates. The three separate indictments alleged this occurred on December 4, 2009, December 7, 2009 and January 27, 2010.

He was tried before the Honorable Donald Hocker and a jury on November 5-8, 2014 and convicted of the charges. He was sentenced to seven years in prison, suspended upon the service of 30 months and two years probation. He was also required to register

as a sex offender.

Mr. Land filed his notice of Appeal on November 14, 2014. The Court of Appeals affirmed his conviction on September 28, 2016. A Petition for Rehearing was filed on October 11, 2016. The Petition for Rehearing was denied on March 23, 2017. This Court granted a request to file the Petition for Writ of Certiorari out of time.

Factual History

SLED agents David B. Dove and Lucinda McKellar conducted separate undercover operations investigating child pornography. Their operation consisted of using a file share program to go on the internet and look for other computers that had a file share program that contained child pornography. Rec. on App. at 141, ll 1-22. When the computer was accessed, they obtained, in addition to pictures and movies they believed contained child pornography, the IP address the computer was using to access the internet and the global unique identification (GUID) number that the file sharing software was using. Rec. on App. at 145, ll 23-25 to 146, ll 1-20.¹ The IP address could change as the person accessing the internet changed locations or providers. The GUID number does not change unless the person takes some action, such as a system restore, to delete the file sharing program and re-installs it. Rec. on App. at 204, ll 4-11; 211, ll 10-

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The GUID is a 32 alphanumeric identifier. The number is so large that every time the program is downloaded, a new number can be assigned without concern for duplication of numbers. While the testimony was that the GUID number is like a VIN number for an automobile, this is not correct. Under no circumstances does a VIN number change while a GUID number will change every time the software is re-installed. The number is unique to the software download and not the computer on which it is downloaded. Rec. on App. at 168, ll 2-9.

17. The software used by the SLED agents did not obtain any unique identification numbers for the computer they were accessing. Or at least there was no testimony any such identification number could be obtained. The agents admitted they could not tell who was using the computer.

The testimony from both agents established that the file sharing software used by the person whose computer they were accessing was named LimeWire. When LimeWire is downloaded and installed, the default position is to give open access to the files the person downloads. The files downloaded are by default stored in a file called "share." Thus, by simply downloading LimeWire and accepting the default position, a user would share the files they download with the world without any further action on their part. Rec. on App. at 144, ll 13-23; 181, 2-6; 209, ll 1-6. Agent Dove testified he believed the majority of people who download LimeWire simply accept the default position. Rec. on App. at 196, ll 11-22. No testimony was presented as to whether a person downloading the program would know the default position permitted them to share files with everyone. If one had their computer on, no further action was required by the person using the computer to permit access to the files they had downloaded. Rec. on App. at 198, ll 5-11. Once the agent connected to the computer that had the LimeWire program, the downloads started automatically. Rec. on App. at 151, ll 6-7.

On December 7, 2009 Agent Dove located the IP address used. He then obtained the location of that IP address from the internet provider that was associated with the IP address. Rec. on App. at 190, ll 4-9. The physical address was that of Christy Land, the mother of David Austin Land. She lived in the residence with her daughter and other

son. Rec. on App. at 193, ll 9-12. They seized from the residence a laptop and two computer towers. Rec. on App. at 193, ll 13-16.

While working on his case. Agent Dove learned that agent McKellar had an investigation concerning the same GUID number. Agent McKellar was involved in downloads on December 4, 2009 and January 27, 2010. The IP address for December 4, 2009 was the same IP address used in agent Dove's investigation. On January 27, 2010 a different IP address was used but the same GUID number. Rec. on App. at 235, ll 15-16; 239, ll 15-17.² The January 27, 2010 IP address was located in the same apartment complex as the IP address used in the other two downloads.

Once the location of the IP addresses was obtained, agents Dove and McKellar conducted further investigations and determined that two open wireless wi-fi connections were available at the apartment complex. By being "open," no pass code was needed to access the internet through the router. They both were open to the public. After making this determination, a search was conducted of both apartments. Computers from both apartments were examined but the router in either location was not seized or examined to determine if it had any evidentiary value. Rec. on App. at 271, 13-16; 201, ll 7-24. Three computers were seized from the Land residence. Two computers from the residence above Ms. Land were seized and examined. No computer was found to contain either the GUID number or child pornography. Rec. on App. at 205, ll 6-24; 246, ll 15-25 to 257, ll 1-9.

