THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-000495

Charles Tillman, ... Appellant,

v.

State of South Carolina, ... Respondent.

Initial Brief of Appellant

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Question II

Did the trial judge err by denying Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

Question III

Did the trial judge err by denying Charles Tillman's motion to exclude photographs depicting Christie Stutler's deceased body—State's Exhibit Numbers 2, 3, 14, 18, 36-39, 47-51, 54-56, 58, 60, 61, 63, 94-123, 136-139, and 141—when those photographs were not relevant to any issue in the case because Mr. Tillman stipulated the manner of death was a homicide and did not contest the nature of any of Ms. Stutler's injuries and the prejudicial effect of admitting the photographs substantially outweighed any probative value?

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Should this Court grant Charles Tillman a new trial based on the cumulative error doctrine?

STATEMENT OF THE CASE

On November 8, 2016, Charles Tillman came home from work and found Christie Stutler dead in the single-wide trailer they shared in Iva, South Carolina. On November 29, 2016, the State charged Mr. Tillman with murder, possession of a firearm during the commission of a violent crime, and obstruction of justice. R. *. On October 20, 2017, the Abbeville County Grand Jury returned true bill indictments for these charges. R. *.[1]

From January 22-26, 2018, the State tried Mr. Tillman for murder and possession of a firearm during the commission of a violent crime before the Honorable Frank R. Addy, Jr. and a jury.[2] Yates Brown and Micah Black, both of the Eighth Circuit Solicitor's Office, represented the State. Charles Grose represented Mr. Tillman. The State and Mr. Tillman stipulated that Christie Stutler's death was a homicide, Tr. 76, 107, 126, and Mr. Tillman acknowledge during his closing argument that whoever killed Ms. Stutler committed murder, Tr. 651. The trial judge agreed the following facts are beyond dispute:

1. Ms. Stutler's time of death was between 11:00 p.m. on November 7, 2016 and 11:00 a.m. on November 8, 2016.

2. From sometime beginning between 8:30 a.m. and 9:00 a.m. on November 8th, Mr. Tillman had an alibi. Mr. Tillman was at work with J.C. Boggs and Walt Tillman.

3. A South Carolina Law Enforcement Division ("SLED") forensic scientist found exactly one particle of gunshot residue on the shirt that

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[1] The Solicitor did not call the obstruction of justice charge to trial.

[2] Mr. Tillman is a black male. Ms. Stutler is a white female. The jurors sitting in judgment of Mr. Tillman included six white men, four white women, one black man, and one black woman. Tr. 34-43. During opening statements, counsel for Mr. Tillman expressed is concern, "Quite frankly in a case like this I'm worried that with my client being a black man and Christie [Stutler] being a white woman, that that might enter into the decision." Tr. 137.

Mr. Tillman wore on November 8th. The scientific testimony cannot establish how this single particle of gunshot residue got onto Mr. Tillman's clothing. This particle of gunshot residue could have gotten on his shirt by Mr. Tillman firing a gun, by Mr. Tillman transferring it to his shirt after touching something in the room where he found Ms. Stutler's body, or by law enforcement transferring it to the shirt by not wearing gloves when collecting the shirt for evidence.

4. A SLED forensic scientist discovered the DNA of *at least* three people on the rifle used to shoot Ms. Stutler. One sample is unquestionably Ms. Stutler's DNA. Mr. Tillman cannot be excluded as contributing one of the samples, although his paternal male relatives cannot be excluded as contributing this sample. The person or people contributing the other DNA sample(s) remain unidentified. The scientific evidence cannot establish when these DNA samples were placed on the rifle or whether the DNA was placed on the rifle by the individual(s) or transferred to the rifle in some other manner.

See New Trial Motion, R. *, and Order Denying New Trial Motion, R *; *see also State v. Vickery*, 399 S.C. 507, 513–14, 732 S.E.2d 218, 221 (Ct. App. 2012) ("In criminal cases, the appellate court sits to review errors of law only. Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." (internal quotations and citations omitted)).

The jurors convicted Mr. Tillman as charged. Judge Addy sentenced Mr. Tillman to life imprisonment without the possibility of parole for murder. Judge Addy did not impose a sentence for possession of firearm during the commission of a violent crime in accordance with S.C. Code. §16-23-490. Tr. 714; R. *.

By written motion filed and served on February 5, 2016, Mr. Tillman moved for a new trial. R. *. By written order dated March 8, 2016, Judge Addy denied Mr. Tillman's new trial motion. R. *. This appeal follows.

STATEMENT OF FACTS

On November 8, 2016, Willie Tillman, who is Charles Tillman's oldest brother, arrived at the property on Bell Road, Iva, South Carolina, which is owned by their mother, Vonnie Cummings. Ms. Cummings lives in the main house with Walt Tillman (Charles Tillman's cousin), Fanny Carson (Ms. Cummings' aunt), and Antonio Tillman (Charles Tillman's son).[3] Charles Tillman and Christie Stutler lived in a single-wide trailer on the property. When Willie arrived at 7:30 a.m., Walt was walking out of the main house. After speaking to Walt, Willie walked to the trailer to ask Charles about a price estimate for re-doing the flooring at the church. The entrance to the trailer is raised off the ground, so Willie walked around to the end of the trailer containing the bedroom that Charles shared with Ms. Stutler. Like most trailers, the walls are very thin. Willie heard Charles tell Ms. Stutler he would leave twenty dollars "for her to get a pack of cigarettes and something to eat that day." Willie asked Charles about the estimate for the church. Charles "was talking back and forth to" Willie and Ms. Stutler. Willie heard Charles asked Ms. Stutler to write the estimate. Willie heard Charles and Ms. Stutler discuss "what to put down" on the estimate. Willie waited outside the trailer. After two or three minutes, Charles came outside and gave Willie the estimate. Shortly thereafter, Charles left for work with Walk and J.C. Boggs. Tr. 607-15; *see also* State's Exhibit 40, Defendant's Exhibits No. 1, 3-6.

Between 8:30 and 9:00 a.m., after Charles and Walt Tillman left for work with Mr. Boggs, Ms. Cummings and Willie Tillman put clothes in the car to go to the laundry mat. Because Ms. Stutler often joins them when they go to the laundry mat, Ms.

[3] Antonio Tillman left for work at 5:30 a.m. Tr. 168.

Cummings "hollered for her." Ms. Stutler did not go that day, telling Ms. Cummings someone was coming to visit her that day. Tr. 155-73.

J.C. Boggs operates a small construction business that makes minor improvements to residential and commercial properties. At about 8:30 a.m. on November 8, 2016, Mr. Boggs picked up Charles and Walt Tillman, who regularly work for him. The three left for a work site "beside the Jockey Lot" in Anderson County.[4] They worked until 5:00 p.m., stopped by the bank, and ate dinner at the Spinx convenience store on Highway 28 in Anderson. Mr. Boggs returned Charles and Walt Tillman to their homes on Bell Road with enough time left for him to vote.[5] Mr. Boggs provided this information to law enforcement. Tr. 590-94. Walt Tillman confirmed this information. Tr. 599-602.

