STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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S.C. SUPREME COURT

Certiorari to Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBIN RENEE HERNDON,

PETITIONER

APPELLATE CASE NO 2019-000467

BRIEF OF PETITIONER

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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 Court granted certiorari.

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.

Factual and Procedural Background

Robin Herndon, a law enforcement officer, testified that she shot her live-in, bipolar, physically abusive boyfriend, Christopher Rowley, in self-defense. The State presented only circumstantial evidence in its attempt to disprove beyond a reasonable doubt Herndon's direct evidence of self-defense. Despite the trial court's error in refusing a Logan charge, the Court of Appeals found the error harmless.

Robin Herndon

After graduating from college with a degree in criminal justice, in 1999 Herndon began her career in law enforcement working for the Department of Probation, Parole, and Pardon Services ("DPPP") in Aiken County. R. 785, l. 15 -788, l. 3. During her career, she also worked for both the Lexington and Edgefield County Sheriff's Offices. R. 788, l. 16 – 790, l. 23. Herndon was a special victim's investigator. R. 788, l. 16 – 790, l. 23. In June 2007, SLED hired Herndon. R. 791, ll. 6 - 16 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. 791, l. 17 – 794, l. 15. Herndon's law enforcement colleagues testified that she was an honest and peaceful person. R. 927, l. 16 – 929, l. 16 (Marie Boulton). R. 947, l. 13 – 948, l. 24 (Lisa Kenner). 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 environment." R.

916, l. 9 – 918, l. 10. Agent Boulton never had any concerns about Herndon's ability to control her behavior or that she might be quick to anger. R. 927, l. 16 – 929, l. 16

Christopher Rowley

Rowley was a big man, approximately 5'11" and 350 pounds. R. 870, ll. 2 – 8. He lived for a time on the streets. R. 1100, ll. 9 – 14. He abused illegal drugs, but had "cleaned himself up" in the year before the shooting. R. 1066, ll. 7 – 22. A counselor diagnosed him with bipolar disorder. R. 1100, l. 20 – 1103, l. 4. Rowley admitted to this counselor that he was "physically aggressive" with Herndon and that he had "severe and extreme mood swings." R. 1096, l. 8 – 1097, l. 13. Rowley had difficulty controlling his anger and had trouble keeping a job. R. 1096, l. 8 – 1099, l. 7. R. 1100, ll. 2 – 8. He admitted getting into physical fights with his mother and his children. R. 1096, l. 8 – 1099, l. 7.

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. 1065, l. 16 – 1078, l. 15. From April 2013, until the shooting in November 2013, the doctor tried five different medications for Rowley's mental illness. R. 1065, l. 16 – 1078, l. 15. In succession, Rowley took Effexor, Wellbutrin, Seroquel, Abilify, and, finally, Lithium. R. 1065, l. 16 – 1078, l. 15. Rowley last refilled his Lithium on September 13, 2013. R. 1074, l. 21 – 1078, l. 15. The doctor refused to refill the Lithium again over the telephone until Rowley came to her office for blood work. R. 1074, l. 21 – 1078, l. 15. 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. 1077, ll. 10 – 18.

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. 794, l. 16 – 795, l. 6. Herndon had recently separated from her second husband. R. 796, ll. 7 – 10. At the end of February 2013, Rowley was unemployed. R. 796, l. 19 – 797, l. 3. His roommates wanted him to leave their apartment and packed up Rowley's possessions. R. 797, ll. 4 - 21. Rowley's mother would not allow him to live with her "because their relationship was somewhat strained." R. 795, ll. 7 - 19. Herndon reluctantly allowed Rowley to move into her house because she "cared about him." R. 798, l. 8 – 800, l. 7.

The decision to allow Rowley to move into Herndon's house caused stress in their relationship. R. 800, ll. 8 – 17. Money was tight. R. 800, ll. 8 – 17. Rowley began working a part-time job, but the couple continued to struggle financially. R. 800, ll. 8 – 17.

