THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
In the Court of General Sessions

The Honorable Frank Addy, Jr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-258 (S.C. Ct. App. filed July 12, 2023)

State of South Carolina . . . . . Respondent

v.

Terry Renee McClure . . . . . Petitioner

PETITION FOR A WRIT OF CERTIORARI

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McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

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Certificate of Petitioner

Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2023.

/s/ Terry R. McClure
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October 6, 2023

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding the erroneous admission of the redacted interrogation video was harmless under the circumstances?

2. Did the Court of Appeals overlook Petitioner's objection to the jury instruction on inferred malice in finding that it was not preserved for appellate review?

3. Did the Court of Appeals overlook the absence of independent evidence of conspiracy in finding the circuit court properly admitted Justin Butler's text messages as the non-hearsay statements of a coconspirator?

4. Did the Court of Appeals err in affirming the admission of expert testimony on "street culture, language, and slang," and in finding the prejudice from use of the word "street" to be harmless?

5. Did the Court of Appeals err in affirming the circuit court's refusal to allow Petitioner to cross-examine Tyvona Toland regarding her prior charges?

STATEMENT OF THE CASE

On July 25, 2016, Terry McClure was extradited from California to South Carolina and served with arrest warrants for the shootings of VonKeith and Tycus Toland. McClure was ultimately indicted by the Lexington County Grand Jury for murder, attempted murder, burglary in the first degree, and possession of a weapon during a violent crime.

On July 26, 2019, McClure filed a motion to dismiss his charges due to a violation of his state and federal rights to a speedy trial.

On September 6, 2019, the circuit court held a hearing on the motion and denied the motion but permitted McClure to renew the motion at the start of trial. McClure's trial was conducted on October 21–25, 2019. During the trial The Circuit Court erred in admitting the redacted video of McClure's interrogation because the video contained numerous hearsay and burden shifting statements; the Circuit Court err in charging the jury on inferred malice when there was positive evidence of express malice in the record; the Circuit Court err in admitting Justin Butler's text messages as non-hearsay statements of a co-conspirator when there was no evidence of conspiracy and when McClure was not charged in any conspiracy; the Circuit Court err in qualifying Officer Zwolak as an expert in "Street Culture, Language, and Slang; lastly the Circuit Court err in refusing to allow McClure to question Tyvona Toland regarding her dismissed charges when such testimony constituted relevant evidence of potential bias and when the refusal caused actual prejudice to McClure in violation of his State and Federal rights to a speedy trial. At the close of trial, McClure was found guilty of all charges. The circuit court sentenced McClure to life in prison for the murder conviction, and thirty-years' imprisonment for the attempted murder charge, with both sentences to run concurrently.

On July 12, 2023, Court of Appeals issued an unpublished opinion in which it affirmed Petitioner Terry McClure's convictions for murder, attempted murder, burglary in the first degree, and possession of a weapon during a violent crime. State v. McClure, Op. No. 2023-UP-258 (S.C. Ct. App. filed July 12, 2023).

ARGUMENT

In affirming Petitioner's convictions, Court of Appeals held: (1) the erroneous admission of the redacted video of Petitioner's interrogation was harmless in light of the overwhelming evidence of guilt; (2) Petitioner's challenge to the circuit court's jury instruction was not preserved for appellate review; (3) the circuit court properly admitted Justin Butler's text messages as the non-hearsay statements of a coconspirator; (4) the circuit court properly admitted expert testimony on "street culture, language, and slang" and possible prejudice from the word street was harmless; and (5) the circuit court did not err in refusing to allow Petitioner to cross-examine Tyvona Toland regarding prior charges because the charges were not pending and she had not been offered leniency in exchange for her testimony. Pursuant to Rule 242, SCACR, Petitioner respectfully petitions for a writ of certiorari because Petitioner believes Court of Appeals misapprehended the facts and law in reaching its rulings on all issues.

I. Court of Appeals erred in finding the erroneous admission of the redacted interrogation video was harmless under the circumstances.

Petitioner contends the error in the Court's harmless error analysis is two-pronged.[1] First, Petitioner asserts that admission of the redacted interrogation video, which included numerous burden-shifting statements, was a structural error subject to automatic reversal. Second, if

[1] The State did not assert that the error in admitting the redacted interrogation video was harmless in its brief. As such, Petitioner did not have an adequate opportunity to respond to such an assertion during the briefing of this appeal. However, at oral arguments, Petitioner responded to Court of Appeals' questions regarding harmless error by asserting the error was structural and by demonstrating why the error was not harmless under the circumstances. Furthermore, Petitioner demonstrated the error's prejudice in his Final Brief and asserted that the burden shifting statements in the video deprived him of due process. Petitioner's Final Brief, pg. 23–25. *See State v. Brewer*, 411 S.C. 401, 412, 768 S.E.2d 656, 662 (2015) (Beatty, J., concurring in part and dissenting in part) ("[T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In my view, *this created a due process structural defect in the trial*." (emphasis added)).

harmless error analysis applies, Petitioner asserts the admission of the video was not harmless under the circumstances.

