STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

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Opinion No. 5758 (S.C. Ct. App. Filed August 12, 2020)

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THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

PETITIONER

APPELLATE CASE NO. 2016-002244

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 24, 2020.

## QUESTION PRESENTED

Whether the Court of Appeals erred by finding the error in charging the jury the *Belcher* instruction that "inferred malice may arise when the deed is done with a deadly weapon," was harmless since the harmless error analysis was defective because it was burden shifting to petitioner to show that a defense or a lesser-included offense was viable before the Court of Appeals would find the jury instruction error was not harmless?

## STATEMENT OF THE CASE

Petitioner Deshanndon Franks was indicted by the Laurens County Grand Jury for two counts of murder, and possession of a weapon during the commission of a violent crime. R. 452 – 457. Co-defendant Tevin Hill was arrested on the same charges. Petitioner had no prior criminal record, and Hill would testify against petitioner in exchange for the charges being dropped. R. 254, ll. 7-25.

Petitioner's case was called to trial on August 24, 2016, before the Honorable Frank R. Addy, Jr., and a jury. J. Falkner Wilkes represented petitioner. Assistant solicitors Warren Mowry and Lance Sheek were the prosecutors. R. 1.

On August 28, 2016, the jury found petitioner guilty on all three counts. R. 446, ll. 12-22. Judge Addy sentenced petitioner to forty-five years' imprisonment, concurrent. R. 450, ll. 11-14.

The Court of Appeals affirmed in State v. Deshanndon Markelle Franks, Op. No. 5758 (filed August 12, 2020). App. 1-18. Petitioner sought rehearing. App. 19-25. The state filed a return to the petition for rehearing. App. 26-37. Rehearing was denied in an order filed November 24, 2020. App. 38-39.

This petition for a writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred by finding the error in charging the jury the *Belcher* instruction that "inferred malice may arise when the deed is done with a deadly weapon," was harmless since the harmless error analysis was defective because it was burden shifting to petitioner to show that a defense or a lesser-included offense was viable before the Court of Appeals would find the jury instruction error was not harmless.

**Relevant trial facts**

The solicitor, in his opening argument, said that Nikesha James was the niece of Sammie Leake, who was also called "Darryl." James and Leake were sharing a mobile home in the Cross Hill area of Laurens County on January 31, 2014. The solicitor said the police concluded petitioner shot both of them, although the solicitor admitted the state did not have any idea why petitioner would have shot them. R. 81, l. 13 – 82, l. 6. There was simply no motive for petitioner to commit this crime.

Atrayel Williams testified that James was one of her best friends. She knew Leake, and she called him "Dab." Williams said she spoke with James on the phone all the time and went to her mobile home. "We was always together basically." She last talked to James on January 30, 2014 at about nine p.m. R. 93, l. 11 – 94, l. 18.

Williams went by the home where James and Leake lived at about 10:30 a.m. on the morning of January 31, 2014. She went with her friend Laquesha Currenton. Williams recalled that Currenton knocked on the door, but the door was unlocked and Currenton went inside. "But Darryl's body was right there, you know. She couldn't -- I don't think she could open enough to get in." Williams called 911. R. 97, ll. 2-19. The bodies of both James and Leake were found inside the house, shot to death. R. 98, l. 4 – 100, l. 21. On cross-examination, Williams said she

talked to James every day, and she said James did not have a boyfriend at the time of the shooting. R. 101, ll. 5-16.

However, Laquesha Currenton testified James "was talking to a guy from Laurens" and she believed that James was in an intimate relationship with this person. She did not know if James was involved with any other men. R. 108, ll. 3-19. Currenton said she would not describe the man in the relationship or the men as "a boyfriend." R. 108, ll. 3-5. Although the defense was later prohibited from pursuing a third-party guilt defense during the state's case, it labelled James Morgan Hill as the obsessive stalker of James who should have been investigated in this shooting. SLED agent Mindy Corley testified there was a sign of a struggle inside the mobile home and that a drug pipe was found. R. 124, l. 1 – 131, l. 1.[1]

Lavashtia Pulley testified she saw petitioner on the night of the shooting at Washes Club, or "liquor house," as it was later described, at about ten o'clock. R. 182, l. 2 – 183, l. 7. She described petitioner as being "pumped, amped, whatever." R. 183, ll. 8-12. Pulley said petitioner was wearing a tan hunting suit and that he was carrying a gun. Pulley claimed petitioner said "you ain't got to worry. It's a Ruger. It's on safety . . ." R. 183, l. 22 – 184, l. 13; R. 184, l. 18 – 185, l. 14.