²

The IP address found by agent Dove and agent McKellar in her first contact was 98.121.204.235 Rec. on App. at 9-12.

Agent Dove further testified that if a program is used that erases pictures or programs the forensic experts should be able to detect the fact that this was done. Rec. on App. at 205, ll 6-25, to 208, ll 1- 11. Of the three computers seized from the residence of Ms. Land, none had the GUID number nor evidence of the file having been deleted. When Mr. Land was interviewed and arrested on February 10, 2009, he, at the request of Agent McKellar, brought his computer. That computer, as well as the computer belonging to his grandfather, was examined by a forensic expert. The GUID number was not found on Mr. Land's computer or his grandfather's computer. Rec. on App. at 271, ll 21-25 to 272, ll 1-5. In addition, the computer had no indication that a system restore has been conducted or any other erasure type program. Rec. on App. at 272, ll 16-25 to 273, ll 1-19. Simply put, no computer seized by the agents had the GUID number on it, child pornography, or evidence that an attempt had been made to erase any pictures or programs.

While at his grandfather's residence, Mr. Land was interviewed by the officer for approximately two hours. Rec. on App. at 276, ll 20-25. In the interview, after about an hour and 50 minutes, he admitted using LimeWire and admitted downloading child pornography. He did not admit to distributing child pornography. He was not asked about his knowledge as to his understanding of how LimeWire works or if he knew the default position would permit people to access his computer. He did identify several titles from those provided by agent McKellar as the title of some of the videos he had downloaded. Mr. Land told the officers he had been up until about 2 am before the interview. Rec. on App. at 276, ll 11-12. He also named several medications he was

taking for post traumatic stress disorder. Rec. on App. at 276, ll 14-16; 275, ll 22-25 to 276, ll 1-2. He stated the files he downloaded at his mother's house were deleted. Rec. on App. at 7-9. He further stated that he did a system restore on his computer. Rec. on App. at 15-21.³ The state presented no evidence that Mr. Land had access to any other computers other than the ones they seized. The state presented no evidence of any missing computers.

³

The testimony at trial established that if Mr. Land had downloaded LimeWire after deleting a prior version from his computer, a new GUID number would have been assigned.

Argument

Question I

Did the State provide sufficient proof to establish for a reasonable jury to conclude that David Austin Land knowingly distributed or exchanged pictures or video of a minor engaged in a sexual act when the state never established any evidence that Mr. Land knew the pictures and videos he down loaded were available to the public from his computer?

To establish the guilt of David Austin Land to the charge of Criminal Exploitation of a minor second degree, the state is required to do more than prove that Mr. Land had pictures and videos that could be accessed by someone with file sharing software. To prove that Mr. Land had the mens rea to violate the statute the state has to prove he in fact knew that a person with file sharing software could access his computer and that he intended to permit such access. The State in this case proved neither.

This Court has said “Criminal liability is normally based upon the concurrence of two factors, ‘an evil meaning mind [and] an evil doing hand.’” *State v. Jefferies*, 316 S.C. 13, 17, 446 S.E.2d 427, 430, 1994 WL 321121 (1994). *See, also, Morissette v. United States*, 342 U.S. 246, 252 (1952) (“Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.”). The evil doing hand has to be more than “clicking default” on a software program unless the state has proven a defendant knew by clicking default he has the required evil intent.

Under S.C. Code § 16-15-405, the State is required to prove a defendant knows

of the nature of the pictures. The statute does not specify a mens rea for the act of distribution of the child pornography. As the South Carolina Supreme Court did in *Jefferies*, this Court should hold that a mens rea of knowledge is required. Under such a holding the state would be required to prove a defendant knew they were in fact actually distributing child pornography. At the trial below the trial judge, with the consent of the state, agreed the state had to prove the defendant acted with at least knowledge that he was acting in violation of the statute. Rec. on App. at 361, 8-24. In his charge, the trial judge equated intent with knowledge. Rec. on App. at 390, ll 24-25 to 391, ll 1-20.

