STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



On Writ of Certiorari to the Court of Appeals
Appeal From Charleston County
The Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2015-001278

The State, Petitioner/Respondent,

v.

Raheem D. King, Respondent/Petitioner.

**PETITIONER/RESPONDENT'S PETITION FOR REHEARING**

By Opinion filed on October 25, 2017, the Court affirmed as modified the Court of Appeals decision affirming Respondent/Petitioner's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversing his conviction for attempted murder, holding the circuit court erred in charging the jury attempted murder is not a specific intent crime and in allowing hearsay testimony. As to the Court's findings regarding the required *mens rea* for statutory attempted murder, the majority opinion overlooked, misinterpreted and/or misapplied the applicable law regarding statutory interpretation, as well as well established law in South Carolina recognizing common law attempt crimes are generally considered specific intent crimes, but common law assault and battery with intent to kill (ABWIK) and assault with intent to kill (AWIK) required only a general intent to inflict harm. The majority's analysis may significantly impact issues beyond the attempted murder statute,

and therefore, Petitioner/Respondent petitions pursuant to Rule 221(a), SCACR, for rehearing on the attempted murder issue.

As evidenced by its almost exclusive reliance on law from other jurisdictions regarding the elements of attempted murder, the majority opinion overlooks and/or disregards the statutory and case law of South Carolina law as it existed at the time the Legislature enacted the attempted murder statute in 2010, which as the concurring opinion succinctly states, is the only basis for determining the South Carolina Legislature's intent when it enacted the statute. When the existing law is considered the primary focus, it is clear the Legislature intended to codify common law ABWIK, which did not require specific intent, in light of dicta in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), indicating ABWIK was attempted murder for all intents and purposes.

Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code §16-3-10 (2003). A specific intent to kill is **not** required for a murder conviction. State v. Foust, 325 S.C. 12, 479 S.E.2d 50, 51 (1996). The common law offense of assault and battery with intent to kill ("ABWIK") was defined as an unlawful act of violence to the person of another, with either express or implied malice aforethought, and as with murder, a specific intent to kill was **not** required. *Id.*[1]

[1]In 1962, the Legislature made the common law ABWIK offense a felony punishable by up to twenty years incarceration, but did not codify the offense itself. S.C. Code Ann. 16-3-620 (2003), *repealed by* 2010 Act No. 273, §7.A, effective June 2, 2010 (abolishing ABWIK, ABIK, ABHAN and other common law offenses). Therefore, the requisite common law general intent requirement still applied. For purposes of murder and ABWIK, malice is the wrongful intent to injure with a wicked or depraved spirit intent on doing wrong, and doing the act intentionally, without just cause or excuse. Tate v. State, 351 S.C. 418, 570 S.E.2d 522, 527 (2002).

To prove common law attempt crimes, the State must prove the defendant had the specific intent to commit the underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent. State v. Reid, 393 S.C. 325, 713 S.E.2d 274, 276 (2011). A person guilty of attempt is punishable as if he had committed the underlying offense. *Id.* (citing Sutton, 532 S.E.2d 283, 285 n. 3 [2000]).

As part of a 2010 sweeping reformation of the criminal code, the Legislature enacted the attempted murder statute and four degrees of assault and battery, and repealed all common law assault and battery crimes, including ABWIK. The attempted murder statute includes all the elements of common law ABWIK, including the "intent to kill." In spite of the fact the attempted murder statute uses the verbatim language of the repealed ABWIK offense, the majority opinion concludes the Legislature did not intend to codify ABWIK, and supports its conclusion by finding the Legislature "purposefully **add[ed]** the language 'with intent to kill' to 'malice aforethought, either express or implied' to require a higher level of *mens rea* for attempted murder than that of murder." (emphasis added). This rationale is completely belied by the fact the very title of the ABWIK offense included the language "with intent to kill."[2]

In Foust, this Court expressly held ABWIK did not require a specific intent to kill, and reiterated that conclusion in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000). Thereafter,

