

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2018-002050

RECEIVED

Apr 21 2020

S.C. SUPREME COURT

The State,

Respondent,

v.

Michael Juan Smith,

Petitioner.

PETITION FOR REHEARING

On March 18, 2020, this Court, in a Per Curiam opinion, reversed and remanded Petitioner's convictions finding "felony attempted-murder is not a recognized crime" and the subsequent jury instruction regarding the ability of the jury to infer malice if the jury concludes attempted murder was the proximate direct result of the commission of a felony was in error. This Court unnecessarily reversed all of Petitioner's convictions. This Court has overlooked the facts of this case¹, its own case law, and the actions of the legislature since this Court's opinion in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), was issued in the following ways:

- The State did not charge the Court's created "felony attempted-murder offense," but instead charged attempted murder pursuant to the statute. Consequently, and entirely consistent with the way the legislature wrote the attempted murder law, the State sought to prove malice aforethought through both express and implied malice.

¹ Inexplicably, the Court fails to even recognize the real victim of Petitioner's malicious actions, Martha Childress, by name.

- The legislature was presented with this Court's holding in King setting the required mental state as specific intent along with the Court's finding that the holding was inconsistent with the language allowing for a finding of implied malice. In response to this Court's recognition that the legislature would need to remove implied malice from the attempted murder statute in order for it to be consistent, the legislature has taken no action to codify this Court's clear modification of the statute. As a result, the legislature has repudiated this Court's finding that specific intent must apply and proving malice aforethought through implied malice is unavailable.
- Any error in charging the jury that it could **infer** malice from the fact the attempted murder was proximately caused by Petitioner's participation in a felony was **entirely harmless** in light of the fact that this Court correctly recognized the jury had to find **express** malice existed in order to convict for attempted murder and that the charge was unnecessary to the determinations to be made by the jury.
- This Court's attempt to vilify the prosecutors for the State by labeling relevant and appropriate victim medical evidence as "gross prosecutorial overreach" should be removed. No issue was ever raised on appeal related to the medical testimony and the testimony regarding the extent of Martha Childress' injuries was entirely relevant to prove the specific intent to kill as well as further demonstrated the maliciousness of Petitioner's actions. Significantly, admitting pertinent victim medical evidence is not an attempt to "improperly appeal to the emotions of the jury" but instead, utilizing properly admitted evidence to establish the elements the State had to prove based on section 16-3-29 of the South Carolina Code.

- Utilizing a completely unraised issue, in order to further support its incorrect finding that the error in giving a completely unrelated jury charge was not harmless violates this Court's repeated statements regarding how an appellate court is to determine whether an incorrect jury charge is harmless.
- This Court's holding clearly reducing the culpability of Petitioner's actions because an innocent bystander was struck instead of his intended victim is in direct contravention of its recent holding in State v. Young, Op. No. 27942 (S.C. Sup. Ct. filed March 12, 2020).
- This Court should address the doctrines of transferred intent and concurrent intent. This Court has only avoided the issue by blatantly misrepresenting the State's intention on remand with regard to charging Petitioner prior to a retrial. The State presented the hypothetical as "Petitioner's alternative" and not as the State's intended plan, and it was only presented in the event this Court eliminated the ability to utilize either transferred or concurrent intent, which its opinion did not address.
- Petitioner's convictions and sentences other than attempted murder should not be reversed on appeal because they were entirely unaffected by the felony murder charge and Petitioner solely sought reversal of the attempted murder conviction on appeal.

Argument

I. Implied Malice and Impact of State v. King

This Court's opinion is premised on an incorrect statement of the underlying charge by the State and the "then-existing law." First, the State properly charged Petitioner with **attempted murder**—a **codified** crime pursuant to section 16-3-29 of the South Carolina Code. The State did not seek to create a new crime of "felony attempted murder" as this Court seems to imply. Instead, the State sought to prove Petitioner guilty of **attempted murder** utilizing all of the available options provided by the Legislature.

Pursuant to the statute as the Legislature drafted it: "A person who, with intent to kill, attempts to kill another person with malice aforethought, **either expressed or implied**, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2010)(emphasis added). In the language chosen by the Legislature, the State could prove malice aforethought through either expressed or implied malice. In seeking to apply the felony murder rule, the State sought to prove malice in part through implied malice. The learned, respected trial judge was not hoodwinked by the State, but instead sought to apply the language of the statute to the case before him.