The admission of the redacted interrogation video was a structural error.

"[T]here are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error." *State v. Rivera*, 402 S.C. 225, 246–47, 741 S.E.2d 694, 705 (2013) (internal quotation marks omitted) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991)). "These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect [ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 247, 741 S.E.2d at 705 (alteration in original) (internal quotation marks omitted) (quoting *Fulminante*, 499 U.S. at 309–10). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* (internal quotation marks omitted) (quoting *Fulminante*, 499 U.S. at 310). "Essentially, an error is structural if it is 'the type of error which transcends the criminal process.'" *Id*. (quoting *Fulminante*, 499 U.S. at 311).

The United States Supreme Court has crafted a three-part test for determining whether an error is a structural error. "First, an error has been deemed structural . . . if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). "Second, an error has been deemed structural if the effects of the error are simply too hard to measure." *Id.* "Third, an error has been deemed structural if the error always results in fundamental unfairness." *Id*. at 296. Notably, however, "[t]he structural/trial error dichotomy does not cover all trial mistakes[, as] some . . . elude neat classification." *State v. Wright*, 432 S.C. 365, 371, 852 S.E.2d 468, 471 (Ct. App.

2020). Nevertheless, South Carolina courts have reversed convictions in cases where the error meets all of the factors laid out by the *Weaver* Court. *See id.* at 371–73, 852 S.E.2d at 472.

Our Supreme Court has acknowledged that the United States Supreme Court held a court's shifting the burden of proof in its definition of reasonable doubt is a structural error. *State v. Jefferies*, 316 S.C. 13, 21, 446 S.E.2d 427, 431 (1994) (noting *Sullivan v. Louisiana*, 508 U.S. 275 (1993) held that a court shifting the burden of proof in the definition of reasonable doubt was not subject to harmless error analysis). In determining that such an instruction is a structural error, the United States Supreme Court explained that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). As such, because "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt," an instruction shifting the burden of proof "does not produce such a verdict." *Id.* The Court further explained that harmless error review looks to the basis on which the jury actually rested its verdict, thus, the proper inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 279. "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.* at 279.

Accordingly, the Court determined that, because "there [w]as []no jury verdict within the meaning of the Sixth Amendment, the entire premise of [harmless error] review is simply absent." *Id.* at 280. Stated differently, "[t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* Consequently, "[t]he most an

appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error." *Id.* Ultimately, the Court found "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Id*. at 281. As a result, "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Id.* (alteration in original) (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). Accordingly, the Court concluded that the "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural error], the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function[.]" *Id*. (third alteration in original) (quoting *Rose*, 478 U.S. at 577).

Here, the circuit court's admission of the redacted interrogation video had the same effect as the erroneous instruction in *Sullivan,* namely, shifting the burden of proof such that Petitioner was forced to prove himself innocent rather than the State proving his guilt beyond a reasonable doubt. *See Brewer*, 411 S.C. at 412, 768 S.E.2d at 662 (Beatty, J., concurring in part and dissenting in part) ([T]he jury was repeatedly bombarded with the unconstitutional notion that Brewer had to prove that he was innocent. In my view, this created a due process structural defect in the trial. Structural defects are not subject to a harmless-error analysis regardless of the evidence presented."). Moreover, this error satisfies all of the *Weaver* factors for determining whether an error is structural. First, the right at issue is not designed simply to prevent erroneous convictions, but to ensure that a defendant is only convicted by a jury verdict of guilty beyond a reasonable doubt as required by the Fifth and Sixth Amendments. *See Weaver*, 582 U.S. at 295 ("[A]n error

has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."). Second, the effects of admitting the burden-shifting statements in the interrogation video are too hard to measure. *See id*. ("[A]n error has been deemed structural if the effects of the error are simply too hard to measure."). Like the burden shifting instruction in *Sullivan,* placing statements demanding that a defendant prove himself innocent before the jury results in a failure to produce a verdict beyond a reasonable doubt.[2] As such, a reviewing court can only speculate as to whether the jury would have produced a verdict of guilty beyond a reasonable doubt had such statements not been admitted. *Cf*. *Sullivan*, 508 U.S. at 281 (noting that when a court shifts the burden of proof in its jury instruction, "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" (quoting *Rose*, 478 U.S. at 578)). Finally, it is axiomatic that a defendant must be convicted by proof beyond a reasonable doubt, and that a defendant has a right against self-incrimination. However, allowing the State to place burden-shifting statements before the jury has the effect of shifting the burden to a defendant to prove himself innocent and commenting on a defendant's reliance on his right not to incriminate oneself. Because the right to a verdict beyond a reasonable doubt and the right not to incriminate oneself are fundamental to a fair trial, the admission of burden shifting statements renders a trial fundamentally unfair. *See Weaver*, 582

