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S.C. SUPREME COURT

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

APPELLATE CASE NO. 2016-001109

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 12, 2014, an Aiken County grand jury indicted appellant Robin Renee Herndon for murder. On February 29, 2016, appellant was tried before the Honorable DeAndrea G. Benjamin and a jury. R. 1. Glenn P. Justis and Donald N. Sorenson represented the State. R. 1. Mark A. Leiendecker, Margaret E. Hinds, and Breen R. Stevens represented appellant. R. 1. The jury acquitted appellant of murder, but convicted her of manslaughter. R. 1401, ll. 6 – 13. The trial judge deferred sentencing. R. 1409, l. 23 – 1410, l. 10. On May 9, 2016, the trial court held a sentencing hearing. R. 1414. Judge Benjamin sentenced appellant to nineteen years' imprisonment. R. 1415, ll. 2 – 9. Judge Benjamin then granted appellant's motion for early parole eligibility as a victim of domestic violence pursuant to S.C. Code Ann. § 16-25-90. R. 1415, l. 14 – 1417, l. 5. This appeal follows.

ARGUMENT

1.

The trial court's legal errors in denying appellant's motion for immunity from prosecution require reversal of appellant's manslaughter conviction.

Introduction

South Carolina's "Stand Your Ground" law was enacted, in part, to protect victims of domestic violence. State v. Jones, 416 S.C. 283, 299-300, 786 S.E.2d 132, 140-41 (2016). In this case, the law failed to protect appellant Robin Herndon ("Herndon"). Herndon, who spent her entire professional career as a law enforcement officer, shot her abusive, mentally unstable live-in boyfriend in self-defense in her own home, but was prosecuted for murder and convicted of manslaughter.

The trial judge agreed that Herndon was a victim of domestic violence. Judge Benjamin granted Herndon's motion for early parole eligibility based on the abuse she suffered at the hands of her boyfriend, Christopher Rowley ("Rowley"). R. 1415, l. 14 – 1417, l. 5. The trial court's recognition of Rowley's abuse of Herndon is incongruent with the legal errors that resulted in its mistaken denial of Herndon's request for immunity after a lengthy pre-trial hearing. R. 447, l. 8 – 454, l. 11. R. 1434 – 1441. Had the trial judge had the benefit of Jones, which was decided by the Supreme Court nine days after Herndon was sentenced, the court would not have committed these errors and Herndon would have been granted immunity.

Factual and Procedural Background

Robin Herndon

After graduating from college with a degree in criminal justice, in May 1999 Herndon began her career in law enforcement working for the Department of Probation, Parole, and Pardon Services ("DPPP") in Aiken County. R. 68, ll. 2 – 9. R. 70, ll. 3 – 7. During her career, she also worked for both the Lexington and Edgefield County Sheriff's Offices. R. 72, l. 9 – 73, l. 14. Herndon was a special victim's investigator. R. 73, ll. 12 – 16. In June 2007, SLED hired Herndon. R. 74, ll. 12 – 23. In 2010, after a divorce, Herndon sought and obtained a transfer from SLED back to DPPP in Aiken County so she could spend more time with her children. R. 75, l. 23 – 78, l. 4.

During the immunity hearing, Herndon's law enforcement colleagues uniformly testified that she was an honest and peaceful person. R. 249, l. 9 – 250, l. 16 (Marie Boulton). R. 271, l. 18 – 272, l. 23 (Lisa Kenner). R. 284, l. 23 – 286, l. 2 (SLED Agent Laurie Cardwell). Agent Marie Boulton ("Boulton"), Herndon's boss at DPPP in Aiken, described her as a good employee who worked well in their "close-knit office." R. 237, l. 1 – 239, l. 18. Agent Boulton never had any concerns about Herndon's ability to control her behavior or that she might be quick to anger. R. 249, l. 19 – 250, l. 16. Agent Boulton described Herndon as "a very peaceful, nice mother, friend." R. 250, ll. 15 – 16.

Christopher Rowley

Rowley, who was 5'11" and weighed 350 pounds,[1] lived for a time on the streets. R. 190, ll. 18 – 21. R. 165, ll. 10 – 11. He abused illegal drugs, but had "cleaned up" in the year

[1] Herndon was 5'3" and weighed 190 pounds. R. 165, ll. 8 – 10.

before the shooting. R. 190, ll. 13 – 25. A counselor diagnosed him with bipolar disorder. R. 205, ll. 2 – 14. Rowley admitted to this counselor that he was "physically aggressive" with Herndon and that he had "severe and extreme mood swings." R. 214, ll. 1 – 7. Rowley could not keep a steady job, in part because he had difficulty controlling his anger. R. 216, ll. 13 – 24. He admitted physically abusing his first wife and his children. R. 218, ll. 11 – 219, l. 1. A police officer who arrested Rowley for criminal domestic violence for an incident with his first wife testified that when he arrived at the scene, the wife had a pistol in her hand. R. 327, ll. 2 – 18. R. 330, ll. 5 – 16.

In the months leading up to the shooting, while Rowley lived in Herndon's house, Herndon took him to her doctor for help with his depression and anxiety. R. 190, ll. 2 – 12. From April 2013, until the shooting in November 2013, the doctor tried five different medications for Rowley's mental illness. R. 190, l. 12 – 198, l. 24. In succession, Rowley took Effexor, Wellbutrin, Seroquel, Abilify, and, finally, Lithium. R. 190, l. 12 – 198, l. 24. Rowley last refilled his Lithium on September 13, 2013. R. 198, ll. 23 – 25. The doctor refused to refill the Lithium again over the telephone until Rowley came to her office for blood work. R. 198, l. 5 – 199, l. 4. Almost 60 days later—the day of the shooting—Rowley had an appointment with the doctor for the lab tests necessary to refill his Lithium prescription. R. 200, l. 23 – 201, l. 7. R. 92, ll. 3 – 4.

Herndon and Rowley's Relationship and Rowley's Abuse

Herndon and Rowley were acquaintances for a couple of years and then began dating in January 2013. R. 79, ll. 4 – 10. Herndon had recently separated from her second husband. R. 79, ll. 14 – 20. In March 2013, Rowley was unemployed. R. 80, l. 23 – 81, l. 2. His roommates wanted him to leave their apartment. R. 80, ll. 11 – 22. Rowley's mother would not allow him

to live with her. R. 81, ll. 14 – 20. Herndon reluctantly allowed Rowley to move into her house. R. 80, l. 8 – 82, l. 6.

