

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**ORIGINAL**

—————  
Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge  
—————

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

PETITIONER.

APPELLATE CASE NO. 2018-002050  
—————

BRIEF OF PETITIONER  
—————

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**RECEIVED**

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S.C. SUPREME COURT

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## **QUESTIONS PRESENTED**

1.

In this self-defense case, whether the Court of Appeals erred in affirming a jury charge on inferred malice based on the “felony murder rule” where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm and in finding citation to and argument by analogy based on a leading case on inferred malice unpreserved for appeal?

2.

Whether the Court of Appeals erred in affirming the trial court’s denial of a directed verdict on the attempted murder charge because the State failed to prove petitioner had the specific intent to kill the victim where it was undisputed that the victim was not petitioner’s intended target in self-defense?

## STATEMENT OF THE CASE

On November 13, 2013, a Richland County grand jury indicted petitioner for attempted murder, possession of a stolen pistol, possession of firearm or ammunition by person convicted of a violent felony, unlawful carrying of a pistol, unlawful possession of a weapon by a person convicted of a crime of violence, and possession of a weapon during the commission of a violent crime. R. 1190-1201. On August 10 – 17, 2015, petitioner was tried before the Honorable Robert E. Hood and a jury. R. 1. Luck Campbell, Meghan Walker, and Dolly Garfield represented the State. R. 1. Aimee Zmroczek and Bridgette Brown represented petitioner. R. 1.

Judge Hood directed a verdict on the possession of a stolen pistol charge. R. 871, ll. 6 – 18. The jury convicted petitioner on the remaining three charges. R. 1170, ll. 1 – 25. Judge Hood sentenced petitioner to thirty years' imprisonment for attempted murder, a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime, a consecutive term of five years' imprisonment for possession of a weapon by a person convicted of a violent felony, a concurrent term of five years' imprisonment for possession of a weapon by a person convicted of a crime of violence, and a sentence of one year's imprisonment for unlawful carrying of a pistol. R. 1187, ll. 3 – 22.

On June 7, 2018, a panel of the Court of Appeals consisting of Judges Huff, Geathers, and McDonald heard oral argument. App. 1. On August 15, 2018, the court issued a published opinion authored by Judge Geathers affirming petitioner's convictions. App. 1. State v. Smith, 425 S.C. 20, 819 S.E.2d 187 (2018). This Court granted certiorari after denial of rehearing by the Court of Appeals.

## ARGUMENT

1.

In this self-defense case, the Court of Appeals erred in affirming a jury charge on inferred malice based on the “felony murder rule” where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm and in finding citation to and argument by analogy based on a leading case on inferred malice unpreserved for appeal.

### Relevant Facts

Two crucial facts were undisputed in this case. First, it was undisputed that the victim in this highly-publicized case, Martha Childress (“Childress”), was not the intended target of the bullet that tragically left her paralyzed. R. 1071, ll. 24 – 25. Second, it was undisputed that petitioner was guilty of two firearm status crimes. Defense counsel conceded petitioner’s guilt on these crimes in her opening statement.<sup>1</sup> R. 222, ll. 18 – 23. Petitioner took the stand and testified he only fired after first hearing a gunshot because he was afraid for his life. R. 939, ll. 17 – 19. Judge Hood charged the jury on self-defense. R. 1155, l. 17 – 1158, l. 11.

A friend of Childress’s testified that they were waiting with a crowd in front of the fountain in Five Points for a taxi when Childress fell. R. 245, ll. 11 – 16. Childress said she could not feel her legs. R. 245, ll. 17 – 19. EMS quickly arrived, found a gunshot wound in Childress’s chest, and transported her to the hospital. R. 229, ll. 8 – 9. R. 232, l. 22 – 233, l. 14. R. 234, l. 16 – 235, l. 6. Childress survived the shooting, but suffered internal injuries and a permanent spinal cord injury. R. 259, l. 16 – 260, l. 5.

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<sup>1</sup> As noted by defense counsel in her opening statement, petitioner pled guilty in federal court to a firearm-related crime. R. 222, ll. 18 – 23. During sentencing, Judge Hood stated that it was likely that petitioner’s federal sentence would run consecutive to his state sentence. R. 1186, ll. 3 – 14.

The shooting occurred after 2:00 AM early Sunday morning after a Saturday that included the State Fair and a Gamecock road football game. R. 276, ll. 5 – 13. Five Points was crowded. R. 276, ll. 2 – 24. Many witnesses testified they heard more than one shot. Childress’s friend testified she heard “[a]bout four or five” gunshots. R. 245, ll. 11 – 13. The police officer who was the first person to respond to Childress heard at least two shots. R. 277, ll. 16 – 19. He could not tell who fired the shots. R. 277, ll. 18 – 19. Another police officer at the scene admitted on cross-examination that it was possible that he heard multiple shots and that the report he wrote after the incident just used the plural, “shots.” R. 356, ll. 2 – 24. Many witnesses testified they heard more than one shot. R. 433, ll. 9 – 10 (Ryan Ellison); R. 464, ll. 23 – 25 (Asia Bethel); R. 497, ll. 22 – 23 (Taqayya White); R. 503, ll. 6 – 12 (Byron Tucker); R. 536, ll. 7 – 11 (Shante Bethel); R. 641, ll. 23 – 25 (Donnell Woodard); R. 940, ll. 9 – 12 (Petitioner).

#### *The Two Groups*

Childress did not know the person who shot her. R. 260, ll. 11-14. Petitioner Michael Juan Smith (“Smith”) was in Five Points that night with his girlfriend, Shante Bethel, and some of their friends. R. 530, ll. 2 – 4. The people in Smith’s group were Smith, Shante Bethel, Asia Bethel, Taqayya White, and Ryan “Rondo” Ellison (collectively, the “Smith Group”). R. 530, ll. 2 – 4. The Smith Group encountered “a group of three guys.” R. 533, ll. 19 – 24. These three men were Daquan Samuel, Byron Tucker, and Donnell Woodard (collectively, the “Samuel Group”). R. 500, l. 20 – 501, l. 9.

Numerous videos from cameras in Five Points were introduced by both sides during the trial. Some of these videos are of excellent quality. State’s Exhibit 74 is an edited version that condenses footage from several cameras into one edited video. R. 310, ll. 9 – 19. (State’s Ex.

74). At the very beginning of State's Exhibit 74, Ryan Ellison is the first of the Smith Group to appear. (State's Ex. 74). He is a tall, thin, black male wearing a white "Aeropostale" t-shirt. (State's Ex. 74). Two of the other girls in the Smith Group follow Ryan Ellison. (State's Ex. 74). Shante Bethel follows wearing white pants. R. 296, ll. 2 – 11. (State's Ex. 74). Smith is the last of the group wearing a tan outfit with a black undershirt. (State's Ex. 74).

Approximately twenty seconds into State's Exhibit 74, members of the Samuel Group appear. R. 293, ll. 5 – 14. (State's Ex. 74). Byron Tucker is wearing a black shirt that says "Watch Out for the Alphabet Boys." R. 500, ll. 20 – 23. (State's Ex. 74). (Defendant's Ex. 3). Donnell Woodard is wearing a short-sleeved white shirt that says "Bustin' It." R. 638, ll. 21 – 25. (Defendant's Ex. 2). (State's Ex. 74).

