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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

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Appellate Case No. 2018-001647

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THE STATE,.....RESPONDENT

v.

ROBERT XAVIER GETER,.....APPELLANT

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**RESPONDENT'S PETITION FOR REHEARING**

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On August 18, 2021, this Court issued a published opinion affirming in part and reversing in part the Appellant's convictions for murder and attempted murder. *State v. Geter,* Op. no. 5851 (S.C. Ct. App. Filed August 18, 2021). In reversing the Appellant's conviction for attempted murder, this Court found that the trial court erred in charging the jury on the doctrine of transferred intent. Within the opinion this Court specifically stated that, "So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary *mens rea* to convict the defendant of the attempted murder of the unintended victim." *State v. Geter,* 2021 WL 3641733, 5 (2021)

Pursuant to Rule 221(a) SCACR, Respondent, the State, respectfully petitions for rehearing because this Court appears to have misapprehended this decision on a critical point. This decision

goes against two previous decisions made by this Court. The majority is of the opinion that the trial Court erred in charging the jury on the doctrine of transferred intent as it relates to attempted murder. This Court in two previous decisions made opposite determinations. In *State v. Williams,* 422 S.C. 525, 812 S.E.2d 917 (2018) and *State v. Smith,* 425 S.C. 20, 819 S.E.2d 187 (2018), this Court ruled that transferred intent could be applied to attempted murder.

In *State v. Williams,* the Appellant fired shots into the home of the victim. Inside that home were two other individuals, no one was injured, but the Appellant was charged with three counts of attempted murder. One of the issues raised on appeal was, "did the circuit court err in charging the jury on the doctrine of transferred intent?" Upon conclusion, this court decided:

> "Evidence supported transferred intent charge in prosecution for attempted murder of three residents of dwelling by firing multiple gunshots into it and at dark figure standing at door during effort to take money from one resident; evidence indicated that defendant intended to get co-perpetrator's money back, specifically intended to commit murder, and was aware that intended victim did not live alone, and it was foreseeable that intended victim would not be alone." *Id.*

After this case was decided, the South Carolina Supreme Court granted certiorari. The Supreme Court decided that it is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes. *State v. Williams,* 427 S.C. 148, 157, 829 S.E.2d 702, 707 (2019). In *Williams,* the Supreme Court also decided that,

> "We therefore find no error in the trial court instructing the jury regarding the applicability of transferred intent to a "general-intent" crime. Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred intent and leave for another day the determination of whether the doctrine applies to attempted murder." *Id,* 427 S.C. at 158, 829 S.E.2d at 707

Another decision previously decided by this Court was *State v. Smith,* 425 S.C. 20, 819 S.E.2d 187 (2018). In *Smith,* the Appellant fired a weapon into a crowd of people shooting at rival

gang members. He unfortunately hit an innocent bystander causing her lifetime paralysis. The Appellant was eventually convicted of attempted murder. One of the questions presented before this court, "was Appellant entitled to a directed verdict on the attempted murder charge?" This Court eventually decided,

> "Evidence was sufficient to establish that defendant's intentional use of deadly force in firing a pistol at rival gang members who had been talking with defendant's female friends, which resulted in injury to unintended victim, was unjustified, supporting defendant's conviction for attempted murder; female friends of defendant testified that rival gang members said nothing threatening to them, but were merely disrespectful, and that only defendant fired a shot, a disinterested witness testified that only defendant had a gun, defendant was free to flee the scene instead of firing, and defendant stated in a phone call to a female friend that he should have been charged with attempted murder instead of assault and battery, such that jury could find defendant had specific intent to kill at least one of the men and that any belief by defendant that he was in imminent danger of losing his life or sustaining serious bodily injury was unreasonable." *Id.*

The facts of the present case are similar. This Court ruled in *Williams* that the Appellant could have fled the area and not fired, which reveals the Defendant's intentional use of deadly force. The identical thing could be said about the Appellant in the present case. The Appellant was told to leave by the bar owner, but instead of vacating he decided to chase the victims outside who were away from the initial incident location. Once he decided to attack those two men he revealed malice which is required for murder and attempted murder.

Certiorari was also granted in the *Smith* decision. The Supreme Court decided to reverse this Court's decision due to felony attempted murder not being a recognized crime in South Carolina. *State v. Smith,* 430 S.C. 226, 234, 845 S.E.2d 495, 499 (2020). The majority has raised attention to this footnote in *Smith* where the Supreme Court stated,

> "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. ABHAN is a general-intent crime, and thus, there would be no question on remand as to the applicability of the doctrine of transferred intent." *Smith,* 460 S.C. at 234, 845 S.E.2d at 499 fn. 9.