The decision to allow Rowley to move into Herndon's house caused tension in their relationship. R. 82, ll. 5 – 18. Money was tight. R. 82, l. 22 – 179, l. 2. Rowley began working a part-time job, but the couple continued to struggle financially. R. 82, l. 22 – 83, l. 5. Herndon helped Rowley pay his child support. R. 134, ll. 18 – 20.

In mid-March, Herndon planned a trip for them to Charleston. R. 82, l. 22 – 83, l. 5. They were packing for the trip. R. 83, l. 19 – 84, l. 11. Rowley complained that he had gained weight and he did not have anything to wear on the trip. R. 83, l. 19 – 84, l. 11. Herndon told him he looked fine and they had no extra money for new clothes. R. 83, l. 19 – 84, l. 11. Rowley grabbed Herndon by her arms and threw her against the bedroom wall. R. 84, ll. 3 – 5. Rowley calmed down and they went on the trip. R. 84, ll. 6 – 11. Rowley's grip left bruises on Herndon's arms. R. 84, ll. 17 – 18.

Rowley's violence escalated. R. 84, ll. 19 – 23. On one occasion as they were getting ready for bed, Rowley became upset because Herndon forgot that he needed a car the next day. R. 85, ll. 1 – 9. Rowley screamed at her. R. 85, ll. 6 – 9. He grabbed her by the arms and slammed her in the bed. R. 85, ll. 10 – 11. Rowley pulled Herndon from the bed and threw her on the floor. R. 85, ll. 10 – 12. He punched the bedpost and broke it from its frame. R. 85, ll. 10 – 15. Rowley spit on Herndon as she lay on the floor. R. 85, ll. 10 – 15.

Herndon's boss, Agent Boulton, remembered seeing bruises on Herndon's arms. R. 246, l. 20 – 247, l. 5. Herndon's daughter saw Rowley pin her mother against a wall on the porch. R. 301, ll. 18 – 21. Another night Rowley grew so angry with Herndon's daughter that he kicked her door so hard it split the wood. R. 303, l. 22 – 304, l. 9. Herndon's daughter did not live with

Herndon full time, but also remembered seeing broken furniture and a hole in a wall. R. 305, ll. 5 – 17.

On another night, the couple began arguing. R. 86, ll. 8 – 14. Herndon followed Rowley into the bedroom. R. 86, ll. 8 – 14. Rowley threw Herndon's block-heeled boot at her head. R. 86, ll. 8 – 14. The boot struck her in the eye. R. 86, ll. 8 – 14. Herndon developed a black eye. R. 86, ll. 17 – 24.

Agent Boulton saw the black eye when Herndon came to work. R. 245, ll. 7 – 21. Her eye was so swollen that it was closed. R. 245, ll. 7 – 21. An administrative assistant at the Aiken DPPP office also saw the black eye. R. 269, ll. 1 – 8. Herndon told her coworkers that she received the black eye when playing a game with her daughter. R. 269, ll. 1 – 8.

Rowley continued to abuse Herndon. R. 87, ll. 14 – 21. In an argument in the car, Rowley almost broke her arm and slapped her in the face. R. 87, ll. 14 – 21. In another argument in her living room, Rowley shoved Herndon to the floor and held her down. R. 88, ll. 1 – 10. When Herndon begged him to let her up, Rowley punched her in the stomach, kicked her, and spit on her. R. 88, ll. 1 – 10. Another night, Rowley pushed Herndon in the bathroom, causing her to fall into the bathtub and break the shower curtain rod. R. 90, ll. 17 – 22. On other occasions during arguments that were mostly about money, Rowley threw lit cigarettes at Herndon's face and continued to punch, hit, and choke her. R. 90, ll. 7 – 22.

Herndon Seeks Help for Rowley

Herndon testified she did not end her relationship with Rowley because she "wanted to help him." R. 85, ll. 19 – 22. In April 2013, Herndon took Rowley to see her physician, Dr. Robyn Fallaw ("Fallaw"). R. 190, l. 2 – 191, l. 13. Rowley told Dr. Fallaw that he "had been getting depressed and anxious over the past year. He felt like he may have some PTSD due to

what he was exposed to on the streets." R. 190, l. 13 – 191, l. 7. Rowley admitted using illegal drugs in the past to "self-medicate his depression and anxiety." R. 190, ll. 13 – 24. Dr. Fallaw prescribed Rowley the antidepressant Effexor. R. 191, ll. 8 – 15.

Dr. Fallaw continued to try different medications to help Rowley. R. 190, l. 12 – 191, l. 24. After Herndon and Rowley began to suspect Rowley had bipolar disorder, Dr. Fallaw recommended that Rowley go to the county mental health clinic because Rowley had no health insurance. R. 193, l. 23 – 194, l. 7. On June 28, 2013, Dr. Fallaw started Rowley on the antipsychotic Seroquel. R. 194, ll. 5 – 25. On July 12, 2013, Herndon called Fallaw and told him Rowley felt the Seroquel was too sedating. R. 195, ll. 7 – 21. Dr. Fallaw switched Rowley to Abilify. R. 195, ll. 7 – 21. Abilify was very expensive and the doctor attempted to get Rowley into a patient assistance program. R. 195, ll. 7 – 21.

Herndon also sought help from Rowley's mother. R. 88, l. 19 – 89, l. 12. Together with Rowley's mother, Herndon took him to see a counselor, Dr. Cheryl Cummings ("Cummings"), on July 17, 2013. R. 89, ll. 11 – 17. R. 211, ll. 6 – 19. Dr. Cummings described Rowley as "unkempt... disheveled... rigid and tense... moderately domineering and controlling... slightly hostile and challenging." R. 213, ll. 4 – 21. Rowley told Dr. Cummings that his symptoms the last six weeks included aggression and "uncontrolled anger." R. 214, ll. 8 – 12. He admitted being "physically aggressive" with Herndon. R. 214, ll. 13 – 23. Dr. Cummings diagnosed Rowley with bipolar disorder. R. 214, l. 24 – 215, l. 14. Rowley's moods were so unstable that Dr. Cummings was unable to treat him with counseling or therapy until medication "psychiatrically stabilized" him. R. 217, ll. 4 – 17. Dr. Cummings said Rowley was obviously unstable. R. 217, ll. 22 – 24. She recommended going to the county mental health clinic for a psychiatric assessment. R. 217, ll. 4 – 17.