#### *The Shooting, the Videos, and the Aftermath*

The members of the Samuel Group exchange words with Smith. R. 293, ll. 5 – 14. (State's Ex. 74). Tucker admitted that Woodard used the word "slob" which is a derogatory term that is "a disrespect towards the Bloods." R. 509, ll. 10 – 19. Tucker agreed that Woodard was a criminal and that he knew Woodard was going to cause trouble the night of the shooting. R. 509, ll. 8 – 9. R. 512, ll. 11 – 12. Shante Bethel admitted being affiliated with the Folks gang and stated that the members of the Samuel Group were in the Folk gang. R. 547, ll. 4 – 12. She heard a member of the Samuel Group use the word "slob" and make statements "like throwing down Blood." R. 548, l. 2 – 549, l. 9. She stated that petitioner had a lot of friends and family members who were Bloods. R. 548, l. 22 – 549, l. 2. Petitioner stated that during this initial altercation with the Samuel Group he heard them call him a "slob." R. 937, ll. 11 – 16. Petitioner denied being a member of the Bloods, but said he had many friends who were

members. R. 937, ll. 19 – 22. Shortly thereafter on the video, from another angle, Smith moves a handgun from one pocket to another. (State’s Ex. 74).

From another angle, the Smith Group makes their way through the crowd waiting on taxis near the fountain. (State’s Ex. 74). Childress is visible standing near the curb. (State’s Ex. 74). The Smith Group heads toward an Exxon station past the fountain. (State’s Ex. 74). The Samuel Group is already near the Exxon station. (State’s Ex. 74). Daquan Samuel can be seen wearing a long-sleeved white shirt near Byron Tucker. R. 638, l. 21 – 639, l. 3. (Defendant’s Ex. 2). (State’s Ex. 74).

The Samuel Group turns around and follows the Smith Group. (State’s Ex. 74). The two groups confront each other. (State’s Ex. 74). Childress suddenly falls, which is the moment immediately after the gunshots. (State’s Ex. 74). People duck and run. (State’s Ex. 74). Daquan Samuel begins heading toward the fountain where Childress was shot. (State’s Ex. 74). Donnell Woodard shoots the bird at the Smith Group. R. 642, l. 25 – 643, l. 13.

Defense expert Christopher Watkins (“Watkins”) produced edited videos depicting several camera angles. R. 892, l. 9 – 896, l. 14. (Defendant’s Ex. 6, 21). Watkins “matched up” the times on the videos to synchronize events depicted on the different cameras. R. 896, ll. 6 – 14. The State introduced a version of Watkins’ video as State’s Exhibit 101. R. 827, ll. 6 – 828, l. 18. (State’s Ex. 101).

Samuel runs through the fountain area. (State's Exhibit 101). Samuel appears to be holding something that looks like a gun in his hand.<sup>2</sup> (State's Ex. 101). R. 899, ll. 17 – 24. Samuel then runs across the street and hovers near an area with several trash cans. (State's Ex. 101). R. 899, ll. 17 - 24.

Smith took the stand in his own defense. R. 935, ll. 5 – 6. He brought a gun to Five Points because he had been assaulted there a couple of months before the shooting. R. 936, ll. 4 – 24. Smith said they were getting ready to leave when he heard a shot and “somebody screamed they had a gun.” R. 938, ll. 2 – 7. Smith fired one shot back. R. 938, ll. 6 – 9. Smith testified that he “was scared for my life. I was scared I was going to get shot, so I returned a shot.” R. 939, ll. 17 – 19. Smith was extensively cross-examined by the State on the contents of his jail calls which contained inflammatory comments about the victim and witnesses. R. 939, l. 25 – 993, l. 11.

Ellison testified he never saw a gun that night. R. 432, ll. 18 – 20. He heard two or three gunshots, ducked, then ran towards the car. R. 432, l. 24 – 433, l. 10. White testified that the man “in the white shirt, he just started acting crazy, like he was about to pull out a gun, pulling up his shirt.” R. 488, ll. 10 – 20. The man in the white shirt was “clutching” like he was about

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<sup>2</sup> Multiple viewings of this video are unlikely to provide concrete proof of whether Samuel was holding a gun. (State's Ex. 101). The video's lack of clarity did not stop the solicitor from excoriating defense counsel in closing for suggesting that Samuel held a gun and claiming that Samuel only had dark-complected hands. R. 1109, ll. 17 – 23. During a closing argument that the Court of Appeals found improperly appealed “to the jurors’ sense of fear,” the solicitor called defense counsel’s argument “the most offensive thing that’s happened in the courtroom this week.” R. 1109, ll. 17 – 23. State v. Smith, 425 S.C. 20, 38, 819 S.E.2d 187, 196 (Ct. App. 2018) (“She improperly alluded to Appellant’s future dangerousness, which is irrelevant to his guilt of the charged offenses, in an attempt to appeal to the jurors’ sense of fear.”). As will be further explained below, the erroneous malice charge given by the trial judge relieved the jury of its duty to critically examine the evidence and decide whether the State had disproved self-defense beyond a reasonable doubt. Indeed, the jury deliberated for little more than one hour in a trial that spanned seven days. R. 1177, ll. 17 – 25.

to pull out a gun. R. 489, ll. 3 – 6. According to White, they kept walking and then heard gunshots and started running. R. 489, ll. 10 – 20. She did not see who fired a gun. R. 489, ll. 19 – 22.

In the statement White gave the night of the shooting, she told police that a man with braids had a gun. R. 495, ll. 22 – 24. White gave a fake name to the police when she gave this statement. R. 489, l. 23 – 490, l. 6. White said that the police did not accept her statement that another man had a gun. R. 496, l. 25 – 497, l. 9. White agreed with defense counsel that the police issued an arrest warrant and made her come to the station with her mother to “give a statement that they wanted.” R. 496, l. 25 – 497, l. 9. Shante Bethel agreed with White that she saw the man in the white shirt pull up his shirt and gesture. R. 535, ll. 20 – 24. She turned her head. R. 535, ll. 20 – 24. She never saw anyone fire a gun. R. 536, ll. 1 – 6. She did not see any members of the Samuel Group with a gun. R. 536, ll. 2 – 3.

Tucker testified that the Samuel Group was cruising through Five Points just “messaging with people pretty much.” R. 502, ll. 3 – 8. Tucker, who claimed to be “a law-abiding citizen,” said that before they went to Five Points he asked his friends if they had any guns on them. R. 502, ll. 18 – 25. R. 510, ll. 9 – 17. On cross-examination, Tucker admitted telling the police that Woodard was a liar and a member of a rival gang of the Bloods. R. 508, l. 17 – 509, l. 9. Samuel and Woodard tried to talk to the girls in the Smith Group. R. 504, ll. 4 – 17. One of the girls told them they did not have enough money. R. 504, ll. 10 – 17. Samuel pulled out some cash. R. 504, ll. 14 – 17. The Smith Group turned back in their direction and then he heard gunshots. R. 504, l. 18 – 505, l. 4. Tucker admitted that he walked away from the scene “[w]ith a smile.” R. 505, ll. 14 – 17.

