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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

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Opinion No. 2021-UP-254 (S.C. Ct. App. Filed July 7, 2021)

Lower Court Case No. 2015-GS-19-00044

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THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

PETITIONER

APPELLATE CASE NO. 2018-001667

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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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 July 26, 2021.

## QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by not finding reversible error where it acknowledged the trial court's instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" was needlessly confusing particularly where the charge also could reasonably have been interpreted as shifting the burden to petitioner to prove a justification or excuse for his wrongful acts thereby rendering the instruction violative of petitioner's Due Process constitutional rights?

2.

Whether the Court of Appeals erred by finding no abuse of discretion in the trial court instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, and it improperly invited speculation as to another person being the shooter and petitioner being guilty as a participant where the evidence did not justify this instruction under the precedent of State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020)?

3.

Whether the Court of Appeals erred by finding no error in the admission of State's Exhibits 58-59, the sentencing sheets, since they were irrelevant to allegedly prove crucial state's witness Phillip Griffin received no consideration from the state for his testimony against petitioner?

## STATEMENT OF FACTS

**Procedural history**

Petitioner was indicted by the Edgefield County Grand Jury for the offense of murder. R. 757. His case was called to trial on August 27, 2018, before the Honorable Eugene C. Griffith, and a jury. Bennett Castro and Elizabeth Fullwood represented petitioner. Suzanne Mayes and Robert McNair were the assistant solicitors. R. 1.

On August 31, 2018, the jury found petitioner guilty. R. 749, ll. 2-3. Judge Griffith sentenced petitioner to life imprisonment based upon his prior conviction in Florida for entering a dwelling while armed. R. 750, l. 16 – 751, l. 11.

The Court of Appeals affirmed in The State v. William C. (Billy) Sellers, Op. No. 2021-UP-254 (filed July 7, 2021). The Petition for Rehearing was filed July 22, 2021. The Petition for Rehearing was denied by order filed July 26, 2021.

This petitioner for a writ of certiorari to the Court of Appeals follows.

**Relevant trial facts**

The indictment in this case alleged that "William C. (Billy) Sellers, did in Edgefield County on or about October 9, 2014, feloniously, willfully, and with malice aforethought, kill Johnny Hydrick, the victim, by means of beating and that the said victim died in Edgefield County as a proximate result thereof . . ." R. 758. There were no co-defendants in this case, and no conspiracy was alleged. The state's case was circumstantial.

The decedent had "oxycodone and oxymorphone in his system" at the time of death. R. 391, l. 17 – 392, l. 16. The state's theory of the case was that petitioner had been buying oxycontin from the decedent. The decedent was found dead inside his home. His hands were

bound by duct tape. The decedent had suffered blunt force trauma, and he had a fractured nose. He died of a closed head injury. R. 381, l. 7 – 386, l. 25.

The pathologist, Dr. Janice Ross, opined that the decedent may have been beaten with "a rod or something with a straight edge." R. 387, l. 25 – 388, l. 6. Dr. Ross also said that some of the decedent's injuries could have come from a fist. R. 391, l. 17 – 392, l. 16.

Richard Hydrick, the decedent's brother, found the decedent's body on October 11, 2014, and he called 911. R. 34, l. 20 – 35, l. 5. Richard had talked to the decedent the night before and "everything was fine." The decedent was on disability after being in a car accident, and he was taking prescription pain medications. He was dating Jessica Reeder. However, Reeder was also living with Travis Murray at the time. R. 35, l. 1 – 40, l. 23.

Richard testified that Reeder had gotten into an argument with the decedent in August or September of that year. Richard believed that Reeder hit the decedent with a baseball bat during the argument. R. 41, l. 5 – 42, l. 24. Defense counsel later argued to the jury Reeder and her jealous live-in boyfriend Travis Murray actually killed the decedent, and that petitioner was blamed for it. "If Billy didn't have the motive, then who did? Two people. Travis Murray and Jessica Reeder. The same two people that had the motive to kill Johnny Hydrick." R. 689, l. – 693, l. 21.

Richard said he talked with Investigator Ireland on October 16, 2014, about items he believed were stolen from his decedent brother's house during the burglary-murder. There was no sign of forced entry. Thus, subterfuge to gain entry may have been involved by someone the decedent knew. The stolen items included guns. A slot machine that the decedent played for pleasure in his home was also "busted up in pieces." R. 42, l. 22 – 47, l. 23.