When Charles Tillman returned to the trailer, he found Ms. Stutler dead in their bed. Her body was stiff. He called 911 at 6:10 p.m.[6] Tr. 139-45.

Abbeville County Sheriff Deputy Evan McCurry was the first law enforcement office to respond. Charles Tillman was "frantic," describing what he had found, and was not able to follow instructions. Deputy McCurry found Ms. Stutler lying face down in the bed with one of her arms hanging off the side of the bed. He went to the side of the

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[4] http://www.jockeylot.com (last viewed Dec. 29, 2018). Located at 4530 Highway 29 North, Belton, SC 29627, the Jockey Lot is 23 miles from the incident location on Bell Road, Iva, South Carolina. *See State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (taking judicial notice of distance).

[5] November 8, 2016 was Election Day.

[6] At first, Mr. Tillman and his family thought Ms. Stutler might have committed suicide. She had a history of mental illness and had talked about "hurting herself." Tr. 169. Robert Stutler, Christie Stutler's father, testified AnMed in Anderson for drug treatment, but AnMed would not accept her without insurance. Tr. 457-59.

bed, "observed blood running [from her head] down the side of the mattress," and determined she was not responsive. He secured the scene and waited for medical personnel to arrive.[7] Tr. 146-154.

Law enforcement interviewed Charles Tillman four times. The first interview occurred while law enforcement still controlled the crime scene. During this interview, Mr. Tillman informed investigators that Mr. Stutler smoked Newport cigarettes and smoked illegal drugs. When investigators asked who "injected drugs" drugs, Mr. Tillman stated neither he nor Ms. Stutler used drugs in that manner. State's Exhibit 124, Defendant's Exhibits 7-12, Tr. 407-08. Investigators misrepresented to Mr. Tillman that the only way a person can get gunshot residue their hands is by firing a gun. Tr. 567, 661. During one of the interviews, investigators misrepresented the forensic pathologist established the time of death to be between 7:00 a.m. and 9:00. During the fourth interview, SLED Lieutenant Darwood Joseph ("Bo") Barton misrepresented to Mr. Tillman that only his and Ms. Stutler's DNA was found on the rifle. Tr. 485-89.[8] Despite all these misrepresentations, Mr. Tillman steadfastly maintained his innocence.

Agent James Tallon, a crime scene agent for SLED, processed the trailer for evidence and sketched the crime scene (State's Exhibit Number 142 and Defendant's Exhibit Number 1, R. *). When he first saw Ms. Stutler's body, he did not see a gunshot wound, but it was obvious she had an injury to her head. When he viewed Ms. Stutler's

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[7] Deputy McCurry started a crime scene log. Tr. 153-54; Defendant's Exhibit No. 2, R. *.

[8] Agent Barton claimed he was not aware of a third person's DNA on the rifle because Abbeville County Sheriff Office Investigators withheld that information from him. Nonetheless, he claimed "misrepresenting things in an interrogation is an accepted police technique." Tr. 485-89.

body, "there was blood in the head, nose, and mouth area." He also saw bruising on the back of her left leg and the right side of her back and an injury to her "right palm, in between the thumb and index finger." He photographed the crime scene and "found some projectile defects above the bed" from a bullet "that appeared to go straight out through the roof." He also documented a bullet hole in the west wall of the bedroom. He also located a cartridge that had fallen behind the bed. He collected fingernail scrapings under fingernail swabs to be submitted to SLED to be processed for DNA.[9] Tr. 372-86.

After Agent Tallon departed the crime scene, Lieutenant Matthew Graham called him to report finding a .22 rifle in a blue car located on the property (State's Exhibit Number 140, R. *). Agent Tallon returned, collected the rifle and "some bullets in a magazine," which he submitted to be processed for latent prints and DNA. Tr. 377-78.

On cross-examination, Agent Tallon acknowledged the trailer was very messy, and sometimes he is not able to locate all the evidence. He also acknowledged that none of the investigators ever informed him who smoked Newport cigarettes or used illegal drugs. Agent Tallon, accordingly, did not collect the package of Newport cigarettes or the drug paraphernalia, which included a syringe, a plastic pipe, and a spoon. Even though he observed what could be cigarette burns on Ms. Stutler's body, Agent Tallon did not collect the ashtray and cigarettes that were turned over in the bedroom. As a result, none of these items were processed for DNA. Agent Tallon also located—but did not collect—an "I Voted" sticker that fell off the clothing of one of the Abbeville County investigators that assisted processing the crime scene. Tr. 387-95; 414-15, Defendant's Exhibit Numbers 7, 10, and 16.

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[9] Agent Tallon also collected a known DNA Sample from Charles Tillman and major case prints from Ms. Stutler. Tr. 383-85.

Agent Kimberly Mears is a forensic scientist in the latent print department at SLED. Although locating a fingerprint on the .22 rifle, Agent Mears testified that fingerprint did not match the known fingerprints of Charles Tillman or Christie Stutler. Investigators never asked her to compare the fingerprint to any other known set of fingerprints. Agent Mears also took swabs from the rifle's trigger and trigger guard (SLED Item 1.1), the non-smooth sides of the "magazine that came with the rifle (SLED Item 1.2), the surface areas of eight cartridges (SLED Item 1.3), and the "cartridge case that was found on the bedroom floor (SLED Item 2.2). Agent Mears forwarded these swabs and a hair fiber found on the cartridge case found on the bedroom floor (SLED Item 2.1) to SLED's DNA section. Tr. 419-28.

Agent Jessica Stowe is a forensic serologist at SLED. She examined "a projectile fired from a .22 rifle" for blood, but did not find any. Agent Stowe also processed the fingernail scrapings taken from Ms. Stutler's right and left hands for further processing by the DNA lab. With the fingernail scrapings from Ms. Stutler's left hand, Agent Mears found a hair that was not suitable to be forward to the DNA lab because the root was not present. Agent Mears also processed the sexual assault kit but did not find any evidence of spermatozoa or semen for possible DNA examination. Finally, Agent Mears examined Charles Tillman's green shirt for blood, but none was found. Tr. 445-55.

Agent Catherine Leisy is a "forensic scientist assigned to the DNA casework department" at SLED. She testified the DNA profile identified on Christie Stutler's fingernail scrapings was Ms. Stutler's DNA. A partial Y-STR (male) profile on the fingernail clippings matched Mr. Tillman's DNA profile, but his male relatives could not be excluded. The second Y-STR profile on the fingernail scrapings was "insufficient for

interpretation." The major contributor of DNA to the trigger and trigger guard of the .22 rifle (SLED Item 1.1) was Ms. Stutler. The Y-STR profile on the trigger and trigger guard was probably a mixture of two people's DNA. The DNA profile on the on-smooth sides of the magazine (SLED Item 1.2) was a mixture of at least three people. For the Y-STR profile found on the magazine matched Charles Tillman's DNA profile, but his make relatives could not be excluded as contributors. Regarding the two profiles that matched Mr. Tillman's DNA profile, Agent Leisy testified "the probability that you could randomly select and unrelated male individual having a profile matching the major contributor [of this DNA sample] is approximately one in 8,600." Finally, Agent Leisy testified she cannot tell when or how the DNA got on these items. For example, Ms. Stutler could get male DNA on her fingernails by handling items in the house. Mr. Tillman's DNA—if it was his DNA—found on the magazine could have gotten there at a prior time. Tr. 502-28.