In *Smith v. State*, 204 So.3d 18 (Fla. 2016) the Court addressed the issue of the use of file sharing programs. The Court said:

Smith sent child pornography images to an electronic “place” by loading them into a specific computer file and, through his use of the file-sharing program, made those images accessible to third parties for whom access was authorized. Smith then sent a “friend” request to a third party which authorized the third party—through the file-sharing program—to obtain access to the place to which the images had been sent. By those purposeful acts, Smith caused the delivery of the images to the third party to take place.

Id. at 22.

In *Smith*, the Court required more than simply downloading a file sharing program by which another may gain access to the computer. To come under the definition of “sent” the Court required an affirmative act. While the South Carolina statute does not use the word “sent” the words used are the equivalent. The South Carolina statute uses “distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material” South Carolina Code of Laws S.C. Code Ann. § 16-15-405 (A)(2).

Notably the statute does not use the phrase “offers for distribution, sell or exchange.”

In the present case, the state never produced any evidence that Mr. Land knew that by clicking on the default position he would be giving another user of peer to peer software access to the files he downloaded. The state never produced any evidence that Mr. Land had sufficient computer knowledge to understand how to change the setting on the LimeWare program to prevent his files from being accessed by others or that such an act was even required. The state has the burden of proving its case. The burden requires the state to prove more than the fact that child pornography files were in a file share folder on his computer. The state is required to prove he intended to distribute those files or he had knowledge that his files could or would be accessed by third parties. Without proof of this knowledge, the state has failed to prove Mr. Land guilty of sexual exploitation of a minor, second degree.

In *United States v. Husmann*, 765 F.3d 169 (3rd Cir. 2014) the court held that merely placing child pornography files in a file share folder of a peer to peer file sharing system is not distribution within the meaning of 18 U.S.C. § 2252(a)(2). The Court held “Based on the ordinary meaning of the word ‘distribute,’ the other statutory provisions criminalizing child pornography offenses, and the decisions of our sister circuits, we hold that the term ‘distribute’ in § 2252(a)(2) requires evidence that a defendant’s child pornography materials were completely transferred to or downloaded by another person.” *Id.* at 176. Thus, a conviction in this case cannot be sustained simply because the files were found in a folder that can be accessed by other individuals.

Mr. Land acknowledges that in this case, unlike *Husmann*, three files containing child pornography were in fact downloaded by the investigating officers. The import is

this: If merely having the files in a folder of a file sharing program is not sufficient to sustain a conviction, what more is required? The answer to that question goes back to the original discussion of the intent or knowledge the government must prove to sustain the conviction. The knowledge is that Mr. Land knew the files are in fact available for third parties to access them. The intent is that with this knowledge, he intended for people to download files. Without proof that Mr. Land has such knowledge or intent, the conviction cannot be sustained. “No presumption of intent may be raised by law from an act.” *Thornton v. State*, 919 A.2d 678, 683, 397 Md. 704, 714 (2007). The State must offer affirmative evidence of the required intent. Several cases that have addressed the question of knowledge support the position of Mr. Land.

In many cases this important distinction has been discussed. The courts have found that the government has proven that the defendant knew or should have known based upon his expertise that the files would be shared. In *State v. Lyons*, 417 N.J. Super.251, 9 A.3d 596 (2010) the Superior Court of New Jersey reversed the dismissal of the charges by the lower court. In finding the state had presented sufficient evidence of distribution, the court said “In his answer to the next question, defendant acknowledged that he knew he had the ability to ‘set it not to share,’ but said he did not do so because he ‘just forgot.’” *Id.* at 599. In *United States v. Richardson*, 713 F.3d 232 (5th Cir. 2013) the court affirmed the defendant’s conviction for distribution of child pornography. In so doing the court found the defendant “knew that what was in his ‘shared’ folder was made available to others through file sharing.” *Id.* at 234. No such facts exist in this case.

In *State v. Fielding*, 15 N.E.2d 912 (Ohio Ct. App. 10th Dist. 2014) the Ohio

court affirmed the conviction noting “Although he conceded that files in the shared location on his laptop could be accessed by others, he stated he did not intentionally share files with others.” *Id.* at 926. Mr. Land made no such concession. *See, also, United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012)(“When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.”)