[2] It is human nature for a juror to question why an innocent party would not simply explain their innocence when pressed to do so by law enforcement. *See* James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 Iowa L. Rev. 577, 640 (2013) (noting that certain evidentiary rules are designed to neutralize jurors' tendency to jump to conclusions and explaining that "[b]ecause blameworthy people so often take remedial measures, cover their tracks, run away, or stay silent in the face of accusations, the law expects jurors to assume that anyone who has done one of these things is guilty *and ignore the fact that innocent people often do them too*" (emphasis added)).

U.S. at 296 ("[A]n error has been deemed structural if the error always results in fundamental unfairness."); *see also Sullivan*, 508 U.S. at 281 ("Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly a[structural] error [], the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, *but without which a criminal trial cannot reliably serve its function*[.]" (emphasis added) (third alteration in original) (quoting *Rose v. Clark*, 478 U.S. at 577)). Accordingly, because the admission of burden shifting statements satisfies the elements of the *Weaver* test, such an error cannot be subject to harmless error analysis.[3]

If harmless error analysis applies, the admission of the video was not harmless under the circumstances.

"The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (quoting *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993)). "Whether an error is harmless depends on the circumstances of the particular case[,]" *State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008), and "its materiality in relation to the case as a whole." *State v. Haselden*, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). As such, where a review of the record establishes the

[3] As an additional policy argument, subjecting the erroneous admission of burden-shifting statements to harmless error analysis fails to deter the State from running roughshod over a defendant's due process rights and rights against self-incrimination. *See State v. Brewer*, 411 S.C. 401, 408, 768 S.E.2d 656, 659 (2015) ("It is *chilling that we have to remind the State* that an accused is presumed innocent and *that the State has the burden to prove guilt beyond a reasonable doubt*." (emphases added)). Instead, the State is incentivized to demonstrate to the jury that a defendant would not explain his innocence when pressed to do so by law enforcement, knowing it can argue the error is harmless on appeal after obtaining a guilty verdict. Consequently, despite the clear holding in *Brewer*, decided in 2015, that the admission of burden-shifting statements is a "grave constitutional error[,]" the State's attempts to have such evidence admitted continues unabated. *Id.*; *see also, e.g.*, *State v. McClure*, Op. No. 2023-UP-258 (S.C. Ct. App. filed July 12, 2023) (trial held in 2019); *State v. Carter*, 438 S.C. 463, 884 S.E.2d 195 (Ct. App. 2022) (trial held in 2018); *State v. Washington*, 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020) (defendant arrested and interviewed in 2016).

error is not harmless beyond a reasonable doubt, the conviction should be reversed. *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Ultimately, in determining whether an error was harmless, South Carolina "jurisprudence requires [appellate courts] not to question whether the State proved its case beyond a reasonable doubt, *but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict*." *Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012) (emphasis added).

In its Opinion, Court of Appeals cites *State v. Carter*,[4] in support of its conclusion that the admission of the unredacted interrogation video was a harmless error. However, the *Carter* Court relied on significant direct evidence in affirming the appellant's convictions for first-degree burglary, kidnapping, armed robbery, and illegal possession of a firearm. *Id*. at 466, 884 S.E.2d at 196. At the beginning of its analysis, the *Carter* Court pointed out that a number of the appellant's associates testified against him. *Id*. at 475, 884 S.E.2d at 201. Such testimony included, *inter alia*: (1) testimony from one of his associates regarding the appellant's involvement in planning the robbery; (2) an admission from one of the appellant's associates that he had given the appellant a gun; and (3) testimony from the appellant's girlfriend that appellant told her he was involved in the home invasion. *Id*. The *Carter* Court further relied on cell phone records corroborating the testimony of one of the appellant's associates regarding the appellant's location on the night the crimes were committed. *Id.* Finally, the Court relied on evidence that the appellant had urged several witnesses to change their statements prior to trial. *Id.*

Here, because the evidence in Petitioner's trial was highly circumstantial, Petitioner asserts his case is more akin to *State v. Washington*.[5] In *Washington*, Court of Appeals found that the

[4] 438 S.C. 463, 884 S.E.2d 195 (Ct. App. 2022).