Milton Grant lived three mobile homes down from James and Leake. Grant testified that on January 31, 2014, he was awakened by the sound of a brown Ford whose bright lights flashed into his mobile home. Grant said that at about three a.m. he heard gunshots. He looked outside, and he saw somebody come to the front door of James' mobile home, turn the porch light off,

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1 1 The pathologist, Dr. James Fulcher, testified that James died as a result of a gunshot to the chest and Leake died from two gunshots to the head. The gun was never recovered, and the state speculated that the murder weapon was a nine-millimeter handgun. R. 151, l. 14 – 155, l. 21; r. 163, l. 10 – 164, l. 9. Ira Parnell, the SLED firearms expert, said although a gun was never found, he determined from the cartridges that they were fired by the same gun. R. 164, ll. 1-9.

and close the door. Grant said this person "had something brown on." R. 204, l. 16 – 207, l. 16. Grant said he did not think he could recognize the clothing if he saw it again because "*they was too far off.*" R. 207, ll. 17-21. (emphasis added).

Tevin Hill testified against respondent. He admitted the charges against him would be dropped if the prosecution believed he told "the truth." Hill testified that he and petitioner, at about eight o'clock on January 30, 2014, went to the Washes Liquor House in Mountville. R. 212, ll. 11-24. Hill said petitioner was wearing "a brown jumpsuit, overalls." R. 214, ll. 21-22. They then went to the mobile home where James lived because "It's just a hangout where people be at." R. 215, ll. 20-23. Hill said that James, Leake, and Tamia Kinard and her baby were present when they arrived. Hill maintained that he gave Kinard and her baby a ride home eventually that early morning in his car. R. 216, l. 1 – 219, l. 12.

Hill's story was that he then went to his grandmother's house after dropping off Kinard, watched television, and fixed himself something to eat at his grandmother's house. R. 219, l. 4 – 220, l. 9. Hill claimed that petitioner called him at about two or three o'clock in the morning and asked him to come outside. Hill maintained petitioner was walking up the road from James' trailer when he stepped outside, and Hill claimed: "He [petitioner] was just like shaky a little bit, you know. Not normal though." Hill maintained petitioner told him "stuff went bad -- it went bad. He said like it went bad." R. 221, l. 13 – 222, l. 7.

Hill maintained petitioner never told him what happened. He said that petitioner said he "had some females up the road like in Greenville." Hill said as he drove, and when they were "[a]lmost to Fountain Inn he said we're going to Dreek Scurry's house [in Fountain Inn]." R. 222, ll. 19-25. Scurry was Hill's cousin, and Hill thought he tried to call Scurry that morning, but he was not sure. Hill said he and petitioner slept at Scurry's house that night, and when they

got up the next morning, Scurry had already gone to work. The men went back to Cross Hill, and Hill said he went to sleep. He awoke when he heard police sirens and saw law enforcement going to the James mobile home. R. 222, l. 8 – 226, l. 20. Hill went outside, and he said he called his brother from there. His brother allegedly told him he "needed to just tell the police that I was down there that night and when I left they was well and healthy." R. 227, ll. 13-24.

Hill acknowledged his cousin, Deputy Rakeisha Hill, telephoned him and told him to contact petitioner so he would come to the crime scene. Hill claimed petitioner wanted him to tell a "story" that after Hill dropped Kinard off that night he drove petitioner out of the Cross Hill area. R. 230, ll. 5-16. Hill admitted he was charged with two counts of murder, attempted armed robbery, but that his cooperation with the state would allow the charges to "come off my record." R. 234, ll. 7-25.

Laurens County Sherriff's Investigator Bryant Cheek used to coach Tevin Hill in AAU basketball. R. 249, l. 16 – 252, l. 24. Cheek said he joked with Hill that it was good to see him when they were at the crime scene the day after the shooting, and "I said I hope you didn't have anything to do with this situation down here, and I remember that." R. 252, ll. 18-24.

The state introduced cell phone evidence, which it argued in the context of the record was incriminating against petitioner. App. 8.