Requesting the charge in this case by the State was not part of an "unrelenting quest to obtain an implied malice charge," but instead the utilization by the State of the express language selected and approved by the Legislature of this state in drafting the crime of attempted murder. This fact is further heightened by the fact that at the time of trial in this case, August 2015, this Court had not issued its King opinion in which for the first time it called into question the

viability of implied malice in proving attempted murder.² In the Court of Appeals opinion issued just a couple months before this trial, the ability of the State to prove malice aforethought through implied malice was never suggested to be a problem and certainly was not eliminated. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). Contrary to this Court's holding, at the time of trial, the State correctly believed the words chosen by the Legislature provided the accurate definition of the crime of attempted murder and sought to properly avail itself of implied malice in order to prove one of the necessary elements.

Additionally, no case law in South Carolina barred **any and all** instructions of implied malice when evidence of self-defense existed until this Court's opinion in this case. Instead, the only case law providing any bar involved the charge that malice could be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) ("Under our policy-making role in the common law, we hold that the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)."). This Court did **not** prohibit **any** implied malice charge when self-defense is at issue. It barred the use of a very specific implied malice instruction, which was **not** requested in this case. To find otherwise is a misapplication of this Court's prior case law.

Additionally, this Court cannot simply rewrite the statute for attempted murder and eliminate the ability to prove implied malice. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an

² As will be discussed later, it appears the Legislature has repudiated this conclusion by the Court.

attempt to expand or limit the scope of a statute.”). As three justices frankly reiterated in a recent case: “If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. **Courts do not have that power.**” Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass’n, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J. concurring) (emphasis added). Eliminating words from the statute that the Legislature clearly chose to incorporate appears to be the exact type of rewrite outside the Court’s power. As a result, this Court should find that attempted murder can be proven using implied malice and find the charge given in this case was an appropriate use of an implied malice charge.

The legislature has repudiated this Court’s holding that implied malice cannot be used to prove the malice in an attempted murder case. Asserting in King “the inclusion of the word ‘implied’ in section 16-3-29 is arguably inconsistent with a specific-intent crime,” this Court specifically asked the Legislature to revisit the statutory definition of attempted murder and eliminate the ability to prove malice through implied malice. “The Legislature is presumed to be aware of this Court’s interpretation of its statutes.” Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). Over two years after this Court’s opinion in King seeking the Legislature to remove a reference to implied malice, and there has not been a bill introduced to eliminate implied malice from the statutory means of proving attempted murder. As a result, any holding by this Court that malice aforethought cannot be proven by implied malice is contrary to the clear language of the statute and contrary to the expressed intention of the Legislature.

II. Lack of Prejudice and Harmless Error

This Court should conclude any error in charging the jury that it could infer malice from the fact the attempted murder was proximately caused by Petitioner's participation in a felony was entirely harmless. The record conclusively demonstrates the charge did not sufficiently prejudice Petitioner to support reversal of his case and an entirely new trial. The windfall this Court bestows on Petitioner is not warranted. As this Court recently pronounced:

An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Kerr, 330 S.C. at 145, 498 S.E.2d at 218).

State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578-79 (2019).

a. Wholly Unnecessary to Jury's Decision

As this Court's opinion clearly noted: "[A]n implied malice charge was **wholly unnecessary** to the jury's decision." (Emphasis added). It strains logic to find the charge was "wholly unnecessary" to the jury's determination of self-defense or attempted murder (the only two options presented), but still find it contributed to the verdict. Simply, it cannot be both.

Additionally, this Court found the giving of the charge altered the State's burden of proof because Petitioner had already admitted his guilt to the underlying felonies. The State has more to prove than simply Petitioner's guilt to the underlying felonies. The State, even under the

felony attempted murder rule, would have to prove that the commission of the felony was a proximate cause for the attempted murder. His admission did nothing to eliminate the State's ultimate burden of proof to establish all the elements of attempted murder any more than a stipulation by the defendant to the existence of prior charges eliminates the State's burden in a burglary case or a CSC with a minor case. The State was still bound to prove all the elements of the crime with evidence presented at trial; only some of the evidence came in the form of the admission by Petitioner. Reliance on the elimination of the State's burden of proof to justify reversal without conducting the proper analysis to determine whether the charge impact the verdict is clear error by this Court.