On October 11, 2014, Officer Joseph Wood responded to the scene at the decedent's home in Edgefield County. Wood testified there were no obvious signs of forced entry. R. 52, ll. 9-11. Blood was found "all throughout the house . . ." R. 52, l. 22 – 53, l. 9. The decedent's hands were bound with duct tape, and there was a blanket covering him. R. 55, ll. 2-15.

The decedent wore an electronic monitor (GPS device) apparently because he was on probation with PPP. R. 63, ll. 2-25. The monitor ceased working at 1:43 a.m. on October 10, 2014. The theory was that the monitor quit working when the decedent died at 1:43 a.m. on October 10, 2014. R. 72, l. 17 – 74, l. 13.

Investigator Curtis Morris testified petitioner's DNA was *not* found inside the home of the decedent. Neither petitioner's DNA nor his fingerprints were found on the duct tape. R. 149, l. 21 – 154, l. 3. Petitioner's DNA was also *not* found on a .38 caliber Titan Tiger gun. R. 161, l. 5 – 162, l. 5. The blanket covering the body of the decedent was not sent to SLED for testing. The baseball bat allegedly used by Jessica Reeder to hit the decedent on a prior occasion was also not collected by law enforcement at the time of his death. R. 157, l. 7 – 158, l. 22. When the decedent's brother, Richard Hydrick, later brought that baseball bat to the police, no blood was found on that bat. R. 158, l. 3 – 159, l. 5.

The state presented various jailhouse snitches who claimed they received information about the murder from petitioner. Dennis Amerson admitted he was a meth addict. R. 174, l. 3 – 175, l. 8. Amerson said he met petitioner for the first time in the Edgefield County jail. R. 175, l. 24 – 176, l. 7.

Amerson maintained that petitioner showed him photographs of his children "and stuff and was like telling me where that he was gonna (sic) get called up and that he was worried that

they were gonna find stuff in his van to convict him of the charges because he had told me that he was being convicted of murder." R. 176, l. 20 – 177, l. 1. Amerson claimed petitioner said "he hopes his wife don't find out that he had done it . . . that she wouldn't have nothing to do with him." R. 177, ll. 8-17.

Amerson maintained petitioner told him that the decedent "was tied up and I think beat. I think that's what it was." Amerson also said petitioner confided that "a slot machine . . . pills, and some change or something like that . . ." were stolen. Petitioner also allegedly told Amerson, "they had got rid of them [the stolen items]." R. 178, ll. 13-24.

In addition, Amerson maintained that petitioner told him that a drug dealer had been arrested in Aiken "or somewhere like that and he had told on him to try to get hisself (sic) out of trouble." R. 179, l. 22 – 180, l. 6. Amerson contended that petitioner confessed to him that he committed the murder and stole pills, money, and a slot machine. Amerson denied that petitioner merely told him that he was accused of doing these things. R. 186, ll. 18-25.

Phillip Griffin was arrested on November 21, 2014. He also was addicted to methamphetamines. R. 197, l. 23 – 202, l. 13. Griffin testified that he became cellmates with petitioner, and they began talking "about each other's charges." Griffin said petitioner told him "at first it wasn't him and then that kind of changed towards the end. . . His story would change a little bit and he kind of started putting himself involved in the case." R. 202, l. 17 – 203, l. 11.

Griffin testified petitioner asked him questions about DNA evidence. Griffin said petitioner mentioned a time "when the guy Johnny fell down the steps and kind of broke his nose, broke his nose and he went to help him up and he said if there was any blood like on the passenger side, that's what that would be from because he tried to help him in the van. He was going to take him to the hospital and the guy Johnny was like no. No. I'll be fine." Griffin

thought petitioner was talking about an incident from September 2014 involving the decedent and the van. R. 204, l. 6 – 205, l. 16.

Griffin opined that petitioner's story "changed a lot." Griffin said petitioner told him he "went there" to commit a robbery and that they were going to "pull a lick." They knew the decedent "just got his prescriptions filled and he was gonna go get his pills. If he had any money, he wanted it, too." The rumor was that a man named "Gee" -- who was never located and may not even exist -- was allegedly involved with petitioner in the robbery. R. 205, l. 13 – 207, l. 4.

Griffin alleged petitioner told him, "They went to his house and they taped him up and was asking him where the pills were and they were pistol whipping him until he told them where the pills were." R. 207, ll. 5-14. Griffin maintained that petitioner was surprised he was charged with murder "because he said when he left, the guy was still alive." R. 209, ll. 4-24.