Herndon called Dr. Fallaw the next day and reported Dr. Cummings' findings. R. 196, ll. 4 – 14. Dr. Fallaw wanted Rowley to see a psychiatrist. R. 196, ll. 3 – 14. She switched Rowley's medications yet again, this time to Lithium. R. 196, ll. 3 – 21. Dr. Fallaw renewed Rowley's Lithium two times over the telephone, but renewed it for the last time until she could check Rowley's blood on September 13, 2013. R. 197, l. 20 – 199, l. 4. Dr. Fallaw testified that if a person quits taking Lithium "cold turkey," it can allow a person to "swing into a depressed or a manic episode." R. 208, ll. 1 – 4. Rowley had an appointment with Dr. Fallaw on the day of the shooting to get his blood checked and to renew his Lithium. R. 201, ll. 1 – 7. In the videotaped statement Herndon gave to police the day of the shooting, she said that Rowley had been out of Lithium for a couple of days. (State's Ex. 34B). Rowley told Herndon he no longer thought he needed the Lithium. (State's Ex. 34B).

The Day of the Shooting

Herndon testified that November 6, 2013, began "like any other normal day." R. 92, ll. 5 – 12. She went to work. R. 92, ll. 5 – 12. At approximately 10:00 AM, Rowley texted Herndon that he loved her and he was depressed. R. 92, ll. 5 – 13. Herndon replied for him to call, which he did, and Rowley told Herndon that he "was irritated and agitated and he didn't know why, and he was depressed." R. 92, ll. 5 – 17. Herndon asked if Rowley wanted her to call Dr. Fallaw to schedule an appointment and Rowley said, "Yes." R. 92, ll. 14 – 23. Herndon scheduled an appointment for Rowley at 2:00 PM. R. 92, ll. 14 – 23.

Rowley had no money so Herndon told him she would write a check to pay the doctor. R. 92, l. 24 – 93, l. 4. Rowley agreed to meet Herndon at a cemetery to pick up the check. R. 93, ll. 2 – 13. Herndon signed out of her office and told them she would be back to see a client

who was scheduled for 2:00 PM. R. 93, l. 19 – 94, l. 5. Herndon drove to the cemetery and waited for Rowley. R. 94, ll. 3 – 5.

Rowley arrived and Herndon gave him the checks. R. 94, ll. 6 – 12. She asked Rowley what was wrong. R. 94, ll. 8 – 12. Rowley again said that he was irritated and agitated. R. 94, ll. 13 – 14. They began arguing because Rowley did not want to go to the doctor. R. 94, ll. 15 – 18. Herndon told him that he would not be able to get his medication unless he got the blood testing done. R. 94, ll. 15 – 18. Rowley became angry. R. 94, ll. 19 – 25. Herndon suggested that she would call Rowley's mother to take them to the doctor and this made him angrier. R. 95, ll. 1 – 7. Rowley called Herndon "a melodramatic bitch." R. 95, ll. 8 – 9.

The argument continued and Herndon told Rowley to take her car (which Rowley had been driving) back to her house and to drive his own car to the doctor. R. 95, ll. 11 – 15. Rowley replied, "I'll wreck this bitch." R. 95, ll. 16. Rowley threatened to run over Herndon because she was blocking his way. R. 95, l. 20 – 96, l. 4. Some people were watching the argument and Rowley yelled that Herndon was causing a scene. R. 96, ll. 5 – 11. Rowley sped out of the cemetery parking lot and Herndon sped after him. R. 96, ll. 12 – 20.

Herndon was worried that Rowley would hurt himself. R. 96, l. 23 – 97, l. 2. Rowley was speeding. R. 97, ll. 3 – 9. He ran off the right shoulder of the road. R. 97, ll. 4 – 9. He passed a car on a double line. R. 97, ll. 4 – 8. Rowley pulled into the driveway and Herndon pulled in behind him. R. 97, ll. 10 – 13.

Rowley immediately began screaming at Herndon that he could not believe that she "followed [him] home." R. 97, ll. 14 – 17. He yelled that he was a "grown ass man," and that he had "a mom" and did not need another one. R. 97, ll. 14 – 17. Herndon pleaded for Rowley to call his mother to come take him to the doctor. R. 97, ll. 18 22. Rowley claimed that Herndon's

car also belonged to him and Herndon replied the car was in her name. R. 97, ll. 18 – 23. Rowley replied, "You know what bitch? If I can't drive this car, neither can you." R. 97, ll. 24 – 25. Rowley then threw the keys to the car on the roof of the house. R. 97, l. 24 – 98, l. 2. The keys remained on the roof until after the shooting and the State entered a police photograph of the keys on the roof into evidence. R. 401, ll. 17 – 19.

Herndon went back to her car to get her house keys. R. 98, ll. 4 – 5. When she turned around, Rowley was standing in front of her, accused her of "bowing up" at him, and said, "If you're going to act like a man, I'm going to beat you like a man." R. 98, ll. 4 – 9. Rowley shoved Herndon and she fell backwards. R. 98, ll. 10 – 13.

Herndon got to her feet and yelled for Rowley to stop. R. 98, ll. 10 – 19. They continued arguing and Rowley again shoved Herndon. R. 98, ll. 14 – 25. She shoved him and he retaliated by shoving her so hard that Herndon again fell. R. 98, ll. 16 – 25. Herndon told him she "was done" and that she "wanted him out of my house and off my property." R. 99, ll. 1 – 12. She screamed at Rowley to "get out." R. 99, ll. 6 – 12.

Rowley paced on the sidewalk and Herndon went into the house. R. 99, ll. 13 – 24. She looked for her other set of keys. R. 99, ll. 19 – 24. She went into her bedroom and then to the kitchen to wash her face. R. 99, ll. 19 – 24. Herndon was crying. R. 99, ll. 19 – 24. Rowley came in the house asking whether Herndon was going to make him homeless. R. 100, ll. 7 – 8. Herndon told Rowley he could not stay and could not keep "putting your hands on me." R. 100, ll. 9 – 11.

