THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Court of Appeals Appellate Case No. 2018-000495
State v. Tillman, S.C.Ct.App. Op. No. 5805 (filed February 17, 2021)

Charles Tillman,.....Appellant,

v.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF *CERTIORARI*

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The Court of Appeals denied Charles Tillman's Petition for Rehearing *En Banc* (A. 12-22) by written order dated April 5, 2021 (A. 9-11).

QUESTIONS PRESENTED

I. Did the Court of Appeals err by affirming the trial court's failure to identify the standard of review and defining the meaning of "substantial circumstantial evidence," 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)?

II. Did the Court of Appeals err by affirming the trial court's denial of Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

III. Did the Court of Appeals err by affirming the trial court's denial of 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?

VI. Did the Court of Appeals err by affirming the trial court's denial of 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?

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

STATEMENT OF 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. 6-8. On October 20, 2017, the Abbeville County Grand Jury returned true bill indictments for these charges. R. 9-14.[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 (R. 77, 108, 127), and Mr. Tillman acknowledge during his closing argument that whoever killed Ms. Stutler committed murder (R. 652). The trial judge ruled 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

[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. R. 35-44. 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." R. 138.

> 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.

New Trial Motion, R. 15-16, and Order Denying New Trial Motion, R. 3; *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. In accordance with S.C. Code. §16-23-490, Judge Addy did not impose a sentence for possession of firearm during the commission of a violent crime. R. 715; R. 1-2. By written motion filed and served on February 5, 2016, Mr. Tillman moved for a new trial. R. 15-22. By written order dated March 8, 2016, Judge Addy denied Mr. Tillman's new trial motion. R. 3-5.

Mr. Tillman appealed to the Court of Appeals. On November 4, 2020, the Court of Appeals convened an oral argument via WebEx. On February 17, 2021, the Court of Appeals affirmed the convictions and sentences. A. 1-8. On March 4, 2021, Mr. Tillman petitioned for rehearing *en banc*. A. 12-22. On April 5, 2021, the Court of Appeals denied the petition. A. 9-11. This petition 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 Walt and J.C. Boggs. R. 608-16; *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. Cummings "hollered for her." Ms. Stutler did not go that day, telling Ms. Cummings someone was coming to visit her that day. R. 156-74.

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

[3] Antonio Tillman left for work at 5:30 a.m. R. 169.

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. R. 591-95. Walt Tillman confirmed this information. R. 600-03.

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] R. 140-46.

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 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] R. 147-55.

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.

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[4] http://www.jockeylot.com (last viewed May 2, 2021). 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." R. 170. Robert Stutler, Christie Stutler's father, testified AnMed in Anderson for drug treatment, but AnMed would not accept her without insurance. R. 458-60.

[7] Deputy McCurry started a crime scene log. R. 154-55; Defendant's Exhibit No. 2.

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, R. 408-09. Investigators misrepresented to Mr. Tillman that the only way a person can get gunshot residue their hands is by firing a gun. R. 568, 662. 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. R. 486-90.[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 142 and Defendant's Exhibit 1). 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 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. R. 373-87.

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). Agent

[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." R. 486-90.

Tallon returned, collected the rifle and "some bullets in a magazine," which he submitted to be processed for latent prints and DNA.[9] R. 378-79.

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. R. 388-96; 415-16, Defendant's Exhibit Numbers 7, 10, and 16.

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. R. 420-29.

[9] Agent Tallon also collected a known DNA Sample from Charles Tillman and major case prints from Ms. Stutler. R. 384-86.

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. R. 446-56.

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 male 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. R. 503-29.

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. R. 356-72. 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. R. 555-573. 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. R. 406-08.

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. R. 429-38.

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. R. 438-46.

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. R. 637-46. 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." R. 646-79.

ARGUMENTS

I. Did the Court of Appeals err by affirming the trial court's failure to identify the standard of review and defining the meaning of "substantial circumstantial evidence," 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)?

Our state recognizes at least two standards for reviewing circumstantial evidence at the directed verdict stage. In some appellate opinions the word "any" will be italicized. *E.g., State v. Land*, 419 S.C. 191, 198, 797 S.E.2d 48, 52 (Ct. App. 2016) ("*any* substantial circumstantial evidence"). In other opinions, the word "substantial" is italicized. *E.g., State v. Odems*, 395 S.C. 582, 584, 720 S.E.2d 48, 49 (2011) (*"substantial* circumstantial evidence"). Often, this Court has not used the word "any" to modify "substantial." *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."). Sometimes, the appellate courts use the word "any" to modify both "direct evidence" and "substantial circumstantial evidence." *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."). Both the trial judge and the Court of Appeals erred by not defining "substantial circumstantial evidence."