Woodard denied being in a gang. R. 641, ll. 17 – 18. He said no one in his group had a gun that evening. R. 641, ll. 19 – 22. Woodard did not see who shot. R. 643, ll. 20 – 23. He admitted that after the shooting, he turned around and shot the bird (with both hands) at the Smith group. R. 643, ll. 3 – 13. Woodard was arrested that evening for disorderly conduct. R. 644, ll. 19 – 21. He had a pending assault and battery charge with the solicitor's office. R. 645, ll. 14 – 17. As for Samuel, even though the ATF knew that he was located in Lawrenceville Georgia, he refused to return to Columbia to testify because he was “fearful of gang retaliation.” R. 826, ll. 13 – 20.

Officer Theodore McLaughlin was on foot patrol in Five Points the night of the shooting. R. 341, ll. 10 – 16. He heard gunshots originating from the fountain area. R. 341, l. 21 – 342, l. 5. On direct examination, Officer McLaughlin claimed that he heard “[o]ne or 2” shots. R. 342, ll. 2 – 5. The report did not say that he heard a pair of shots. R. 356, l. 20 – 357, l. 3.

After hearing the gunshots, Officer McLaughlin ran toward the fountain. R. 342, ll. 6 – 19. He saw petitioner running with his hand in his coat pocket. R. 342, l. 20 – 343, l. 3. The officer could tell there was a heavy object in the pocket and caught Smith in front of a pizza restaurant. R. 342, l. 24 – 343, l. 20. He took a pistol from Smith's pocket and detained him. R. 344, l. 12 – 345, l. 18. Officer McLaughlin said the pistol “was still warm to the touch.” R. 346, ll. 1 – 3. Smith told Officer McLaughlin, “I didn't mean to shoot.” R. 350, ll. 3 – 9.

Officer McLaughlin put Smith in the back of the patrol car. R. 351, ll. 13 – 17. He turned on the recording device in the patrol car. R. 351, ll. 20 – 25. When asked whether Smith was in the back of the patrol car for “almost 2 hours,” Officer McLaughlin replied that he was not sure. R. 358, ll. 5 – 7. Smith was respectful. R. 358, ll. 22 – 23. The recording was entered into evidence without objection. R. 353, ll. 16 – 22.

Michael Painter (“Painter”) was visiting Five Points from Florence. R. 362, l. 10 – 363, l. 5. He was standing near the fountain. R. 363, ll. 6 – 9. He saw a “black man in a tan jacket and tan pants” standing on the corner. R. 363, ll. 10 – 16. Two black males wearing black shirts and jeans walked up to the man in the tan jacket. R. 363, ll. 13 – 23. Painter saw the two men confront the man in the tan jacket. R. 367, ll. 10 – 21. Painter saw “a muzzle flash and heard a pop, pop.” R. 364, ll. 1 – 2. The muzzle flash came from the man in the tan jacket who ran away from the fountain. R. 364, ll. 5 – 25. Painter did not see anyone else with a gun. R. 365, ll. 1 – 2.

The police found one shell casing at the scene. R. 372, ll. 11 – 20. The police found a blood stain near the fountain. R. 379, ll. 7 – 380, l. 9. The distance from the blood stain to the shell casing was approximately 110 feet. R. 394, ll. 13 – 15. Revolvers do not eject shell casings. R. 411, ll. 5 – 16.

Investigator Gilliam directed the crime scene investigator to collect gunshot residue samples. R. 408, ll. 8 – 14. The police collected gunshot residue samples from two subjects, Smith and Rondo Ellison. R. 373, l. 17 – 374, l. 22. Investigator Gilliam did not direct the collection of a gunshot residue sample from Donnell Woodard. R. 408, ll. 8 – 17.

*The Argument Below on the Felony Murder Instruction and the Trial Court’s Ruling*

After the close of the evidence, the trial judge heard argument from the parties on jury charges. R. 1038, l. 4 – 1059, l. 10. The State immediately conceded that the court should charge self-defense. R. 1038, ll. 7 – 8. Defense counsel then argued that a felony murder charge based on the gun indictments was improper because the gun offenses were “status” crimes. R. 1038, l. 12 – 1039, l. 13. Petitioner argued that carrying a gun illegally was unlike crimes

typically associated with felony murder, “like burglary, armed robbery, where you’re committing an act that is likely to lead.” R. 1038, ll. 18 – 22.

The State argued that the felony murder charge just gives the jury “another way to infer malice.” R. 1039, ll. 15 – 19. Judge Hood asked if any law limited the types of felonies to which the felony murder rule applied and the solicitor replied that she was unaware of any limitation. R. 1039, ll. 20 – 25. The solicitor then clarified her position, stating that the “only language” she had seen said “something about felonies that are inherently dangerous.” R. 1040, ll. 3 – 8. The solicitor then argued that a “person who is not allowed by law to carry a gun would be a felony and is inherently dangerous.” R. 1040, ll. 3 – 8.

Defense counsel argued that allowing the jury to infer malice from the defendant’s illegal possession of a pistol would make him “automatically responsible for the result.” R. 1040, l. 22 – 1041, l. 2. The court then read his proposed felony murder charge and asked the defense for any case “that says gun possession as a felony” does not trigger the rule. R. 1041, ll. 10 – 20. Defense counsel did not respond immediately with a citation, but argued that her research revealed that the felony murder rule “was intended for crimes such as kidnapping, armed robbery, burglary.” R. 1041, ll. 21 – 24. Judge Hood then took up other issues to allow defense counsel an opportunity to provide authority to the court. R. 1041, l. 25 – 1042, l. 7.

After taking up other questions, when the court returned to discussion of the felony murder rule, defense counsel cited Gore v. Leake 261 S.C. 308, 199 S.E.2d 755 (1973) and State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review). R. 1047, l. 7 – 1048, l. 2. Petitioner argued that the felony murder rule only applies “to those felonies which are inherently foreseeable dangers to human life.” R. 1047, ll. 10 – 12.

Judge Hood then ruled that he would give the felony murder charge. R. 1048, l. 17 – 1049, l. 21. The trial court stated:

I believe that the carrying of a firearm in these conditions **with the Defendant's criminal history** put everybody in an extreme risk of danger that was present in the area that night. . . .

So the difference in this situation is it's not like we have somebody in the community lawfully carrying a firearm that chooses to, you know, use it or to defend themselves. This is an individual **who based upon his prior criminal history** would not be allowed to carry a firearm period in state court or in federal court. And so I—you know, I think the unlawful carrying of a pistol by a convicted felon in our community in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, he knew was violent, he had been beaten up and assaulted rises to a different level, and I will charge the version of felony murder.

R. 1048, l. 23 – 1049, l. 21 (emphasis added). Judge Hood gave the following charge to the jury:

Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law.

You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if one attempts to kill another during the commission of a felony, the inference of malice may arise.

R. 1149, ll. 7 – 17. Petitioner specifically objected to this instruction after the court charged the jury and before deliberations began. R. 1165, ll. 18 – 23.

#### *The Court of Appeals' Decision*

The Court of Appeals affirmed and therefore drastically expanded South Carolina's felony murder rule to status crimes, also known as *malum prohibitum* offenses. State v. Smith, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018) The Court of Appeals attempted to limit its decision to the facts of this case. Id. at 41-42, 819 S.E.2d at 198 (“...the circumstances of this

specific case justified the circuit court’s instruction on the felony murder rule.”). But the decision cannot be limited to its facts because, logically, it would allow circuit judges to determine whether the felony murder rule can be expanded based on the facts before them. The question of law cannot be avoided so easily and the scope of South Carolina’s felony murder rule must first be decided.

