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.

PETITION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a), SCACR, Charles Tillman petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

As a threshold matter, this Court did not defer to the trial judge's findings of fact. *See 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)). This error of law impacted this Court's holdings in multiple issues presented in this appeal. 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 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. 15-23, and Order Denying New Trial Motion, R 3-5. Once this Court gives proper deference to these factual findings, the need to reverse the trial court becomes apparent.

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)?

This Court summarily dismissed this issue by stating:

> As to the trial court's failure to define the standard of review it applied in evaluating Tillman's motion for directed verdict, the trial court found there was substantial circumstantial evidence Tillman committed the crimes of which he was accused. *See State v. Arnold*, 361 S.C. 386, 389, 605 S.E.2d

> 529, 531 (2004) ("The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.").

State v. Tillman, No. 2018-000495, 2021 WL 609089, at 4 (S.C. Ct. App. Feb. 17, 2021).

This Court—like the trial court below—did not define the meaning of "substantial circumstantial evidence." During the hearing on the directed verdict motion, Mr. Tillman and the trial judge discussed—at great length—the confusion surrounding the definition of "substantial circumstantial evidence" resulting from conflicting opinions of our Supreme Court. R. 576-87. Mr. Tillman's Brief of Appellant, at 11-18, and Reply Brief of Appellant, at 1-2, specifically asked this Court to define the meaning of "substantial circumstantial evidence" consistent with the holdings 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). *See State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the [C]ourt of [A]ppeals to apply [the Supreme] Court's precedent." (citing S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.")). If "substantial circumstantial evidence" is defined consistent with the holdings in *Schrock, Mitchell, Arnold,* and *Hernandez*, then the State did not present substantial circumstantial evidence in this case.

As seen above, the trial judge made specific findings of fact regarding the facts that were beyond dispute presented during Mr. Tillman's jury trial. When "substantial circumstantial evidence" is properly defined, the facts beyond dispute support directing a verdict of acquittal.

At a minimum, as discussed in Mr. Tillman's briefs, our state's precedent is inconsistent regarding the standard for the trial court to apply when considering a directed verdict motion. This Court, accordingly, should rehear this matter and provide guidance about the meaning of the term substantial circumstantial evidence.

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?

Mr. Tillman's Brief of Appellant, at 19-20, specifically asked this Court to apply "the 'substantial circumstantial evidence' standard applied in *Schrock, Mitchell, Arnold,* and *Hernandez*." Section I of the Law/Analysis section of this Court's opinion, however, does not discuss these cases at all. *Tillman*, at 2-3. Once these cases are considered, the Court's obligation to grant Mr. Tillman's motion for a directed verdict becomes apparent. "[I]t is incumbent upon the [C]ourt of [A]ppeals to apply [the Supreme] Court's precedent." *Phillips*, 416 S.C. at 194, 785 S.E.2d at 453.

As seen above, the trial judge made specific findings of fact regarding the facts that were beyond dispute presented during Mr. Tillman's jury trial. When "substantial circumstantial evidence" is properly defined, the facts beyond dispute require directing a verdict of acquittal.

This Court, accordingly, should rehear this matter, consider *Schrock, Mitchell, Arnold,* and *Hernandez*, reverse the trial court, and enter an order directing 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?

Although acknowledging the proper standard for reviewing the admissibility of crime scene and autopsy photographs, this Court did not apply it.

The challenged crime scene and autopsy photographs were not relevant to any contested issue at trial. Rules 401 and 402, SCRE. Even though the photographs were arguably relevant to establish what Mr. Tillman "saw upon arriving at the scene," *Tillman*, at 3, Mr. Tillman did not contest the condition Mr. Stutler was found in their bedroom. His initial belief that Ms. Stutler might have committed suicide was based on his prior knowledge of her mental health. Although "the autopsy photographs were used to show bruising and cigarette burns," *id.*, Mr. Tillman did not contest those injuries.

This Court recognized "photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id.* (internal quotations omitted). Yet, this Court never conducted an analysis regarding whether these photographs were likely to arouse sympathy and prejudice. Nor did it apply a Rule 403, SCRE analysis.

This Court, accordingly, should rehear this matter, withdraw its opinion, reverse the trial court, and remand for 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?

This Court's opinion implicitly holds the prosecution solicited inadmissible testimony when "the State asked State Law Enforcement Division Agent Bo Barton questions about his experience as a criminal profiler." *Tillman*, at 4. Yet, this Court summarily denied this issue because "[t]he trial court's curative instruction was lengthy and unequivocal in dispelling any notion that it had qualified Agent Barton as an expert in any legally legitimate scientific field." *Tillman,* at 4 (citing *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005)). This holding overlooks the trial judge acknowledging a curative instruction could not "unring the bell" under the circumstance of this case. *State-Record Co. v. State*, 332 S.C. 346, 356, fn. 19, 504 S.E.2d 592, 597, fn. 19 (1998) (internal quotations omitted). Once this Court defers to the trial judge's finding of fact that the jurors could not disregard Agent Barton's testimony, *see Vickery, supra,* the need reverse the trial court's failure to declare a mistrial becomes apparent.

