The Supreme Court of South Carolina

Re: Waiver of Distance Learning Limitations

Appellate Case No. 2020-000447

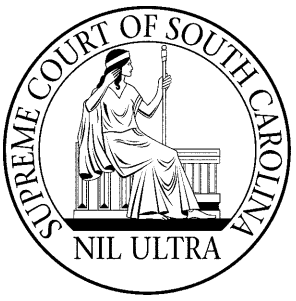
ORDER

Lawyers who failed to comply with 2019-2020 Continuing Legal Education (CLE) requirements will be suspended if they do not file reports of compliance and pay the filing fee and any penalty by April 15, 2020. Rule 419(c)(2), SCACR. Based on the continued development of Coronavirus (COVID-19) and the advice from the Centers for Disease Control and the South Carolina Department of Health and Environmental Control urging against public gatherings, this Court finds it appropriate to waive the restriction in paragraph V(B)(3) of Appendix C to Part IV, SCACR, stating lawyers may obtain no more than eight credit hours of CLE via online or telephonic courses.

Effective immediately, lawyers may earn all or any portion of the required fourteen hours of CLE credit for the 2019-2020 annual reporting year through online or telephonic programs.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
March 17, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 18, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Petitioner,

v.

Tony Latrell Kinard, Respondent.

Appellate Case No. 2019-001604

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Newberry County
Donald B. Hocker, Circuit Court Judge

Opinion No. 27955
Heard March 11, 2020 – Filed March 18, 2020

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General William M. Blitch Jr., both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Petitioner.

Richard James Dolce, of Richard J. Dolce, Attorney at Law, and Michael Vincent Laubshire, both of Columbia, for Respondent.

PER CURIAM: We issued a writ of certiorari to review the court of appeals' decision in *State v. Kinard*, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samuel Robert Drose, Respondent.

Appellate Case No. 2020-000016

Opinion No. 27956
Submitted February 27, 2020 – Filed March 18, 2020

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Joseph P. Turner, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Samuel Robert Drose, of Marion, *pro se*.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of two years, a definite suspension of three years, or disbarment. Respondent requests the sanction be made retroactive to May 19, 2014, the date of his interim suspension. *See In re Drose*, 408 S.C. 182, 758 S.E.2d 506 (2014). As a condition of discipline, Respondent agrees to complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to reinstatement. Respondent further agrees to enter into a repayment plan with the Commission on Lawyer Conduct (the Commission) to repay $26,437.32 paid on Respondent's behalf from the Lawyers' Fund for Client Protection (the Lawyers' Fund). Finally, Respondent agrees that, should he be reinstated to the practice of law, he will sign a two-year monitoring contract with Lawyers Helping Lawyers (LHL) that includes the provision of quarterly reports to the Commission.

We accept the Agreement and suspend Respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement are as follows:

Facts

The South Carolina Law Enforcement Division arrested Respondent on May 14, 2014, and charged him with possession of a controlled substance, first offense.[1] Respondent pled guilty, entered pre-trial intervention, and was sentenced to a conditional discharge upon his completion of three years' probation. Respondent successfully completed probation, and his charge was dismissed in May 2017.

Respondent represented a client (Client) who had been in an automobile accident. Respondent settled the liability portion of the accident case and received a settlement check for $25,000 in the fall of 2011. Respondent was entitled to a third of the settlement. Respondent paid one of Client's medical bills in November 2011 and a few others in April 2012. However, Respondent failed to pay the remainder of Client's medical bills despite assuring Client he would do so. Respondent also failed to pay any of the settlement funds to Client and, instead, began converting the funds to Respondent's own use. At the time Respondent was placed on interim suspension, there was less than $100 in his trust account. The Lawyers' Fund later paid Client the amount Client was owed from the settlement.

Law

Respondent admits that by his conduct he violated Rules 1.15 (safekeeping property); 8.4(a) (violating the Rules of Professional Conduct); 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (committing a criminal act involving moral turpitude); 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(e) (engaging in conduct prejudicial to the administration of justice), RPC, Rule 407, SCACR.