In any event, the State proved malice aforethought and there was no conclusion for the jury to make but that malice existed. As noted by the Court of Appeals in State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007), Black's Law Dictionary defines "express malice" as "The intent to kill . . . arising from a deliberate and rational mind." Black's Law Dictionary 1043 (9th Ed. 2009). As a result, once the jury found Petitioner acted with a specific intent to kill and did not believe his self-defense theory, it found he acted with express malice. Any need to consider the judge's instruction on inferring malice was rendered unnecessary. As this Court explained in its opinion:

In claiming self-defense, *Smith admitted he had an express intent to kill*, but argued his intent to kill was legally justified due to an imminent threat to his life from the rival group. Thus, there was no need for the jury to infer his malice from the circumstances surrounding the shooting. Rather, the jury was faced with the choice of either believing Smith's story and finding he acted in self-defense, or believing Smith had a self-admitted intent to kill that was *not* legally justified—the very definition of express malice.

Smith, Op. No. 27958 (emphasis in original). As discussed, the jury charge, even if erroneous, did not affect the jury's determination on self-defense. Because the evidence demonstrated express malice, the instruction on implied malice could not have affected the jury's verdict.

As far back as at least 1847, Petitioner's actions were recognized as malicious.

If one were to fire a loaded gun into a crowd, . . . **the law would infer malice** from the **wickedness** of the act: so also the law will imply that the prisoner intended the natural and probable consequences of his own act, as in the case of shooting a gun into a crowd, the law will imply, from the **wantonness** of the act, **that he intended to kill someone**

State v. Smith, 33 S.C.L. 77, 80–81, 2 Strob. 77 (S.C. App. L. 1847) (emphasis added). A different opinion should not occur in this case. The Court can chastise the State for seeking an implied malice charge and find the trial court's charge was error, but still retain Petitioner's convictions and sentences. His intentional firing at a group of people clearly was a malicious act and no reasonable jury could have concluded it was anything but attempted murder. See e.g., Middleton, at 319, 755 S.E.2d at 436 (“[T]he only conclusion established by the evidence is that Petitioner was guilty of attempted murder.”); Arnold v. State, 309 S.C. 157, 170-171, 420 S.E.2d 834, 841 (1992) (“[I]t is clear that the [erroneous jury charge] beyond a reasonable doubt did not contribute to the verdict in this case.”). Because the only conclusion a jury could reach was that the actions by Petitioner taken with malice aforethought, this Court should find any error harmless and affirm his convictions and sentences.

b. Reliance on an Unrelated and Utterly Unpreserved Issue

In addition, this Court has overlooked or misapprehended relevant facts and portrayed them as an attempt to “improperly appeal to the emotions of the jury” and characterizes improperly as “gross prosecutorial overreach.” As part of a footnote which is entirely dicta, this

Court creates an issue which had never before been raised to an appellate court, even by Petitioner's very skilled and thorough appellate attorney, related to medical evidence of Martha Childress' injuries. This Court addresses this completely unpreserved issue in order to chastise prosecutors for doing their job and utilizing the evidence at their disposal consistent with the statute drafted and left unchanged by the Legislature. In even raising this issue, the Court ignores its own longstanding case law and the Appellate Court Rules: "An appellate court may not, of course, reverse for any reason appearing in the record." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000); State v. Hudgins, 319 S.C. 233, 239, 460 S.E.2d 388, 391 (1995) (declining a request to adopt a plain error rule); see also, Rule 208(b)(1)(B), SCACR ("[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

Moreover, as this Court has expressly stated: "If a question is not presented for our review, we should not answer it **no matter how much we may want to do so.**" Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) (emphasis added). The Court also quoted the famous line from former Chief Judge Sanders: "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Id. (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984)). The entirety of footnote eight of this Court's opinion should be removed because it is unnecessary to this Court's opinion, legally unsupportable, and factually incorrect.

This Court's discussion of the objection to the Martha Childress' medical evidence and the State's response is not in line with the Record before the Court. During the colloquy with the State's medical expert, the vast majority of the testimony this Court discusses as objected to by

Petitioner was actually admitted without any objection at all by Petitioner's capable trial counsel. It is only at the very end of the presentation of the evidence when the State presented evidence of the possibility of future life threatening infections that counsel finally objected stating: "Your Honor, **at this point**, I'm going to object. I'm not quite sure how this is relevant." (R.670)(emphasis added). Counsel apparently had no objection to the prior testimony, much of which is discussed in this Court's footnote. The State did respond to the very limited nature of the objection by indicating: "I think the fact that she could have recurrent infections, that this injury could still cost her her life." The second statement this Court references was not part of the State's response to the trial court. Instead, it was part of closing argument to the jury to explain to the jury what evidence they had seen and heard. The State's argument was simply to explain to the jury the seriousness of Martha Childress' injuries so they can understand the malice, the wickedness, with which Petitioner acted. The Record shows to characterize it as part of the State's analysis to admit the victim medical evidence is wrong.