Herndon tried to leave to return to work. R. 100, ll. 12 – 15. Rowley yelled, "Oh, I see. I'm just a do-boy who pays your bills." R. 100, ll. 16 – 17. Rowley blocked Herndon's exit. R. 100, ll. 18 – 21. Herndon told him to get out of her way. R. 100, ll. 18 – 21. Rowley shoved

Herndon to the floor and "just started whaling on me with his fist." R. 100, ll. 18 – 21. Herndon held her arms up for protection and when Rowley leaned up, she wriggled away and drew her service-issued gun. R. 100, l. 22 – 101, l. 5. Herndon told Rowley to get out and that she was calling the police. R. 101, ll. 2 – 5. Rowley turned and started walking towards the door and Herndon reholstered her gun. R. 101, ll. 8 – 13.

Instead of leaving, Rowley slammed the front storm door with his fist. R. 101, ll. 14 – 15. Rowley "started slapping on his chest and screaming, 'You want some, come get some. Step your game up.'" R. 101, ll. 21 – 23. Rowley charged Herndon with his fist raised. R. 101, l. 19 – 102, l. 5. Herndon backed up and drew her gun. R. 102, ll. 2 – 5. Rowley opened his hand and hit the gun. R. 102, ll. 2 – 5. Herndon turned her head and heard the gun fire. R. 102, ll. 2 – 5. She "was afraid he was going to kill me." R. 109, ll. 8 – 12.

Herndon dropped the gun. R. 102, ll. 12 – 16. She asked Rowley if he was hit. R. 102, l. 17 – 18. Rowley grabbed his throat, turned, went out the front door and fell on the front porch. R. 102, ll. 19 – 23. Herndon began screaming, pulled Rowley's hand away, and then there was "blood everywhere." R. 102, l. 21 – 103, l. 3. Herndon put her hand on his neck to put pressure on the wound, tried to call 911, and screamed for help. R. 103, ll. 8 – 13. A neighbor came and Herndon told her to call an ambulance. R. 103, ll. 14 – 22. Rowley stood up and then fell back in a chair. R. 103, ll. 19 – 25. Herndon continued to apply pressure on the wound until the ambulance and the police arrived. R. 104, ll. 1 – 3. Rowley died from the gunshot wound.

The Aftermath of the Shooting

The first officer to arrive was dispatched at 2:14 PM. R. 19, l. 16 – 20, l. 7. He described Herndon as "Very frantic. Possibly classified as hysterical at that time." R. 21, ll. 2 – 5. Herndon told the officer what happened. R. 12, ll. 9 – 21. He removed Herndon's gun from

inside the house and locked it in his patrol car. R. 29, ll. 12 – 23. The police transported her to the Aiken County Sheriff's Office for further questioning. R. 24, ll. 2 – 9.

At Herndon's house, the police found a shell casing inside the living room. R. 398, ll. 13 – 24. (State's Ex. 14). No blood was found inside the house. R. 400, ll. 1 – 21. On her direct-examination, the crime scene investigator said there was no evidence of a struggle inside the house, but admitted on cross-examination that the fact that furniture was not disturbed was not evidence there was **not** a struggle in the house. R. 400, ll. 1 – 401, l. 2. R. 403, l. 21 – 405, l. 4.

The State's sole non-police witness at the immunity hearing was Herndon's neighbor from across the street, Lacey Burton ("Burton"). Burton was leaving her house to pick up her child. R. 352, ll. 11 – 14. She heard a man and woman yelling. R. 352, ll. 15 – 19. She said the woman was angry. R. 353, l. 20 – 354, l. 1. The woman walked inside the house. R. 354, ll. 9 – 16. The man was smoking a cigarette and stayed in the front yard. R. 354, ll. 9 – 16. He walked onto the porch and out of Burton's view. R. 354, ll. 9 – 16. Burton testified on direct-examination, "and as soon as he walked onto the porch, I heard a gunshot." R. 354, ll. 9 – 16. She later clarified that this time period was not immediate, but "No more than 30 to 60 seconds." R. 355, ll. 16 – 21. She did not see either person make physical contact with the other person. R. 354, ll. 21 – 24. Immediately after hearing a gunshot, Burton heard the woman "just yelling to breathe." R. 356, ll. 23 – 25.

Less than two hours later, at 4:08 PM, the police videotaped Herndon's statement. (State's Ex. 34B). She is covered in blood. (State's Ex. 34B). Mascara coats her face. (State's Ex. 34B). Herndon is breathing heavily and is overcome by emotion throughout the video. (State's Ex. 34B). She tells the police about Rowley's attack and his abuse. (State's Ex. 34B). After telling the police she used to be "a CDV investigator," Herndon said, "I'd be embarrassed

for anybody to know I let, I let my boyfriend beat me." (State's Ex. 34B). She also told the police that she knew Rowley had been arrested for criminal domestic violence in the past. (State's Ex. 34B).

Dr. Lois Veronen from Winthrop University testified as an expert witness for Herndon at the immunity hearing. R. 138, ll. 13 – 20. The court qualified her as an expert in clinical psychology with an emphasis on intimate partner violence. R. 142, ll. 6 – 23. Dr. Veronen evaluated Herndon. R. 154, l. 15 – 157, l. 14. Testing revealed a diagnosis consistent with Herndon being a victim of intimate partner violence. R. 156, ll. 16 – 17. Dr. Veronen testified that, consistent with the characteristics many other women show, Herndon tried to "explain away the violence by saying that, he's depressed and troubled." R. 156, l. 18 – 157, l. 4. Dr. Veronen testified that women in abusive relationships become more vigilant and sensitized to the violence and more aware of cues that the violence might be escalating or becoming more serious. R. 158, l. 18 – 159, l. 3.

Wallis Alves ("Alves"), a public defender in Aiken, met with Herndon at the jail on November 13, 2013, seven days after the shooting. R. 341, l. 23 – 342, l. 16. She took pictures of Herndon's bruises with her iPad. R. 342, l. 20 – 344, l. 20. (Defendant's Ex. 7 – 19). Alves's photographs show significant bruising on Herndon's arms, including the back of her arms. (Defendant's Ex. 7 – 19).

Arguments at the Immunity Hearing and the Trial Court's Ruling

Herndon filed a written motion arguing that she was immune from prosecution under the Protection of Persons and Property Act (the "Act"). R. 1419 – 1429. S.C. Code Ann. § 16-11-440. The trial court also heard extensive argument from appellant and the State. R. 412, l. 18 – 446, l. 18. Appellant argued she was immune from prosecution under section 16-11-440(C) of the Act.[2] R. 1419 – 1429. R. 413, l. 15 – 424, l. 24. R. 441, l. 7 – 446, l. 18.