The State called two forensic scientists from SLED with GSR expertise. Agent Ila Simmons took "four particle lifts" from Mr. Tillman's shirt for GSR examination. Tr. 355-71. Agent Tyler Sturkie processed the "particle lifts" for GSR. Agent Sturkie found exactly one particle of GSR on the right sleeve of Mr. Tillman's shirt. On direct examination, Agent Sturkie testified there were two ways the one particle of gunshot residue could get on Mr. Tillman's shirt. "One is that [the shirt] was in the vicinity of the discharge of a firearm, or the second is an object that GSR on it came into contact with this object as well." On cross-examination, Agent Sturkie explained GSR "will come out of any opening [of the gun,] which would include the barrel and the ejection port." He acknowledged if you fired the .22 rifle towards the ceiling of the bedroom in the trailer,

then GSR could settle all over the bedroom. Finally, in order to avoid the possibility of transferring GSR to an object, an investigator collecting the evidence should wear rubber gloves. Tr. 554-572. Investigator Hines, who had already been to the crime scene, admitted he did not wear gloves when he collected Mr. Tillman's shirt to be examined for gunshot residue. Tr. 405-07.

Agent James B. Green is a forensic firearms examiner at SLED. He examined the .22 rifle, the cartridge case found on the bedroom floor, and the bullet fragment recovered from the wall of the trailer. He concluded the shell case was fired by the .22 rifle. His examination of the bullet fragment was inconclusive. Tr. 428-37.

Agent Jared Castellani, a forensic toxicologist at SLED, examined Christie Stutler's blood that was collected during the autopsy. He testified Ms. Statler's blood contained .22 milligrams per liter of methamphetamine and .12 milligrams per liter of amphetamine. Agent Castellani testified methamphetamine is a street drug, sometimes called Ice. When methamphetamine breaks down, one of the components is amphetamine. Tr. 437-45.

During its closing argument, the State relied on the circumstantial evidence—DNA and GSR in particular—to argue Charles Tillman was responsible for Christie Stutler's death. Tr. 636-45. Mr. Tillman presented an alternate theory about the murder that law enforcement did not investigate. Christie Stutler was alive when Charles Tillman went to work with J.C. Boggs and Walt Tillman. While Mr. Tillman was at work, someone else came to the trailer to use illegal drugs with Ms. Stutler, a fact confirmed by the presence of the syringe. "[T]hat person flipped out or got violent. . . .,

shot and killed Christie [Stutler], and panicked and hid the gun in the car as they were fleeing the scene." Tr. 645-78.

ARGUMENTS

Question I

Did the trial judge err by denying Charles Tillman's motion for the court to identify the standard of review it applied when considering Mr. Tillman's motion for a directed verdict when existing South Carolina precedent supports at least two standards of review, due process requires the prosecution to present more than a "scintilla" or "modicum" of evidence, and Mr. Tillman expressly requested the trial judge apply the standard of "substantial circumstantial evidence" employed by our state's appellate courts in *State v. Schrock*, 283 S.C. 129, 322 S.E.2d 450 (1984), *State v. Mitchell*, 332 S.C. 619, 506 S.E.2d 523 (Ct. App. 1998) *affirmed by State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004), and *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)?

When moving for a directed verdict, Mr. Tillman acknowledged:

> [T]here's direct evidence that proves a homicide and direct evidence for which a jury could concluded that somebody murdered Christie [Stutler]. The issue in this trial is the identity of the person who did that. And in this case the State's entire case on that [issue] is circumstantial evidence. And so, when we get into circumstantial evidence we get into an area that quite frankly has gotten a little bit confused in the appellate opinions.

Tr. 575-76. Counsel noted "the directed verdict standard Your Honor is supposed to consider is whether there's any substantial circumstantial evidence." *See, e.g., State v. Cherry*, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."). Counsel noted our state recognizes two standards of review. First, "[I]n some of those opinions the word 'any' will be italicized." *See, e.g., State v. Land*, 419 S.C. 191, 198, 797 S.E.2d 48, 52 (Ct. App. 2016) ("*any* substantial circumstantial evidence"). Second, in other opinions, the appellate courts emphasize the word "substantial." *See,*

e.g., State v. Odems, 395 S.C. 582, 584, 720 S.E.2d 48, 49 (2011) (*"substantial* circumstantial evidence"). Often, our Supreme Court has not used the word "any" to modify "substantial." *See, e.g., Odems; State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused...."); and *State v. Rosemond*, 356 S.C. 426, 429–30, 589 S.E.2d 757, 758 (2003) ("If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury.").

Mr. Tillman remined the trial judge about *Jackson v. Virginia* where the Supreme Court of the United States "said a scintilla of evidence is not enough to submit a case to the jury," Tr. 576. 443 U.S. 307, 320 (1979) ("But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt.").

Mr. Tillman identified *Schrock*, "where there was a lot of circumstantial evidence placing [Schrock] in the vicinity of the murder," *Hernandez* where finding drugs in the back of a truck was not sufficient evidence to submit to the jurors the drug trafficking charges of the drivers of another truck in the same caravan, and *Arnold* where law enforcement finding the accused's "fingerprint on a tab from a coffee cup lid found in the center compartment between the seats" of the deceased's car was insufficient evidence to submit the case to the jurors. 361 S.C. 386, 389, 605 S.E.2d 529, 530 (2004). Tr. 577.

Mr. Tillman request the trial judge not "consider any of the admitted falsities that were used by law enforcement in the interrogation" such as law enforcement claiming the murder occurred between "7:00 and 9:00 [a.m.] when the undisputed fact in the record is,

is that there was a 12 hour window and information was misrepresented to Charles [Tillman], either intentionally or carelessly."[10] Mr. Tillman pointed out "the window of time" where "he was at work" and to the evidence in the record that Ms. Stutler was alive when he left" for work. Counsel argued:

> I realize you've got to view this [evidence] in a light most favorable to the State. But even viewing it in a light most favorable to the State, there is a window of time where [Ms. Stutler] could have been shot and killed when Charles [Tillman] was not there. You do not have an admission from Charles [Tillman]. In fact, you have denial after denial, even when they pressured him with false information. And I – what I anticipate the State is going to argue is that this DNA on the gun and the gunshot residue are pieces of circumstantial evidence that allow them to get this case to the jury. My concern with that – and again, I trust that you're not going to consider what we know are misrepresentations [by law enforcement investigators] about, you know, the DNA and what GSR means in the interrogation. I assume that you're going to consider what the science establishes is, which is nobody can say when and how those samples got there. A lot like the fingerprint and the automobile.[11] Presumably a lot like the drugs in the car, you know, in the Edgefield case.[12] And the best that they can establish is that it's there. They can't establish how it got there. There's also the fingerprint case in Newberry[13] where the fingerprints on the window. The screen that's removed. That wasn't enough to get the burglary charge to the jury.
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> [W]hen you look at the scientific evidence – you know, first of all, they're not conclusively saying that Charles [Tillman's] DNA is on the gun because they can't rule out other male relatives. But they do conclusively state that there's other peoples' DNA on the gun. But the

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[10] The trial judge never stated whether he would consider law enforcement's false statements as circumstantial evidence supporting sending the case to the jurors.

