STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-458 (S.C. Ct. App. filed December 12, 2018)

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robin Renee Herndon, Appellant.

Appellate Case No. 2016-001109

Appeal From Aiken County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2018-UP-458
Heard October 9, 2018 – Filed December 12, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

PER CURIAM: In this criminal appeal, Robin Renee Herndon appeals her conviction of voluntary manslaughter. On appeal, Herndon argues the circuit court erred in (1) denying her immunity under the Protection of Persons and Property

Act[1] (the Act), (2) admitting the testimony of forensic pathologist Dr. Janice Ross because the court abandoned its reliability determination to the jury and her testimony was outside the scope of her expertise, and (3) refusing Herndon's request to instruct the jury on the circumstantial evidence charge from *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Issue 1: *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard of review."); *Semken v. Semken*, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008) ("A preponderance of the evidence stated simply is that evidence which convinces as to its truth."); *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) ("An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) ("[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial."); S.C. Code Ann. § 16-11-440(C) (2015) ("A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60."); *Curry*, 406 S.C. at 372, 752 S.E.2d at 267 (finding immunity under the Act "is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the [circuit] court by the preponderance of the evidence"); *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (outlining the elements of self-defense as the following: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if the defense is based on the defendant's actual belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily

[1] *See* S.C. Code Ann. §§ 16-11-410 through -450 (2015).

harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance); *Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71, 74 (1921) (finding when there is no conflicting testimony or when there is no evidence upon a material matter, the question presented is one of law; if the evidence is contradictory, the question is one of fact); *State v. Butler*, 407 S.C. 376, 382, 755 S.E.2d 457, 460 (2014) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." (quoting *State v. Richburg*, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968))); *State v. Hendrix*, 270 S.C. 653, 657, 244 S.E.2d 503, 505 (1978) ("[U]nless it can be said as a matter of law that self-defense was established, it was not error to submit the case to the jury.").

2. As to Issue 2: Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011) (explaining, before a witness is qualified as an expert, the circuit court, *acting as gatekeeper*, "must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) . . . the expert's testimony is reliable.") (emphasis added); *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (finding the court must *evaluate the substance* of the expert's testimony to determine if it is reliable); *State v. White*, 382 S.C. 265, 269–71, 676 S.E.2d 684, 686–87 (2009) (establishing scientific and non-scientific testimony required a reliability finding before admitting the testimony, and further finding expert testimony, related to dog tracking evidence, was reliable due to the evidence concerning the *extensive training and experience* of the law enforcement officer and the *training and reliability* of the canine) (emphasis added); *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) ("The qualification of an expert witness and the admissibility of the expert's testimony are matters largely within the [circuit] court's discretion."); *Nelson v. Taylor*, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (Ct. App. 2001) ("Qualification depends on the particular witness' reference to the subject."); *State v. Lopez*, 306 S.C. 362, 364, 412 S.E.2d 390, 391 (1991) (providing a pathologist, who performed the victim's autopsy, may testify regarding the specific injuries he observed and the victim's cause of death as a result of those injuries); *State v. Gray*, 408 S.C. 601, 607, 759 S.E.2d 160, 163 (Ct. App. 2014) (illustrating a forensic pathologist, who performed the autopsy, may testify regarding the victim's cause of death based on the forensic pathologist's personal observations of the victim's

wounds while performing the autopsy); *White*, 382 S.C. at 269, 676 S.E.2d at 686 ("A [circuit] court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.").

3. As to Issue 3: *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (holding that in reviewing jury charges, the appellate court considers the jury charge as a whole, and a jury charge is correct if "it contains the correct definition and adequately" explains the law) (citation omitted); *Logan*, 405 S.C. at 91, 747 S.E.2d at 448 (finding a jury charge that "is substantially correct and covers the law does not require reversal" (quoting *id.* at 549, 713 S.E.2d at 603)); *id.* at 100, 747 S.E.2d at 452–53 (clarifying the new jury charge the case provided did not prevent a circuit court from charging the jury using the *State v. Grippon*[2] or *State v. Cherry*[3] language but it could not exclusively rely on that charge over an objection by a defendant); *State v. Drayton*, 411 S.C. 533, 543–46, 769 S.E.2d 254, 259–61 (Ct. App. 2015) (recognizing *Logan* and finding no reversible error in the omission of the reasonable hypothesis charge the defendant requested after the circuit court gave a jury charge on circumstantial evidence that contained the language from *Grippon*), *cert. denied on this issue, vacated in part on other grounds, and aff'd in result*, 415 S.C. 43, 780 S.E.2d 902 (2015); *State v. Jenkins*, 408 S.C. 560, 573, 759 S.E.2d 759, 766 (Ct. App. 2014) (finding "any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the [circuit] court's instruction, as a whole, properly conveyed the applicable law").