Appellant argued she was without fault in bringing on the difficulty because she was assaulted by Rowley in her own home and was attempting to eject him after multiple instances of abuse. R. 1427. R. 420, l. 7 – 421, l. 23. R. 424, ll. 9 – 24. Herndon argued she was in reasonable fear of imminent danger of great bodily injury not only because of the violent actions of the 350-pound Rowley on the day of the shooting, but also because of the prior abuse. R. 413, l. 15 – 424, l. 24. R. 441, l. 7 – 446, l. 18. R. 1427. Because Herndon was in her own home, the Act did not require her to prove that she had no other means of avoiding the danger, but appellant also argued that retreat was impossible when faced with Rowley's charge. R. 1427.

The State claimed the shooting was Herndon's fault because she was "egging on this argument" at the cemetery. R. 426, l. 19 – 427, l. 16. The solicitor argued that Herndon was at the cemetery "continuing to needle" Rowley. R. 427, ll. 8 – 11. The State pointed to minor inconsistencies between Herndon's videotaped statement given when she was drenched in her boyfriend's blood and her testimony during the immunity hearing—for example, Herndon's use of the word "shove" in the video instead of "punch" to describe Rowley's assault inside the house. R. 432, l. 12 – 435, l. 3. The solicitor invited the court to speculate that the bruises in the photographs taken by Alves were self-inflicted at the jail. R. 435, ll. 4 – 17. Finally, the

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2 Appellant also argued she was immune from prosecution under section 16-11-440(A). Herndon is not appealing the trial judge's ruling denying immunity under that section of the Act.

solicitor rested most of his argument on Burton's testimony that she saw no physical altercation in the yard and that Rowley was only out of her sight for 30-60 seconds after he entered the house. R. 428, l. 7 – 430, l. 3.

Judge Benjamin considered the motion overnight. R. 446, ll. 19 – 24. The next morning, the trial judge ruled Herndon was not entitled to immunity. R. 447, l. 5 – 454, l. 18. The trial judge ruled that Herndon was at fault in bringing on the difficulty because she "made a conscious choice to follow him to the home knowing his current state of mind, according to her." R. 451, l. 10 – 452, l. 4. Herndon did not meet the second and third element of self-defense because of alleged inconsistencies about whether she actually pulled the trigger or whether Rowley caused the gun to discharge when he swatted at the gun. R. 452, l. 5 – 423, l. 2. The court also cited Burton's testimony and the crime scene evidence showing undisturbed furniture inside the house and blood outside of the house.[3] R. 453, l. 3 – 454, l. 18. The trial proceeded and the jury acquitted Herndon of murder, but convicted her of voluntary manslaughter. R. 1401, ll. 4 – 15.

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3 The trial judge denied appellant's immunity motion from the bench on March 2, 2016. R. 447, ll. 2 – 14. The guilt phase of appellant's trial ended on March 8, 2016. R. 1. Forty (40) days after the trial (but before sentencing), the trial judge entered a written order denying immunity. R. 1434 – 1441. This order cites evidence introduced during the trial by the State, but that the State failed to introduce at the immunity hearing. R. 1434 – 1441. For example, the Order cites the autopsy report when the pathologist only testified during the trial. R. 1434 – 1441.

Defendants are entitled to a pre-trial determination of their immunity. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Neither the court nor the State can rely on evidence that might later be introduced during the trial to decide the immunity question and inclusion of evidence from the trial in the immunity order was error. This Court should only examine the evidence produced at the immunity hearing and the trial judge's detailed ruling from the bench in deciding the immunity issue on appeal.

DISCUSSION

The trial judge's denial of immunity contains several purely legal errors. While immunity rulings with disputed facts are reviewed under the abuse of discretion standard, errors of law are reviewed *de novo*. State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (providing for abuse of discretion review of immunity decisions); State v. Adams, 409 S.C. 641, 646-47, 763 S.E.2d 341, 344 (2014) (stating first the deferential standard of review in suppression hearings, but noting that questions of law are reviewed *de novo*). The trial judge committed two purely errors of law in holding that (1) appellant brought on the difficulty by going to her own property after the argument at the cemetery; and (2) that appellant, a battered woman, was not in reasonable fear of great bodily injury or death from the much larger and violent Rowley. Furthermore, considering the evidence as a whole, the trial judge abused her discretion in denying an abused woman immunity when she defended herself in her own home.

The Immunity Statute's Purpose and Requirements

The Legislature passed the Act to recognize "that a person's home is [her] castle." S.C. Code Ann. § 16-11-420(A). "[P]ersons residing in . . . this State have a right to expect to remain unmolested and safe within their homes. . . ." S.C. Code Ann. § 16-11-420(D). Porches are included within the definition of "dwelling." S.C. Code Ann. § 16-11-430(1). The term "residence" includes the term "dwelling," so a porch is part of a dwelling under the Act. S.C. Code Ann. § 16-11-430(3).

The operative section of the Act is section 16-11-440. S.C. Code Ann. § 16-11-440. The relevant provision for this appeal is section 16-11-440(C), which provides:

> 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.

S.C. Code Ann. § 16-11-440(C). The "phrase 'another place' in subsection (C) encompasses a residence." State v. Jones, 416 S.C. 283, 295, 786 S.E.2d 132, 138 (2016). If a person meets the requirements of section 16-11-440(C), they are "immune from criminal prosecution." S.C. Code Ann. § 16-11-450(A). A defendant proceeding under section 16-11-440(C) must prove the elements of self-defense, absent the duty to retreat, by a preponderance of the evidence. Jones at 301, 786 S.E.2d at 141.

In Jones, our Supreme Court held that one of the Act's primary purposes was "to protect victims of domestic violence who are, in general, cohabitants in a residence." Jones at 299-300, 786 S.E.2d at 140-41. The Court found that while legal scholars may debate whether cohabitants may use stand your ground laws, "Appellate courts have responded by authorizing a person, who is charged with a violent crime against a cohabitant that occurs in their residence, to invoke the doctrine and seek immunity from prosecution." Id. The Court applied the principles of self-defense to the defendant in Jones, who was a victim of domestic violence, and found she was immune from prosecution. Id. Jones was decided after appellant's trial. If the trial judge had the benefit of Jones, it is likely she would have granted appellant immunity.