[11] *See Arnold, supra.*

[12] *See Hernandez, supra.*

[13] *State v. Mitchell*, 332 S.C. 619, 622, 506 S.E.2d 523, 525 (Ct. App. 1998) ("a fingerprint found outside a dwelling near the point of entry is [not] 'substantial' circumstantial evidence sufficient to permit a jury to receive the case") *affirmed by State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000).

> important part is, that gun's on the property. He's admitted to shooting it before. Nobody can tell you when or how his DNA got there. So it does not establish that it got there at the time the gun was fired that killed Christie [Stutler]. Same with the GSR. They cannot establish that it got there as a result of firing a gun. So when – if you focus on the "any" I think you get into the *Jackson vs. Virginia* problem. But if you focus on the "substantial" and then combining it, "any substantial," I think that Mr. Tillman is entitled to a directed verdict.

Tr. 578-80 (footnotes added).

In response, the State relied on the DNA evidence, the GSR evidence, Ms. Cummings statement during on the 911 call that there was a gun at the trailer the prior day, and the window of time when Ms. Stutler was alive at the trailer and Mr. Tillman was present before he went to work. Tr. 580-81. Mr. Tillman responded by pointing to cases like *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013), a homicide by child abuse case, where proof that the accused was present in the home at the time the child was injured was insufficient circumstantial evidence to submit the case to the jurors. Tr. 581-82.

The trial judge observed Mr. Tillman "is perhaps correct that the Court's [sic] have been less than specific on what exactly substantial circumstantial evidence means." The trial judge, in fact, discussed this very concern during a CLE presentation to the Greenwood County Bar but has "yet to see further clarification from the Supreme Court." The trial judge, nevertheless, denied Mr. Tillman's directed verdict motion. Tr. 582-85.

After the trial judge ruled, Mr. Tillman pointed out:

> The only – the concern that I have was with the part of your ruling where you said that you don't have to be concerned with what the any substantial circumstantial evidence means. I don't know that you can apply the law to the facts without knowing what that means. And I would just respectfully ask for your definition for the record in case our Court – Appellate Courts are having to look at this [issue]. And I realize I'm putting you in a difficult spot because of the opinions out there, but I also feel like the law

> has probably gotten a little unclear on some of this because we don't have these conversations at this stage of the trial on the record.

Tr. 585-86. The trial judge acknowledged that confusion about the meaning of "substantial circumstantial evidence" is discussed by circuit court judges on their listserv. The trial judge still did not define "substantial circumstantial evidence," stating it "mean[s] exactly what the Courts have articulated in the past. So that will be my ruling." Tr. 586.

Mr. Tillman presented his case, which did not fill in any of the gaps in the State's case. *See Hepburn, supra* (discussing waiver rule); *see also State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) (modifying *Hepburn*). At the close of all the evidence, Mr. Tillman renewed his directed verdict motion. Tr. 626. In his new trial motion, Mr. Tillman reminded:

> This Court declined Mr. Tillman's request to define "substantial circumstantial evidence." Mr. Tillman respectfully renews his request for this Court to define "substantial circumstantial evidence." Mr. Tillman believes this Court applied a constitutionally inadequate standard denying him due process of law. *See Jackson* and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

R. *. Although acknowledging Mr. Tillman's request to define "substantial circumstantial evidence," the trial judge did not define the term. R. *.

An "any circumstantial evidence" standard would not comply with due process.[14] *See Winship* and *Jackson, supra.* Rather, due process requires the trial judge to determine the existence of "substantial circumstantial evidence" in order to submit the case to the jurors. *Jackson* demands nothing less. Such a rule is consistent with our state's longstanding requirement that an accused's motion for a directed verdict must be

[14] U.S. Const. Am. XIV; S.C. Const. Art. I, § 3.

granted when the evidence "is such as to permit the jury to merely conjecture or to speculate." *State v. Cain*, 419 S.C. 24, 31, 795 S.E.2d 846, 850 (2017); *State v. Brown*, 267 S.C. 311, 316, 227 S.E.2d 674, 677 (1976). It is equally well settled, "The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478. This Court, therefore, should hold that trial judges must apply a "substantial circumstantial evidence" standard when considering the accused's directed verdict motion. Otherwise, trial judges would allow jurors to base their decision on speculation and conjecture.

The cases cited by Mr. Tillman at trial are instructive about the meaning of "substantial circumstantial evidence." In *Schrock*, Schrock admitted to being in the general area at the time of a double murder. At the crime scene, law enforcement located a footprint that was consistent with Schrock's footprint and Marlboro cigarette butts. Schrock admitted he smoked Marlboro cigarettes. "[O]n the morning after the incident, [Schrock] disposed of clothes and tennis shoes he had been wearing." 283 S.C. at 132, 322 S.E.2d at 451. Our Supreme Court held:

> The evidence presented by the State in the instant case may raise a suspicion of Schrock's guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt, to his guilt. From the record before us, we can reach no other conclusion but that Schrock was entitled to a directed verdict of not guilty based on the lack of evidence.

283 S.C. at 134, 322 S.E.2d at 453.

In *Mitchell*, a burglar entered the homeowner's house though a broken window and stole some guns. Law enforcement found Mitchell's thumbprint on a window screen found directly under the broken window. Additionally,

> the state presented evidence that Mitchell had been on the [] property at least twice, once to help [the home owner's] son move furniture and attend a social gathering in the house and another time to help the son unload lumber. [The homeowner] further testified that Mitchell had not entered the room where the broken window and glass were found on either occasion.

332 S.C. 619, 621, 506 S.E.2d 523, 524 (Ct. App. 1998), *affirmed by State v. Mitchell,* 341 S.C. 406, 535 S.E.2d 126 (2000). This Court reversed, holding the fingerprint found on the window screen was no "substantial" circumstantial evidence of entry into the house. 332 S.C. at 622, 506 S.E.2d at 525. The State appealed. Our Supreme Court affirmed, reasoning:

> The evidence in this case is entirely circumstantial. The only evidence linking respondent to the burglary is the fingerprint. The State did not present any evidence whether the screen was on the window at the time the window was broken or when the screen had been removed. The fact that respondent's fingerprint was on a screen that was propped up against the house does not prove entry where respondent had been in and around the victim's house as least three times prior to the burglary.

341 S.C. at 409, 535 S.E.2d at 127.

In *Arnold,*

> the State's theory of the case was that [Arnold] and [the decedent] drove to the woods where [Arnold] shot [the decedent] while [the decedent] was kneeling "either by force or for sex." [Arnold] then drove the [decedent's borrowed BMW] car to Tennessee and stopped for coffee on the way [leaving his fingerprint on a coffee lid found in the car].