[5] 431 S.C. 619, 848 S.E.2d 794 (Ct. App. 2020). While Petitioner's case is more similar to *Washington*, Petitioner would also note that the *Washington* Court focused on the hearsay issue

admission of hearsay statements in the appellant's recorded interrogation justified reversing his convictions for first-degree burglary, malicious injury to property, and obtaining goods by false pretenses. *Id*. at 621, 848 S.E.2d at 795. Beginning its analysis, Court of Appeals noted that the "prosecution's case against [the appellant] was strong but circumstantial." *Id*. at 625, 848 S.E.2d at 797. The Court further highlighted several pieces of evidence that could lead to conflicting conclusions. *Id.* For example, the Court noted that pawn tickets for a Winchester rifle were incriminating, but balanced this evidence against the victim's description of the "missing rifle as a Savage, not a Winchester." *Id.* Crucially, Court of Appeals pointed out the State's closing argument in which it highlighted the recorded interview. *Id*. at 625, 848 S.E.2d at 798. Ultimately, Court of Appeals found that "[u]nder the circumstances, it appears . . . the hearsay figured so prominently in [appellant]'s trial that its 'reverberating clang . . . would drown all weaker sounds.'" *Id*. (quoting *Shepard v. United States,* 290 U.S. 96, 104 (1933) (Cardozo, J.)).

As in Washington, the evidence against Petitioner was highly circumstantial. At trial, the State was able to demonstrate that Petitioner traveled with Justin Butler to South Carolina for the purpose of purchasing a vehicle from VonKeith Toland. The State presented evidence that Petitioner's fingerprint was found in the vehicle to be purchased, however, there was no fingerprint or DNA evidence found at VonKeith's home, the scene of the shootings, and Petitioner's cell phone data did not show that he went to the property. (R. 353–54, 356, 382, 441, 732–33). Unlike *Carter,* there was no testimony from Petitioner's codefendant that would place petitioner at the scene or that the two had planned to murder the Tolands.

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after determining the appellant did not object to the recording on burden-shifting grounds. *See id.* at 623, 848 S.E.2d at 796 ("As in *Brewer,* here there was no objection made to the recording on burden-shifting grounds.").

Instead, the only evidence suggesting that Petitioner participated in the shootings was testimony from VonKeith. However, Petitioner demonstrated multiple times that VonKeith was not a credible witness and that his testimony was unreliable and contradictory. While testifying about his identification of Petitioner, which occurred shortly after he awoke from a coma, VonKeith made two statements tending to cast doubt on his identification. First, he stated "*I noticed someone else that that I knew*, so that's how I kind of remembered the picture." (R. 210). Second, he provided that he was still on pain medicine when presented with the photo lineup, indicating "I was - - I kind - - that kind of left me because I was still mentally challenged . . . ." (R. 210) (emphasis added).

Additionally, VonKeith made several additional statements that contradicted other evidence in the record. For example, VonKeith testified that he remembered Petitioner kicking in his sliding glass door and attempted to bolster this statement by asserting that he could even remember the type of shoes petitioner was wearing. (R. 173). Notably, however, several law enforcement witnesses testified that the glass door had been broken *outward*, rather than inward. (R. 295, 300, 475–76). Additionally, VonKeith testified to crawling through his yard and under the house after being shot multiple times, but law enforcement found no crawl marks or blood trails on the property. (R. 174–76, 349–51, 374, 558). VonKeith testified that Petitioner demanded money and drugs after shooting him, but conceded that he did not provide this information to law enforcement until almost two years after the incident. (R. 232). VonKeith admitted that he lied to law enforcement about his brother's possession of a stolen Dodge Charger. (R. 195–96). He further conceded that he had previously been convicted for drug trafficking and, after claiming that he no longer sold or trafficked drugs, was presented with text messages he received regarding the sale of marijuana and firearms. (R. 158, 218–25).

There was additional evidence in the record tending to detract from the State's theory of the case. Notably, VonKeith, who professed to be a car salesman, secured his house like a compound, as it was set deep in the woods and had a privacy fence, multiple outdoor cameras, and at least five dogs. (R. 198, 295, 298, 320–21, 477). Law enforcement testified to finding a handgun under VonKeith's bed and a box of ammunition that had missing bullets, but indicated they did not swab the handgun for gunshot residue. (R. 334–35, 345). Law enforcement further testified that all of the shell casings found on scene could have been fired by VonKeith's handgun and that they all of appeared to be fresh despite VonKeith's contention that his fiancé had fired the gun on an unspecified New Year's Eve.[6] (R. 206, 266, 334–35, 346–47). Additionally, one of the investigators described finding VonKeith's shorts, which had marijuana and $1,000 in cash in the pockets. (R. 342). Ultimately, like *Washington*, the evidence against Petitioner was predominantly circumstantial, and numerous factual inconsistencies existed between the evidence presented and the testimony, particularly VonKeith's version of events.