The Trial Judge's Ruling that Appellant Brought on the Difficulty by Returning to Her Own Home is an Error of Law

No matter the scope of the argument at the cemetery, Herndon had every right to return to her own home. Encouraged by the solicitor's argument that Herndon was "egging" Rowley on and "needling" him at the cemetery, the trial judge ruled that Herndon brought on the difficulty by traveling from the cemetery to her own house. R. 451, l. 1 – 452, l. 4. The trial judge found that Herndon "chose to follow" Rowley to the house and "this action to follow Rowley to the

home led to the shooting that occurred within the home." R. 451, ll. 9 – 24. This holding contravenes the entire purpose of the Act.

The name of the Act itself shows the error of this ruling. The Act is titled the "Protection of Persons and Property Act." S.C. Code Ann. § 16-11-410. It was undisputed that the house belonged to Herndon. Herndon had every right to return to her own property. Her home was her castle, and neither Rowley nor anyone else had the right to exclude her from her residence, no matter their state of mind. See S.C. Code Ann. § 16-11-420(A), (D), and (E). First and foremost, property rights include the right to exclusive possession. Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 137-42, 747 S.E.2d 468, 472-75 (2013) (discussing the right of exclusive possession in a nuisance case). No legal impediment existed to Herndon's right to possess and be present in her property whenever she wished. Rowley's state of mind and Herndon's decision to "follow" him are legally irrelevant. The trial judge unfortunately accepted the State's argument that the analysis should begin at the cemetery instead of on Herndon's property.

The trial judge's ruling has the perverse effect of turning a victim of domestic violence into a trespasser in her own home. In denying Herndon immunity under section 16-11-440(A)—the trespasser provision—the trial court held that Rowley could not be a trespasser because he lived in the house. Despite Herndon's uncontested ownership of the house, Rowley's assault and past abuse, and Herndon telling Rowley to leave, the court held that because Herndon and Rowley shared expenses, Rowley could not be a trespasser. The court's finding that Herndon could not return to her house while Rowley was agitated meant that Herndon was excluded from her own property—converting Herndon into the trespasser instead of the serial abuser Rowley. The Legislature surely did not intend for victims of domestic violence to be legally excluded

from their own homes while their abusers calm down, sober up, or otherwise deign to let them return home.

The court's holding also imposes on Herndon a duty to retreat, which is expressly forbidden by the Act. S.C. Code Ann. § 16-11-440(C) (providing that a homeowner has no duty to retreat). If Herndon could not return to her own property without "bringing on the difficulty," this meant she had to physically be somewhere else. Requiring Herndon to exclude herself from her own home while Rowley was "agitated" effectively meant she had to retreat. Converting the first element of self-defense into a duty to retreat is a legal error.

Even if the trial judge's holding on this element is not a purely legal error, the court's ruling still fails. It was undisputed that Rowley had a doctor's appointment to renew his Lithium. Herndon met Rowley at the cemetery to give him checks to pay for his own doctor's appointment. Herndon's entire purpose on that fateful afternoon was to get Rowley to go to the doctor and "following" him home to ensure that he went to the doctor cannot be construed as bringing on the difficulty. If the Court were to accept the solicitor's argument about "needling," then any spouse who nags the other can be found to bring on a difficulty. The trial court erred in holding her actions brought on the difficulty and Herndon proved this element of self-defense.

The Trial Judge Erred in Holding Herndon Did Not Meet the Second and Third Elements of Self-Defense

The trial judge erred in holding that a 5'3" battered woman in her own home did not have a reasonable fear of great bodily injury from a 350-pound man who had beaten her in the past, who she knew had beaten his former wife, and who was bipolar and out of Lithium. Rowley was threatening to hit Herndon and charged her with his fist raised. Fists can be deadly weapons. State v. Bennett, 328 S.C. 251, 262, 493 S.E.2d 845, 851 (1997). In Bennett, the Court noted

that blows from fists cause people to die in boxing matches and can cause fatal concussions. Id. The Court also noted the size disparity between the parties in Bennett. Id. The defendant outweighed the victim by approximately 100 pounds and was nine inches taller. Id.

Almost that exact same disparity exists in this case between Herndon and the much larger Rowley. Herndon was 5'3" and weighed 190 pounds. R. 165, ll. 8 – 10. Rowley was 5'11" and weighed 350 pounds. R. 190, ll. 18 – 21. Rowley's doctors testified about his admitted aggressiveness and inability to control his moods and his anger. Herndon was well aware of Rowley's uncontrolled bipolar disorder and that he was out of Lithium. She also knew he had been arrested for assaulting his first wife. Herndon testified she was afraid. R. 104, ll. 11 – 12. She said, "I was afraid he was going to kill me." R. 109, ll. 8 – 12.

Furthermore, the court erred in its failure to understand how Dr. Veronen's testimony regarding victims of domestic violence affects the law of self-defense.[4] See Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992). Under Robinson, a battered woman can experience a reasonable fear of imminent danger "even when the batterer is absent or asleep." Id. at 79, 417 S.E.2d at 91. If a battered woman can experience a reasonable fear of imminent death while their attacker is asleep, then it was error to hold Herndon's fear was unreasonable when faced with an ongoing, brutal physical assault.

The court rested its holding, in part, on Herndon's uncertainty whether she pulled the trigger. R. 452, ll. 14 – 22. This ruling is an error of law. The trial judge seemingly ruled that the question of whether Herndon intended to pull the trigger was dispositive of self-defense, but this fact was irrelevant. Under the court's logic, if Herndon shot Rowley at point blank range five times, she would be entitled to immunity. But here, Herndon's honest testimony that in the

[4] The trial judge found Herndon was a battered woman at the sentencing hearing. R. 1415, l. 14 – 55, l. 5.

middle of the chaos of Rowley's attack she did not know whether she pulled the trigger or Rowley's own actions caused the gun to fire somehow strips her of immunity. This illogical result was not the Legislature's intent.

Finally, Burton's testimony is not inconsistent with Herndon's. The solicitor claimed Burton's testimony contradicted Herndon's account because Burton did not see the shoving Herndon described. Burton also did not see Rowley throw the keys on the roof, but it is undisputed that this occurred. Burton's guess that 30-60 seconds elapsed after Rowley left her sight to the time of the gunshot is also consistent. It does not take longer than a minute to walk up the stairs to the porch, assault Herndon, walk back to the door, and then again attempt to assault her. Burton confirmed that she heard Herndon screaming immediately after the gunshot. Burton's testimony showed there was a confrontation in the yard, Herndon went into the house first, Rowley followed her into the house and, after the elapse of a minute, the fatal shot was fired.