Finally, Griffin said that petitioner -- in addition to talking about a person named "Gee" -- also mentioned a person named "Jersey." R. 212, ll. 19-23.

**Griffin's sentencing exposure**

Griffin admitted he had a sentencing exposure of *fifty years' imprisonment* at the time, but he denied he received any sentencing exposure assistance for testifying against petitioner. R. 228, ll. 9-20. He admitted some charges were dropped, and that he got a lenient sentence with probation on other charges. However, he still denied the sentencing judge knew of his agreement to testify in this case. R. 226, l. 4 – 228, l. 20.

After Griffin claimed he received no sentencing consideration for testifying against petitioner, the state sought to introduce two of Griffin's guilty plea sentencing sheets which had "no negotiation" checked on the form. Defense counsel objected on the grounds of relevance,

and that objection was overruled. The sentencing sheets were therefore admitted. R. 231, l, 16 – 233, l. 1. R. 752.

Hakim Talib testified that he sold marijuana to "the whole neighborhood" and that petitioner began buying marijuana from him also. He was "Jersey." R. 291, l. 24 – 292, l. 5. Hakim said that petitioner at one point approached him about buying "a shotgun, pills, and a .38." R. 296, ll. 11-15. Hakim maintained that he told petitioner he did not want to buy a shotgun, "I ain't interested in no shotgun. I can't flip no shotgun like that. I don't want no big giant gun. I don't need no big gun." R. 297, ll. 15-20.

Hakim said he talked to Investigator Ireland about what he knew about this case and he told him about "Gee." Hakim said he thought Gee was a "real person," but he did not know his real name. R. 318, l. 21 – 320, l. 21.

Wesley Brown had been convicted of trafficking in crack. R. 439, l. 1 – 440, l. 13. Brown met petitioner when he was his cellmate in the detention center. R. 440, ll. 11-19.

Brown testified that in "general conversation" petitioner mentioned Shawn Nicholson, who was known as "Bald Head." Brown told petitioner he was very close to Shawn, and petitioner allegedly told Brown "that Shawn was his alibi and that, you know, he just went to talking about, you know, all kind of small stuff about saying that a guy named Jersey was the reason he was locked up. Said Jersey got caught with some stuff, some drugs or something, got busted in Aiken and told on him." R. 442, l. 1 – 443, l. 19.

Brown contended that petitioner wanted Brown to talk to the investigator "and basically tell the investigator that Jersey was the one who killed this guy." R. 443, l. 20 – 444, l. 2. Brown also contended petitioner wanted him "to say that I met Jersey and sold him some drugs and he tried to sell me some guns and Jersey was supposed to tell me that, you know, guns came

from the guy that got killed and all of this stuff. He wanted me to tell the investigator that Jersey gave me all the information about the murder." R. 444, ll. 3-9.

Brown testified petitioner "gave me a piece of paper that he had done wrote down what he wanted me to say." R. 445, ll. 1-16. Brown claimed that petitioner told him that "they did it with a .38" but he did not know the other person -- "who that could be" -- petitioner may have alleged was also involved. R. 446, ll. 1-25.

However, Brown maintained petitioner wanted him to "pin it on Jersey." R. 447, ll. 3-4. Brown testified that petitioner told him they used a .38 "not to shoot him but to beat him with it. They beat him with a .38." R. 447, ll. 15-18. Brown said the letter he wrote said:

> "Sometime in the middle of October I went to serve some reefer to a guy named Jersey, a/k/a Hakim Talib. After I served him, he began to ask me if I was interested in buying a shotgun, a .38 revolver or some pain pills. He said he had beat some dude's ass who owe him some money. Beat him unconscious with a .38 he was trying to sell so he took the guy's shotgun and pills as payment. Told me that had it been him he'd have given everything that he had to avoid a beating like that. Jersey said he had his cousin handle it like pros, that there was no way it would come back on them. I said I didn't need anything like that. A couple of weeks later I was visiting a friend who told me Jersey got busted with a pound of reefer and some gun. I went to his house off Alfred Street and he told me that he was gonna get probation he thought because he told the police about the guy he beat who ended up dying and set up a white boy he used to sell reefer to. Jersey said he found out from the white boy dude named Billy that he was questioned by the Edgefield police about the death of his pill guy so Jersey had his cousin who was serving the white guy at the time start putting certain information in the white boy's phone but didn't say what. It said that the white boy was a duck and trusted anyone. He said he was a meth head and was an easy fall guy. Jersey then asked if I could get him right with some reefer and I said I'll see what I could do. I'll see what was up."