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading and the filings in the Court of Appeals, relevant to this claim, are fully incorporated herein.

When moving for a directed verdict, Mr. Tillman acknowledged "direct evidence that proves a homicide" and "direct evidence for which a jury could concluded that somebody murdered" Ms. Stutler, but argued "the State's entire case" regarding identity of the killer is based on "circumstantial evidence." Mr. Tillman argued, "[W]hen we get into circumstantial evidence we get into an area that quite frankly has gotten a little bit confused in the appellate opinions. R. 576-77. Mr. Tillman also reminded 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" (R. 577). 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.").

The trial judge agreed 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 acknowledged confusion about the meaning of "substantial circumstantial evidence" is discussed by circuit court judges on their listserv. 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." Ultimately, the trial judge did not define "substantial circumstantial evidence," stated it "mean[s] exactly what the Courts have articulated in the past," and denied the motion for a directed verdict.[10] R. 583-87. Mr. Tillman renewed his request for the trial court to define "substantial circumstantial evidence" at the end of the State's case (R. 627) and in his Motion for a new trial (R. 20).

The Court of Appeals summarily dismissed this issue by holding, "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." *Tillman*, at 4 citing (*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.")).

"Substantial circumstantial evidence" has to be more than an any evidence standard of review. An "any circumstantial evidence" standard would not comply with due process.[11] *See In re Winship*, 397 U.S. 358 (1970) and *Jackson, supra.* Rather, due process requires the trial judge

[10] A detailed summary of the colloquy between the trial judge and Mr. Tillman's counsel can be found in the Final Brief of Appellant, at 11-15.

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

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 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. This 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" and, "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 a home though a broken window and stole some guns. Mitchell's thumbprint was 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 homeowner's] son move furniture and attend a social gathering in the house and another time to help the son unload lumber." 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). The homeowner "testified that Mitchell had not entered the room where the broken window and glass were found on either occasion." *Id.* The Court of Appeals 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, and this 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." 361 S.C. at 389, 605 S.E.2d at 531 (internal quotations omitted). Arnold then drove the decedent's borrowed "car to Tennessee and stopped for coffee on the way." leaving his fingerprint on a coffee lid found in the car. *Id*. This 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. This 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 court and the Court of Appeals 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.

II. Did the Court of Appeals err by affirming the trial court's denial of Charles Tillman's directed verdict motion when the State failed to present "substantial circumstantial evidence" he killed Christie Stutler?

At trial, Mr. Tillman contended he is entitled to a directed verdict if "substantial circumstantial evidence" is properly defined. His new trial motion argued:

> 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. 20. 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 Court of Appeals disagreed and held, "Multiple pieces of circumstantial evidence, when put together, create more than mere suspicion Tillman killed Victim. *Tillman*, at 4.

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading and the filings in the Court of Appeals, relevant to this claim, are fully incorporated herein.

The State relied on circumstantial evidence, and the trial court ruled certain facts were beyond dispute. R. 3, 15-16. 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 the Court of Appeals and direct a verdict of acquittal.

III. Did the Court of Appeals err by affirming the trial court's denial of 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?

Mr. Tillman objected to crime scene and autopsy photographs showing Ms. Stutler's deceased body because those photographs were not relevant to any contested issue in the case and the prejudicial effect of those photographs substantially outweighed and probative value. The Court of Appeals "conclude[d] the trial court did not abuse its discretion in admitting the disputed photographs as they were relevant to matters in controversy, were highly probative, and were not unduly prejudicial." *Tillman*, at 3.

"'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"). "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 this Court that has "strongly encourage[d] all solicitors to refrain from pushing the envelope on admissibility to a gain a victory." *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010).

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading and the filings in the Court of Appeals, relevant to this claim, are fully incorporated herein.

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, arguing the State should not be allowed "to admit any photographs showing [Christie Stutler's] body." The trial judge conducted *in camera* hearings regarding the admissibility of these photographs. R. 54-83, 108-13, 116, 178, 273-85, 287-89. Mr. Tillman argued "[s]ome of the photographs, both from the residence and from the autopsy have what also appears to be medical intervention involved." In some of the photographs, Ms. Stutler's has "been moved somehow, either turned over or their holding up hands." Mr. Tillman argued, "[T]here's no other evidentiary value other than trying to appeal to the emotions of the jurors," particularly when "we're going to have relatively few factual disputes this trial" because "the

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." R. 54-56.

The trial judge instructed the Solicitor "to speak to the issue of relevancy."[12] R. 57. *See* Rules 401, 402, SCRE. The Solicitor argued the State has to prove Ms. Stutler did not commit suicide. R. 56-77. 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." R. 77-79.