The facts of Jones fully support Herndon's entitlement to immunity. In Jones, the defendant suffered a physical assault at the hands of her live-in boyfriend inside their apartment. Jones at 286-89, 786 S.E.2d at 134-35. The attack continued outside of the apartment. Id. The defendant fled, but later returned to the apartment. Id. The boyfriend was "throwing her things around." Id. The defendant started putting her belongings in her car.

On one of her trips back inside the apartment, the defendant took a knife for protection. Id. In the living room, the boyfriend started yelling and grabbed and shook her. Id. The defendant stabbed her boyfriend because she believed he "was getting ready to hit her again." Id. The boyfriend died from the stab wound to the chest. Id.

The Jones Court held the defendant was entitled to immunity under section 16-11-440(C). Id. at 299-302, 786 S.E.2d at 141-42. The Court found that the defendant's belief that she was in danger of great bodily injury or death was reasonable because she stated she thought her boyfriend was going to hit her and she was afraid he would kill her. Id.

Herndon presented a more compelling case for self-defense than the defendant in Jones. Herndon was a respected law enforcement officer. Rowley had a history of abusing women and had assaulted Herndon on numerous occasions. Rowley, just like the boyfriend in Jones, did not have a weapon but used his fists. Rowley was bipolar and had stopped taking his Lithium. Herndon, like the defendant in Jones, defended herself inside her own home. The trial judge abused her discretion in holding Herndon's fear of her abuser was unreasonable. This Court should apply the Act as it was intended: to protect victims of domestic violence. Herndon's conviction should be reversed.

2.

The trial court erred in allowing a pathologist to offer an unreliable opinion on crime scene reconstruction, which was outside the scope of her expertise.

The State's theory at trial was that Herndon was not entitled to a self-defense verdict because she supposedly shot Rowley as he was walking up the steps to the porch. R. 1327, l. 5 – 1328, l. 13. The solicitor asked the jury to infer this fact from the angle of the bullet through Rowley's body. R. 1332, ll. 4 – 22. This inference was based on the testimony of the State's pathologist, Dr. Janice Ross ("Ross"). R. 1337, l. 15 – 1341, l. 2.

The court qualified Dr. Ross as an expert in forensic pathology. R. 564, l. 22 – 565, l. 19. Rowley had a gunshot wound just to the right of the midline of the lower neck. R. 570, ll. 3 – 16. The range of the gunshot was within two feet. R. 570, l. 3 – 571, l. 5. The bullet lodged "just underneath the skin of the back, right back." R. 571, ll. 7 – 17. Dr. Ross said "the pathway [of the bullet] is going front to back, towards the right and slightly downward." R. 571, ll. 18 – 23.

The solicitor asked Dr. Ross how the gun was positioned when Rowley was shot. R. 573, ll. 9 – 13. Dr. Ross testified:

> The gun would have had to be to the victim's left and above the neck or the position—**the position of the body, you can't tell from just one—from the direction of the bullet.** The victim may have been bent over. If they're face to face, if he's bent over, then if the bullet is going straight, when you put the person back upright, it looks like it is going down.

R. 573, ll. 14 – 21 (emphasis added). The solicitor then asked if "that would be consistent or inconsistent if Mr. Rowley was coming up a flight of steps and the shooter was up at the top of the steps" and appellant objected. R. 573, l. 22 – 574, l. 4. Appellant's objection was that the question called for crime scene reconstruction and exceeded the scope of Dr. Ross's

qualifications. R. 573, l. 25 – 574, l. 4. The trial judge sent the jury out after a bench conference. 574. 670, ll. 5 – 14.

Appellant argued that a pathologist is not qualified to testify about crime scene reconstruction. R. 574, l. 15 – 581, l. 9. Appellant cited the court's gatekeeper function under Rule 702 and State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001). R. 574, l. 15 – 581, l. 9. Prior to trial, appellant filed a motion to prohibit unqualified opinion testimony and during the argument about Dr. Ross's testimony, made the motion a court's exhibit. R. 580, ll. 17 – 24. R. 1430 – 1431. Judge Benjamin ruled the testimony was admissible "if she can answer that question," citing State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). R. 580, l. 9 – 581, l. 9. When the jury returned, the solicitor asked whether Rowley's wound would be consistent or inconsistent with a victim being shot while walking up a flight of steps by a shooter at the top of the steps. R. 581, ll. 17 – 23. Dr. Ross replied, "It is consistent." R. 581, l. 24.

The trial judge erred in admitting this testimony under Rule 702 because the court abandoned the reliability determination to the jury and Dr. Ross's opinion exceeded the scope of her qualifications. In State v. Tapp, 398 S.C. 376, 387, 728 S.E.2d 468, 474 (2012), the Court reversed because the trial judge admitted the expert's testimony "based merely on a finding he was qualified as an expert, and left the reliability determination for the jury." Id. Here, the trial judge made no reliability determination under Rule 702 and allowed Dr. Ross to testify regarding the solicitor's hypothetical simply because she had already been qualified as an expert.

While Dr. Ross was certainly qualified to testify about the wounds she observed inside the body, the court made no determination that her opinions about the positions of Herndon and Rowley were reliable. Dr. Ross's answer to the question immediately preceding the one that drew the objection shows her testimony was not reliable. R. 603, ll. 14 – 21. Dr. Ross said, "the position of

the body, you can't tell from just one—from the direction of the bullet." R. 603, ll. 14 – 21. The court ruled that she could answer the question "based on her qualifications as a forensic pathologist, she can answer that question, if she can. If she can't, she can state that she cannot." R. 580, ll. 9 – 12. This reasoning improperly allows an expert to determine the reliability and scope of their own testimony and abdicated the court's gatekeeper function under Rule 702. See Rule 702, SCRE. "The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). The failure to make a reliability determination was error.