[1] The evening of his arrest, Respondent resigned his position as a Marion County magistrate. The following morning, Respondent self-reported to ODC.

Respondent also admits his conduct constitutes grounds for discipline pursuant to Rule 7(a)(1), RLDE, Rule 413, SCACR (violating or attempting to violate the Rules of Professional Conduct).

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state. Accordingly, we accept the Agreement and suspend Respondent for a period of three (3) years, retroactive to the date of his interim suspension. Respondent shall repay the $26,437.32 the Lawyers' Fund paid on his behalf, or enter into a reasonable repayment plan with the Commission, within thirty (30) days of the date of this opinion.

Additionally, we remind Respondent that, pursuant to the Agreement, prior to seeking reinstatement, he must demonstrate his compliance with Rule 33, RLDE, Rule 413, SCACR (reinstatement following a definite suspension of nine months or more), including completion of the Legal Ethics and Practice Program Ethics School and Trust Account School within one year prior to filing a petition for reinstatement. Further, upon reinstatement, Respondent shall sign a two-year monitoring contract with LHL that includes filing quarterly reports with the Commission.

Finally, within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that Respondent has complied with Rule 30, RLDE, Rule 413, SCACR (duties following suspension).

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Edward J. Westbrook, Petitioner,

In Re: The Murkin Group, LLC, Respondent.

Appellate Case No. 2018-002263

ORIGINAL JURISDICTION

Opinion No. 27957
Submitted February 28, 2020 – Filed March 18, 2020

JUDGMENT DECLARED

Edward J. Westbrook, of Richardson, Patrick, Westbrook & Brickman, LLC, of Charleston, *pro se*.

Theodore von Keller, of Crawford & von Keller, LLC, of Columbia, for Respondent.

PER CURIAM: This case is before us in our original jurisdiction to determine whether Respondent, the Murkin Group, LLC (Murkin), engaged in the unauthorized practice of law (UPL). We hold Murkin has engaged in UPL.

UNDERLYING FACTS

In April 2017, the Wando River Grill (Restaurant) became dissatisfied with the service of its linen supplier (Cintas) and Cintas' ability to supply the type of linens

Restaurant needed. Restaurant contacted another supplier to secure some or all of its required linens and notified Cintas of its need to suspend at least a portion of Cintas' services. Cintas claimed Restaurant's suspension of service constituted a breach of the parties' contract, invoked a liquidated damages provision in the contract, sought more than $8,000 in damages, and hired Murkin to collect the outstanding debt.[1] Petitioner, a South Carolina attorney, represented Restaurant in the resulting dispute.

In April 2018, Murkin sent a demand-for-payment letter to Restaurant demanding $8,106.43. Email communications followed between Murkin and Restaurant regarding Restaurant's issues with Cintas' past performance of the parties' contract and possible reinstatement of the contract, and Cintas' provision of linens. Murkin claimed Cintas would waive its damages claim if Restaurant paid a "one-time processing fee for the reinstatement" of services and signed certain "documentation that [Restaurant] need[ed]" to sign to reinstate Cintas' service. Murkin prepared and sent a reinstatement agreement to Restaurant with signature lines for Restaurant and "The Murkin Group, on behalf of Cintas Corporation – Charleston, SC."

Because the Murkin-prepared reinstatement agreement materially altered the terms of the parties' original contract and imposed new obligations on Restaurant and because the agreement's terms were contrary to discussions Cintas personnel had directly with Restaurant, Restaurant sent the proposed reinstatement agreement to Petitioner. Restaurant's manager also informed Murkin he was attempting to continue a dialogue with Cintas to resume Cintas' linen service, but Cintas personnel refused to respond. Murkin informed Restaurant's manager all communications were to be handled through Murkin.

