

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable 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

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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SC Court of Appeals

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL1

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW4

ARGUMENT

The Court of Appeals erred in finding harmless the trial judge’s erroneous refusal to give the circumstantial evidence charge required by State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), where the State’s case against petitioner was entirely circumstantial versus direct evidence of petitioner’s actions in self-defense.5

CONCLUSION.....22

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 21, 2019.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding harmless the trial judge's erroneous refusal to give the circumstantial evidence charge required by State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), where the State's case against petitioner was entirely circumstantial versus direct evidence of petitioner's actions in self-defense?

STATEMENT OF THE CASE

On May 12, 2014, an Aiken County grand jury indicted petitioner Robin Renee Herndon for murder. On February 29, 2016, petitioner 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 petitioner. R. 1. The jury acquitted petitioner 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 petitioner to nineteen years' imprisonment. R. 1415, ll. 2 – 9. Judge Benjamin then granted petitioner'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.

On October 9, 2018, a panel of the Court of Appeals consisting of Judges Huff, Short, and Williams heard oral argument on petitioner's appeal, which raised three issues. App. 1-3. On December 12, 2018, the court affirmed petitioner's conviction. App. 1-3. Petitioner asked for rehearing on one issue, which was denied by the Court of Appeals on February 21, 2019. App. 17. This petition for certiorari follows.

STANDARD OF REVIEW

An error must be harmless beyond a reasonable doubt. State v. King, 424 S.C. 188, 201, 818 S.E.2d 204, 210-11. Only an error that did not contribute to the verdict can be harmless beyond a reasonable doubt. Id.

ARGUMENT

The Court of Appeals erred in finding harmless the trial judge's erroneous refusal to give the circumstantial evidence charge required by State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), where the State's case against petitioner was entirely circumstantial versus direct evidence of petitioner's actions in self-defense.

Reasons for Granting Certiorari

This Court should grant certiorari because if the Court of Appeals' decision is left standing, then this Court's ruling in Logan will have no practical effect. If the failure to give a Logan charge in this case is not reversible error, it is difficult to imagine the case where a trial judge's blatant refusal to follow the law of Logan would ever be anything but harmless. Petitioner, a former SLED agent and probation officer, shot her manic depressive, abusive, boyfriend in self-defense. Judge Benjamin granted petitioner's motion for early parole eligibility as a victim of domestic abuse. To refute petitioner's testimony proving self-defense, the State relied almost entirely on circumstantial evidence. Under the facts of this case, the Logan error cannot be harmless and this Court should grant certiorari to ensure trial judges follow Logan.

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.

Herndon moved for immunity and 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 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.

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

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. 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).

The Pathologist's Testimony

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). Over petitioner's objection, the State asked Dr. Ross 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 Court of Appeals' Decision

The Court of Appeals' decision only examined the language of the jury charge as a whole—and, paradoxically, relied on Logan to conclude that the charge was correct and not giving the requested instruction was harmless.

Discussion

The State's case against Herndon was entirely circumstantial. No direct evidence existed that disproved self-defense. The State's best evidence was the pathologist's 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.

Petitioner 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. Petitioner'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. Petitioner 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.

Petitioner'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. Petitioner renewed her objection after the trial court gave its charge. R. 1366, ll. 10 – 18. Judge Benjamin stated petitioner'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). Petitioner 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 in 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 petitioner 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.


The Court of Appeals' erred by only analyzing the language of the jury charge itself in a vacuum and failing to consider both the mandatory language of Logan and the evidence in the case. This Court made the Logan charge mandatory for all cases that followed. This 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 explicit instructions in Logan.

The Court of Appeals 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. This Court should grant certiorari to maintain the validity of its ruling in Logan.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's conviction.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
Honorable DeAndrea G. Benjamin, Circuit Court Judge

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

THE STATE,

RESPONDENT,

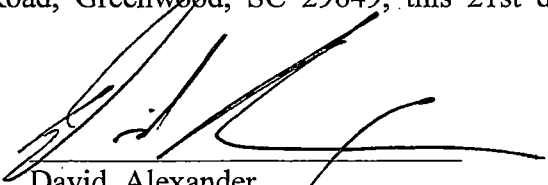
V.

ROBIN RENEE HERNDON,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 March, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of March, 2019.

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

RECEIVED

MAR 21 2019

SC Court of Appeals



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 21, 2019

William F. Schumacher, Esquire
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

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MAR 21 2019

SC Court of Appeals

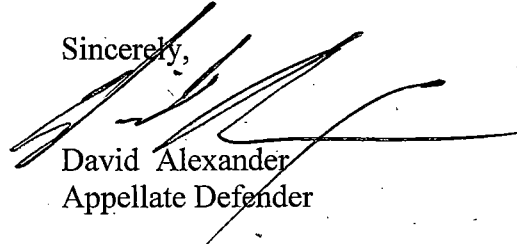
Re: The State v. Robin Renee Herndon,

Dear Mr. Schumacher:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,



David Alexander
Appellate Defender

DAA/cp

Enclosures

~~cc: Court of Appeals~~