Accordingly, the circuit court's erroneous admission of the redacted interrogation video caused significant prejudice to Petitioner. As Court of Appeals acknowledged, the video had the effect of shifting the burden to Petitioner to prove his innocence in violation of his due process rights. Moreover, the video had the effect of bolstering the testimony of the State's witnesses and creating inferences not supported by evidence in the record. In determining that the video was admissible, the circuit court explained that the video "substantiate[d] . . . a lot of evidence that[had] already been admitted" and "corroborate[d] a lot of the State's theory." (R. 593). In other

[6] VonKeith noted that he could not remember whether he made this same assertion when he testified at a prior hearing in June 2016. (R. 215).

words, the circuit court found that the hearsay statements in the video strengthened the State's case and bolstered the testimonies of its witnesses. This was improper and unfairly prejudicial.

The statements in the interrogation video also allowed the State to compensate for the lack of DNA evidence and imply that Butler had offered evidence against McClure. While, Detective Trojanowski acknowledged that he may lie to a criminal suspect about what information he may or may not possess, he did not specifically indicate which of his statements to Petitioner were lies. (R. 790–91). Consequently, the admission of the interrogation video allowed the State to pave over these holes in its case by presenting the jury with Detective Trojanowski's statements confidently asserting that Petitioner's DNA would be found on the scene and that Butler provided information against Petitioner (State's Ex. 4, 20:44–20:47).

Furthermore, the prejudicial effects of the interrogation video were compounded because (1) the State published it to the jury immediately before resting its case, and (2) the State relied heavily on the video in its closing argument. As such, the erroneously admitted interrogation video was one of the last things presented to the jury before deliberations. Additionally, like in *Washington*, the State repeated hearsay statements from the video in its closing argument and placed more burden shifting language before the jury, asking "[i]f he was there legitimately looking at a car and wasn't part of what happened and wasn't the cause of what happened, *why would he have lied to the police when asked, and [given an] opportunity to tell the story?*" (R. 825–29) (emphasis added). *See State v. King*, 334 S.C. 504, 514–15, 514 S.E.2d 578, 584 (1999) ("The State continuously stressed this improper [evidence] in its closing argument. Therefore, it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict." (emphasis added)).

Ultimately, the admission of the interrogation video, which was rife with hearsay and unconstitutional burden-shifting statements, was not harmless because the State's case was highly circumstantial, its most important witness was not credible and gave unreliable testimony, and the video allowed the state to bolster its case, shift the burden to Petitioner, and place conclusions before the jury that were not supported by the evidence.

II. Court of Appeals overlooked Petitioner's objection to the jury instruction on inferred malice in finding that it was not preserved for appellate review.

In South Carolina, it is axiomatic that, "[i]n order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs, Inc. v. Hitchock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments[,]" *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), because "[w]ithout an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review[,]" rather, "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010).

On appeal, Petitioner argued that the circuit court erred in instructing the jury on inferred malice because (1) it constituted an improper judicial comment on the facts in the record, and (2) it lowered the State's burden of proof for attempted murder by relieving the State of its obligation to prove express malice. At trial, the circuit court informed the parties during the jury charge conference that it had removed any express or implied malice language from the instructions, and

that it did not plan to instruct the jury on implied malice. (R. 810–11). The State argued that an instruction on implied malice was supported by South Carolina law. (R. 811–12). In response, Petitioner argued that the instruction should not be included because the *Burdette*[7] case was "a definite trend toward the elimination of inferences as being burden shifting." (R. 812). The circuit court clarified Petitioner's argument, stating, "I don't know that it's so much burden shifting as it is they're - - they're asking the courts to no longer instruct on what they consider to be factual issues." (R. 812). In deciding to include the instruction on implied malice, the circuit court based its decision on the evidence surrounding the attempted murder. (R. 813). The circuit court noted that its decision was subject to Petitioner's objection, and that it "understood [Petitioner's] position," but thought the State's position was correct. (R. 813).

At the outset, Petitioner would note that the State did not argue this issue was unpreserved in its brief or at oral argument. *See State v. Washington*, 431 S.C. 619, 624, 848 S.E.2d 794, 797 (Ct. App. 2020) ("While [appellate courts] may invoke preservation rules on [thei]r own, [they] should not be quick to disturb the parties' silence."); *see also Atl. Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("[T]he silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.").