R. 448, l. 19 – 449, l. 18.

Brown claimed he wrote the letter because petitioner told him he could get out of jail if he provided good information to law enforcement. R. 474, ll. 4-14. Brenda Heath, the

questioned documents examiner, testified petitioner was the author of State's Exhibit 84, the letter. R. 485, ll. 7-10.

Investigator Phillip Ireland testified he spoke to petitioner on October 25, 2014. R. 502, l. 2 – 504, l. 3. Ireland said petitioner asked him, "Have you found anyone else besides me who did this, or do you feel like it's just me?" R. 505, ll. 15-24.

Ireland related that during his investigation he learned that Travis Murray and Jessica Reeder had a strained relationship and that Travis was very jealous of her. R. 526, l. 12 – 533, l. 5. Ireland testified that the decedent provided Jessica Reeder with pills and money. Ireland also learned that Jessica Reeder had hit the decedent with a baseball bat on a prior occasion. R. 531, l. 5. – 533, l. 5.

Petitioner admitted to Ireland that he had purchased pills from the decedent. Finally, Ireland offered that Travis Murray and Jessica Reeder were both arrested for the first-degree burglary of the decedent's home and for the murder of the decedent. R. 544, ll. 17-23. Ireland finally opined he believed that "Gee" was a real person although law enforcement was never able to locate him. R. 539, l. 18 – 540, l. 4.

Shawn Nicholson testified that petitioner was his neighbor for a year or a year and a half. They both got high smoking marijuana "and things of that sort." R. 577, l. 12 – 578, l. 6.

Nicholson testified that he, Travis Murray, and petitioner went to an abandoned house to "scrap for metal" to sell to the recycling plant. R. 579, l. 4 – 582, l. 9. Nicholson heard petitioner and Travis talking about a man "Travis (sic) girlfriend was dealing with" at the time. R. 584, ll. 1-22. Nicholson said he never learned the name of the man they were talking about, but he thought it was someone having sex "with his [Travis's] girlfriend" and they were talking

about "doing a lick." Nicholson thought "they was just talking trash," and that they were not serious about robbing this man. R. 586, l. 1 – 587, l. 9.

Nicholson testified that on the night of October 9, 2014, petitioner came to his house and said he had been in an argument with his girlfriend or wife. R. 587, l. 10 – 594, l. 6. While petitioner stayed at Nicholson's house that night, Nicholson maintained that petitioner was gone from about midnight to 3:00 a.m. that morning. R. 591, l. 9 – 596, l. 11.

Joseph Lowe testified he had sold meth to petitioner in the past. R. 629, l. 2 – 630, l. 14. Lowe said petitioner "wanted to know if I wanted to do a lick with him." This apparently involved the robbery of a disabled man who "gets drunk and gets pilled up and passes out and he'll be an easy target and I told him I didn't want no part of it." R. 631, ll. 2-6.

Lowe also testified that petitioner called him on the phone late at night and asked him "if I wanted to trade him some, he said I think a shotgun and a rifle and some pills that he had gotten, uhm, and I didn't want them . . ." R. 631, l. 25 – 632, l. 6. Lowe maintained petitioner told him "for a beating like that he would have give everything he had to not get a beating like that but he didn't have but a dollar in his wallet." Lowe said he thought petitioner told him "a shotgun and a rifle and some pills were stolen." R. 632, ll. 22-25.

Lowe thought that petitioner wanted to trade the stolen items for "crystal meth." R. 633, ll. 4-8. Lowe said he contacted Tommy Brock, a longtime family friend, with the Aiken police department to tell him about what petitioner had said about the incident. R. 635, l. 11 – 647, l. 23. Lowe admitted he had only known petitioner for about two weeks when he claimed petitioner asked him about "doing this lick." R. 647, ll. 5-20. Lowe also maintained that he only continued talking to petitioner so that Investigator Ireland could find petitioner and arrest him. R. 651, ll. 4-22.

**The charge conference – malice and accomplice liability**

Defense counsel Fullwood objected to the judge charging the jury that malice is the "intentional doing of a wrongful act without just cause or excuse and [or] with an intent to inflict an injury under circumstances that the law will infer an evil intent [or malice]." Counsel argued that the phrase "*without just cause or excuse*" could be construed as burden shifting. Fullwood also observed, "I know it's in the charge books but I always object to it because I think it's wrong." R. 725, l. 20 – 726, l. 21.