The Court of Appeals also extended our error preservation rules to forbid citation of relevant authority and argument by analogy on appeal. *Id.* at 44-45, 819 S.E.2d at 200 (“The State argues Petitioner did not preserve his Belcher argument for review because he did not raise it at trial. We agree.”). By doing so, the court avoided considering the contradiction of allowing a jury to infer malice from possession of a deadly weapon in Smith’s case versus State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) *overruled in part by State v. Burdette*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, Op. No. 27910 (July 31, 2019), which forbids charging a jury that they may infer malice from the use of a deadly weapon. Today, in Burdette, this Court did away with this inferred malice charge in all factual circumstances. And as will be seen in Issue 2 below, the court erred in finding any error harmless based on the doctrine of transferred intent and by improperly weighing the credibility of the witnesses. Smith at 47, 819 S.E.2d at 201 (“These undisputed facts **belie Petitioner’s claim that he was acting in self-defense** and, instead, show express malice and his specific intent to kill at least one of the three men he encountered. Moreover, the State showed specific intent *as to Victim* through the doctrine of transferred intent.”) (emphasis added).

### Discussion

South Carolina has never applied the felony murder rule to status firearm offenses. The trial court’s erroneous felony murder charge allowed the jury to infer malice solely from

petitioner's possession of a firearm. As argued by trial counsel, illegally possessing a firearm is a status crime, not an inherently dangerous *malum in se* crime, and does not provide a sufficient basis to charge the felony murder rule. See Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973) (discussing application of rule to crimes that are inherently evil, or *malum in se*, and criticism of applying rule to other crimes (*malum prohibitum*)).

The giving of a felony murder instruction in this case was particularly egregious because petitioner received a self-defense charge. At the time this case was tried, it was error under Belcher to charge an inference of malice from the use of a deadly weapon when evidence mitigating the crime exists. Now, this charge is always improper no matter the evidence. Burdette. If it is improper to charge that malice may be inferred from the use of a deadly weapon, then allowing a jury to infer malice from the mere possession of a deadly weapon is manifestly erroneous. The trial court's charge transformed a crime of specific intent into one of strict liability.

#### South Carolina's Felony Murder Rule

Gore contains this Court's most expansive discussion of the felony murder rule, but left for another day the rule's ultimate scope. Gore at 315-18, 199 S.E.2d at 757-59. Gore involved a burglary. Id. at 312-14, 199 S.E.2d at 756-57. A homeowner surprised thieves in her house. Id. The thieves were seen in Gore's car a few blocks away minutes after the robbery. Id. The police chased the car and the culprits crashed. Id. The police and the thieves had a gun battle. Id. Gore fled into the woods and was wounded by a shot from the police. Id. One of his confederates shot and killed a police officer. Id. The jury charge given by the trial judge blended an accomplice liability charge with the felony murder rule. Id. at 314-15, 199 S.E.2d at

757. The examples of felonies given by the trial court were grand larceny, robbery, and burglary. Id.

The Court surveyed the current status of the felony murder rule in other jurisdictions and in scholarly commentary. Id. at 315-18, 199 S.E.2d at 757-59. The Court first noted that many jurisdictions had statutory versions of the felony murder rule, but no such statute existed in South Carolina. Id. The Court stated that South Carolina had “consistently followed the common law rule” and quoted an early case: “Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder.” Id. quoting State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891).

The Gore Court dismissed the defendant’s argument because his cases involved “statutory offenses which were *malum prohibitum* rather than *malum in se*.” Id. “*Malum in se*” means “A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law.” Black’s Law Dictionary, (6<sup>th</sup> Ed. 1990). “An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.” Id. “*Malum prohibitum*” means “a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law.” Id. The dismissal of the defendant’s argument based on examples of *malum prohibitum* acts is perhaps an indication that the Court believed that the rule would not apply to such crimes.

Expanding on the difference between *malum in se* crimes and *malum prohibitum* crimes, the Gore Court stated:

Finally, in this connection attention is called to the fact that the felony-murder rule and the application thereof to a homicide committed in connection

with the perpetration of ‘any felony’ has been increasingly criticized and/or modified by a number of writers and courts. It is argued that even though the rule might have sufficient justification when its operation is predicated upon the commission of an inherently dangerous felony, **there is no room for the logical application of that doctrine where the felony committed was not an inherently dangerous one.**

Gore at 316, 199 S.E.2d at 758 (emphasis added). The Court then noted the difference in how jurisdictions decide whether a felony is inherently dangerous. Id. at 316-17, 199 S.E.2d at 758-59. While some jurisdictions considered only the elements of the crime in the abstract, other considered both the nature of the felony and the circumstances surrounding its commission. Id. Ultimately, the Court determined that it did not need to decide this issue because the felony murder rule clearly applied to a burglary and shootout with the police. Id.

The cases cited by Gore as examples of previous applications of the felony murder rule in South Carolina involved inherently dangerous crimes. In State v. Cannon, 49 S.C. 550, 27 S.E. 526 (1897), a felony murder charge was given in a burglary case. Levelle involved a suicide which was described as *malum in se*. Levelle, 13 S.E. at 321. State v. Johnson, 156 S.C. 63, 152 S.E. 825 (1930) contains limited facts, but one of the exceptions refers to the defendants stealing a watch or money, which likely means that the court applied the felony murder rule to a robbery. In State v. Williams, 189 S.C. 19, 199 S.E. 906, 907-08 (1938), the underlying felony was attempted murder. In State v. Woods, 189 S.C. 281, 1 S.E.2d 190, 193 (1939), the underlying crime was escape. In State v. Ciesielski, 213 S.C. 513, 515, 50 S.E.2d 194, 194 (1948), the underlying crime “was robbery or burglary.” All of these crimes are *malum in se* and inherently dangerous. None of them approach the status offense in Smith’s case.

This Court next discussed the felony murder rule in the death penalty case of State v. Yates, 280 S.C. 29, 210 S.E.2d 805 (1982). Yates and a confederate robbed a rural store armed

with a pistol and knife. Yates at 33, 310 S.E.2d at 807-08. Yates shot the clerk, but did not kill him. Id. The clerk's mother entered the store and Yates ran with the money. Id. Yates' accomplice stabbed the clerk's mother to death, but the clerk got a gun and killed the accomplice. Id.

Yates asked the Court to strike armed robbery as an aggravating circumstance because of the prospect he was convicted on a theory of vicarious liability. Id. at 34, 310 S.E.2d at 808. Rejecting Yates' argument, the Court stated, "Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder." Id. While not a true felony murder case, the underlying felony—armed robbery—would certainly trigger its application as a *malum in se* crime.

In 1985, the Court promulgated a jury charge on implied malice and the felony murder rule. State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 342-43 (1985). The underlying felony in Norris was rape. Id. at 89, 328 S.E.2d at 341. The trial judge in Norris gave a felony murder charge nearly identical to the charge given by Judge Hood in this case:

The law also allows the jury to infer malice if you conclude that the homicide was a proximate, direct result of the commission of a felony. And for that regard, criminal sexual conduct in the first degree would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow.