Further, as demonstrated by the record, Petitioner objected to the inclusion of the implied malice instruction and based his objection on *Burdette*. While Petitioner misstated the *Burdette* Court's rationale, the circuit court indicated that it understood the objection to be in regard to judicial instructions on facts in the record. *See Brannon*, 388 S.C. at 502, 697 S.E.2d at 595 ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to

[7] *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

preserve an issue for appellate review."). Accordingly, the circuit court asserted that it understood Petitioner's position, but decided to include the instruction due to the facts surrounding the attempted murder charge. *See id.* at 502, 697 S.E.2d at 595–96 ("[A] litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue."). Thus, this issue was raised to and ruled upon by the circuit court and therefore preserved for appellate review.

III. Court of Appeals overlooked the absence of independent evidence of conspiracy in finding the circuit court properly admitted Justin Butler's text messages as the non-hearsay statements of a coconspirator.

Pursuant to Rule 801(d)(2)(E) of the South Carolina Rules of Evidence, "A statement is not hearsay if [t]he statement is offered against a party and is a statement by a co[-]conspirator of a party during the course and in furtherance of the conspiracy." "A conspiracy is 'a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or achieving by criminal or unlawful means an object that is neither criminal nor unlawful. *The essence of a conspiracy is the agreement*.'" *State v. Sims*, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) (emphasis added) (quoting *State v. Buckmon*, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001)). "Under the Federal Rules of Evidence, this same rule has been interpreted to allow admission of a co-conspirator's statement only where there is evidence of the conspiracy *independent* of the statement sought to be admitted." *State v. Gilchrist*, 342 S.C. 369, 372, 536 S.E.2d 868, 869 (2000).

In its Opinion, Court of Appeals cited *State v. Anderson*,[8] in support of its conclusion that Justin Butler's text messages were admissible as the statements of a coconspirator. However, *Anderson* is distinguishable from the case at bar in one crucial aspect, namely, the presence of

[8] 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004).

independent evidence of conspiracy in addition to the statements sought to be admitted. In the case, Jamal Manick shot and killed the victim in the parking lot of a restaurant. *Id*. at 515, 593 S.E.2d at 820. At trial, the State alleged that the appellant conspired with Manick and Fred Ross to rob the victim. *Id*. Ross, testifying for the State, explained that he was hanging out in an apartment with Manick when the Appellant arrived and told them "that he had a lick," indicating that the men could rob the victim. *Id*. at 516, 593 S.E.2d at 821. Ross further testified that later that evening, he drove Manick to the restaurant where Appellant had set up a drug deal with the victim. *Id.*

Another witness, Bobby Lukie, testified that he rode with Ross and Manick to the restaurant and that Manick shot the victim. *Id*. Lukie further testified that around 11:00 p.m. on the night of the murder, he drove by a convenience store and noticed Ross and Manick standing outside the store. *Id*. at 517, 593 S.E.2d at 822. Lukie explained that when he asked what the two were doing, Ross told him "they had a lick or something like that." *Id*. The appellant objected to this testimony arguing that it was hearsay, but the circuit court allowed it in as the non-hearsay statement of a coconspirator because the statement was made in furtherance of a conspiracy. *Id*. On appeal, Court of Appeals affirmed the circuit court's decision, finding there was evidence presented at trial that Ross and Manick conspired with the appellant to rob the victim. *Id*. Court of Appeals further found the statements allegedly made to Lukie by Ross were sufficient to allow the jury to reasonably infer that the statements were made in furtherance of the conspiracy, particularly because Lukie agreed to accompany Ross and Manick to the robbery. *Id.*

Accordingly, Court of Appeals did not find that Lukie's agreement to accompany the defendants to the robbery was independent evidence of conspiracy, as Lukie's decision to ride with the defendants without the context of Ross's statement would not by itself lead to the conclusion

that they were conspiring to rob the victim. Rather, Court of Appeals found Ross's statement and Lukie's subsequent decision to accompany the defendants was evidence of furtherance of the conspiracy, as it amounted to the recruitment of an additional coconspirator. Instead, the independent evidence of conspiracy was Ross's testimony that appellant told his coconspirators "that he had a lick" and that appellant set up the drug deal with the victim.

Here, there is no independent evidence of conspiracy outside the statements made in Justin Butler's text messages. While such statements could potentially constitute evidence of furtherance of the conspiracy, the statements cannot establish the existence of conspiracy on their own. The lack of independent evidence of conspiracy is further demonstrated by the State's argument at trial, in which it asserted "I think we can fairly say that Justin Butler is a coconspirator in this case *because he is a co defendant* . . . ." (R. 120) (emphasis added). However, the mere fact that Butler and Petitioner were co-defendants does not automatically lead to the conclusion that a conspiracy existed. Similarly, the mere fact that Petitioner and Justin Butler traveled to South Carolina together does not suggest that a conspiracy to commit murder existed absent additional evidence demonstrating such an agreement. *See State v. Crawford*, 362 S.C. 627, 637, 608 S.E.2d 886, 891 (Ct. App. 2005) ("The mere fact that two persons happened to be doing the same thing at the same time does not compel the conclusion that there was a conspiracy." (quoting William Shepard McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina*, 476 (4th ed. 2002))). Unlike *Anderson*, where testimony distinct from the challenged statement revealed that the appellant organized and informed his coconspirators about the robbery, there was simply no independent evidence demonstrating a criminal agreement between Petitioner and Butler.