In mid-March, Herndon planned a trip for them to Charleston. R. 801, l. 5 – 802, l. 23. While packing for the trip, Rowley complained that he had gained weight and he did not have anything to wear on the trip. R. 801, l. 5 – 802, l. 23. Herndon told him he looked fine and they had no extra money for new clothes. R. 801, l. 5 – 802, l. 23. Rowley grabbed Herndon by her arms and shoved her against the door. R. 801, l. 5 – 802, l. 23. Rowley calmed down and they went on the trip. R. 801, l. 5 – 802, l. 23.

Rowley's violence escalated. R. 802, l. 24 – 803, l. 9. 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. 803, l. 12 – 804, l. 20. Rowley yelled at her. R. 803, l. 12 – 804, l. 20. He grabbed her by the arms and pushed her on the bed. R. 803, l. 12 – 804, l. 20. Rowley dragged Herndon from the bed, threw her on the floor, and spit on her. R. 803, l. 12 – 804, l. 20. He punched the bedpost and broke the frame. R. 803, l. 12 – 804, l. 20.

Herndon's boss, Agent Boulton, remembered seeing bruises on Herndon's arms. R. 925, ll. 19 – 23. Herndon's daughter saw Rowley pin her mother against a wall on the porch. R. 1006, ll. 9 – 25. Another night Rowley grew so angry with Herndon's daughter that he kicked her door so hard it split the wood. R. 1009, ll. 6 – 17. Herndon's daughter did not live with Herndon full time, but also remembered seeing broken furniture and doors and a hole in a wall. R. 1010, l. 9 – 1011, l. 16.

On another night, the couple began arguing. R. 806, l. 7 – 808, l. 6. Herndon followed Rowley into the bedroom. R. 86, ll. 8 – 14. Rowley threw Herndon's boot at her face. R. 806, l. 7 – 808, l. 6. The boot struck her in the eye. R. 806, l. 7 – 808, l. 6. Her eye "swole shut" and "turned real black and blue." R. 806, l. 7 – 808, l. 6.

Agent Boulton saw the black eye when Herndon came to work. R. 924, l. 12 – 926, l. 2. Her eye was so swollen that it was closed. R. 924, l. 12 – 926, l. 2. An administrative assistant at the Aiken DPPP office, Lisa Kenner, also saw the black eye. R. 951, ll. 2 – 22. Herndon told her coworkers that she received the black eye while playing with her daughter. R. 924, l. 12 – 926, l. 2.

Rowley continued to abuse Herndon. R. 808, l. 11 – 811, l. 16. In an argument in the car, Rowley almost broke her arm and slapped her in the face. R. 808, l. 11 – 811, l. 16. In another argument, Rowley shoved Herndon to the floor and held her down. R. 808, l. 11 – 811, l. 16. When Herndon begged him to let her up, Rowley kicked her and spit on her. R. 808, l. 11 – 811, l. 16. Another night, Rowley pushed Herndon in the bathroom, causing her to fall into the bathtub and break the shower curtain rod. R. 808, l. 11 – 811, l. 16. On other occasions during arguments that were mostly about money, Rowley threw lit cigarettes at Herndon's face. R. 808, l. 11 – 811, l. 16.

Herndon Seeks Help for Rowley

Herndon testified she did not end her relationship with Rowley because she "loved him." R. 809, ll. 12 - 17. In April 2013, Herndon took Rowley to see her physician, Dr. Robyn Fallaw ("Fallaw"). R. 1065, l. 16 – 1066, l. 6. Rowley told Dr. Fallaw that he "had been having depression and anxiety for approximately a year." R. 1066, ll. 7 – 21. Rowley said he thought he had PTSD "from what he had been exposed to previously in his life on the streets." R. 1066, ll. 7 – 22. Rowley admitted using illegal drugs in the past to "self-medicate from some of the depression and anxiety symptoms" R. 1066, ll. 7 – 22. Dr. Fallaw prescribed Rowley the antidepressant Effexor. R. 1066, ll. 7 – 22.