The judge then stated, "That's how charges get amended and changed." However, after the solicitor said she had no comment or objection to the "standard charge," the judge overruled counsel's objection to the "without just cause or excuse" malice instruction. "I'm gonna stick with the standard charge. Do you know how oddly I have my granddad's old charge book and he retired in '67 and this charge is in there still. . . ." R. 725, l. 20 – 726, l. 21.

Defense counsel Fullwood then said she was not waiving her objection to the "without just cause or excuse" jury instruction, but she asked the judge to modify it with the preface that it could "lead to an inference of malice depending on your view of the evidence" if the judge was going to charge it. The judge said he "would think about it." R. 726, l. 22 – 727, l. 13.

Defense counsel Fullwood also objected to charging the hand of one is the hand of all, or the accomplice liability instruction. She noted that there was no evidence "[t]hat there was anyone else involved. There's no testimony that this was the act of more than one person." Counsel argued that "references" or "suggestions" and "innuendo" did not constitute evidence which was needed for an accomplice liability instruction. R. 662, ll. 13-22.

The state argued while there were not any indicted co-defendants, that petitioner's statements could be interpreted to mean he did not act alone. Defense counsel then cited Wilds

v. State, 407 S.C. 432, 756 S.E.2d 387 (2014), in support of her argument that accomplice liability should not be charged in this case. Counsel noted the very real problem that the Supreme Court recognized in Wilds was that "the jury might believe this part and this part, not this part, but if we can patch it together, they might think that, and that's what Wilds says you can't do to be entitled to a charge on accomplice liability." R. 662, l. 4 – 665, l. 23.

The judge said he understood the defense objection to "the hand of one, hand of all" charge but stated he was going to instruct it over petitioner's objection. R. 662, l. 13 – 666, l. 5; r. 727, l. 14 – 728, l. 11.

**The jury charge**

The judge charged the jury, "In order to sustain a conviction for murder the state must prove beyond a reasonable doubt that he, a person, the defendant killed another person with malice aforethought. Now, I tell you that malice is defined as hatred, ill will, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse or with an intent to inflict danger or under the circumstances which the law infers an evil intent or malice. . . ." R. 740, l. 21 – 741, l. 7. (emphasis added).

The judge also instructed that "hand of one is the hand of all," specifically, inter alia, the judge instructed, "Two people can be guilty of killing another person when only one of the two had a gun and there's only one bullet, only one of the two fired the shot that caused the death but if the two or more people are acting together assisting each other in committing the offense, the act of one is the act of all or as it is sometimes said the hand of one is the hand of all." R. 742, l. 4 – 743, l. 11.

1.

The Court of Appeals erred by not finding reversible error where it acknowledged the trial court's instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" was needlessly confusing particularly where the charge also could reasonably have been interpreted as shifting the burden to petitioner to prove a justification or excuse for his wrongful acts thereby rendering the instruction violative of petitioner's Due Process constitutional rights

**Discussion**

As seen, defense counsel objected to the judge charging the jury that malice was the "intentional doing of a wrongful act without just cause or excuse." Defense counsel correctly noted that this instruction could reasonably be interpreted by the jury to be burden shifting. Meaning, that petitioner intentionally doing a wrongful act without just cause or excuse constituted malice and shifted the burden to petitioner to prove just cause or excuse. R. 725, l. 20 – 727, l. 13. "Even though the Elmore[1] charge dealt only with the prohibition of a presumption of malice from the use of a deadly weapon, the principle behind the case likewise prohibits the presumption of malice from the intentional doing of an unlawful act." State v. Peterson, 287 S.C. 244, 247-48, 335 S.E.2d 800, 802 (1985). The "intentional doing of a wrongful act without just cause or excuse" instruction in this case while not using the word "presumption" was just a slightly more modern version of the same erroneous burden shifting instruction.

[1] State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), subsequent history omitted, *overruling* recognized on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

The Court of Appeals agreed the instruction was confusing and unnecessary. See State v. William C. (Billy) Sellers, 2021-UP-254 (July 7, 2021) (Williams, Thomas, and Hill, JJ.) at p. 3. Nonetheless, the Court found it was bound by this Court's precedent in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) that a similar instruction was not an unconstitutional burden shifting charge. Bell should be overruled given this Court's modern precedent of revisiting "dubious and outworn jury instructions. See, Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019)." State v. William C. (Billy) Sellers, 2021-UP-254 (July 7, 2021) at p. 3.