**Charge conference**

Defense counsel objected to the court giving a Belcher[2] instruction that the use of a deadly weapon could be used by the jury to infer malice. The judge reasoned that the inference of malice instruction "would be appropriate in this case because there's no evidence tending to reduce the homicide to a voluntary or involuntary homicide." R. 410, l. 22 – 411, l. 18. The

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[2] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

judge said he understood the defense objection to the Belcher instruction. R. 410, l. 22 – 411, l. 18.

**Closing argument**

Defense counsel correctly argued in closing to the jury that this was a circumstantial evidence case, and he attempted to point out that law enforcement did not adequately investigate James Morgan Hill as a suspect, where he was the stalker and the father of "Ms. Pulley's child. Ms. Pulley is the one that says she saw a pistol earlier that evening . . ." R. 417, l. 2 – 420, l. 21. Defense counsel pointed out that Tevin Hill had a lot to gain by blaming the murder on petitioner where he was the co-defendant. R. 417, l. 9 – 422, l. 16.

**Jury instruction**

The judge instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is defined under our law as an article, instrument, or substance which is likely to cause death or great bodily harm." R. 433, ll. 14-25. Defense counsel again took exception to this jury charge. R. 439, ll. 4-13.

The pathologist testified in this case that both victims died as a result of gunshot wounds. "A pistol, shotgun, rifle . . ." are obviously deadly weapons. R. 433, ll. 22-25.

**Court of Appeals**

In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court of Appeals noted that this Court held that regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Burdette was decided after briefing in this case, but before oral argument. Consequently, petitioner and respondent filed memoranda addressing its impact on this case prior to oral argument before the Court of Appeals. Petitioner correctly argued pursuant to

Burdette that the instruction in this case "was erroneous regardless of whether there was any evidence to reduce, mitigate, excuse, or justify the homicide." App. 16.

The Court of Appeals agreed the trial judge erred by charging "inferred malice may also arise when the deed is done with a deadly weapon." R. 433, ll. 14-25. However, the Court wrote:

> Pursuant to *Burdette*, we find the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon. *See Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583. Nevertheless, under the circumstances of this case, we find the error was harmless beyond a reasonable doubt.
> ...
>
> ...Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the "intentional doing of a wrongful act without just cause or excuse[] and with an intent to inflict an injury" and that malice could be inferred from conduct showing a total disregard for human life. *The trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse, or justify the homicide*. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence concerning the shooter's intent was presented. Furthermore, the jury submitted three questions to the trial court during deliberations and none of these concerned malice. Although we are mindful that the instruction is now improper regardless of the evidence presented at trial, as Franks points out, his defense focused on discrediting the State's theory that he was the shooter and suggesting a third, unknown person may have committed the act. *However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling*. We acknowledge malice is an element of murder, meaning the State has the burden of proving that element beyond a reasonable doubt. Nevertheless, because the pivotal question before the jury in this case was whether Franks was the shooter and no evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the instruction was not misleading or confusing.

App. 16-18. (emphasis added).

**Rehearing**

Petitioner argued on rehearing, and continues to argue in this certiorari petition that: "The opinion in this case merely shifts the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) gatekeeping function on the presence of a lesser included offense or other 'mitigating factor' being the reason *not to give the inference of malice from the use of a deadly weapon jury instruction* to a reason to find the erroneous inference of malice jury charge harmless if the defendant cannot prove such evidence of a lesser-included offense or 'other mitigating factor' was present in the case." App. 19-23.

**Discussion**

The judge erred by including the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), instruction in his charge to the jury. That is even more apparent following State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), which held that regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Petitioner was entitled to the benefit of Burdette, although he did not need it, because his case was pending on direct appeal when Burdette was decided. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

The trial judge reasoned because voluntary and involuntary manslaughter were not lesser-included offenses in this case that the implied malice from the use of a deadly weapon instruction was proper. However, any evidence that would "reduce, mitigate, excuse, or justify the homicide" made the implied malice from the use of a deadly weapon instruction improper under Belcher, and it was improper regardless following Burdette.

The harmless error analysis of the Court of Appeals rendered the Burdette instruction error meaningless unless petitioner could demonstrate that the improper inference of malice instruction would have been improper under Belcher because there was evidence that would "reduce, mitigate, excuse or justify the homicide." Again, the Court of Appeals reasoned in this case that the error was harmless, inter alia, because "the trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence of the shooter's intent was presented." App. 17.