Dr. Fallaw continued to try different medications to help Rowley. R. 1069, l. 6 – 1077, l. 25. After Herndon and Rowley began to suspect Rowley had bipolar disorder, Dr. Fallaw recommended that Rowley go to the county mental health clinic to see a psychiatrist. R. 1069, l. 6 – 1077, l. 25. On June 28, 2013, Dr. Fallaw started Rowley on the antipsychotic Seroquel. R. 1071, ll. 1 – 11. On July 12, 2013, Herndon called Fallaw and told him Rowley felt the Seroquel was too sedating. R. 1072, ll. 1 – 8. Dr. Fallaw switched Rowley to Abilify. R. 1072, ll. 1 – 8. Abilify was very expensive and the doctor attempted to get Rowley into a patient assistance program. R. 1073, ll. 2 – 6.

Herndon also sought help from Rowley's mother. R. 811, l. 19 – 814, l. 10. Together with Rowley's mother, Herndon took him to see a counselor, Dr. Cheryl Cummings ("Cummings"), on July 17, 2013. R. 814, l. 11 – 815, l. 12. Rowley told Dr. Cummings that his symptoms the last six weeks included severe mood swings, aggression and "uncontrolled anger." R. 1096, ll. 8 - 22. He admitted being "physically aggressive" with Herndon. R. 1096, ll. 8 - 22. Dr. Cummings diagnosed Rowley with bipolar disorder. R. 1100, l. 15 – 1103, l. 8. Rowley's

moods were so unstable that Dr. Cummings was unable to treat him with counseling or therapy until medication psychiatrically stabilized him. R. 1103, l. 9 – 1104, l. 4. She recommended going immediately to the county mental health clinic for a psychiatric assessment. R. 1103, l. 12 – 1104, l. 4.

Herndon called Dr. Fallaw the doctor switched Rowley's medications yet again, this time to Lithium. R. 815, ll. 3 - 19. R. 1072, ll. 9 – 23. Dr. Fallaw wanted Rowley to see a psychiatrist, but agreed to start him on Lithium "to help with mood stabilization." R. 1072, ll. 9 – 23. She increased Rowley's Lithium dosage on August 12. R. 1074, ll. 3 – 20. Dr. Fallaw renewed Rowley's Lithium over the telephone, but renewed it for the last time until she could check Rowley's blood on September 13, 2013. R. 1073, l. 7 – 1078, l. 15. Dr. Fallaw testified that if a person quits taking Lithium, it can allow a person to "go into a depressive or a manic state." R. 1078, ll. 11 - 15. Rowley had an appointment with Dr. Fallaw on the day of the shooting to get his blood checked and to renew his Lithium. R. 1077, ll. 13 - 18. 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 "a normal day." R. 818, ll. 2 – 6. She went to work. R. 818, ll. 2 – 6. At approximately 10:00 AM, Rowley texted Herndon that he loved her and he was depressed. R. 818, ll. 2 – 6. Herndon replied for him to call, which he did, and Rowley told Herndon that he "was really irritated and agitated and he didn't know why." R. 818, ll. 7 – 12. Herndon asked if Rowley wanted her to call Dr. Fallaw to schedule an

appointment and Rowley agreed. R. 818, ll. 13 - 22. Herndon scheduled an appointment for Rowley at 2:00 PM. R. 818, ll. 13 - 22.

Rowley had no money so Herndon told him she would write a check to pay the doctor. R. 818, l. 23 – 819, l. 13. Rowley agreed to meet Herndon at a cemetery to pick up the check. R. 818, l. 23 – 819, l. 13. Herndon signed out of her office and told them she would be back at 2:00 PM. R. 819, l. 19 – 820, l. 5. Herndon drove to the cemetery and waited for Rowley. R. 820, ll. 6 – 12.