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[2]Citing State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925), the majority opinion finds ABWIK and murder "were originally designated as one offense." There may have been historical confusion over whether to charge the crime as: (1) "assault and battery with intent to kill;" (2) "assault and battery with intent to kill and murder;" or (3) "assault and battery with intent to kill committed with malice," such that ABWIK was sometimes called "assault and battery with intent to kill and murder." *See* State v. Young, 131 S.C. 94, 126 S.E. 445, 446-47 (1924); State v. Milan, 88 S.C. 127, 70 S.E. 447, 449 (1911). It does not appear, however, that ABWIK and murder were ever considered a single offense in South Carolina. Indeed, the cases simply struggled with whether "intent to kill" was the same as "intent to murder." Jones, 130 S.E. at 748–49.

the Court of Appeals reached the same conclusion in State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007), finding there was little difference between general intent to kill and malice aforethought required for AWIK (or ABWIK). *Id.* at 170 ("Since the definition of malice aforethought encompasses general intent to kill, we find it difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill.").

Consequently, prior to 2010, any ambiguity regarding the *mens rea* required for ABWIK was conclusively resolved, and the Legislature enacted, or created, the attempted murder statute against that back-drop.[3] In light of the law as it existed in 2010, the rules of statutory construction lead to the conclusion the Legislature intended the attempted murder statute to codify common law ABWIK, with the undisputed general intent *mens rea*. *See* State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196, 197 (1997) (Legislature is presumed to be aware of common law when enacting statutes and using terms that have a well-recognized meaning in the law).[4]

Further, when taken to its logical conclusion, the majority's analysis leads to absurd results the Legislature could not have intended. "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278, 283 (2011).

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[3]The Legislature's use of the word "create" does not mandate a finding it intended to do anything other than codify ABWIK, especially in light of the dicta in Sutton indicating attempted murder did not exist in South Carolina because of ABWIK. Unfortunately, the opinions in this case have re-created the ambiguity that was resolved prior to 2010.

[4]Contrary to the majority opinion's assertion the Court of Appeals opinion in Kinard indicated "confusion" regarding the required *mens rea* for murder and ABIK, and challenged "inconsistences" in case law regarding malice aforethought, Kinard explicitly recognized Foust resolved any existing ambiguity by eliminating the "artificial distinction" between general intent and malice aforethought. 646 S.E.2d at 170.

By way of example, the majority's analysis casts doubt on the continued viability of the transferred intent doctrine, which is based on case law prior to 2010. *See* State v. Fennell, 340 S.C. 266, 531 S.E.2d 512, 514 (2000) (defendant's criminal intent to kill the intended victim is transferred to the unintended victim, and whether he killed the intended victim or a third party by mistake is irrelevant). In Fennell, the Court explained the defendant's mental state was like a "spotlight," which was not extinguished at the moment a bullet strikes and killed the intended victim, but in that case shined on both victims, stating "[a] person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deed when that force kills or injures an unintended victim." Significantly, the court noted it would be "[in]appropriate" to limit the defendant's punishment and penalty to a maximum punishment of ten years' imprisonment, which was the penalty for ABHAN at that time. *Id.* at 516-517.

Footnote 5 of the majority opinion in this case, however, cites a Kentucky case for the proposition "'there is no such criminal offense as an attempt to achieve an unintended result.'" Taking that language to its logical conclusion, the doctrine of transferred intent, which contemplates an unintended result, will not stand as to attempted murder, or an attempt of the various degrees of assault and battery.