Dr. Brett Woodard, the State's forensic pathologist, testified about many of these photographs. *See* R. 294-303. The Solicitor emphasized the photographs during the State's closing argument. R. 640.

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). R. 56-57, 76-77, 79-81, 127, 134, 178, 528, 585, 633, 663. 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

[12] At several points, the trial judge got confused about the grounds for the objection. See, e.g. R. 64 ("[T]he objection is that the prejudicial effect outweighs and probative value." Counsel for Mr. Tillman reminded, "And relevance."); R. 67 ("But the question is whether the prejudice outweighs any probative value."); and R. 76 ("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" caselaw 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." R. 76.

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.

In addition to not being relevant, the photographs 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.

IV. Did the Court of Appeals err by affirming the trial court's denial of 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 Solicitor qualified SLED Lieutenant Darwood Joseph ("Bo") Barton as an expert in criminal profiling but stopped short of tendering him as an expert. Mr. Tillman moved for a mistrial and objected to the trial judge's curative instruction as inadequate to cure the error and resulting prejudice. The Court of Appeals summarily rejected this issue by holding, "The 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. In doing so, the Court of Appeals erred because, even under the trial court's curative instruction, nothing prevented the jurors from inferring Agent Barton has some sort of special expertise.

Before admitting expert testimony, the trial judge must determine "the subject matter is beyond the ordinary knowledge of the jury," "find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," and "evaluate the substance of the testimony and determine whether it is reliable." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010); *cf. State v. White*, 382 S.C. 265, 676

S.E.2d 684 (2009) (trial court's gatekeeping function of assuring reliability of expert testimony applies to nonscientific evidence); Rule 702, SCRE.

The facts set forth herein support this claim and, by this specific reference, the allegations raised elsewhere in this pleading and the filings in the Court of Appeals, relevant to this claim, are fully incorporated herein.

SLED Agent Barton testified he graduated from Wofford College with a Bachelor of Science, obtained a Master's Degree in Criminal Justice from Charleston Southern University, worked for SLED for "[t]hirty years," is "a lieutenant in charge of the behavioral science unit" at SLED, is board certified as a criminal profiler," and is "one of the criminal profilers at SLED." He explained Abbeville County Sheriff's Office Captain Natalie Talbert requested his assistance as a criminal profiler. R. 461-62. 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." R. 462.

The Solicitor asked Agent Barton if he interviewed Mr. Tillman on November 29, 2016, and Agent Barton testified:

> 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 –."

R. 462-66. Mr. Tillman placed the prior sidebar on the record and moved for a mistrial. Mr. Tillman understood from the Solicitor 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," but they disclosed "absolutely nothing about an expert in criminal profiling." Counsel pointed out, "They went through all of his qualifications" but "didn't offer him as an expert." Counsel reminded the

trial judge that criminal profiling "is a junk science." Now, the prosecution is "getting ready to explain why Captain Natalie Talbert called him in and what a criminal profiler does." They portrayed Agent Barton "to this jury as somebody who's an expert, who's putting his stamp of approval on" on the process. Later, "they're going to argue he's an expert." R. 466-68.[13]

The Solicitor never responded to the expert testimony issue, but rather claimed 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." R. 468. Counsel for Mr. Tillman pointed out the prosecution could have introduced the witness to the jurors without portraying him as an expert in criminal profiling. R. 468-69.

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 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,"[14] the trial judge decided to give a curative instruction. R. 469-70, 475.

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[13] 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.,* R. 88-102, 280.

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

Counsel disagreed the State's presentation was an "innocent mistake," but rather it "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." R. 470-71, 476. 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." R. 474.

Over objection, the trial judge ultimately instructed the jurors informed the jurors, "before we proceed further, I want to clear up any misconceptions that perhaps you harbor concerning Mr. Barton and his current testimony." After acknowledging Agent Barton's educational and professional background, the trial judge explained:

> 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.

R. 477-78.[15] 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, even if not considered an expertise by the courts. Mr. Tillman renewed his request for a mistrial in his Motion for a New Trial. R. 17-18.

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

[15] 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." R. 476.

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. Although not recognized as an expert by the trial judge, nothing prevented the jurors from inferring Agent Barton has some sort of special expertise.

"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.

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

CONCLUSION

For the forgoing reasons, this Court should grant the writ and consider the issues. This Court's guidance is needed to reconcile conflicting caselaw and clarify the meaning of "substantial circumstantial evidence." This Court should establish predictable guidelines for admission of autopsy and crime scene photographs depicting the decedent's body. This Court should also address prosecutors' efforts to introduce, through the backdoor, inadmissible expert testimony by emphasizing a witnesses' educational and professional background but stopping short of tendering the witness as an expert.

Respectfully Submitted,

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