This Court, accordingly, should rehear this matter, withdraw its opinion, reverse the trial court, and remand for 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)?

This Court summarily resolved this issue by stating:

> Tillman's contention the trial court erred in refusing to give the substantial circumstantial evidence charge as stated in *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989), is without merit. The trial court was bound to give the charge it gave—the charge set forth by our supreme court in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). *See id.* at 98-99, 747 S.E.2d at

> 451-52 (disapproving of the "every other reasonable hypothesis" language in *Edwards* because it came close to shifting the burden of proof to the defendant to provide an alternate theory that would prove his innocence); *see also State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.").

Tillman, at 4.

While Mr. Tillman's appeal was pending before this Court, our Supreme Court once again modified the circumstantial evidence charges because of a concern that the *Logan* charge given to Mr. Tillman's jurors might "invade the fact-finding role of the jury." *State v. Herndon*, 430 S.C. 367, 369, fn. 1, 845 S.E.2d 499, 500, fn. 1 (2020). In his Brief of Appellant, at 29-32, and Reply Brief of Appellant, at 8-9, Mr. Tillman argued the *Logan* charge does not convey to the jurors that the prosecution has the burden of disproving, beyond a reasonable doubt, any alternate theories that an accused argues are supported by the circumstantial evidence in the case. The more our Supreme Court "waters down" the circumstantial evidence charge, the greater the danger jurors will convict an innocent person.

This Court's opinion illustrates the dangers an innocent person could be convicted when the jurors are not instructed adequately regarding the prosecution's burden of disproving alternate explanations of the evidence consistent with the circumstantial evidence. Regarding the denial of the directed verdict, this Court held:

> Taken cumulatively and in the light most favorable to the State, the evidence described above is sufficient to withstand directed verdict. As the trial court noted, taken in isolation, the evidence may only have raised a suspicion of Tillman's guilt. However, when put together and coupled with Tillman's inconsistent and implausible statements to police, the threshold required to withstand directed verdict was met. Many of the items on this list could be challenged. For example, Victim and Tillman lived together so his DNA could have been under her nails without a struggle. Tillman could have

> gotten GSR on his shirt just by being in the room where Victim was shot. However, it was within the *jury's* purview to determine what each piece of evidence meant, how the pieces fit together, and whether the sum of the evidence was sufficient to convict Tillman.

Tillman, at 3. This Court thus condoned the jurors speculating how to piece together the prosecution's circumstantial evidence in a manner inconsistent with the State's burden of proof.

As seen above, the trial judge made specific findings of fact regarding the facts that were beyond dispute presented during Mr. Tillman's jury trial. This Court's failure to defer to the trial judge regarding these findings of fact, *see Vickery, supra,* is particularly prejudicial when considered with this Court's holding allowing the jurors to speculate about how the "pieces" of circumstantial evidence "fit together."

This Court, accordingly, should rehear this matter, withdraw its opinion, reverse the trial court, and remand for a new trial.

Question VI

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

This Court resolved this issue by holding, "Because we find the issues raised by Tillman were properly decided by the trial court, his cumulative error argument is unavailing." *Tillman,* at 4. Once this Court recognizes the errors discussed in this petition for rehearing, this holding cannot stand. This Court, accordingly, should rehear this matter, withdraw its opinion, reverse the trial court, and remand for a new trial.

REQUEST FOR REHEARING *EN BANC*

Pursuant to Rule 219, SCACR, Charles Tillman respectfully requests that this Court rehear this matter *en banc*. Defining the meaning of "substantial circumstantial evidence" "involves a question of exceptional importance."

CONCLUSION

For the foregoing reasons, this Court should rehear this matter *en banc*, withdraw its opinion, and reverse the trial court, and direct a verdict of acquittal. Alternatively, this Court should reverse the trial court and remand this case for a new trial.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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March 4, 2021
Greenwood, South Carolina

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Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-12-16-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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March 4, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: *State of South Carolina v. Charles Tillman*
Appellate Case Number 2018-000495

Dear Ms. Kitchings:

Enclosed please find Mr. Tillman's Petition for Rehearing *En Banc*, 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,

s/*E. Charles Grose, Jr.*
E. Charles Grose, Jr.

cc: Mr. Charles Tillman
Caroline Scrantom, Esquire