Again, by way of example, if the defendant shoots at a person with the specific and undisputed intent to kill the person, but misses the intended victim completely and hits another person, since the defendant did not specifically intend to kill the actual victim, he could not be

charged with attempted murder in connection with the actual victim. At most, the defendant could be charged with ABHAN, which carries a significantly lower potential penalty.[5]

The following factual scenarios further illustrate the impact of the majority opinion:

> 1. Defendant enters the home of Husband and Wife intending to murder Husband. He hears a muffled voice from behind the closed bathroom door, and believing it is Husband, Defendant throws open the door and immediately starts shooting. If Husband is the person behind the door and is killed, Defendant is guilty of murder and can be punished by death or a mandatory prison term of thirty years to life, and is ineligible for parole or any early release program. If he only injures Husband, Defendant is guilty of attempted murder, and could be sentenced up to a maximum of thirty years' imprisonment and would be ineligible for probation or a suspended sentence. Both offenses are classified as most serious offenses under the recidivist sentencing statute, S.C. Code Ann. § 17-24-45 (Supp. 2015), and the State may be able to pursue a sentence of life without the possibility of parole if Defendant had prior convictions for serious or most serious offenses.
>
> 2. Wife was the person in the bathroom and was killed, and since murder is not a specific intent offense, Defendant would still be guilty of murder and face the same penalties referenced above. If Wife is only injured, however, Defendant could only be only be guilty of ABHAN, and only face a maximum sentence of twenty years' imprisonment, without restrictions on the judge's ability to issue a suspended sentence or probation, and would eventually be eligible for early release programs.
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> 3. Wife was the person in the bathroom, but Defendant completely missed her with his shots. Since Defendant only had the specific intent to kill Husband, given the majority opinion's interpretation of the attempted murder statute, at most, Defendant would only be guilty of first-degree assault and battery, which is neither a most serious or serious offense, and would face a maximum sentence of only ten years' imprisonment, with no restriction on suspended sentencing and probation. Further, the conviction could not be considered for future life without parole purposes.

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[5]The mere fact the Legislature increased the potential sentence for attempted murder to thirty years rather than the potential twenty year sentence for common law ABWIK does not lead to the conclusion the Legislature intended to raise the required *mens rea* from general to specific intent. Rather, raising the penalty simply brought the potential penalty for attempted murder in line with the minimum potential penalty for non-capital murder. In effect, repealing ABWIK and applying common law attempt to the murder offense would have had the same result regarding the applicable punishment. *See* Reid, 713 S.E.2d at 276 (person guilty of attempt is punishable as if he had committed the underlying offense).

The only difference between the above scenarios is the identity of the person behind the door. In every situation, Defendant had the specific intent to kill Husband and clearly attempted to do so. When the person behind the door was Wife, however, and she was either injured or escaped with no harm, Defendant would either be guilty of lesser crimes with drastically reduced sentences, or not guilty of any crime under the assault and battery and attempted murder statutes.

Finally, the majority opinion's analysis essentially renders a significant aspect of the attempted murder statute, **implied** malice aforethought, superfluous. *See* In re: Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843, 849 (2017) (court must interpret a statute such that no word, clause, sentence, provision or part is rendered surplusage or superfluous). The opinion itself acknowledges that aspect of its holding in Footnote 5 by suggesting the Legislature "re-evaluate the language following 'malice aforethought' as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime." The Footnote further notes the absence of evidence of express malice and a specific intent to kill would "involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600." Recognizing the impact of the majority opinion holding, Footnote 13 of the concurring opinion cautions "against any implied malice instruction in a future prosecution under section 16-3-29." Even if the footnotes are dicta, the majority opinion essentially renders the word "implied" meaningless for purposes of prosecutions for attempted murder.

Based on the foregoing, Petitioner/Respondent submits the Court should reconsider the majority opinion as to the *mens rea* required under the attempted murder statute. At a minimum,

the extent of the holding as to other attempt crimes and the doctrine of transferred intent should be clarified.

Respectfully submitted,

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November 16, 2017

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**CERTIFICATE OF SERVICE**

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I, Sally B. Ellison, hereby certify I served the Petitioner/Respondent's Petition for Rehearing on Respondent/Petitioner by placing two copies in the United States Mail Service, postage pre-paid, addressed as follows:

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
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I further certify all parties required by Rule to be served have been served.

This 16th day of November, 2017.

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