This harmless error analysis was burden shifting to petitioner to show why the error was not harmless. Yet, due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). As our Supreme Court explained in Burdette, its holding was based on the constitutional requirement that the state bears the burden of proving each element of an offense beyond a reasonable doubt. Burdette, 427 S.C. at 502, 832 S.E.2d 582 ("[W]hen the trial court tells the jury it may use evidence of the use of a deadly weapon *to establish the existence of malice*, a critical element of the charge of murder, the trial court *has directly commented upon facts* in evidence, elevated those facts, and emphasized them to the jury."). (emphasis added).

As petitioner has consistently argued, there was no evidence of a motive offered for the crime in this case. Petitioner understands that the state did not have to prove motive, but a burden cannot be placed upon petitioner to show that the homicide did involve just cause or excuse, that it was not the result of a total disregard for human life or that evidence of a lesser-included offense existed or (as seen below) to prove that a third-party committed the murder. All

of this placed an unconstitutional burden upon petitioner to prove the inference of malice error was not harmless. If harmless error is to be rarely or at least judicially invoked, this harmless error analysis turns that principle on its head.

The Court of Appeals finally noted that petitioner's defense focused on discrediting the state's theory that he was the shooter "and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling." App. 17-18. Petitioner did not bear the burden of proving that a third party committed the murder. Under State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941), evidence of third-party guilt is limited "to such facts as are inconsistent with [the defendant's] own guilt and such facts as raise a reasonable inference or presumption as to his own innocence." While there was no evidence of a motive for petitioner to commit this murder, to put the burden upon petitioner to prove his innocence by showing a third party committed the murder was once again unconstitutional burden shifting. Further, this case would not have been reversed had petitioner raised the issue of third-party guilt under the surviving onerous State v. Gregory standard, and it was respectfully unfair to make that part of the harmless error analysis in this case. See Holmes v. South Carolina, 547 U.S. 319, 328 (2006) (approving the State v. Gregory standard and abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001)).

Finally, even if putting the burden on petitioner to show there was evidence, which would "reduce, mitigate, excuse, or justify the homicide" was not an unconstitutional burden shifting harmless error standard, there, nonetheless, was evidence in this case, which would "reduce, mitigate, excuse, or justify the homicide," as petitioner has previously argued to the Court of Appeals.

The jury in this case could have concluded that petitioner was present at the murder scene with Tevin Hill but determined that he was not the shooter or merely present. Petitioner did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19. There was no DNA, fingerprints, or other forensic evidence linking petitioner to the murder. R, 339, l. 8 – 342, l. 8.

Further, evidence that petitioner had a gun, and that he allegedly told Pulley it was a nine-millimeter "Ruger" on the night of the shooting, and that a nine-millimeter Ruger was the murder weapon was all speculation. The murder weapon was never found, and all the state's witnesses could opine was that the same gun fired the shots that killed both victims.

If petitioner was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be evidence petitioner was guilty of some other crime, but it was mitigated or reduced against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter, which the trial judge erroneously found conclusive, and which the Court of Appeals then made part of it improper harmless error analysis. R. 296, l. 2 – 298, l. 19; r. 336, l. 13 – 338, l. 11; app. 17-18.

As seen, the state admitted it could not point to a single reason why petitioner would kill these two victims. A jury instruction that malice could be implied from petitioner having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

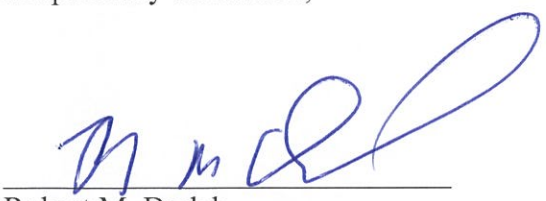
Following Burdette, the Court of Appeals has simply now put the Belcher burden of showing there was evidence which would "reduce, mitigate, excuse, or justify the homicide," or to show there was evidence of a lesser-included offense, or that someone else committed the

crime under Gregory upon the defendant as part of its harmless error analysis. That is burden shifting, improper, and fundamentally unfair. Certiorari should be granted.

## CONCLUSION

For the foregoing reasons, certiorari should be granted to allow full briefing on this issue.

Respectfully Submitted,



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ATTORNEY FOR PETITIONER

This 19th day of January, 2021.