Rowley arrived and Herndon gave him the checks, but Rowley was acting "really strange." R. 820, l. 8 – 822, l. 14. She asked Rowley what was wrong. R. 820, l. 8 – 822, l. 14. Rowley was irritated and angry. R. 820, ll. 8 – 12. Herndon suggested that she would call Rowley's mother to take them to the doctor and this made him angrier. R. 820, l. 8 – 822, l. 14. 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. 820, l. 8 – 822, l. 14. Rowley replied, "I'll wreck this bitch." R. 820, l. 8 – 822, l. 14. Rowley threatened to run over Herndon because she was blocking his way. R. 820, l. 8 – 822, l. 14. Some people were watching the argument and Rowley yelled that Herndon was causing a scene. R. 820, l. 8 – 822, l. 14. Rowley sped out of the cemetery parking lot and Herndon sped after him. R. 822, ll. 13 - 20.

Herndon was worried. R. 822, l. 15 – 823, l. 5. Rowley ran off the right shoulder of the road. R. 822, l. 15 – 823, l. 5. He passed a car on a double line. R. 822, l. 15 – 823, l. 5. Rowley pulled into the driveway and Herndon pulled in behind him. R. 822, l. 15 – 823, l. 5.

Rowley immediately began screaming at Herndon that he could not believe that she followed him. R. 823, ll. 6 - 18. He yelled that he was a "grown ass man," and that he "didn't

need another mother." R. 823, ll. 6 - 18. Herndon pleaded for Rowley to call his mother to come take him to the doctor. R. 823, ll. 6 - 18.

Herndon told Rowley that the car was in her name and she did not want him driving it. R. 823, l. 17 – 825, l. 10. Rowley replied, "You know what bitch? If I can't drive this car, neither can you." R. 823, l. 17 – 825, l. 10. Rowley then threw the keys to the car on the roof of the house. R. 823, l. 17 – 825, l. 10. Herndon went back to her car to get her house keys. R. 823, l. 17 – 825, l. 10. 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. 823, l. 17 – 825, l. 10. Rowley shoved Herndon and she fell backwards. R. 823, l. 17 – 825, l. 10.

Herndon got to her feet and yelled for Rowley to stop. R. 823, l. 17 – 825, l. 10. They continued arguing and Rowley again shoved Herndon. R. 823, l. 17 – 825, l. 10. She shoved him and he retaliated by shoving her so hard that Herndon again fell. R. 823, l. 17 – 825, l. 10. Herndon told him she "was done" and that she "wanted him to get out of my house and off my property." R. 823, l. 17 – 825, l. 10.

Rowley paced on the sidewalk and Herndon went into the house. R. 825, l. 7 – 826, l. 12. She looked for her other set of keys. R. 825, l. 7 – 826, l. 12. She went into her bedroom and then to the kitchen to wash her face. R. 825, l. 7 – 826, l. 12. Herndon was crying. R. 825, l. 7 – 826, l. 12. Rowley came in the house asking whether Herndon was going to make him homeless. R. 825, l. 7 – 826, l. 12. Herndon told Rowley he could not stay and could not keep "putting your hands on me." R. 825, l. 7 – 826, l. 12.

Herndon tried to walk around the sofa, but Rowley blocked Herndon's path. R. 826, l. 13 – 827, l. 10. Herndon told him to get out of her way. R. 826, l. 13 – 827, l. 10. Rowley shoved

Herndon to the floor and started punching her. R. 826, l. 13 – 827, l. 10. Herndon held her arms up for protection and when Rowley stepped back, she drew her service-issued gun. R. 826, l. 13 – 827, l. 10. Herndon told Rowley to get out and that she was calling the police. R. 826, l. 13 – 827, l. 10. Rowley swatted at the gun and told Herndon "not to point that thing at him if I wasn't going to use it." R. 827, ll. 1 – 5. Rowley turned and started walking towards the door and Herndon reholstered her gun. R. 826, l. 13 – 827, l. 10.

Instead of leaving, Rowley slammed the front storm door. R. 827, l. 7 – 828, l. 19. Rowley "started beating on his chest and he was screaming, 'You want some, come get some. Step your game up.'" R. 827, l. 7 – 828, l. 19. Rowley charged Herndon with his fist raised. R. 827, l. 7 – 828, l. 19. She thought he was going to punch her again. R. 827, l. 7 – 828, l. 19. Herndon was "terrified." R. 871, ll. 7 – 16.