361 S.C. at 389, 605 S.E.2d at 531. Our Supreme Court held:

> Viewing the evidence most favorably to the State, [Arnold's] fingerprint on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where respondent was located after his stay in Savannah, raises a suspicion of guilt but is not evidence that respondent killed [the decedent]. Further, there is no evidence respondent was at the scene of the crime, which according to the State's theory was in Colleton County.

361 S.C. at 390, 605 S.E.2d at 531.

In *Hernandez,* federal agents intercepted a tractor-trailer transporting 900 pounds of marijuana from Mexico to Trenton, South Carolina. A federal agent took the place of the driver of the tractor-trailer and transported the contraband to its destination in Edgefield County. The three defendants in *Hernandez*, occupying a rented Ryder truck, joined a caravan including the tractor-trailer transporting the contraband. When the tractor-trailer and the Ryder truck got stuck in the mud on a dirt road, the federal agents arrested the three occupants of the Ryder truck and charged them with trafficking marijuana. "At trial, [the three defendants] moved for a directed verdict claiming that the State had only proved mere presence at the scene and had failed to prove the element of knowledge." 382 S.C. at 623, 677 S.E.2d at 604. The trial judge denied the motion, the jurors convicted, and the three appealed. Our Supreme Court held, "[T]his evidence does not constitute substantial circumstantial evidence of knowledge." 382 S.C. at 625, 677 S.E.2d at 605.

In each of these cases—*Schrock, Mitchell, Arnold,* and *Hernandez*—an "any circumstantial evidence" standard would have allowed the trial judge to submit the cases to the jurors. The evidence in each case raised a suspicion of guilt; however, our appellate courts, applying a "substantial circumstantial evidence" standard, analyzed the limitations of the evidence and held the trial judge erred by not entering a directed verdict of acquittal. This Court should hold the trial judge erred by not identifying the standard of review applied by the court. This Court should further hold that the "substantial circumstantial evidence" standard applied in *Schrock, Mitchell, Arnold,* and *Hernandez* is the appropriate standard.

Question II

Did the trial judge err by denying Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

After pointing out the trial judge declined his request to define "substantial circumstantial evidence," Mr. Tillman's new trial motion argued the trial judge erred by denying his directed verdict motion, pointing out:

> Once this Court appropriately defines "substantial circumstantial evidence," the need to enter a directed verdict of acquittal becomes apparent. The prosecution merely presented evidence raising a suspicion that Mr. Tillman murdered Ms. Stutler. The forensic pathologist testified that the time of death was between 11:00 p.m. on November 7th and 11:00 a.m. on November 8th. Mr. Tillman has a confirmed alibi while he was at work on November 8th. The prosecution cannot account for how the single particle of gunshot residue got onto Mr. Tillman's shirt. Even if it is accepted that Mr. Tillman's DNA is on the rifle that shot Ms. Stutler, it cannot account for how or when Mr. Tillman's DNA got onto the rifle.

R. *. Thus, viewing the evidence in a light most favorable to the State, the evidence presented at trial established that Ms. Stutler was alive at 8:30-9:00 a.m. on November 8th when Charles Tillman left for work with J.C. Boggs and Walt Tillman.

The State, however, relied on circumstantial evidence. The State's own forensic experts testified about the limitations of this evidence. A SLED forensic scientist found exactly one particle of gunshot residue on the shirt that Mr. Tillman wore on November 8th. The scientific testimony cannot establish how this single particle of gunshot residue got onto Mr. Tillman's clothing. This particle of gunshot residue could have gotten on his shirt by Mr. Tillman firing a gun, by Mr. Tillman transferring it to his shirt after touching something in the room where he found Ms. Stutler's body, or by law enforcement transferring it to the shirt by not wearing gloves when collecting the shirt for evidence. Another SLED forensic scientist discovered the DNA of *at least* three people

on the rifle used to shoot Ms. Stutler. One sample is unquestionably Ms. Stutler's DNA. Mr. Tillman cannot be excluded as contributing one of the samples, although his paternal male relatives cannot be excluded as contributing this sample. The person or people contributing the other DNA sample(s) remain unidentified. The scientific evidence cannot establish when these DNA samples were placed on the rifle or whether the DNA was placed on the rifle by the individual(s) or transferred to the rifle in some other manner.

Although the State's circumstantial evidence arguably meets an "any circumstantial evidence" standard, it cannot meet the "substantial circumstantial evidence" standard applied in *Schrock, Mitchell, Arnold,* and *Hernandez.* This Court, therefore, should reverse the trial court and direct a verdict of acquittal.

Question III

Did the trial judge err by denying Charles Tillman's motion to exclude photographs depicting Christie Stutler's deceased body—State's Exhibit Numbers 2, 3, 14, 18, 36-39, 47-51, 54-56, 58, 60, 61, 63, 94-123, 136-139 and 141—when those photographs were not relevant to any issue in the case because Mr. Tillman stipulated the manner of death was a homicide and did not contest the nature of any of Ms. Stutler's injuries and the prejudicial effect of admitting the photographs substantially outweighed any probative value?

Prior to opening statements, the trial judge noted the State had marked over 100 photographs, many of which were not objectionable,[15] but Mr. Tillman objected to some, arguing the State should not be allowed "to admit any photographs showing [Christie Stutler's] body." Specifically, Mr. Tillman objected to State's Exhibit Numbers 2, 3, 13, 14, 18, 36-39, 47-51, 54-56, 58, 60, 61, 63, 94-123, 136-139, and 141. The trial judge

[15] State's Exhibit Numbers 4-12, 15-17, 19-35, 40-46, 52, 53, 57, 59, 62, and 64-93 were admitted into evidence without objection and without need for further identification. Tr. 110-12.

conducted a lengthy *in camera* hearings regarding the admissibility of these photographs. Tr. 53-82, 107-12, 115, 177, 272-84, 286-88. Mr. Tillman pointed out:

> Some of the photographs, both from the residence and from the autopsy have what also appears to be medical intervention involved. Some of the photographs from the residence, her body is where it was found. In other photographs it's been moved somehow, either turned over or their holding up hands. We've been doing this a long time and I think the pendulum is swinging back to where it used to be on photographs of decedents, and particularly autopsies that there could be a prejudicial effect of introducing these photographs, particularly if there's no other evidentiary value other than trying to appeal to the emotions of the jurors. And that's what I'm concerned is going on here, because I think we're going to have relatively few factual disputes this trial.

Tr. 53-54. Counsel informed the trial judge:

> [T]he dispute is going to be whether or not Mr. Tillman killed Christie Stutler before he went to work of whether she died after he went to work and, therefore, was killed by someone else. So this is not a case where we're going to be contesting the nature of any of the wounds.

Tr. 55.

The trial judge instructed the Solicitor "to speak to the issue of relevancy."[16] Tr. 56. *See* Rules 401, 402, SCRE. The Solicitor argued the State has to prove Ms. Stutler did not commit suicide. Tr. 55-76. To remove any confusion, Mr. Tillman stipulated that homicide was the manner of Christie Stutler's death, and the trial judge recognized the stipulation "seems to remove a great number of issues and the question of whether it's a suicide [is] out of the picture." Tr. 76-78.