State v. Tremaine, 315 S.W.3d 769 (Mo. Ct. App. W.D. 2010) has special application to this case from a factual discussion and the legal application. In *Tremaine* the defendant was accused of possessing child pornography and “promoting child pornography in the first degree by offering to disseminate it.” *Id.* at 770. As in this case, Mr. Tremaine had downloaded child pornography with the use of LimeWire. His conviction was affirmed because the court found that Mr. Tremaine knew the files he downloaded were accessible to others. In reaching this conclusion the court noted:

While Detective Anderson testified that “there's also a setting on LimeWire *that I believe is by default, on the newer versions, that will allow you to share partial files,*” this statement did not establish that the LimeWire program had set Tremaine's computer to share files in the “Incomplete” folder automatically and without his knowledge. Indeed, the testimony of defense expert Greg Chatten suggests Tremaine's active involvement in determining which (if any) of his files would be shared. Chatten testified that, “[f]rom whatever setting you've put in LimeWire is to where your—what folder or folders you wish to share, yes.” Hence, the jury could reasonably conclude that Tremaine voluntarily enabled the sharing of files in his “Incomplete” folder, which constituted the offer to disseminate child pornography. *Id.* at 774-775

In the present case the newer version of LimeWire did in fact set Mr. Land's computer to share files in the “share” folder by default and without the knowledge of Mr. Land. Mr. Land

did not have to perform an affirmative act, which would show knowledge, to have LimeWire set up a folder that would share files. The State has not proven he had the knowledge that he was in fact sharing files. The Court of Appeals said “The evidence, including Land's own admissions, established that Land knew how LimeWire worked and knew that the child pornography he downloaded would be available for others to download and view.” *State v. Land*, 419 S.C. 191, 202, 797 S.E.2d 48, 54 (Ct. App. 2016), *reh'g denied* (Mar. 23, 2017). The record in this case does not establish that fact. Granted Mr. Land knew how to download the program and generally knew how it could be used, the State never established any evidence he was an expert in the operation of the program. This Court cannot infer from a barren record, Mr. Land had such knowledge of file sharing. Most people have downloaded programs and do not understand fully how the programs work or what the programs are capable of doing.

The Court of Appeals argued that because Mr. Land admitted he had “received” the child pornography, he was guilty of sexual exploitation of a minor second degree. The Court of Appeals ignored the fact that at the trial below, the trial court had equated “received” with “possessed” and gave the lesser included offense of sexual exploitation of a minor, third degree. This was a proper ruling. As the Kansas court said “If the elements in overlapping provisions are identical, the due process considerations involved in Kansas' identical offense sentencing doctrine apply and a defendant may only be sentenced to the lesser punishment provided for in the identical, overlapping provisions.” *State v. Thompson*, 200 P.3d 22, 36, 287 Kan. 238, 258 (2009). The State below acquiesced in the interpretation of the statute. Rec. on App. at 244, 120 to 246, 117. As “receive” and “posses” have the same meaning, the Court of Appeals cannot now affirm a conviction for second degree based on “receiving.”

The Court of Appeals further erred in holding that a simple internet search is “soliciting” under the statute. The Court of Appeals failed to consider that one, in common parlance, does not equate an internet search with “solicitation.” The word “solicit” means “to appeal for something” or “to ask earnestly” or “to ask for the purpose of receiving.” The definition further continues “The term implies personal petition and importunity addressed to a particular individual to do some particular thing.” Black’s Law Dictionary 4th Ed. (1957). “The theme running through all the cases [defining solicit] is that to solicit means ‘to appeal for something,’ ‘to ask earnestly,’ ‘to make petition to,’ ‘to plead for,’ ‘to endeavor to obtain by asking’ and other similar expressions.” *State v. Blakney*, 50 Ohio Misc. 3, 3–4, 361 N.E.2d 567, 568 (1975); *State v. Jacob*, 2015 Ohio 4760, 50 N.E.3d 279, 283 (2015) (“Solicit means ‘to seek, to ask, to influence, to invite, to tempt, to lead on, or to bring pressure to bear.’”); *Skelhorn v. State*, 332 Ga. App. 782, 787, 773 S.E.2d 45, 49 (2015), reconsideration denied (July 7, 2015), cert. denied (Oct. 5, 2015) (“In ordinary usage, the term ‘to solicit’ means ‘[t]o seek to obtain by persuasion, entreaty, or formal application ... [t]o commit the criminal offense of enticing or inciting (another) to commit an illegal act’”) A “Google” search on the internet hardly qualifies as soliciting. Such a search does not qualify as “an appeal for something,” to make petition to,” to plead for,” or “to endeavor to obtain by asking.” Nor does it qualify under the other common definitions of “solicit.” Solicit implies a personal request of another, which did not occur in this case. In common parlance, one does not do a computer search and say they are “soliciting” items. When one directly contacts another individual either face to face or by other direct communication, then soliciting occurs. That did not occur in this case. Therefore, there was no solicitation. If any ambiguity as to the meaning of the word “solicit” exists, that ambiguity must