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.

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[2] 327 S.C. 79, 489 S.E.2d 462 (1997).

[3] 361 S.C. 588, 606 S.E.2d 475 (2004).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-458

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

APPELLANT

APPELLATE CASE NO. 2016-001109

PETITION FOR REHEARING

Appellant petitions for rehearing on the third issue raised in appellant's brief regarding the trial court's failure to give the required charge on circumstantial evidence from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Respectfully, the Court's opinion that the error is harmless fails to consider the evidence in the case and the relevant law. If the Logan error in this case is harmless, it is difficult to imagine any case where the error would be prejudicial and that would render the Supreme Court's mandate that the charge be given when requested a nullity.

This Court's analysis appears to have ended at the language of the jury charge itself and failed to consider both the mandatory language of Logan and the evidence in the case. The Supreme Court made the Logan charge mandatory for all cases that followed. The Supreme Court would not have made the charge mandatory if its language were merely surplusage. Therefore, relying solely on an inadequate circumstantial evidence charge to find the error harmless is improper and is contrary to the Supreme Court's explicit instructions in Logan.

Second, this Court failed to consider the evidence in the case and concluded the error was harmless solely on the language of the charge. See, e.g., State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (reversing on an erroneous jury charge after examining the facts of the case to decide whether the error was harmless). The error here cannot be harmless beyond a reasonable doubt because of the requested charge dealt precisely with the nature of the evidence in this specific case. See Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (examining the precise nature of the error and how it affected the specific case in conducting a prejudice analysis in a PCR case). The State's case against Herndon was entirely circumstantial. No direct evidence existed that disproved self-defense. The State's entirely circumstantial case was pitted against Herndon's direct evidence that she acted in self-defense. A erroneous charge on circumstantial evidence cannot be harmless where the defendant's case is based on direct evidence and the State's case is based solely on circumstantial evidence.

The State's best evidence was the pathologist's inadmissible testimony that asked the jury to infer that Herndon shot Rowley as he walked up the steps. The State's case was built on speculative inferences and the Logan charge that circumstantial evidence must generate consistent inferences which point conclusively to guilt was essential. Not giving the Logan charge allowed the jury to convict Herndon based on circumstantial evidence that merely

portrayed her conduct as suspicious. The Logan charge would have told the jury that this means the State's proof failed.

Every significant piece of evidence the State used to disprove self-defense and convict appellant required the jury to make inferences. As explained in Issue 2, the pathologist's testimony about the angle of the bullet in Rowley's body required the jury to infer that Rowley was shot on the steps, not inside the house. This testimony required the jury to disregard an inference that Rowley may have been bent over as he charged Herndon.

Burton's testimony that she did not see any physical confrontation in the yard required the jury to make several logical leaps. It required the jury to infer that the shoves Herndon described could only have occurred during the limited time Burton was watching and that her vision was not obscured by the trees in her yard. Even the solicitor conceded that Burton may not have seen the shoving described by Herndon when he said, "Lacey might not see that first push." R. 1326, ll. 11 – 12. The jury had to infer that Herndon's description of the assaults inside the house could not have occurred within the 30-60 seconds described by Burton. From all of Burton's testimony, the jury was then required to make the additional inference that Herndon was lying and intentionally killed Rowley from some evil motive.