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[16] At several points, the trial judge got confused about the grounds for the objection. See, e.g. Tr. 63 ("[T]he objection is that the prejudicial effect outweighs and probative value." Counsel for Mr. Tillman reminded, "And relevance."); Tr. 66 ("But the question is whether the prejudice outweighs any probative value."); and Tr. 75 ("The question is whether the prejudicial effect outweighs the probative value."). Mr. Tillman pointed out, "I don't think that's the entire question, because" case law talks about "whether or not these photographs depict something that's in issue or not," *i.e.* relevance, and Mr. Tillman is "not contesting a single thing that they've talked about so far, as far as what injuries are there." Tr. 75.

Dr. Woodard, the State's forensic pathologist, testified about many of these photographs. *See* Tr. 293-302. The Solicitor emphasized the photographs during the State's closing argument. Tr. 639.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE; *see also State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100 (1999) ("testimony and the victim's photograph were not relevant to proving the guilt of appellant").

Mr. Tillman objected to the photographs based on relevance. Because Mr. Tillman stipulated Ms. Stutler's death was a homicide, the photographs did not assist the jurors in making this determination. Mr. Tillman repeatedly offered to stipulate to the injuries depicted in the photographs and pointed out that Dr. Woodard could testify about the nature of the wounds without needing to use the photographs (using a diagraph, for example). Tr. 55-56, 75-76, 78-80, 126, 133, 177, 527, 584, 632, 662. These photographs were not relevant, and this Court should order a new trial. "Because the evidence of [Mr. Tillman's guilt was not overwhelming, [this Court] cannot find this irrelevant evidence did not affect the outcome of the trial under a harmless error analysis." *Langley*, 334 S.C. at 648, 515 S.E.2d at 100.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded . . . if they are irrelevant or not substantially necessary to show material facts or conditions." *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton,* 288 S.C. 21, 339 S.E.2d 692 (1986)). Use of horrendous photographs is "an area of growing concern" for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope." *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010).

In addition to not being relevant, the photpgraphjs were extremely prejudicial. In light of the stipulation, the prejudicial effect of these photographs substantially outweighed any probative value. The prosecution emphasized these photographs during its closing argument, compounding the prejudice. Admission of this evidence was not harmless. *See Langley, supra.* This Court should order a new trial.

Question IV

Did the trial judge err by denying Charles Tillman's motion for a mistrial when the State sought to introduced evidence from a purported "criminal profiler," when "criminal profiling" is not a legitimate science?

The State called SLED Lieutenant Darwood Joseph ("Bo") Barton, and the following exchange occurred:

Q: And how long have you been in law enforcement, Mr. Barton?

A: Thirty years.

Q: And have you always been at SLED or did you work in other departments?

A: I've been at SLED since I graduated college.

Q: And where did you go to college?

A: Wofford College.

Q: And you've got a degree – was it a Bachelor's of Science?

A: Bachelor of Arts in Sociology, and then my Master's degree is Criminal Justice from the Charleston Southern University.

Q: All right. And you said you've been at SLED for about 30 years. What is – what's your title right now at SLED?

A: I am a lieutenant in charge of the behavioral science unit. I'm one of the criminal profilers at SLED.

Q: And before you became a criminal profiler, did you work in other areas at SLED?

A: Yes, sir. I worked in – my first job was Bloodhound tracking team, SWAT team, then I went to undercover narcotics, then I worked the violent crimes task force, drug task force, and then moved over into homicide, and then from there I went into the – excuse me. I went into the protocol to become board certified as a criminal profiler.

Q: And how long have you been a criminal profiler?

A: Since 2003.

Q: And you're a lieutenant over that division now at SLED?

A: Correct.

Q: On November the 8th of 2016, did you – you didn't respond to Bell Road, did you?

A: No, sir. I didn't

Q: How did you go about becoming involved in this particular case?

A: I received a call from Captain Talbert, Natalie. And so, she had formally worked at SLED and we worked – worked cases together before. And behavioral science or criminal profilers get called in occasionally to –

Tr. 460-61.

Counsel for Mr. Tillman asked for a sidebar and objected to Lieutenant Barton testifying as an expert in "criminal profiling." The trial judge "sustained" the objection and instructed the Solicitor to "move along, please, and ask another question." Tr. 461.

After asking Lieutenant Barton if he interviewed Mr. Tillman on November 29, 2016, Tr. 461-65, the following transpired:

Q: In the interview with Mr. Tillman, what did you all talk about initially when you all – when he first – when he first got there?

A: My point to talk to Mr. Tillman was to try to understand a better understanding of what he believed happened that day, what actually happened that day, events leading, state of mind of the victim, that kind of thing. So we began talking and I was going to give – I gave him three separate options as to the possible likelihood after my review of the case file –

Tr. 465.

Mr. Tillman moved for a mistrial, arguing:

I think the first thing is that the record needs to reflect that we had a sidebar where I informed the Court that I had been told that the purpose of this witness was that he took an interview and that they were going to either talk about that interview or play parts of that interview. That's gone back and forth during this trial. I had been given absolutely nothing about an expert in criminal profiling. They went through all of his qualifications in that and didn't offer him as an expert. You instructed him when you sustained the objection to move on. That is a junk science and I made that objection because he was getting ready to explain why Captain Natalie Talbert called him in and what a criminal profiler does. You instructed him to move on, and now what he's getting ready to say is, based on my review of the file as an expert at criminal profiling I wanted to give Charles Tillman three scenarios and see how he responded to them, and he's going to going to give opinion testimony. And he's being portrayed to this jury as somebody who's an expert, who's putting his stamp of approval on it, that they're going to say, this guy, who's a criminal profiler

> from SLED, came up and told you whatever, they're going to argue he's an expert.
>
> I'm moving for a mistrial. This is not a science. This is a junk science. This type of testimony is not admissible in the Courts of South Carolina and we were sandbagged on this issue because we were told he was here to do an audio recording that now they're saying they're not even going to play for the jury, they're just going to let him give opinions on it.

Tr. 465-67.[17]

The Solicitor never responded to the expert testimony issue, but rather argued their intent was to limit the amount of the tape recording that had to be played to the jurors in order to avoid juror "fatigue." Tr. 467.

Counsel for Mr. Tillman elaborated:

> What I don't want is, is I don't want him testifying like an expert, based on the review of my file, I wanted to give him three different scenarios. He's expressing an opinion on the evidence, an opinion on the victim's state of mind, an opinion on Charles [Tillman's] state of mind. That's what I have an objection to. If they want to – they didn't need to do all of this. A lot of times they call polygraph examiners to say, well, I got a statement from a person. The jury never hears that they're polygraph examiners. I feel like we have been totally sandbagged on this issue. If they want to ask him what questions did you ask him, what answers did he give, that's fine. I don't have a problem with us trying to end some of this video fatigue, but this is their evidence. And in the best evidence of what I asked him and what he said is what's on that video. And he does talk about – I've been doing this for a long time and I know things, but he doesn't give opinions on that like he's getting ready to do in this Court.

Tr. 467-68.