Id. at 91, 328 S.E.2d at 342 (emphasis removed). The Court, instead of approving the charge given by the trial judge in Norris (and the one given by Judge Hood), promulgated its own "proper charge on implied malice." Id. at 92, 328 S.E.2d at 342-43. The Supreme Court's implied malice charge is:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. The Court's citation for its malice charge indicates that it created this charge from the inference of malice from use of a deadly weapon. Id. citing State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

In this case, Judge Hood did not give this Court's approved Norris charge, but instead used the trial judge's charge quoted in the Norris opinion. R. 1149, ll. 7 – 17. Not only was charging felony murder error in this case, the court also used the wrong felony murder charge. Furthermore, the underlying crime in Norris was undoubtedly a *malum in se* crime—rape. The question of the applicability of the felony murder rule to rape was not seriously in question in Norris.

In 2008, the Supreme Court reversed a murder conviction and a life sentence because of trial counsel's failure to object to an improper felony murder charge. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). The underlying crime in Lowry was armed robbery—unquestionably a *malum in se* crime. Id. at 502, 657 S.E.2d at 761. The trial court originally gave the Supreme Court's approved Norris charge on felony murder. Id. at 502, 657 S.E.2d at 762. After the jury was sent to deliberate, the solicitor claimed not to have heard the trial judge's felony murder charge. Id. The trial judge brought the jury back to the courtroom and gave an altered felony murder charge: “That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to

commit a felony makes the killing murder.” Id. at 503, 657 S.E.2d at 762. The defendant’s attorney did not object to this charge. Id.

The Supreme Court held that the additional charge shifted the burden of proof to the defendant and created a mandatory presumption of malice. Id. at 504-07, 657 S.E.2d at 763-64. The Court also held that the additional charge contradicted the proper Norris charge and “exacerbated the error by confusing the jury as to its fact-finding duties with respect to Petitioner’s murder charge.” Id. While Judge Hood’s instruction did not create a mandatory presumption of malice with language such as “makes the killing murder,” Lowry demonstrates the importance of using the correct Norris charge, not confusing the jury, and reducing the State’s burden of proof.

*Contradictions with Implied Malice and the Court of Appeals’ Issue Preservation Error*

The Court of Appeals refused to consider what was until today’s decision in Burdette, the leading case on implied malice in the last twenty years, Belcher. The court held any reference to Belcher was unpreserved. This Court’s opinion in Burdette makes the refusal to consider the logical applicability of these cases even more problematic. Petitioner readily concedes the trial lawyer never cited Belcher. But, as is required in an appeal, petitioner conducted additional research and made arguments by analogy to Belcher. Petitioner also brought to the court’s attention the inherent contradiction that would arise if the felony murder rule for possession of a firearm was used in a self-defense case where the trial judge could not charge that malice could be inferred from the use of a deadly weapon. Petitioner also gets the benefit of Burdette because it was issued during the pendency of his appeal.

The Court of Appeals erred in its issue preservation analysis. Without question, the application of the felony murder rule to a status crime as was done in this case is a novel legal

issue in South Carolina. In petitioner's argument concerning the improper felony murder rule instruction, petitioner cited Belcher to show the court why it should not expand the felony murder rule in this novel way. Petitioner did not cite Belcher as part of a separate issue on appeal, but in an attempt to show the court the felony murder instruction given in this case is inconsistent with South Carolina law on inferred malice and should not be expanded.

Like the felony murder rule, Belcher deals with an instruction on implied malice and is one of the most important implied malice cases in South Carolina. Petitioner cited Belcher for the point that if it is improper to charge a jury that it cannot infer malice from the use of a deadly weapon, then it is improper to charge the jury that it can infer malice from the mere possession of a deadly weapon as was done in this case. Burdette only increases the logical force of this argument. The question before the Court of Appeals was whether a status offense such as felon in possession of a firearm can form the basis of a felony murder rule charge. Petitioner applied the reasoning of Belcher to this case and did create a brand new issue on appeal. The logic of Belcher unquestionably bears on this question, yet the court mistakenly refused to even consider this logic because the trial lawyer never cited Belcher. South Carolina has *issue* preservation rules, not *analogy* or *research* preservation rules.

The point of an appeal should be to reach the right result on the law. In every case, appellate courts conduct their own research to find the right result. Had the court applied Belcher as a result of its own research, no one would bat an eye because of the clear applicability of Belcher's logic to the case at bar. Yet, under the reasoning of the opinion below, because petitioner cited the case, precedent from this Court whose logical applicability cannot be questioned must be ignored and a contradiction created in the law that must be solved by a future

court. No such preservation rule exists. Appellate lawyers must conduct extensive research and bring precedent from both South Carolina and other jurisdictions to the Court's attention.

However, even if such a rule existed, it would have little utility and would waste judicial resources. This Court owes no deference to a trial court on purely legal issues. Purely legal ideas—like the logical force of an analogy to Belcher or Burdette—are reviewed de novo. This Court neither needs nor defers to the opinions of trial judges on pure questions of law. Refusing to consider the logical application of a case or an analogy has zero utility except to play “gotcha” with criminal defense attorneys. Atlantic Coast Bldrs & Contractors v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring).

Belcher shows that the problems which led to a reversal in Lowry are present in petitioner's case. In Belcher, the Supreme Court overturned decades of jurisprudence that allowed juries to infer malice from the use of a deadly weapon even when evidence of justification, excuse, or mitigation existed. Belcher at 612, 685 S.E.2d at 810. Belcher received a self-defense charge. Id. The Court found that allowing the jury to infer malice from the use of a deadly weapon where self-defense was charged was both inaccurate and confusing. Id. at 609-12, 685 S.E.2d at 808-10. With Burdette, this Court has forbidden this charge.

The court's charge here allowed the jury to infer malice solely from Smith's admitted guilt on the weapons charges. The jury also could have found that Smith acted in self-defense, but because of the weapons charges, convicted him despite his justification in shooting. The same confusion and prejudice that the Court found erroneous in Belcher and Burdette are present in petitioner's case.

Furthermore, if the court's felony murder charge is allowed to stand, then our state's malice jurisprudence will contain a massive contradiction. Burdette forbids charging the jury on

the inference of malice from the use of a deadly weapon. The jury charge in this case, if approved, would allow the inference of malice from the mere possession of a deadly weapon. Burdette shows a preference for removing any charges dealing with facts and inferred malice and leaving it to attorneys in closing argument to draw these inferences for jurors. The reasoning from Burdette also applies to this case. Logic and consistency mandate elimination of this contradiction.