The Court of Appeals wrote:

> "It is the intentional doing of a wrongful act without just cause or excuse or with an intent to inflict danger or under the circumstances which the law infers an evil intent or malice." We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with "intentional doing of a wrongful act without just cause or excuse" in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are also not sure how a wrongful act can be said to be done with malice if all that is proven is that the act was done with intent (all crimes require some level of intent except strict liability ones, *see, e.g., State v. Ferguson,* 302 S.C. 269, 271-72, 395 S.E.2d 182, 183 (1990)). Nor are we sure how an intentional act that is justified or excusable by law could be a crime. But even amidst the trend by our supreme court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, See Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019), we are quite sure we must comply with the precedent of Bell.

State v. William C. (Billy) Sellers, 2021-UP-254 (July 7, 2021) at pp. 2-3.

This confusing and misleading instruction, as noted by the Court of Appeals above, should not have been given this Court's more recent precedents. In State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), this Court held that "Regardless of the evidence presented at trial, a trial court shall not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon." Burdette overruled State v. Belcher, 385 S.C. 597, 685

S.E.2d 802 (2009), which allowed the inference of malice instruction from the use of a deadly weapon unless there was evidence which would reduce, mitigate, excuse or justify the killing or assault and battery with intent to kill.

As petitioner argued to the Court of Appeals, and that Court acknowledged, this Court's decision in Burdette was consistent with its pattern of disapproving of jury instructions on how the jury should interpret certain evidence. For example, this Court in State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) cited State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980), where it held it was improper for the trial court to charge the jury that the defendant's flight may be considered evidence of guilt. State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) This Court also cited State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), where it held that the trial judge correctly refused the defendant's request to charge specific examples of voluntary manslaughter that might be considered evidence of a legal provocation.[2] See State v. Burdette, 427 S.C. at 502, 832 S.E.2d at 582 (2019). Further, in State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013), this Court held that the trial court must not charge the jury that actual knowledge of the presence of drugs is strong evidence of a defendant's intent to control their disposition or use. Finally, in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), this Court held that even in the rare future case where evidence is permitted of a defendant's attempted suicide, that it will still be improper for the trial court to instruct the jury by way of a limiting instruction or otherwise about how it should interpret that suicide evidence. This Court noted that under the South Carolina constitution, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018), *citing* S.C. Const. Art. V, § 21.

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[2] Overruled on other grounds in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

Here, the objectionable jury charge as to malice went beyond the "inference of malice" as defense counsel noted. The instruction was that malice was "the intentional doing of a wrongful act without just cause or excuse." As with the other cases cited above, this instruction was unnecessary and problematic as it was about how the jury should interpret evidence. The solicitor was free to argue there was no excuse or justification for petitioner being involved in drug transactions with the decedent, or him allegedly entering the decedent's home with the intent to harm him, or him allegedly hitting the decedent, and that the jury could find this evidence constituted malice. However, it was quite different and improper for the trial court to *charge it, and* it was burden shifting. As defense counsel argued, the state must prove a defendant's guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Any jury instruction that has the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime is impermissible. See, Sandstrom v. Montana, 442 U.S. 510 (1979). See, also, High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989) where this Court held that defense counsel was ineffective for failing to object to a burden shifting instruction. In High, the judge charged involuntary manslaughter as "the unintentional cause of the death of another through mere criminal negligence." The judge defined intent as "to act knowingly." The judge then charged the jury that the law presumes the intent from the doing of an unlawful act. *Citing* Yates v. Aiken, 484 U.S. 211 (1988) and Sandstrom v. Montana, 442 U.S. 510 (1979), where the Supreme Court found the instruction was "clearly erroneous." See, High v. State, 300 S.C. 88, 89, 386 S.E.2d 463, 464 (1989).

Even if this Court determines that this jury instruction is not impermissibly burden shifting, which petitioner strongly maintains it is, the instruction should still be deemed reversible error because it was very confusing, and unnecessary. The purpose of jury

instructions is to enlighten the jury as to what the law is, in order that the jury may arrive at a just, fair, and proper verdict. It is therefore error to give jury instructions which are by their nature misleading or confusing. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

The Court of Appeals correctly found this jury instruction confusing and unnecessary, but it affirmed because it noted it was bound by this Court's precedent in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991). State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991). It is respectfully time to revisit the precedent of Bell, and to overrule it. Further, certiorari should be granted since in this case there were numerous "wrongful acts" -- as seen above -- the jury could find petitioner committed without just cause or excuse, and which therefore constitute "malice" for purposes of the murder charge given this burden shifting, misleading and confusing jury instruction. Those acts included petitioner allegedly selling or buying drugs. They also could include burglary. In addition, they could include an alleged plan to do "a lick," or the beating of the decedent. Certiorari should respectfully be granted on this issue. See Rule 242 (b)(1) & (4).