Herndon backed up and drew her gun. R. 827, l. 7 – 828, l. 19. Rowley opened his hand and hit the gun. R. 827, l. 7 – 828, l. 19. Herndon turned her head and heard the gun fire. R. 827, l. 7 – 828, l. 19. She did not mean to pull the trigger. R. 827, l. 7 – 828, l. 19.

Herndon asked Rowley if he was hit. R. 828, l. 12 - 830, l. 21. Rowley grabbed his throat, turned, went out the front door and fell on the front porch. R. 828, l. 12 - 830, l. 21. Herndon begged Rowley to let her see, pulled Rowley's hand away, and then "started seeing all this blood." R. 828, l. 12 - 830, l. 21. Herndon put her hand on his neck to put pressure on the wound, tried to call 911, and screamed for help. R. 828, l. 12 - 830, l. 21. A neighbor came and Herndon told her to call an ambulance. R. 828, l. 12 - 830, l. 21. Rowley stood up and then fell back in a chair. R. 828, l. 12 - 830, l. 21. Herndon continued to apply pressure on the wound until the ambulance and the police arrived. R. 828, l. 12 - 830, l. 21. Rowley died from the gunshot wound.

The Aftermath of the Shooting

The first officer to arrive was dispatched at 2:14 PM. R. 542, ll. 1 – 6. He described Herndon as "frantic" and screaming. R. 543, ll. 2 – 5. Herndon told the officer what happened. R. 543, l. 6 – 553, l. 16. He removed Herndon's gun from inside the house and locked it in his patrol car. R. 543, l. 6 – 553, l. 16. The police transported her to the Aiken County Sheriff's Office for further questioning. R. 554, ll. 4 – 11.

At Herndon's house, the police found a shell casing inside the living room. R. 606, ll. 2 - 9. No blood was found inside the house. R. 619, l. 24 – 620, l. 9. The crime scene investigator admitted that someone could be shot inside, go outside, and leave no blood in the house. R. 620, ll. 3 – 9. 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. 604, ll. 19 – 23. R. 619, ll. 5 – 23.

Herndon's neighbor from across the street, Lacey Burton ("Burton"), testified for the State. R. 523, ll. 9 – 15. Burton was leaving her house to pick up her child. R. 523, l. 21 – 525, l. 18. She saw an argument between a man and woman, with the woman yelling. R. 523, l. 21 – 525, l. 18. She said the woman was upset. R. 523, l. 21 – 525, l. 18. The woman walked inside the house. R. 527, ll. 1 – 23. The man was smoking a cigarette and stayed in the front yard. R. 527, ll. 1 – 23. After he finished his cigarette, he walked up the stairs. R. 527, l. 16 – 528, l. 4. Burton's view ended at the porch steps. R. 527, ll. 1 - 23. About "30 to 60 seconds" after the man walked up the steps, Burton heard a gunshot. R. 527, l. 19 – 528, l. 4. Immediately after hearing a gunshot, Burton heard the woman "just yelling to breathe." R. 528, ll. 5 – 12.

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. 1132, l. 17 – 1133, l. 11. The court qualified her as an expert in clinical psychology with an emphasis on intimate partner violence. R. 1132, l. 17 – 1133, l. 11. Dr. Veronen evaluated Herndon. R. 1136, ll. 4 – 21. Testing and history revealed a diagnosis consistent with Herndon being a victim of intimate partner violence. R. 1156, l. 13 – 1157, l. 6.

Wallis Alves ("Alves"), a public defender in Aiken, met with Herndon at the jail on November 13, 2013, seven days after the shooting. R. 907, l. 21 – 912, l. 12. She took pictures of Herndon's bruises with her iPad. R. 907, l. 21 – 912, l. 12. (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 languge 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.

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 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 petitioner required the jury to make inferences. 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 shoving that 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.

In Logan, the defendant attempted to rape the victim in the bathroom of a bar. Logan at 86-87, 747 S.E.2d at 445-46. The victim testified at trial that Logan choked her, punched her, and attempted to rape her. Id. She identified Logan in a photographic lineup. Id. at 87, 747

S.E.2d at 446. Her testimony was powerful direct evidence of Logan's guilt. It does not appear from the opinion that Logan testified, so her testimony was not pitted against Logan's. Id.