*The Felony Murder Rule's Application to Status Firearm Offenses in Other Jurisdictions*

In most states, the felony murder rule is a creature of statute and limits its application to enumerated felonies. See The Hon. Rudolph J. Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763, 766 (Fall 1999). None of these states apply the felony murder rule to status firearm offenses. See Guyora Binder, Making the Best of Felony Murder, 91 B. U. L. Rev. 403, 450-53 and n.262-79 (Mar. 2011). See also, e.g., Alaska Stat. Ann. § 11.41.100(a) (limiting crimes for first-degree murder to sex offenses and kidnapping of children, first-degree criminal mischief, and terroristic threatening), Alaska Stat. Ann § 11.41.110 (limiting crimes for second-degree murder to arson, kidnapping, sexual assaults, burglary, escape, robbery, and certain drug crimes); Cal. Penal Code § 189 (limiting felonies to arson, rape, carjacking, robbery, mayhem, kidnapping, train wrecking, sex crimes, or shooting a firearm from a motor vehicle); 720 Ill. Comp. St. § 5/9-1(a)(3) (stating that felony murder rule applies to “forcible” felonies), 720 Ill. Comp. St. § 5/2-8 (defining “forcible felony” as including treason, murder, sexual assaults, robbery, kidnaping, burglary, and arson); N.D. Cent. Code § 12.1-16-01(1)(c) (listing applicable felonies as treason, robbery, burglary, kidnaping, arson, felony offenses against children, and escape); Me. Rev. Stat. Ann. Tit. 17-A, § 202(1) (defining felony murder as applying to robbery, burglary, kidnapping, arson, sexual assault, and escape); Nev.

Rev. Stat. Ann. § 200.030(1)(b) (limiting felonies for first-degree murder to sexual assault, kidnapping, arson, robbery, burglary, home invasion, sex crimes, and child/elder abuse); N.H. Rev. Stat. Ann. § 630:1-a (limiting felonies for first-degree murder to sexual assault, armed robbery, burglary, and arson), N.H. Rev. Stat. Ann. § 630:1-b (limiting second-degree murder to Class A felonies), N.H. Rev. Stat. Ann. § 159:3 (stating possession of a firearm by a convicted felon is a Class B felony); N.H. Rev. Stat. Ann. § 159:4 (stating that carrying a concealed pistol without a license is a Class B felony); N.J. Stat. Ann § 2C:11-3(a)(3) (limiting felonies for murder to robbery, sexual assault, arson, burglary, kidnapping, carjacking, escape, and terrorism); 18 Pa. Cons. Stat. Ann. § 2502(b) (enumerating felonies for second-degree murder as robbery, rape, arson, burglary, and kidnapping); W.Va. Code Ann. § 61-2-1 (enumerating felonies for felony murder as arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape, of felony drug manufacturing). Two states legislatively abolished the felony murder rule. See Haw. Rev. Stat. Ann. § 707-701 (abolishing felony murder rule); Ky. Rev. Stat. Ann. § 507.020 (abandoning felony murder rule as an independent basis for establishing an offense of homicide). The omission of status firearm offenses from felony murder statutes shows that the legislatures of the several states recognize that the felony murder rule should only apply to *malum in se* crimes. The number of states with a statutory definition of felony murder counsels judicial restraint in drastically expanding this doctrine in South Carolina. Any such expansion should be left to the Legislature.

Even where a statutory felony murder rule applies on its face to “any” felony and does not enumerate specific felonies, courts have limited their reach to inherently dangerous felonies. See State v. Anderson, 666 N.W.2d 696 (Minn. 2003). The Minnesota Supreme Court’s opinion in Anderson is instructive. In Anderson, the defendant killed the victim with a stolen shotgun and

the underlying crimes for the felony murder rule were felon in possession of a firearm and possession of a stolen firearm. Id. at 697. The court confronted Minnesota’s second-degree murder statute, which provided that a person was guilty if they killed a person “while committing or attempting to commit a felony offense.” Minn Stat. Ann. § 609.19, subd. 2(1). Analyzing the statutory language, the court stated, “Admittedly, under its plain language, except for the three specified exceptions, the statute appears to apply to all other felonies.”<sup>3</sup> Anderson, 666 N.W.2d at 700.

Despite this “plain language,” the court determined that the statute did not apply to status firearm offenses. Id. at 698-701. The court examined the history of the felony murder rule in America. Id. The felony murder rule was originally limited in scope because there were few felonies, they were all *malum in se*, and they were all punishable by death. Id. *citing* James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 Wash. & Lee L. Rev. 1429 (1994); 2 Wayne R. LeFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5 (1986). The court noted that as the number of felonies expanded to include “comparatively minor offenses. . . . many courts have judicially limited the application of the doctrine so that not every felony offense serves as a predicate felony for a felony-murder charge.” Anderson, 666 N.W.2d at 699.

The Minnesota Supreme Court ultimately concluded that “the predicate offenses of felon in possession of a firearm and possession of a stolen firearm are not inherently dangerous.” Id. at 701. The court distinguished use of a firearm from possession of a firearm. Id. The court found that possession of a firearm by a felon was not dangerous in the abstract and did not have the “special danger” or imminency as the violent crimes traditionally associated with the felony

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<sup>3</sup> The exceptions are violent crimes, such as criminal sexual conduct, which make the crime first-degree murder. Minn Stat. Ann. § 609.19, subd. 2(1).

murder rule. *Id.* See also Griffin v. Commonwealth, 533 S.E.2d 653, 658-60 (Va. 2000) (reversing felony murder conviction based on predicate offense of possession of a firearm by a convicted felon); People v. Satchell, 489 P.2d 1361, 1370 (Cal. 1971) (reversing a felony murder conviction based on the predicate offense of felon in possession of a concealable firearm and stating, “[W]e find it difficult to understand how any offense of mere passive possession can be considered to supply the element of malice in a murder prosecution.”) *overruled on other grounds by* People v. Flood, 957 P.2d 869 (Cal. 1998).

In a recent case from West Virginia, that state’s highest court decided that the felony murder rule had no place in the prosecution of an attempt crime. State v. Sanders, 827 S.E.2d 214 (W.Va. 2019). The Sanders court determined that felony murder only applies when a homicide occurs. *Id.* at 217-18. The court reasoned that “[A] felony-murder theory eliminates the State’s burden to prove specific intent.” *Id.* Like West Virginia, South Carolina’s attempted murder statute contains a specific intent requirement and this reasoning applies here with equal force. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). The Sanders court stated that it was joining “the majority of the jurisdictions that have examined this precise issue and have similarly rejected the crime of attempted felony-murder.” Sanders, 827 S.E.2d at 219-20 (citing cases from over twenty jurisdictions that have refused to recognize a crime of felony attempted murder).

*Petitioner’s Self-Defense Charge Negates the Felony Murder Rule*

South Carolina’s self-defense and accident jurisprudence further supports adoption of the reasoning of Anderson and the other states that conclude that the felony murder rule does not apply to a status firearm offense. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). In Burriss, the defendant illegally possessed a pistol because he was too young. *Id.* at 259, 513

S.E.2d at 106. The trial judge refused to charge accident because the defendant “was not acting lawfully because he was in unlawful possession of a firearm.” Id. Examining earlier self-defense and accident cases, the court held that “a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” Id. at 262, 513 S.E.2d at 262 *citing* State v. McCaskill, 300 S.C. 256, 300 S.E.2d 268 (1990) and State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). Under Burriss—and as recognized by the trial judge in charging self-defense—petitioner’s status firearm offenses did not prevent a self-defense charge. Like Burdette, the rule from Burriss further causes contradiction and confusion in a jury charge if status firearm offenses can serve as the predicate for felony murder where self-defense is charged. If the rule advocated by the State is adopted, a reformed felon who was the victim of a vicious assault by a gunman would be entitled to arm himself in self-defense with the gunman’s firearm under Burriss, but also be subject to prosecution for felony murder the minute he possessed the gun.