The evidence from the crime scene required additional inferences. The State argued no struggle occurred inside the house. Accepting this argument required the jury to infer that no struggle occurred from the fact that the furniture was not disturbed. The State asked the jury to make this inference despite the crime scene investigator's admission that the furniture's placement also did not conclusively disprove that a struggle occurred inside the house. The State asked the jury to infer from the cigarette butt and lighter on the porch that Rowley was shot outside instead of him dropping a cigarette before entering the house and losing his lighter after

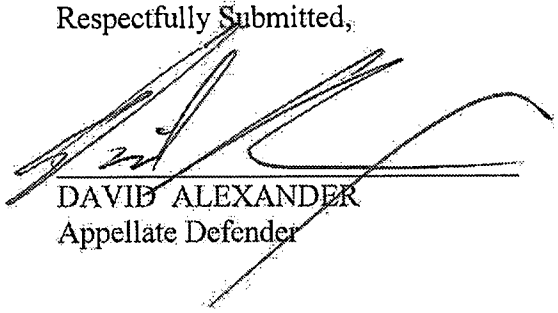
being shot in the throat, falling twice, and urgently treated by Herndon, the police, and paramedics. The State asked the jury to further infer Rowley was shot outside because of the lack of blood inside the house, instead of inferring that Rowley was shot inside the house, grabbed his throat, walked outside, and then began bleeding externally when Herndon pulled away his hand to see his wound. Making this inference also required disregarding the pathologist's testimony that Rowley's bleeding was largely internal and his "chest cavity was full of blood." R. 582, ll. 4 – 19.

The State's argument about the minor inconsistencies between Herndon's videotaped statement and her trial testimony asked the jury to infer Herndon was lying instead of piecing together what she remembered from a horrific, traumatic incident. In the videotaped statement, the police officer recognized this exact probability when he told the blood-soaked Herndon, "Let's back up and get some stuff, right? I know you probably want . . . It'll come to you a little bit more as time goes. . . . you know that you can change and look at something different for a minute, and it'll come back, some of it." (State's Ex. 34B). The State also asked the jury to infer—or speculate—from the severe bruising of Herndon's arms in Alves's photographs that she may have self-inflicted these wounds because several days had passed in the jail.

The State's inferences from circumstantial evidence were countered by the direct evidence of self-defense from Herndon. Herndon unequivocally testified that Rowley threatened her, assaulted her in her yard and in her home, and that she thought he was going to kill her. R. 824, l. 2 – 829, l. 19. She testified that she was "terrified." R. 885, ll. 9 – 17. The State's inferences asked the jury to believe that Herndon, a seasoned law enforcement officer—who minutes before, left work to give Rowley money to go to a doctor's appointment—then killed Rowley because she was mad that he threw her keys on the roof.

The State's inferences from the circumstantial evidence were not consistent. The State's inferences did not point conclusively to Herndon's guilt beyond a reasonable doubt. The State's inferences barely portrayed Herndon's behavior as suspicious. Had the trial judge given the defendant's requested Logan charge, the jury would have concluded that the State's proof failed. This Court should grant rehearing and reverse.

Respectfully Submitted,



DAVID ALEXANDER
Appellate Defender

This 21st day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robin Renee Herndon, #368111, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 21st day of December, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of December, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2016-001109

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,.....APPELLANT.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On December 12, 2018, this Court issued an opinion affirming Appellant's conviction for resisting arrest. Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to the petition. For the following reasons, Appellant's petition for rehearing should be denied.

The trial judge's instruction on circumstantial evidence is a correct charge under South Carolina law. Moreover, any error in failing to provide the jury with the Logan charge is harmless because the jury instructions, as a whole, adequately conveyed the applicable law and the State's burden of proof.

Appellant argues the trial judge erred in refusing to provide the jury with the Logan circumstantial evidence charge. The State disagrees with this allegation of error: the trial judge provided the jury with the Grippon[1] charge, which the Supreme Court of South Carolina has found to be a current and accurate explanation on the evidentiary value of circumstantial

[1] State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

evidence. Moreover, even if the trial judge erred in refusing to provide the Logan charge, any such error was harmless because the trial judge's instructions, as a whole, accurately conveyed the applicable law to the case and the State's burden of proof.