be resolved in favor of Mr. Land. As the United States Supreme Court has said “Under a long line of our decisions the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008).

The State could have charged Mr. Land with a violation of S. C. Code § 16-15-410, sexual exploitation of a minor, third degree and had a relatively clean case. This would have simply required that the State prove he possessed child pornography. Instead, the State elected to prove a violation of S. C. Code § 16-15-405, sexual exploitation of a minor, second degree. By electing to charge this violation, the State elected to prove Mr. Land had the intent to distribute the child pornography and not to just possess it. As there was no direct proof of this intent, the State elected to rely exclusively upon circumstantial evidence to prove such an intent. In this case there was no substantial circumstantial evidence that Mr. Land knowingly violated the law by distributing child pornography. As the State offered no evidence for the fact, this Court cannot infer or assume that Mr. Land in fact knew the program he installed permitted other to access his computer without his giving specific permission or changing the setting on the program.

The requirement that the state is required to present facts of a defendant’s knowledge that his computer makes downloaded files accessible to third parties does not prevent the state from prosecuting cases of child pornography. As the court noted in *Husmann* “In the end, our interpretation of ‘distribute’ in § 2252(a)(2) might affect the government’s charging decisions,

but it does not handicap the government's ability to prosecute child pornography offenses.” *Id* at 176.

Question II

Did the South Carolina Court of Appeals err in applying an “any evidence” standard of review in evaluating the evidence in this case?

In affirming the conviction of David Austin Land, the South Carolina Court of Appeals in reviewing the sufficiency of the evidence said the verdict must be sustained “If there is any direct evidence or *any* substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury.” *State v. Land*, 419 S.C. 191, 198, 797 S.E.2d 48, 52,(Ct. App. 2016)(emphasis in original) In so ruling, the Court of Appeals followed a long line of decisions by this court *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006) *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). *State v. Harris*, 351 S.C. 643, 572 S.E.2d 267 (2002); *State v. Venters*, 300 S.C. 260, 387 S.E.2d 270 (1990) . But this Court has not consistently applied the “any substantial” evidence standard. This Court has said “However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011)(emphasis in the original). To place special emphasis on the word “substantial” as opposed to the word “any” changes appreciably the burden upon the State in a circumstantial evidence case.

When a court places emphasis upon “any” evidence, whether it be direct or circumstantial

evidence, the principle established in *Jackson v. Virginia*, 443 U.S. 307 (1979) is ignored. In that decision the Court held “Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . could be deemed a ‘mere modicum.’ But it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Id* at 320. Thus, the Court of Appeals, and perhaps this Court in other cases, improperly looked to see if there were “any” substantial circumstantial evidence instead of reviewing the evidence with an eye toward determining if there were “substantial” circumstantial evidence.

This Court has frequently said the appellate court should not “weigh” the evidence in making a determination as to whether there is more than “some circumstantial” evidence. In determining if there is “substantial circumstantial” evidence, a court would in fact be required, in some degree, to weigh the evidence. In fact, to comply with the mandate of the United States Supreme Court in *Jackson*, a reviewing court must to some degree weigh the evidence.

In reviewing a conviction based upon circumstantial evidence, this Court, as does any court, has two options. The evidence can be reviewed under a standard that affirms most convictions, and therefore the vast majority of guilty defendants will have their convictions affirmed. Or this Court can review the convictions under a standard of review that offers the best chance to exonerate the innocent at the expense of reversing the convictions of some guilty. As one author has said “Because, as discussed, courts should err on the side of ensuring

innocent persons are not convicted, rather than ensuring that the guilty are, they should employ a review mechanism that strives to reverse all unjust convictions, even if such a standard means reversing some proper convictions. The reasonable hypothesis of innocence standard is one such method.” Julie Schmidt Chauvin, Comment, “*For It Must Seem Their Guilt*”: *Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOYOLA L. REV. 217, 246 (2007). The “any” substantial circumstantial evidence standard of review is certainly not a standard of review that would protect the innocent who were wrongfully convicted. The authors urge a standard of review that ensures that the factually innocent in a circumstantial evidence case have a better chance of having their convictions reversed.