Furthermore, Court of Appeals did not address Petitioner's argument that the admission of Justin Butler's text messages as statements of a coconspirator was inconsistent with its decision to

instruct the jury on inferred malice. Because conspiracy is an agreement that intends to bring about a criminal result, it must be predicated on express malice. *See State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003) ("Express malice is when there is a *deliberate intention to unlawfully take the life of another*." (emphasis added)). However, if malice must be inferred from Petitioner's conduct, then there was not sufficient independent evidence of an agreement to kill the Tolands from which it could be determined that a conspiracy to commit murder existed. *See State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (indicating that malice need be implied *only if there is no positive evidence of express malice* (emphasis added)).

IV. Court of Appeals erred in affirming the admission of expert testimony on "street culture, language, and slang," and in finding the prejudice from use of the word "street" to be harmless.

Rule 702, SCRE Analysis

"[A]ll expert testimony under Rule 702, SCRE, imposes on the [circuit] courts an affirmative and meaningful gatekeeping duty." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020) (emphasis added) (internal quotation marks omitted) (quoting *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997). Further, "[i]n assessing the admissibility of expert testimony, the [circuit] court must make a threshold determination of reliability." *State v. Jones*, 423 S.C. 631, 638, 817 S.E.2d 268, 272 (2018). Indeed, "[r]eliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686 (emphasis added). In engaging in a Rule 702 analysis, the

circuit court must assess the reliability of (1) the expert's method and (2) the substance of their testimony. *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020).

Officer Zwolak's qualifications were insufficient to testify as an expert and his unreliable testimony had minimal probative value. Officer Zwolak testified that he was familiar with "street culture, language, and slang" through conducting interviews with "people who communicate in this way," utilizing social media, and watching rap videos. (R. 762–63). Such experience does not suggest that Officer Zwolak was more qualified to define slang terms than the jury, as it cannot be concluded that none of the jurors had engaged in these common activities. Moreover, the circuit court underestimated the jury's ability rely on context to interpret the slang words for themselves. Officer Zwolak's methods similarly made his testimony unreliable, as he testified that "street slang" changed daily and varied among different regions of the country. Officer Zwolak could not provide a reliable definition of the words "nickel" or "hammy," but instead speculated to the jury that such words were slang for firearms. (R. 778–79). As a result, Officer Zwolak's testimony had minimal probative value.

Because Officer Zwolak was not qualified to testify as an expert and his methods were unreliable, his speculative testimony could only serve to prejudice Petitioner. *See State v. Jones*, 383 S.C. 535, 557–58, 681 S.E.2d 580, 592 (2009) ("In the absence of scientific reliability, the evidence could only operate to provide inaccurate and inconclusive information for the jury."). Despite his inability to provide reliable definitions for the words "nickel" and "hammy," Officer Zwolak was permitted to speculate, in the course of a murder trial, that Petitioner and Butler were discussing firearms. Thus, rather than providing accurate definitions for the words in question, Officer Zwolak guessed that the slang used should be interpreted in the worst way possible. As such, the prejudice in his testimony outweighed its minimal probative value.

The prejudice from qualifying Officer Zwolak as an expert in "street culture, language, and slang" was not harmless under the circumstances.

Pursuant to Rule 403 of the South Carolina Rules of Evidence, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

Qualifying Officer Zwolak as an expert in "street culture, language, and slang" was highly prejudicial to Petitioner. Because there was minimal probative value to having Officer Zwolak speculate as to the definition of three words, the main thrust of qualifying him as an expert in "street culture, language, and slang" was to suggest to the jury that Petitioner spoke like a criminal. In turn, this suggested to the jury that Petitioner was a criminal and should be found guilty because the charges against him were in conformity with his "street culture." As such, this qualification was unfairly prejudicial because it tended to suggest that Petitioner should be found guilty because Petitioner was a criminal. *See id*. ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one."); *see also King*, 334 S.C. at 514, 514 S.E.2d at 583–84 ("This improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character."); *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923) ("[The effect of propensity evidence] is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.").

V. Court of Appeals erred in affirming the circuit court's refusal to allow Petitioner to cross-examine Tyvona Toland regarding her prior charges.