The victim's direct evidence of Logan's guilt was corroborated by strong circumstantial evidence. Two friends and a policeman saw the victim's injuries after she left the bathroom. Id. One of these witnesses saw Logan leave from the same bathroom. Id. Members of the victim's family corroborated her testimony that she saw Logan's car near her home after the attack. Id. at n.4. None of these pieces of circumstantial evidence require leaps of logic or multiple chains of inferences to prove Logan's guilt. The victim's friend saw her go into the bathroom uninjured; the victim returned with injuries. This evidence does not lend itself to inferences other than the victim was injured in the bathroom.

The Court of Appeals has examined circumstantial evidence charges post-Logan three times and found no error and/or harmless error: in State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014); in State v. Lynch, 412 S.C. 156, 771 S.E.2d 346 (Ct. App. 2015); and in State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015). In all three cases, the defendants requested the "exclusion of every other reasonable hypothesis" language from Edwards. Jenkins at 572-73, 759 S.E.2d at 765-66. Lynch at 177-78, 771 S.E.2d at 357-58. Drayton at 543-44, 769 S.E.2d at 260. None of these trial judges had the benefit of Logan when the Edwards charge was requested. The Court of Appeals found no error in refusing the Edwards charge.[1] Jenkins at 572-73, 759 S.E.2d at 765-66. Lynch at 177-78, 771 S.E.2d at 357-58. Drayton at 544-46, 769 S.E.2d at 260-61. That problem does not exist in Herndon's case. Here, the defense requested the exact language required by this Court in Logan and gave the

[1] It is important to note that Lynch was a bench trial, so the debate involved the standard the trial judge would use to examine the evidence. Lynch at 174 and n.3, 771 S.E.2d at 356 and n.3. The lack of a jury significantly diminishes any prejudice or possible confusion.

citation for Logan to the trial judge, but the court still refused to give this Court's mandated charge.

An examination of these three cases reveals important differences between them and Herndon's case. First, Herndon testified. None of the defendants in Jenkins, Lynch, and Drayton testified. Second, none of the three cases involved self-defense.

Like Logan, the direct evidence in Jenkins was compelling: Jenkins' wife testified she saw him murder the victim, chop up her body, and put the parts in bags for delivery to relatives of a woman he wanted to intimidate. Jenkins at 563-67, 759 S.E.2d at 761-63. This horrific direct evidence was corroborated by compelling circumstantial evidence: SLED matched the victim's DNA from her severed body parts in the bags to blood found in the defendant's home and van. Id. It does not appear from the opinion that Jenkins testified. No difficult chain of inferences was required and this physical evidence was formidable.

Lynch pitted the State's substantial circumstantial evidence against the defendant's proven lies given in statements to police. Lynch at 171-74, 771 S.E.2d at 354-56. Lynch was convicted of the murder of his girlfriend and her grandaughter. Id. Their bodies were never found. Id. Lynch was caught at the Canadian border where he told police he wanted to "see bears." Id. Lynch did not testify, but in these statements he denied driving the victim's car and claimed to be shocked when told they were missing. Id. But Lynch had been stopped for speeding days earlier in Texas while in the victim's car. Id. Her car was found abandoned with license plates removed near a bus station in Seattle. Id. Blood from the victims was found in their apartment, where Lynch lived with them. Id.

While Lynch's statements are direct evidence of his innocence, statements given to police are different from sworn testimony delivered to the jury from the witness stand. Lynch's

statements were proved false. Lynch never claimed self-defense. The State's circumstantial evidence was consistent and pointed to Lynch's guilt. Furthermore, Lynch did not contain any contest about the defendant's mens rea. His defense appeared to suggest that the victims were still alive, but the opinion states Lynch conceded the victims "were murdered by criminal means." Id. at 170 and n.2, 771 S.E.2d at 353-54 and n.2. Lynch's scant evidence was contradicted by his flight in the victims' car and their blood in the apartment. Herndon, in stark contrast, tried to save Rowley's life and immediately yelled for a neighbor to call 911. Herndon's case was only about self-defense and her state of mind.