The Kansas Supreme Court confronted the contradiction between the felony murder rule and self-defense in State v. Underwood, 615 P.2d 153 (1980). Prior to its decision in Underwood, Kansas allowed status firearm crimes to serve as the predicate offense for felony murder. Underwood, 615 P.2d at 300-01. The defendant in Underwood was a felon in possession of a firearm and returned with a gun to the scene of an earlier argument. Id. at 155-56. The defendant ultimately shot the man with whom he had argued and claimed self-defense at trial. Id. The Underwood court overruled its earlier precedent, partially because of the conflict between the felony murder rule and self-defense. Id. at 162-63. The court concluded that “filing a charge under the felony murder rule in most, if not all, cases removes any possibility of establishing the defense of self-defense.” Id. In part because of this intractable legal dilemma,

the court held that status firearm crimes would no longer provide the predicate offense for felony murder. Id. Like in Underwood, the trial court's felony murder charge in this case negated the jury's duty to determine whether the State disproved self-defense beyond a reasonable doubt.

Simply put, mere possession of a firearm is not inherently dangerous. U.S. Const. Amend. II. S.C. Const. art. I, § 20. Possession of a firearm by a convicted felon is *malum prohibitum* and is not inherently dangerous. This Court should not expand our common law felony murder rule to include status firearm offenses, particularly in a case where self-defense is charged. If such an expansion were to take place, it should be left to the Legislature to do so—as shown by the multitude of legislative enactments concerning the felony murder rule by the several states. The trial court's felony murder charge allowed the jury to infer malice when it was undisputed petitioner had no intent to shoot the victim. The charge contained an inherent contradiction and was confusing. State v. Rothell, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990). This Court should reverse.

Petitioner was entitled to a direct verdict on the attempted murder charge because the State failed to prove petitioner had the specific intent to kill the victim where it was undisputed that the victim was not petitioner's intended target in self-defense.

In State v. Williams, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, Op. No. 27893, 2019 WL 2440954 (June 12, 2019), this Court decided to “leave for another day” the question of whether the doctrine of transferred intent applies to attempted murder. That day has come. Unlike in Williams, Smith's case was tried as a specific intent crime and the trial judge charged the jury that “attempted murder requires the specific intent to kill.” R. 1148, ll. 15 – 16. Therefore, resolution of this case depends upon the conflict between the specific intent requirement from King and the doctrine of transferred intent.

Even assuming that the bullet in Childress's spine came from petitioner's gun, no evidence existed that Childress was petitioner's target. The State conceded this point in its closing argument. R. 1071, ll. 24 – 25. The State relied wholly on the felony murder rule and the doctrine of transferred intent to prove the intent element of attempted murder. R. 1070, l. 24 – 1074, l. 19.

After the close of the evidence, petitioner moved for a directed verdict on the attempted murder charge. R. 1036, ll. 11 – 19. Defense counsel argued that attempted murder is a “specific attempt crime” and that the State had not proved petitioner had “the specific intent to commit a murder under the statute.” R. 1036, ll. 11 – 19. The solicitor responded that her position was “that firing into a crowd . . . would be a specific intent to kill.” R. 1037, ll. 1 – 4. The trial judge denied petitioner's motion. R. 1077, ll. 5 – 9.

Because attempted murder requires specific intent under King, the transferred intent doctrine does not apply. If the doctrine of transferred intent applies to attempted murder, it would water down the element of specific intent to the point where its meaning would be hard to distinguish from general intent. King states that without express malice or specific intent, a “crime 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.” King at 26-27, n.5, 810 S.E.2d at 63-64, n.5. The dissent in King agreed with the majority that, after its ruling, the notion of implied malice for specific intent crimes would be problematic. Id. at 73-74, n.9, 810 S.E.2d at 32, n.9. Transferred intent is just another way to infer or imply malice and King indicates that doing so for a specific intent crime is improper. Everything in King indicates that transferred intent does not apply to this specific intent crime.

Considering the careful analysis given to the Legislature’s intent in King, South Carolina should adopt the rationale of a jurisdiction like Alabama, which declined to read transferred intent into its statutory crime of attempted murder. Cockrell v. State, 890 So.2d 174 (Ala. 2004). The Alabama Supreme Court’s decision in Cockrell is well-researched and cites the differing points of view around the nation, including South Carolina law as it existed under ABIK. Id. at 175-82. After analyzing the various rules adopted by other jurisdictions and the intent of the Alabama legislature, the court applied the rule of lenity and determined that it would not adopt transferred intent for attempted murder. Id. at 180-82.

Particularly helpful from Cockrell is the concurrence of Justice Harwood. Id. at 183-84. Justice Harwood wrote separately to emphasize that the Alabama legislature had ““covered all the bases”” with both attempted murder and the different degrees of assault and battery. Id. He wrote, “This complete allocation of criminal culpability under a comprehensive legislative

scheme furnishes some insight concerning the legislative intent regarding the applicability of the doctrine of transferred intent to the offense of attempted murder.” Id. South Carolina’s comprehensive statutory scheme enacted in 2010 along with the attempted murder statute created new degrees of assault and battery. See S.C. Code Ann. § 16-3-600. The logic of Justice Harwood’s concurrence applies in South Carolina.

Just as in Alabama, our Legislature “covered all the bases” with attempted murder and the different degrees of assault and battery. If an unintended victim dies, the defendant can be prosecuted for murder because it remains a general intent crime and the intent can be transferred. If an unintended victim lives, the defendant can be prosecuted for attempted murder for the intended victim and one of the assault and battery crimes enacted by the Legislature according to the degree of intent and harm for the unintended victim. By “covering all the bases,” the Legislature ensured that a guilty defendant cannot “get away with” attempted murder. Therefore, unlike a homicide, the judicial fiction of transferred intent is unnecessary.

The Alaska Supreme Court recognized both this rationale of applying the varying degrees of assault and battery given by the legislature and the absurd results that can arise from applying transferred intent to attempted murder in Ramsey v. State, 56 P.3d 675 (Alaska 2002). Ramsey dealt with a tragic school shooting. Ramsey, 56 P.3d at 676-77. The defendant walked into a high school cafeteria with a shotgun and pointed it at a student named Palacios. Id. When Palacios turned around, the defendant fired. Id.

The shotgun blast killed Palacios and pellets from the shotgun injured two other students, SM and RL.<sup>4</sup> Id.

The Ramsey court dealt with the question of whether the defendant's specific intent to kill Palacios could be transferred to SM for attempted murder. Id. at 680-83. After noting the split in jurisdictions on the issue, the Alaska Supreme Court decided not to apply transferred intent to its attempted murder statute which, like South Carolina's, required specific intent. Id. The court explained part of its reasoning by carrying the prosecution's argument to its logical, but absurd, conclusion:

The problem with the State's argument is that its logic leads to the conclusion that Ramsey could have been found guilty of the attempted murder of everyone in the school. The jury certainly found that Ramsey intended to cause the death of Palacios. And because his actions would have placed almost any reasonable person in the school in fear of serious physical injury, it is hard to say where the State's attempted murder theory would stop. A defendant can be found guilty of attempted murder whether or not he actually injures his intended victim. Therefore, the State's argument, carried to its logical extension, would allow it to convict Ramsey of the attempted murder of everyone in the building.