The trial judge agreed with Mr. Tillman's account of the sidebar and observed, "It sounded as if the State was about to qualify, or attempt to qualify, or elicit testimony that

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[17] At various times during the trial, Mr. Tillman reminded the trial judge about the three-prong test set forth in *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) regarding trial courts' gatekeeping function for admitting expert testimony. *See, e.g.*, Tr. 87-101, 279.

would indicate that Mr. Barton is an expert in criminal profiling." And, "[T]he manner in which the testimony was being presented, although I think it was an innocent mistake on the part of the State, the manner in which it was starting to come out when Mr. Grose objected certainly seems to lend itself to the very thing Mr. Grose is complaining about." And, "[I]t was definitely headed in the direction of giving the imprimatur in criminal profiling that there is some way to magically discern whether someone is telling the truth or not." The trial judge noted criminal profiling is not recognized as an expertise in South Carolina. The trial judge did not think the questioning "crossed the line" requiring a mistrial. Although acknowledging the trial court could not "unring the bell,"[18] the trial judge decided to give a curative instruction. Tr. 468-69, 474.

Counsel disagreed the State's presentation was an "innocent mistake" when he argued:

> Well, I think that this was carefully crafted questions and answer, and because they took so much time developing his expertise when they could have just said did you interview Mr. Tillman on such and such a date. And so, at this point, you're right. We can't unring the bell. And so, any curative instruction is – I'm going to deem inadequate to have the continuing motion. But I think that the Court needs to craft something this says this witness – because you've – we've not objected to any expert that they've called in this case.
>
> ****
>
> And so, every time that an expert has been qualified without objection, you have explained, appropriately, what our system says that we tell about an expert. And so, I think that – you know, number one, if you're going to craft a curative instruction, this jury needs to be told that he's not an expert and that he cannot testified as to opinions. Something similar to but opposite of what you've said with people who were deemed to be experts.

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[18] *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted).

Tr. 469-70, 475. Mr. Tillman asked for any curative instruction to include, "That it was improper for the State and the witness to present him as an expert." Tr. 473. Over objection, the trial judge ultimately instructed the jurors:

> Ladies and gentlemen of the jury, thank you for your continued attention and your continued patience and I wanted – before we proceed further, I want to clear up any misconceptions that perhaps you harbor concerning Mr. Barton and his current testimony. I want you to understand, ladies and gentlemen, previously today and yesterday we had a number of individuals testify as expert witnesses. I explained that when somebody is qualified as an expert, they are allowed to give opinion testimony. They cannot testify about something – or they can testify about something they observed, but they can also testify about their opinions.
>
> In this case, ladies and gentlemen, Mr. Barton's background, his job history, that kind of thing, that was alluded to in certain testimony. But please, understand that Mr. Barton is not an expert in any field that's recognized in the law. Criminal profiling is not a recognized science. It is not an area of expertise that's appropriate for an expert opinion or expert testimony, and Mr. Barton is not, in any way, shape, or form, an expert in any sort of science or in any sort of recognized field that would warrant qualifying him as an expert in that field. And to the extent that that impression may have been given to you, I want to dispel that immediately. And please, understand this is – this witness' testimony is limited to something that he observed, something he heard, something he saw, smelled, tasted, felt, et cetera, and is not in any way, shape, or form opinion or expert testimony in any way.

Tr. 476-77.[19] This instruction not only did not "unring" the bell, but it called further attention to the error and the perception that Lieutenant Barton had some special knowledge, if not considered an expertise by the courts. Mr. Tillman renewed his request for a mistrial in his Motion for a New Trial. R. *.

[19] Recognizing the magnitude of the issue, the trial judge stated, "You don't have to object to my statement, Mr. Grose. You are covered. You don't need to object afterwards be I know you have to object, regardless of what I say in order to preserve this issue." Tr. 475.

By sustaining Mr. Tillman's objection and giving the curative instruction, the trial judge found the testimony inadmissible. Even after the curative instruction, Mr. Tillman was prejudiced because the jurors were left with the impression that there was something uniquely probative about Agent Barton's interview techniques and testimony, suggesting a decision in an improper basis.

"While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial to determine the guilt of a specific individual. In other words, this type of testimony unduly tends to suggest a decision on an improper basis." *State v. Huckabee*, 419 S.C. 414, 425, 798 S.E.2d 584, 589 (Ct. App. 2017) (internal quotations omitted) (holding probative value of criminal-profile testimony was substantially outweighed by danger of unfair prejudice, and thus testimony should have been excluded under rule which provided for such exclusion).

Agent Barton's testimony about criminal profiling was inadmissible and suggested the jurors render a verdict on an improper basis. *Id.* It is impossible for this Court to say that this testimony did not affect the verdict. *See, e.g., Langley, supra.* This Court should order a new trial.

Question V

Did the trial judge err by denying Charles Tillman's request to charge based on *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989)?

During the charge conference, Mr. Tillman requested this Court provide the jurors with the *Edwards* circumstantial evidence instruction, to wit:

> [E]very circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the

> accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989) (citing *State v. Littlejohn,* 228 S.C. 324, 89 S.E.2d 924, 926 (1955). This Court instead provided the instruction mandated by *State v. Logan*, 405 S.C. 83, 86, 747 S.E.2d 444, 445 (2013)[20] ("*Logan* charge").

"A key purpose of [*Edwards'*] cautionary charge . . . was to preclude conviction of the innocent. The modern American trend, however, has been to abandon the common law instruction concerning circumstantial evidence. This has the effect of creating the very danger that the [common law] rule sought to eliminate." Rosenberg, 31 Hous. L. Rev. at 1390. In fact, since *Edwards*, our Supreme Court has struggled with how trial courts should explain circumstantial evidence to jurors in a criminal case. In *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), the Court approved an alternate instruction that became mandatory after *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). Both *Grippon* and *Cherry* were three-to-two decisions, with the minority opinions wanting to retain the *Edwards* Charge. But, in *Grippon* and *Cherry*, our Supreme Court, "never rejected the 'reasonable hypothesis' phrase [of the *Edwards* Charge] or found this phrase shifted the burden of proof." *Grippon*, 327 S.C. at 82, 489 S.E.2d at 463.

Our Supreme Court revisited this issue and "modif[ied] *Grippon* and *Cherry* to allow the additional language provided . . . if requested by a defendant," by setting forth a

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[20] Mr. Tillman acknowledged that the Court was not allowed to grant his request for the *Edwards* instruction under the plain language of *Logan.* Mr. Tillman's request and subsequent objection to the jury instructions, however, were needed to preserve this issue for appeal.

new instruction. *Logan*, 405 S.C. at 99-100, 747 S.E.2d at 452-53. In *Logan*, the majority opinion warned that "requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant." *Id.* 405 S.C. at 98, 747 S.E.2d at 451-52 (citing *State v. Aleksey*, 343 S.C. 20, 26, 538 S.E.2d 248, 251 (2000) ("Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'")).