2.

The Court of Appeals erred by finding no abuse of discretion in the trial court instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, and it improperly invited speculation as to another person being the shooter and petitioner being guilty as a participant where the evidence did not justify this instruction under the precedent of *State v. Washington*, 431 S.C. 394 848 S.E.2d 779 (2020).

In finding no error in the trial judge charging "accomplice liability" in this case, the Court of Appeals cited State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020), "(For an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" (alterations in original) (quoting *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011))). Accordingly, we find the trial court properly instructed the jury on accomplice liability." State v. William C. "Billy" Sellers, 2021-UP-254 (filed July 7, 2021) at p. 3.

This Court's opinion in State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020) did not support a jury instruction on accomplice liability in this case. In this case, who allegedly the murderer petitioner was aiding and abetting was mere speculation, whereas in State v. Washington there was no competent evidence that Kinloch, the person targeted by the state as being Washington's accomplice, was actually the shooter. The accomplice liability instruction therefore impermissibly invited the jury to speculate that Kinloch could have been the shooter Washington was assisting. See State v. Washington, 431 S.C. at 411, 848 S.E.2d at 788.

As seen above, the solicitor argued that even though there were no co-defendants or co-conspirators in this case that an instruction on accomplice liability was proper. The solicitor said some of petitioner's statements themselves implied another person or others may have been involved. R. 662, l. 13 – 666, l. 5; r. 727, l. 14 – 728, l. 11. Petitioner submits that the state must identify the alleged murderer that petitioner was acting with to be entitled to an instruction on accomplice liability given the holding in State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020). Certiorari should be granted for the benefit of the bench and bar on this issue.

Defense counsel correctly argued that pursuant to this Court's opinion in Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) that it was improper to give an instruction on accomplice liability on the theory that the jury may believe some of the testimony and disbelieve other parts of the testimony. Further, the innuendo and rumors about someone else being involved were just rumors. R. 662, l. 13 – 666, l. 5; r. 727, l. 14 – 728, l. 11.

Petitioner alone was indicted for murdering the decedent. There was no indictment or allegation of conspiracy. A man named "Gee" was mentioned, but at the end of the trial the fact of whether such a man -- "Gee" -- even existed was still being discussed. The Court of Appeals noted testimony from three jail house snitches, which varied as seen above, but mentioned "Gee" and petitioner robbing the victim, or petitioner and "his friends" allegedly tying the victim up, beating him and robbing him, or "'they' beat an old white man with a .38 and stole some pills." State v. William C. "Billy" Sellers, 2021-UP-254 (filed July 7, 2021) at p. 3.

While defense counsel blamed the murder on Travis Murray and Jessica Reeder in this closing argument, the motive to kill the decedent was their motive, independent of petitioner.

The instruction on accomplice liability based on speculation by jail house snitches that someone else or others may have been involved was improper. In Wilds v. State, there was no

evidence anyone other than the defendant was the shooter. While the evidence in this case was not as dramatically clear cut, there was still no evidence presented by the state that anyone other than petitioner was the killer -- if petitioner was the killer. The state's case was circumstantial, and there was no circumstantial evidence that someone else was the killer. The jury should have been forced to decide if the state proved beyond a reasonable doubt that petitioner killed the decedent. Allowing a guilty of murder verdict based on a theory – accomplice liability – where the evidence did not support that theory was error. See State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020); Wilds v. State. 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014).

As seen, defense counsel noted that the jury instruction on accomplice liability was improper on the basis that the jury may find an alternate theory of liability because the jury "may believe some of the evidence and disbelieve other evidence." Wilds v. State, 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014), *citing* Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). In many murder cases, innuendo and rumors are alive – that does not justify a jury instruction and a verdict based on "accomplice liability." Most respectfully, "the hand of one is the hand of all" is a very dangerous jury "dynamite" instruction given its broad interpretation -- such as the "one bullet" being shot and multiple people still being guilty of murder instruction given in this case.