Evidence of bias

Pursuant to Rule 608(c) of the South Carolina Rules of Evidence, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." "Evidence of a witness's bias can be compelling impeachment evidence, and for that reason *'considerable latitude is allowed' to defense counsel in criminal cases 'in the cross-examination of an adverse witness for the purpose of testing bias.*'" *Smalls v. State*, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018) (emphases added) (quoting *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)). Our Supreme Court has found that "[i]f the mere existence of [a] charge ma[kes] it likely [the witness] would give biased testimony, . . . the dismissal of the charge ma[kes] the likelihood of bias manifest—because [the witness] actually received the benefit he hoped the solicitor would provide in exchange for his cooperation." *Id*. at 183, 810 S.E.2d at 841.

Here, Petitioner sought to question Tyvona Toland regarding multiple charges that were dismissed prior to the trial of Petitioner's co-defendant Justin Butler. (R. 258–59). During Petitioner's proffer, Tyvona testified that she was arrested in January 2014 by the Lexington County Sheriff's Department on charges of trafficking cocaine, sale and delivery of a pistol, possession of a weapon during a violent crime, and manufacturing/distribution of drugs. (R. 260). Additionally, Tyvona testified that all of the charges were dismissed in May 2016, a month before she testified at Justin Butler's trial. (R. 260–61). The circuit court noted that the timing of the State's dismissal of the charges may have made the charges relevant in Butler's case, but concluded that Petitioner should not be allowed to solicit Tyvona's testimony regarding the charges. (R. 268–69). The circuit court's determination that evidence of Tyvona's potential bias would have been relevant in Justin Butler's case but not Petitioner's is inconsistent. Tyvona was testifying regarding the same alleged crime as she did in testifying against Butler, who she testified against a month

after having her charges dismissed. Thus, Petitioner had the same motivation to question Tyvona about her original testimony as Justin Butler. Consequently, any potential bias that would have been relevant in Butler's case should have been relevant in Petitioner's case.

Speedy trial

In its Opinion, Court of Appeals did not address Petitioner's argument that the circuit court's refusal to allow him to cross-examine Tyvona Toland regarding her prior charges resulted in actual prejudice in violation of his right to a speedy trial.

Pursuant to the constitutions of the United States and the State of South Carolina, in all prosecutions, the accused shall enjoy the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14. "A speedy trial means a trial without unreasonable and unnecessary delay." *State v. Hunsberger*, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016). "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." *State v. Langford*, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012). "The remedy for a speedy trial violation is dismissal of the charges." *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371.

"To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay . . . ." *Id.* at 342–43, 794 S.E.2d at 372. "Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness." *Id.* at 343, 794 S.E.2d at 372. After an accused meets this initial burden, a court must consider the following factors to determine if there has been a speedy trial violation: "(1) length of delay; (2) the reason for the delay; (3) the accused's assertion of his right to a speedy trial; and (4) whether the delay prejudiced the accused." *Id.*

Prior to trial, Petitioner moved for a dismissal of his charges due to a violation of his speedy trial rights. (R. 16–17). The circuit court properly concluded that the three-year period between the time Petitioner was served with his warrants and his speedy trial motion triggered the speedy trial analysis. (R. 25–26). *See State v. Waites*, 270 S.C. 104, 108, 240 S.E.2d 651, 653 (1978) (holding a delay of two years and four months was "sufficient to trigger []review of the other three factors"). The circuit court indicated it would hold Petitioner's motion for a speedy trial open throughout the trial to allow Petitioner to demonstrate actual prejudice stemming from the delay. (R. 27). Ultimately, however, the circuit court's ruling precluding Petitioner from questioning Tyvona Toland about potential bias resulted in such actual prejudice. *See Hunsberger*, 418 S.C. at 351, 794 S.E.2d at 376 ("Actual prejudice occurs when the trial delay *has weakened the accused's ability to . . . elicit specific testimony* . . . ." (emphasis added)). In so ruling, the circuit court found the dismissal of the charges was not relevant in Petitioner's trial due to *the passage of time between the dismissal of Tyvona Toland's charges and Petitioner's trial*. (R. 268–69). Thus, had the State prosecuted Petitioner with ordinary promptness, Petitioner would have had the benefit of questioning Tyvona Toland regarding the dismissed charges. *See State v. Reaves*, 414 S.C. 118, 131, 777 S.E.2d 213, 219 (2015) (finding impairment of the defense to be the most serious form of prejudice because "the inability of the defense to prepare its case . . . cuts to the heart of the fairness inherent in the system"). Accordingly, the refusal to let Petitioner question Tyvona Toland regarding her dismissed charges constitutes the actual prejudice necessary to find that Petitioner's speedy trial rights were violated.

Conclusion

Based on the foregoing, Petitioner respectfully requests this Court grant a writ of certiorari on all issues as laid out in this Petition.

Respectfully submitted:

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