Id. at 681-82. Like the concurrence in Cockrell, the Alaska court rejected this absurd result by relying on its legislature's creation of multiple degrees of assault and battery. Id. at 682-83. The court held the jury should have been instructed that it needed to find that Ramsey had the specific intent to kill SM to find him guilty of attempted murder and needed to assess Ramsey's criminal intent and actions as to each of the remaining victims under the different degrees of assault and battery. Id. The Ramsey court's observation begs the question of whether Smith

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<sup>4</sup> The defendant continued his rampage through the school. Id. He fired into the ceiling and pointed a gun at other teachers. Id. He shot and killed the principal. Id. He fired at police officers who responded to the shooting, but then surrendered. Id. The defendant was ultimately convicted of two counts of first-degree murder, one count of first-degree attempted murder, and fifteen counts of third-degree assault. Id. A note left behind by the defendant provided some evidence that the principal was the defendant's primary focus, but also indicated that he intended to kill other, unidentified individuals. Id. at 677.

could have been charged with the attempted murder of every person in Five Points that night under the State's theory of transferred intent.

Like Alaska and Alabama, South Carolina's Legislature enacted a comprehensive statutory scheme for attempted murder and assault and battery. South Carolina also requires specific intent for attempted murder. The judicially created fiction of transferred intent is simply not required in this state to fully punish a defendant or to correctly charge a jury.

The Alaska court's rationale serves a workable balance when a trial court is confronted with a case with horrific facts like the school shooting in Ramsey. Rejecting transferred intent does not mean that a mass shooter or bomber like Ramsey cannot be charged with multiple counts of attempted murder. It only means the state cannot rely on transferred intent to convict the defendant of multiple counts of attempted murder. For example, no evidence suggests the monstrous shooter in Las Vegas intended to kill any one specific person at the music concert, but it certainly suggested he specifically intended to kill every person at the concert. Nothing would prevent the State from charging a mass shooter or bomber with the attempted murder of multiple victims in such a scenario. But such monsters are different from a defendant who may have the intent to kill a specific person, but misses. Rejecting transferred intent for attempt crimes does not deprive the State of any necessary tool to fully prosecute criminals and ensures that the law prevents overreaching by the State in other cases.

Also indicating that this Court should reach the same result is the rule of lenity. The Supreme Court of Connecticut applied the rule of lenity to reject transferred intent for attempted murder. State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993). "A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed or no one is even injured." Id. "The doctrine of transferred intent, generally

considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor.” Id. Just like South Carolina, Connecticut applies the rule of lenity. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (“Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.”). The rule of lenity, combined with the force of its own logic, led the Hinton court “to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder.” Hinton, 630 A.2d at 602.

California also rejects the doctrine of transferred intent for attempted murder. People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005). Attempted murder in California requires the specific intent to kill. Id. at 734. California recognizes transferred intent for murder, but not attempted murder. Id. at 735. California interprets specific intent as the intent to kill a specific victim. Id. “Whether the defendant acted with the specific intent to kill ‘must be judged separately as to each alleged victim.’” Id. quoting People v. Bland, 48 P.3d 1107 (Cal. 2002).

The facts of Smith are instructive. The defendant fired a single shot into a car, narrowly missing both a baby and its mother. Id. at 736-37. He was found guilty of attempted murder of both the baby and the mother. Id. The court distinguished motive and intent. Id. Like in South Carolina, motive is not required. Id. However, because the defendant knew both the baby and the mother were in his line of fire, the court found specific intent as to both victims with no need for transferred intent. Id. at 737-38.

In State v. Brady, 903 A.2d 870 (Md. 2006), the Court of Appeals of Maryland considered its own tumultuous precedent and cases from other jurisdictions and decided not to apply transferred intent to attempted murder. The Brady court noted that in 1988, it initially decided that transferred intent would apply to attempted murder, but four years later, in 1993,

reversed course. Id. at 876-78 citing State v. Wilson, 546 A.2d 1041 (Md. 1988) and Ford v. State, 625 A.2d 984 (Md. 1993). The defendant in Brady shot at a fleeing apartment resident, missed, and injured another resident. Brady, 903 A.2d at 882-83. The court held that the defendant could be “convicted only of the attempted murder of the intended victim and transferred intent does not apply.” Id.

This Court should adopt the reasoning of states like Alabama, Alaska, California, Connecticut, and Maryland. These courts’ analyses apply with great force in South Carolina because here, a defendant can be charged with the attempted murder of his intended victim even if the intended victim is not injured. We also require specific intent. Unlike murder, a defendant cannot “get away with” attempted murder if his aim fails and can be fully punished under the Legislature’s comprehensive statute. Refusing to expand the judicially created fiction of transferred intent gives effect to our Legislature’s statutory scheme.

South Carolina’s version of attempted murder requires specific intent and South Carolina uses the rule of lenity. The State elected to prosecute petitioner for the attempted murder of Childress instead of the attempted murder of Daquan Samuel, Byron Tucker, and Donnell Woodard.<sup>5</sup> An injury to the victim is not a required element of attempted murder. S.C. Code Ann. § 16-3-29. Therefore, this Court should apply the reasoning of Hinton to this case and hold that South Carolina does not apply transferred intent to attempted murder. Without the doctrine of transferred intent, no evidence existed to sustain petitioner’s attempted murder conviction and the case should only have gone to the jury on the lesser included offenses. This Court should reverse.

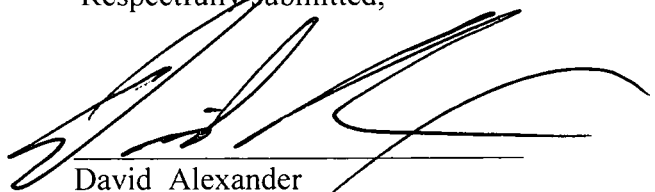
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<sup>5</sup> This Court should take note that unlike the many reported decisions dealing with this issue where the defendants were tried for crimes related to both the intended and unintended victims, here Smith was not tried (nor has ever been tried) for any crime related to Samuel, Tucker, or Woodard.

**CONCLUSION**

The State overreached in this highly publicized criminal trial. The Court of Appeals criticized the solicitors for this overreaching in this case and cited other examples from Richland County. The State's zeal to secure a conviction ultimately led to severe legal errors by the trial court that require correction. This Court should reverse petitioner's attempted murder conviction and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender


ATTORNEY FOR PETITIONER

This 31st day of July, 2019.

CERTIFICATE OF COUNSEL FOR PETITIONER

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 31, 2019



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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

RECEIVED  
JUL 31 2019  
S.C. SUPREME COURT

THE STATE,

RESPONDENT,

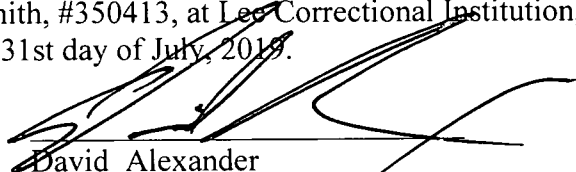
V.

MICHAEL JUAN SMITH,

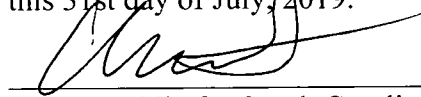
PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Michael Juan Smith, #350413, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 31st day of July, 2019.

  
David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 31st day of July, 2019.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina

My Commission Expires: *October 26, 2019*