Furthermore, "an expert's testimony may not exceed the scope of his expertise." State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011) (holding that forensic pathologists may not testify regarding the state of mind or the guilt of the accused). In Ellis, an officer was qualified as an expert in crime scene processing and fingerprint identification. Id. at 177-78, 547 S.E.2d at 491-92. The officer's testimony concerning the location of the victim and the position of the body at the time of a shooting was improper. Id This allowed the officer to improperly give his opinion on the ultimate issue in the trial, which was self-defense. Id

The officer in Ellis was qualified as an expert in crime scene processing. Id. The officer visited the scene and took measurements. Id. Even so, his testimony about the position of the victim's body was impermissible and exceeded the scope of his expertise. Id. The Court noted that the State was free to argue inferences about the position of the victim, but that the expert's testimony was improper. Id. See also Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (Ct. App.

2001) (citing Ellis and reversing because a physical therapist's testimony about causation of the plaintiff's injuries exceeded qualifications).

Here, Dr. Ross had no familiarity with the crime scene. Nothing in her qualifications or her testimony indicates she had any training in crime scene reconstruction. She was qualified to give her opinions on what she found at the autopsy and anything else exceeded the scope of her qualifications and was unreliable. Matthews—the case cited by the court—does not support its ruling. In Matthews, the pathologist testified "to the path of the bullet and the location of various bullet fragments in the brain." Matthews at 391, 373 S.E.2d at 594. The pathologist did not offer any opinion about the positions of the victim relative to the shooter or judge hypotheticals about the physical layout of crime scenes. Id. Furthermore, the objection in Matthews was not that the testimony exceeded the pathologist's qualifications or was unreliable, but that his testimony was "'gory' and 'gruesome.'" Id. The trial court improperly expanded what was essentially a Rule 403 analysis in Matthews into a legal conclusion that pathologists can always testify about crime scene reconstruction.

Admitting this evidence allowed the solicitor to use her testimony in place of arguing the inferences from the path of the bullet through the body. The solicitor emphasized this testimony to the jury, telling them in closing argument that "she did say it would be consistent if he was walking up the steps and she's about—remember she's about 5'4" and he's about 5'10", 5'11". R. 1338, l. 23 – 1339, l. 1. The solicitor then did a "demonstration" with co-counsel for the jury. R. 1339, l. 2 – 1341, l. 2. After concluding the demonstration, he told the jury, "I mean, that's just pure physics." R. 1341, l. 2. The improper expert testimony combined with the solicitor's reliance and emphasis on it in closing argument prejudiced appellant and this Court should reverse.

3.

Where the State's case against appellant was entirely circumstantial, the trial court's error in refusing appellant's request to give the charge on circumstantial evidence from *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) requires reversal of appellant's conviction and a remand for a new trial.

The State's case against Herndon was entirely circumstantial. No direct evidence existed that disproved self-defense. As seen above in Issue 2, 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.

Appellant gave the trial judge written requests to charge. R. 1219, l. 17 – 1220, l. 1. Judge Benjamin had them marked as Court's Exhibits so that she could review them. R. 1219, l. 17 – 1220, l. 1. Appellant's second request asked the court to give the circumstantial evidence charge from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). R. 1432 – 1433. Appellant argued his request was "drawn directly from Logan" and was "a direct quote of the 2013 Supreme Court decision." R. 1225, l. 23 – 1226, l. 8.

The solicitor opposed giving the Logan charge, stating he could not tell the difference between the requested instruction and the trial court's charge. R. 1225, ll. 18 – 22. The trial judge ruled, "I'll go with the charge that's in the desk book. It seems very similar, so I will not charge Number 2." R. 1226, ll. 12 – 14. The trial judge added that the desk book had "been updated since 2013." R. 1226, ll. 16 – 17.

Appellant's requested charge reads, in relevant part:

> 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.

R. 1432 – 1433. This request is a direct, exact quote from the charge mandated by the Supreme Court in Logan. Logan at 99, 747 S.E.2d at 452. The trial court did not give this crucial part of the Logan charge. R. 1345, l. 16 – 1346, l. 10. Appellant renewed her objection after the trial court gave its charge. R. 1366, ll. 10 – 18. Judge Benjamin stated appellant's objection was "noted for the record." R. 1366, ll. 17 – 18.

The trial judge erred in refusing to give the Logan charge. When requested by the defense, giving the Logan charge is mandatory. Id. The Court stated that trial courts should give its promulgated circumstantial evidence charge "when so requested by a defendant." Id. Trial courts "may not exclusively rely on" the standard circumstantial evidence charge "over a defendant's objection." Id., 747 S.E.2d at 452-53. The Logan Court reasoned that "at times, a separate framework **is necessary** to the jury's analysis of circumstantial evidence." Id. (emphasis added). Appellant requested the Logan charge in writing, at the charge conference, and objected after the court charged the jury. Failure to give the Logan charge was error.

The failure to give the Supreme Court's mandated charge is this case cannot be harmless because the State's case was entirely circumstantial. 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.

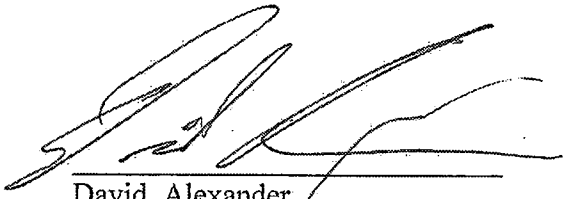
The State's argument about the minor inconsistencies between Herndon's videotaped statement and her trial testimony asked the jury to infer Herndon was lying instead of piecing together what she remembered from a horrific, traumatic incident. In the videotaped statement, the police officer recognized 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 reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction and find that she is immune from prosecution. Alternatively, this Court should reverse appellant's conviction and remand this case for a new trial.



David Alexander
Appellate Defender

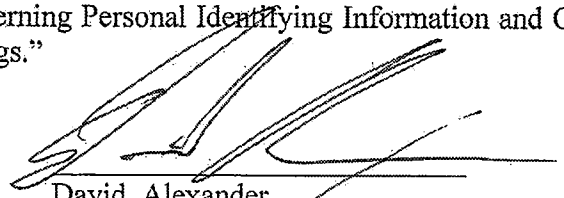
ATTORNEY FOR APPELLANT

This 8th day of January, 2018

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 8, 2018.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

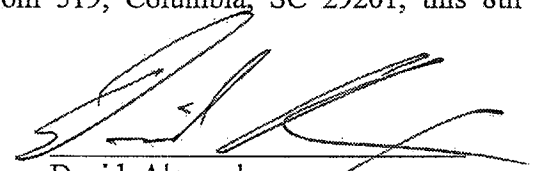
V.

ROBIN RENEE HERNDON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of January, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of January, 2018.

(L.S)

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