Importantly, the State has the burden to prove that Petitioner fired his gun with an intent to kill someone and also that he acted with malice, express or implied, as set forth by the statute. Not knowing what a jury is looking for in order to establish those elements, the State must put forth all relevant evidence. While it is true, the State does not have to prove an actual injury occurred, one excellent means to prove a specific intent to kill is to show the ramifications of Petitioner's actions and the fact that they clearly had the ability to kill someone—and still to this day have the ability to cause the death of Martha Childress. Additionally, malice "does not of necessity import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief . . ." State v. Heyward, 197 S.C. 371, 15

S.E.2d 669, 671 (1941). The State, which has but one chance to convince a jury it has met its burden beyond a reasonable doubt, sought to admit evidence demonstrating the extent of the damage caused by Petitioner from which the jury could certainly extrapolate the fact he acted with a malignant recklessness, a wicked heart, and a depraved spirit. See e.g., State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957).

Additionally, this Court utilizes this unpreserved issue to further justify its finding that the charge was not harmless. This Court has egregiously failed to apply its own case law for determining whether a jury instruction is harmless error. Instead, this Court seems to apply a quasi-cumulative error analysis, or decided to reverse for any reason appearing in the record. In order to reverse, this Court has previously required both error and prejudice. As discussed above and stated many times by this Court, in order for a defendant to be prejudiced by a jury instruction it must have impacted the verdict. Extraneous issues, wholly unrelated to the jury instruction, should not be a factor in determining whether Petitioner has established prejudice caused by the improper instruction.

III. Conflict with State v. Young

This Court recently found a defendant's culpability should not be reduced because an innocent bystander was killed and not the shooter's intended victim. This Court extended that holding to all those involved in the shootout, even if they were not the ones that pulled the trigger, had no intention of anyone shooting at the innocent bystander, nor had a meeting of the minds in regards to shooting an innocent bystander. See State v. Young, Op. No. 27942 (S.C. Sup. Ct. filed March 12, 2020).

However, the Court's opinion in this case greatly reduces Petitioner's culpability for exactly that reason—because he hit Martha Childress, an innocent bystander, instead of one of the rival individuals he was intending to shoot and kill. This Court now finds, in complete deviation from the logic of Young, that solely because Martha Childress was shot instead of Byron Tucker, Daquan Samuel, or Donnell Woodard, Petitioner should not be fully held responsible for his actions. The people and Legislature of the state cannot intend that the life-altering damage Petitioner did to Martha Childress is not worthy of the same consequences as would be applied to Tucker, Samuel, or Woodard, even though in this case she is the real victim of Petitioner's malicious actions.

As this Court discussed in Young, it should not be the identity of the victim that controls. It should be the intent through which Petitioner acted and the logical and natural consequences of that act which should result in the conviction for attempted murder. Had Martha Childress died instead of just having her life shattered, there is no question Petitioner would have been guilty of murder and subject to life in prison or even the death penalty. See S. C. Code Ann. § 16-3-20(C)(a)(3) (“knowingly created a great risk of death to more than one person in a public place by means of a weapon”); State v Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007). However, under this Court's opinion, he cannot be tried for her attempted murder and face thirty years in prison. Instead, it appears the Court believes his actions of shooting at an innocent crowd of people and striking one who was not his intended victim would warrant only a prosecution for assault and battery of a high and aggravated nature and a maximum ten-year sentence. This holding should be rectified. This Court should find that the ultimate victim does not matter, but that when someone fires a gun at a crowd of people, intending to kill anyone in the crowd, he should be held liable to the likely and natural consequences of his act. Whether it is the intended victim

that is struck or an innocent bystander like Martha Childress, the actor's criminal intent is the same. The Court should conclude the statute does not require a specific intent to kill a specific person, but instead find that it requires a specific intent to kill "another person" and that the actions of shooting an innocent bystander can be properly prosecuted as attempted murder. This is entirely in line with the language of the statute and in line with this Court's recent holding in Young. The result in Young was correct. The result in this case clearly was not.