In Irene Merker, Rosenberg, Yale L. Rosenberg, “*Perhaps What Ye Say is Based Only on Conjecture*”— *Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371 (1995) the authors stated:

In the case of circumstantial evidence, however, the ultimate determination of guilt is based also on inferences from the evidence, and the court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt. Thus, use of the reasonable hypothesis standard for appellate sufficiency review would preserve the appropriate roles of judge and jury in circumstantial evidence cases. *Id.* at 1416

This Court has on at least two occasions used a standard of review that would require an appellate court to determine if the state has in fact proven the case to the exclusion of a

reasonable hypothesis of innocence. This was used after giving the state the benefit of all credibility issues. This standard of review is also the standard most likely to exonerate the innocent at the expense of freeing some guilty. As former Chief Justice Toal stated in her concurring opinion affirming the conviction, “Put another way, the circumstances proven are consistent with each other, and when taken together, point conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis.” *State v. Daniels*, 401 S.C. 251, 263, 737 S.E.2d 473, 479 (2012). Support for this standard of review is also found in reversing the conviction in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009) where, in footnote 2, after citing the “to the exclusion of every other reasonable hypothesis” standard, the Supreme Court stated “it nonetheless illustrates the lack of evidence against Petitioners.” *Id.* at 626, 677 S.E.2d at 606. While Mr. Land urges this Court to adopt a standard of review that excludes every other reasonable hypothesis, except that of the guilt of the defendant, such a standard is not necessary in this case. To reverse this conviction this court need not use this standard. All that is needed is to follow the guidance of *Jackson, supra* and not use the “any” evidence standard. When the record in this case is examined to determine if the State introduced substantial circumstantial evidence, not that Mr. Land possessed child pornography, but that he knowingly distributed it, the conclusion has to be no such substantial evidence exists. No court should ever hold that an assumption that a defendant knows the entire workings of a computer program is substantial circumstantial evidence. Without this assumption in this case, there is no evidence to convict Mr. Land of the crime of distribution of child pornography.

No doubt requiring the State to prove a defendant had actual knowledge of the fact that he knew the program would enable others to access his computer will result in some guilty individuals not being convicted. But it will also assure that some innocent defendants will not be convicted. As was said by the Pennsylvania Supreme Court:

It is true, of course, that permitting the Commonwealth to introduce the out-of-court assertions ... against the defendant ... would make it easier to convict the guilty. Unfortunately, it would also make it easier to convict the innocent. If such a trade-off is acceptable, why not suspend the hearsay rule entirely when the Commonwealth introduces evidence in a criminal case? More defendants, guilty and innocent alike, would undoubtedly be convicted. The same result would obtain if we allowed the Commonwealth to introduce coerced confessions.

However, such a trade-off is not acceptable. It is a fundamental precept of law in Pennsylvania that one charged with crime, be it murder, child abuse, or keeping a public nuisance, comes to trial clothed in the presumption of innocence. If we bear this in mind, we will be less tempted to distort the law of evidence in favor of the Commonwealth in order to increase the conviction rate. The Commonwealth should be bound by the same rules of evidence, including the hearsay rule, as other litigants. *Commonwealth v. Bujanowski*, 418 Pa. Super. 163, 172, 613 A.2d 1227, 1232 (1992).

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 19 2017

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

S.C. SUPREME COURT

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case № 2014-002423

The State of South Carolina, Respondent,

vs.

David A. Land, Petitioner.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for Attorney C. Rauch Wise regarding the above entitled case. That on May 11th, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Certiorari and Appendix in the above case addressed to William M. Blicht, Jr., Office of the Attorney General, PO Box 11549, Columbia, South Carolina 29211, and Jenny Abbott Kitchings, Clerk of the Court of Appeals, PO Box 11629, Columbia, South Carolina 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 15th day

of May, 2017.

Michelle O Collins (L.S.)

Notary Public for South Carolina

My Commission Expires: 12/13/26