In *Holland v. United States*, the Supreme Court of the United States reminded the bench and bar of government's obligation, as part of its duty "to see that justice is done," 348 U.S. at 136, to disprove leads presented to it by an accused. 348 U.S. 121, 136 (1954). This obligation is consistent with the prosecution's burden of proof. *See Winship, supra.* The *Logan* Charge, however, omits instructing the jurors the State's proof must "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis," which implies that the prosecution has the burden of disproving every reasonable hypothesis inconsistent with guilt by proof beyond a reasonable doubt. Such an instruction is mandatory when an accused presents other defenses. "[W]hen self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." *State v. Burkhart*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). *And see* Suggested Jury Instructions—Criminal, pp. 294-95. The prosecution, likewise, has the "burden of disproving the defense of alibi." *State v. Bealin*, 201 S.C. 490, 23

S.E.2d 746, 754 (1943).[21] *And see* Suggested Jury Instructions—Criminal, pp. 275-76 and Ralph King Anderson, Jr., South Carolina Request to Charge—Criminal, 2007, § 6-19. "An alibi charge is considered especially crucial when the evidence is entirely circumstantial." *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). In a criminal sexual conduct case, if the accused raises the defense of consent, then "the state must prove beyond a reasonable doubt that the victim did not consent." Suggested Jury Instructions—Criminal, p. 278.

Mr. Tillman's case illustrates why the *Edwards* instruction is more appropriate than the *Logan* instruction. *Edwards* requires the exclusion of all reasonable hypotheses that the accused is not guilty. *Logan* leaves open the possibility that an innocent person might be convicted. This Court should order a new trial.

Question VI

Should this Court grant Charles Tillman a new trial based on the cumulative error doctrine?

The cumulative error doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). *And see State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002) (cumulative error of solicitor's improper argument and improperly excluded evidence warranted reversal). This Court should order a new trial because admission of the

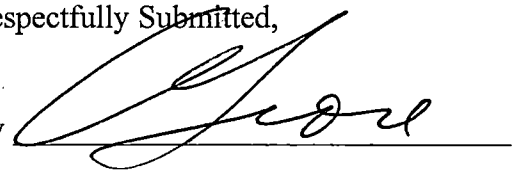
[21] The trial judge, in fact, charged Mr. Tillman's jurors, "The State has the burden of disproving the Defendant's alibi defense." Tr. 692. Under the facts of this case, the *Edwards* instruction was necessary for the jurors to understand the State had the obligation to disprove, beyond a reasonable doubt, the alternate theory advanced by the defense.

photographs combined with the "criminal profiler" testimony combined to deny Mr. Tillman a fair trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Charles Tillman's convictions and enter an order directing a verdict of acquittal. In the alternative, this Court should reverse the convictions and remand this case to the Court of General Sessions for a new trial.

Respectfully Submitted,

By 

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December 31, 2018
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of General Sessions
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2018-000495

Charles Tillman,..... Appellant.

v.

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

Certificate of Service

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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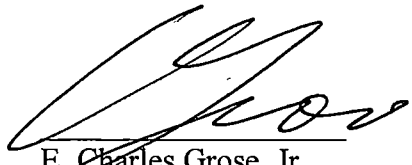

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December 31, 2018
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December 31, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Charles Tillman*
Appellate Case Number 2018-000495

Dear Ms. Kitchings:

Enclosed please find Mr. Tillman's Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, along with a certificate of service.

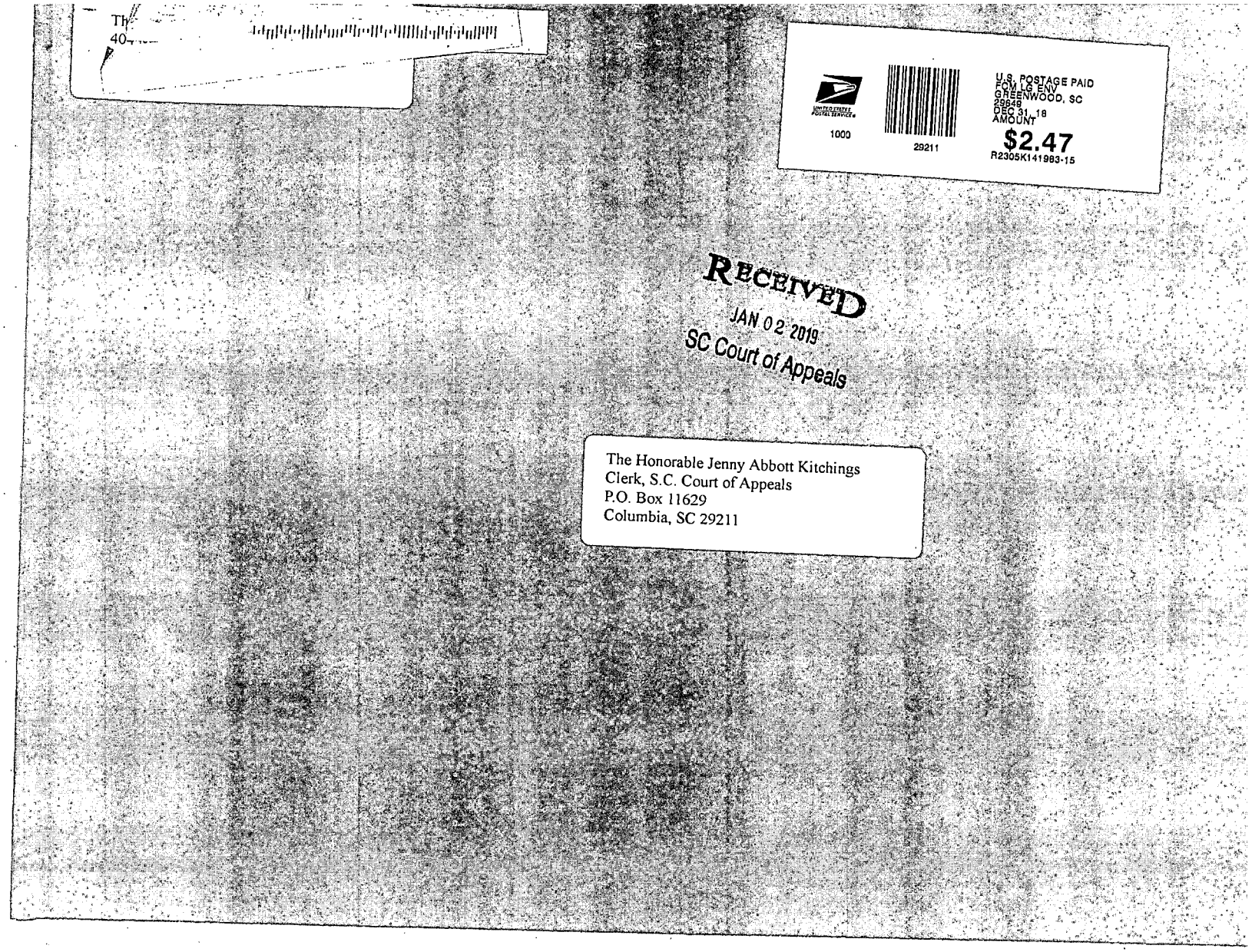
Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Charles Tillman
Melody J. Brown, Esquire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