Drayton contained little direct evidence of the defendant's innocence—he claimed to police in a phone call that he did not go to Charleston with the murdered victim. Drayton at 537, 769 S.E.2d at 256. His claim was contradicted by significant circumstantial evidence. Id. at 536-42, 769 S.E.2d at 256-59. The police collected Drayton's DNA from blood found in the victim's car. Id. Multiple witnesses saw Drayton with wounds, including a severely cut finger after the victim's disappearance. Id. Drayton told several different stories about how he cut his finger. Id. He sold the victim's engagement ring at a pawn shop. Id. Cell phone evidence placed Drayton at the scene where the victim's body was found. Id. Drayton did not testify and the state of mind of the victim's killer does not appear to have been at issue in the case, especially considering the multiple stab wounds and slit throat suffered by the female victim. Id. Again, the circumstantial evidence in Drayton was used to show he was the killer, not defeat a claim of self-defense like in Herndon's case.

The State will certainly point to the common harmless error analysis contained in Logan, Jenkins, Lynch, and Drayton. The appellate courts in these four cases did not analyze the kind or quantity of evidence in these cases, but only looked at the text of the jury charge itself to

determine whether the error was harmless. The courts concluded that because the defendants received a proper instruction on reasonable doubt, the error was harmless.

But these decisions do not forbid going outside the four corners of the jury charge to determine whether the error was harmless. Such a broad, arbitrary, inflexible harmless error rule does not exist. Harmless error is not applied in such a rote fashion. If harmless error were to be applied in this manner for Logan requests, this Court's mandate that trial judges must give the charge when requested by a defendant would never be reversible error unless a trial judge forgot to charge reasonable doubt (which would be the error causing reversal, not Logan). The State could urge trial judges to ignore Logan with no fear of being reversed, despite this Court's requirement. The standard of review stated in Logan explicitly states that the evidence presented at the trial shall be considered. Logan at 90, 747 S.E.2d at 448. The Logan Court stated, "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole **and in light of the evidence and issues presented at trial.**" Id. (emphasis added).

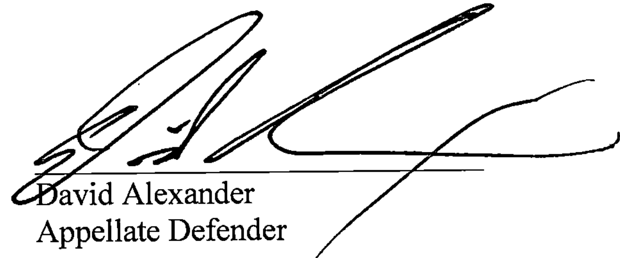
The Court of Appeals failed to consider the evidence in the case and concluded the error was harmless solely on the language of the charge. See, e.g., State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (reversing on an erroneous jury charge after examining the facts of the case to decide whether the 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. Under Smalls, the error is specifically tied to the evidence in the case and cannot be harmless.

Furthermore, 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 bipolar, 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.

CONCLUSION

For the foregoing reasons, this Court should reverse petitioner's conviction and grant her a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

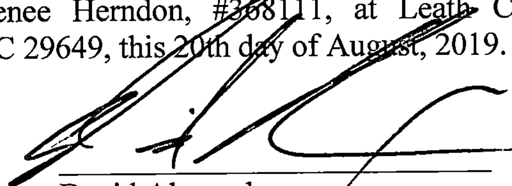
V.

ROBIN RENEE HERNDON,

PETITIONER

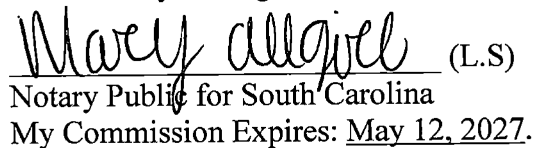
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Robin Renee Herndon, #368111, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 20th day of August, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2019.


(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.