In the majority opinion it was decided that the Supreme Court strongly suggested that in both *Williams* and *Smith* that the lesser offense of ABHAN would serve as an appropriate punishment. The Respondent argues that the Supreme Court did not recommend that ABHAN would be a more appropriate punishment. The Supreme Court just stated that if the Appellant was convicted of ABHAN this issue cannot be raised. However, as stated within the dissent of the present case, "while our Supreme Court reversed our decision to affirm *Smith's* attempted murder conviction on other grounds there is nothing to indicate that the court rejected our interpretation of its jurisprudence as to transferred intent." *State v. Geter,* 2021 WL 3641733, 7 (2021)(Geathers J. Dissenting)

The majority is of the belief that the Supreme Court vacating the issue of transferred intent in *Williams* equates to them making a decision as to the legality of the issue of transferred intent as it applies to attempted murder. The Respondent disagrees, the court made no decision, because the attempted murder was tried as a general intent crime. The Supreme Court stated that it is well settled that transferred intent applies to general intent crimes, however, because this court treated attempted murder as a specific-intent crime they decided to vacate this decision and "leave for another day the determination of whether the doctrine applies to attempted murder." *Williams,* 427 S.C. at 158, 829 S.E.2d at 707. The Supreme Court has yet to rule on this issue.

As stated within my brief many jurisdictions have already decided this issue. In Nevada, *Ochoa v. State,* 115 Nev. 194, 198 (1999)(Doctrine of transferred intent allowed defendant's intent in fatally shooting intended victim to be transferred to bystander who was accidently shot as

unintended victim, and thus to support attempted murder conviction arising from shooting of bystander; fact that intended victim was killed did not prevent intent from transferring to unintended victim). In Illinois, *People v. Swaney,* 2 Ill.App.3d 857 (1971)(person who, while assaulting another with intent to kill, unintentionally injures a third person is guilty of intent to kill the third person). In Louisiana, *State v. Bass,* 115 So.2d 616 (2013)(The doctrine of transferred intent applies when a person inflicts great bodily harm to an unintended victim).

This Court has previously ruled that transferred intent applies to attempted murder. There has been no change in circumstances for this Court to change their ruling relating to this issue. The South Carolina Supreme Court has yet to address this issue with an affirmative ruling. Since the Supreme Court has never ruled, the previous ruling allowing transferred intent to apply to attempted murder should stand. There was obvious malice when the Appellant viciously attacked both victims with a knife. If Mr. Stone had unfortunately died the Appellant would be facing two counts of murder. So the Appellant should not be absolved of his actions just because Mr. Stone was fortunate enough to survive his significant injuries. It is obvious that the Appellant had a total disregard for human life when he committed these offenses. The solicitor should have been allowed to charge the Appellant with attempted murder since he displayed malice by taking one life and nearly taking another.

In *State v. Williams,* this Court reached a conclusion that transferred intent applies to attempted murder. This was decided because of the long established precedent regarding transferred intent explained in *State v. Fennell,* 340 S.C. 266, 531 S.E.2d 512 (2000). In *Fennell,* the Supreme Court explained transferred intent this way:

> The defendant's mental state, or *mens rea,* whatever it may be at the time he allegedly commits the criminal act is contained within the defendant's brain when he commits the act. That mental state never leaves the defendant's brain; it is not "transferred" from the

> defendant's brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source – the defendant's mind – to its target – the intended victim.
>
> Nor is that mental state in limited supply. The mental state "spotlight" is not extinguished as the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who also is injured or killed. *Fennell,* 340 S.C. at 271, 531 S.E.2d at 515.

There was nothing in the Supreme Court decisions of *Williams* or *Smith* that repudiates this analysis or states that the doctrine of transferred intent is inapplicable when it comes to attempted murder. Clearly when you use the *Fennell* analysis, transferred intent applies to attempted murder.

Since the Supreme Court declined to address this issue in both the *Smith* and *Williams* opinions, this Court should continue to apply the logic provided in the *Fennell* decision. This Court has applied this decision to previous cases relating to transferred intent as it applies to attempted murder, the same should be done in the present case.

## CONCLUSION

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a) SCACR, and requests this Court reinstate Petitioner's conviction for attempted murder.

Respectfully submitted,

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Columbia, South Carolina
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**CERTIFICATE OF SERVICE**
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I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing and Certificate of Service has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, August 26, 2021 to RDudek@sccid.sc.gov, and to his assistant at hkellner@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 26th day of August, 2021.

Donna D'Alessio

Donna D'Alessio, Legal Assistant for
Tommy Evans, Jr.
Assistant Attorney General