IV. Transferred or Concurrent Intent

After this Court finds the charge on implied malice, whether error or not, was not reversible error, it should address the issue of whether transferred intent or concurrent intent would apply in an attempted murder appeal. This Court's unnecessary dicta in footnote eight leaves the question wholly unanswered. Instead, this Court places a charging requirement on the State which is incorrectly based on its misunderstanding of the State's position in its brief and is a violation of the separation of powers.³

In its footnote, this Court asserts: "Nonetheless, we note the State indicated that—were the Court to reverse Smith's convictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim." The State did not indicate bringing multiple charges is how we planned to charge the crimes on retrial. The State actually wrote:

³ The Court's Opinion also recognizes that one bullet cannot equal one charge, but could result in multiple charges for each shot fired. For instance in this case, one bullet would need to equate to at least three charges of attempted murder and one charge of ABHAN if this Court does not recognize transferred intent or concurrent intent and allow the State to charge based on the actual victim of Petitioner's malicious actions. An actor must be held responsible for the harm his malicious act causes. The opinion directs more charges than would generally be sought.

Petitioner's alternative is for the State to charge him with three counts of attempted murder based on his firing of the weapon at the three individuals in the rival gang. The State would then also charge him with assault and battery of a high and aggravated nature under section 16-3-600(B)(1) (Supp. 2015) for the gunshot to Ms. Childress. . . . **Petitioner is thereby requesting** to be subjected to at least a possible sentence of 110 years instead of 30 years as indicted by the State. This is unnecessary if the Court finds the doctrine of "transferred intent" applicable as the malice towards the three individuals would then apply to the victim in this case.

(Brief of Respondent p.18).

The State presented the option as what **Petitioner** was seeking, not what the State had already determined to do on a retrial. Further, the charges were only suggested as possible charges on retrial if this Court directly ruled that neither transferred nor concurrent intent applied. This Court's opinion leaves that issue without resolution.

Significantly, the Court's opinion, to the extent it is restricting the possible charges to those listed, would violate the separation of powers that gives prosecutors and not the judiciary the power to determine the charges brought against a defendant. "Undoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." State v. Langford, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012); see also, State v. Fletcher, 322 S.C. 256, 261, 471 S.E.2d 702, 705 (Ct. App. 1996) ("In South Carolina, the solicitor is charged with the responsibility of prosecuting criminal charges, including procurement of the proper indictment from the grand jury.").

As this Court stated State v. Thrift:

Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution and South Carolina case law place the

unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion

State v. Thrift, 312 S.C. 282, 291–92, 440 S.E.2d 341, 346–47 (1994).

As a result, this State asks this Court to consider the doctrines of transferred intent and concurrent intent to determine their applicability in this case. Ultimately, the State asks this Court to affirm Petitioner's convictions and sentences, but even if this Court remands for a new trial, the determination needs to be made so that a proper charging decision can be made. Instead of repeating the arguments, the State relies entirely on its Issue II found in its Brief of Respondent pages 13 through 19.

V. Reversal of Other Convictions

Finally, this Court should clearly reconsider the reversal of all of Petitioner's convictions and sentences and limit the reversal solely to the attempted murder conviction. First, the other convictions were entirely unaffected by the giving of the felony attempted murder jury charge. The gun convictions were based on Petitioner's prior actions and status as a convicted felon, which as this Court acknowledges, was admitted at trial. Further, in his Brief of Petitioner, he only requested: "This Court should reverse petitioner's attempted murder conviction and remand for a new trial." (Brief of Petitioner p.35). As a result, this Court should not reverse all of Petitioner's convictions and sentences, and should limit any possible reversal solely to the attempted murder conviction requested by Petitioner in his statement of requested relief. This Court should

affirm Petitioner's gun charges and their respective sentences regardless of its decision related to the attempted murder charge.

CONCLUSION

For all the foregoing reasons, the State requests the Court grant the petition for rehearing;


- 1) find the felony attempted murder charge proper in light of the Legislature's clear decision to retain implied malice in the attempted murder statute, or in the alternative, find that the charge if erroneous did not impact the jury's verdict and, therefore, was not prejudicial to warrant reversal;
- 2) remove footnote eight in its entirety because it is based on misrepresentations of the Record and misapplications of case law, and it is entirely dicta addressing, in part, issues never even raised on appeal and designed solely—for reasons unclear—to vilify dedicated prosecutors;
- 3) address the issue of transferred intent or concurrent intent to find that Petitioner was properly convicted of the attempted murder of Martha Childress, or in the alternative, address the doctrines so that a proper charging decision can be made on remand.

Respectfully submitted,

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