In State v. Logan, our Supreme Court considered whether the circumstantial evidence jury instruction from Grippon remained an appropriate statement of the law. 405 S.C. at 90, 747 S.E.2d at 448. Logan asserted that the charge from Grippon was invalidated by the Court's more recent decisions in cases involving challenges to the denials of directed verdict motions. Logan, 405 S.C. at 91, 747 S.E.2d at 448. However, the Court disagreed and found that the trial judge committed no error in instructing the jury on the law of circumstantial evidence in a manner consistent with the charge articulated in Grippon. Logan, 405 S.C. at 94, 747 S.E.2d at 449. The Court then went on to propose a new circumstantial evidence jury charge containing the following language:

> There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452. Regarding the newly-articulated charge, the Court instructed that the charge should be provided "when so requested by a defendant[.]" Id. Thus, the Court modified its earlier holdings in Grippon and Cherry to allow trial judges to instruct juries on

circumstantial evidence using its proposed language if that language was requested by a defendant. Logan, 405 S.C. at 100, 747 S.E.2d at 453.

The facts of this case are indistinguishable from Logan. In both cases, the trial judges instructed the jury in a manner consistent with the approved jury charge from Grippon. See Logan, 405 S.C. at 90, 747 S.E.2d at 447 (identifying the circumstantial jury instruction given in Logan's case, which contained virtually identical language to the circumstantial evidence jury instruction given in Appellant's case). As a result, the trial judge properly instructed the jury on the law of circumstantial evidence. See id. at 94, 747 S.E.2d at 449 ("[T]he trial court did not err in providing a circumstantial evidence charge consistent with Grippon."). Notably, the Supreme Court in Logan did not find that the circumstantial evidence charge from Grippon reduced the State's burden of proof or constituted an incorrect statement of the law. See Logan, 405 S.C. at 100, 747 S.E.2d at 452-453 ("This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in Grippon and Cherry."). Instead, the Supreme Court simply proposed a new circumstantial evidence charge that could appropriately be given upon request. See Logan, 405 S.C. at 99, 747 S.E.2d at 452 (providing a new circumstantial evidence jury instruction that should be given when requested that did not include any "reasonable hypothesis" language). Because the charge given was a complete and accurate statement of the law, it could not have been error.

Finally, even assuming the trial judge somehow erred in failing to give the Logan instruction on circumstantial evidence, any error was entirely harmless because the trial judge fully and correctly instructed the jury on the State's burden of proof. In Logan, the Supreme Court of South Carolina found the trial court's proper instruction on the reasonable doubt burden of proof rendered "any conceivable error . . . harmless beyond a reasonable doubt" because the

Grippon charge, combined with the clear instruction on reasonable doubt, properly conveyed the applicable law to the jury. Logan, 405 S.C. at 94, n.8, 747 S.E.2d at 449 n.8. Notably, the reasonable doubt instruction in Logan included the following language:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty. If, on the other hand, you think there is a real possibility the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty . . . . You should weigh all the evidence in this case, and, after weighing the testimony, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty . . . . The burden of proof remains on the [S]tate to prove guilt beyond a reasonable doubt.

Id. Since Logan, this Court has repeatedly found harmless error in the failure to provide the Logan charge where the jury was given the Grippon charge and a correct instruction on reasonable doubt. See State v. Drayton, 411 S.C. 533, 545–46, 769 S.E.2d 254, 260–61 (Ct. App. 2015) (vacated in part on other grounds, aff'd in result); State v. Jenkins, 408 S.C. 560, 573–74, 759 S.E.2d 759, 766 (Ct. App. 2014). In the instant case, the trial judge gave the Grippon charge and used an instruction on reasonable doubt identical to that of the trial court's in Logan. Thus, the jury charges, as a whole, properly instructed Appellant's jury on the applicable law. See Wharton, 381 S.C. at 213, 672 S.E.2d at 788.

Accordingly, the trial judge's refusal to give the Logan circumstantial evidence charge did not constitute a prejudicial abuse of discretion.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny rehearing in this case.

Respectfully submitted,

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January 7, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2016-001109

THE STATE, ...RESPONDENT,

v.

ROBIN RENEE HERNDON,.....APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Return to the Petition for Rehearing in the above-referenced case by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served this 7th day of January, 2019.

Shana Montgomery

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The South Carolina Court of Appeals

The State, Respondent,

v.

Robin Renee Herndon, Appellant.

Appellate Case No. 2016-001109

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

Paul G. Short, Jr. J.

H. Bruce Williams J.

Columbia, South Carolina

FILED

February 21, 2019

cc:
Alan McCrory Wilson, Esquire
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Samuel R. Hubbard, III, Esquire