Petitioner was indicted for murder. The jury's task was to decide whether petitioner killed the decedent with malice aforethought in violation of S.C. Code § 16-3-10. Allowing the jury to convict petitioner on an improper alternative theory of liability by inviting speculation based on the jury believing some evidence but not believing other evidence presented by the state impermissibly invited speculation. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014). Further, petitioner submits it was necessary for the state to name the person petitioner

was allegedly aiding and abetting at the time of the murder before it was entitled to an accomplice liability instruction given the precedent of State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020). Giving an accomplice liability instruction where the alleged murderer -- "Gee" -- may not even exist, and on the basis of other speculation which can be drawn from dissecting the various claims of jail house snitches was improper. Certiorari should be granted.

3.

The Court of Appeals erred by finding no error in the admission of State's Exhibits 58-59, the sentencing sheets, since they were irrelevant to allegedly prove crucial state's witness Phillip Griffin received no consideration from the state for his testimony against petitioner.

The state wanted the jury to conclude that because the sentencing sheets had the box checked for the plea being "without Negotiations or Recommendation" that that proved Griffin was not given any sentencing consideration by the state in return for his testimony against petitioner. R. 752-753. That simply was not true, and the state knew that. The judge erred by ruling the sentencing sheets, State's Exhibit 58 and State's Exhibit 59, were relevant for that purpose and admissible given the facts of this case.

The context of what occurred here was clear. Phillip Griffin was being questioned about his sentencing exposure, and he was denying that his testimony was affected by that sentencing exposure or that he was biased or had a motive to misrepresent the truth because he had received leniency from the state. In State's Exhibit 58, it showed that Griffin pled guilty to grand larceny $2,000 to $10,000 "without negotiation or recommendation" since that box was checked on the sentencing sheet. State's Exhibit 59 involved another guilty plea. R. 752-753.

The sentencing sheets were not relevant because the negotiation or recommendation was an "official position" taken by the government in court when a defendant pleads guilty. It is

widely known that suspects and defendants can be given sentencing consideration in many other ways besides on the record in a courtroom at the time of a guilty plea. While the review of a plea agreement is limited to only those terms on the record following State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994), using a sentencing sheet of a state's witness in a separate case in such a misleading fashion should respectfully not be approved by this Court.

The Court of Appeals held the sentencing sheets were relevant and seemingly reasoned that, because petitioner questioned Griffin's potential bias because of sentencing consideration for his testimony, the sentencing sheets became admissible in rebuttal, *citing* State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct.App. 2012). However, the sentencing sheets did not properly rebut anything that mattered – anything relevant. In McEachern conversely, a drug case, the defendant "Hollie gave lengthy testimony concerning where all the money came from that was found in her pocketbook to rebut any inference that the money was connected to the drugs. Further, Hollie specifically proclaimed none of the money found in her pocketbook was drug money. Thus, Hollie opened the door to admission of evidence that she agreed to forfeit the money in question . . . [as drug proceeds money]." State v. McEachern, 399 S.C. at 138, 731 S.E.2d at 610.

State's Exhibits 58 and 59 were not relevant to rebut normal cross-examination about whether a jail house snitch, Griffin, had received sentencing consideration for his testimony, and therefore may well have had a motive to misrepresent the truth. Griffin admitted he had a sentencing exposure of fifty years but he received a sentence of five years suspended on eighteen months and three years-probation. He actually served only eleven months. R. 227, ll. 6-16. The sentencing sheets were irrelevant and impermissible to show Griffin received no sentencing

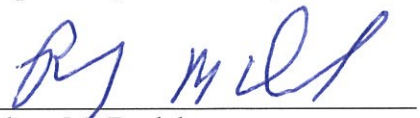
consideration. Although a Rule 403 objection would have been proper also, relevance was a proper objection, and all that was needed in this case.

In State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013), this Court found the judge erred in admitting evidence the defendant gave a police officer false identifying information because there was no nexus between the false information and the underlying crime, bank robbery. Here, the sentencing sheets showing Phillip Griffin pled guilty "without negotiation or recommendation" to two crimes were irrelevant because they had no nexus to the real issue at hand – whether Philip Griffin received sentencing consideration for his extraordinarily damaging testimony against petitioner. For this reason, State's Exhibits 58 and 59 were not relevant and they were inadmissible under Rule 401, SCRE. See, State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Griffin was a very important witness for the state, who claimed petitioner told him *"they"* went to the decedent's house where "*they* taped him up and was asking him where the pills were and *they* were pistol whipping him until he told *them* where the pills were." R. 207, ll. 5-14. (emphasis added). The error therefore was not harmless, particularly given the erroneous accomplice liability instruction, and certiorari should respectfully be granted on this issue as well.

## CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on each issue.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2021.