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[1] Murkin is a Florida limited liability company that provides debt collection services to its clients in exchange for a contingency fee. Murkin advertises itself as having "in-house collection specialists." Pursuant to its Service Agreement with its clients, once an account is turned over to Murkin, the client agrees to cease all communication with the debtor regarding the account and allow Murkin to be the sole point of contact. The Service Agreement provides that the client authorizes Murkin to act as its agent and to collect the accounts according to Murkin's policies and procedures. The agreement further provides, "In the event it becomes necessary to forward Client's Accounts to an attorney for legal action, Client directs and authorizes [Murkin], as its agent, to assign the Accounts to an attorney as designated by [Murkin] . . . . [Murkin] must receive authorization from the Client prior to filing a lawsuit or settling an account."

After learning of Murkin's response to Restaurant manager, Petitioner contacted Murkin, indicated Restaurant had issues with Cintas' performance under the parties' contract, and requested Murkin have its South Carolina counsel contact him directly. In response, Murkin's representative stated, "Whether or not this gets forwarded to local counsel[] is a decision which our office will make, with our client, when we feel it appropriate," and reiterated any resolution of the matter would require Restaurant to sign Murkin's reinstatement agreement.

Restaurant did not sign the reinstatement agreement, and no South Carolina counsel for Murkin or Cintas contacted Petitioner. In response to Restaurant's refusal to sign, a Murkin representative emailed Petitioner and threatened the matter could "escalate, which potentially could cost your client a lot more[] if our clients [sic] wishes to file a suit action [sic], our attorney there[] would add on attorney fees, court costs, sheriff fees for service of process and, of course, accrued interest."[2] The Murkin representative stated that, if Murkin did not hear back from Petitioner, Murkin would assume Restaurant was not willing to resolve the balance, and the representative would "make . . . specific recommendations on how I feel Cintas should proceed."

In November 2018, Petitioner emailed Murkin asking for the South Carolina Bar numbers of several Murkin employees "if they are members of the Bar." The Murkin representative responded stating Petitioner's desire to deal with Murkin's local counsel "means nothing, since that is a decision made between our client and our office." The representative further claimed authority to bind any attorney to whom Murkin referred the matter to settle for no less than Murkin demanded, stating, "our attorneys, once they receive signed Suit Authorization documents, executed by our client, will not settle for less [than the $8,106.43 discussed in April 2018] . . . . [Our attorneys] will also be directed[] to not accept payment arrangements on the balance . . . ."

In December 2018, Petitioner filed a petition pursuant to the Court's request in *Medlock v. University Health Services, Inc.*, 404 S.C. 25, 28, 743, S.E.2d 830, 831 (2013), and *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992), that any individual who becomes aware of conduct that

[2] This communication was legally misleading as the linen service contract between Cintas and Restaurant did not allow a "[law]suit action," but required arbitration of any disputes. Additionally, the service contract did not provide for the recovery of attorney's fees.

might constitute UPL should bring a declaratory judgment action in the Court's original jurisdiction.

We referred the matter to the Honorable Kristi F. Curtis as special referee to take evidence and issue a report containing proposed findings of fact and recommendations of law. The parties elected to move forward without discovery on a stipulation of facts. Oral arguments were held at the Sumter County Courthouse on September 20, 2019. Judge Curtis filed her report on September 30, 2019, recommending this Court find Murkin's actions constituted UPL. Murkin filed exceptions to the report. After careful consideration of the briefs and oral argument in this case, we hereby adopt Judge Curtis' recommendations and findings as discussed below.

In her proposed conclusions of law, Judge Curtis found Murkin went beyond the mere collection of a debt and crossed into UPL by:

(1) becoming involved in negotiating a contract dispute between Cintas and Restaurant and interposing itself between the parties for the purpose of negotiating a settlement on behalf of Cintas;

(2) purporting to advise Cintas as to what legal action it should take;

(3) indicating to Restaurant that it would advise Cintas as to whether to accept a settlement offer;

(4) purporting to control whether and when the case would be referred to an attorney;

(5) purporting to control the actions of the attorney and claiming it could direct the attorney not to settle the claim or make payment arrangements with Restaurant;

(6) threatening to file suit and making specific claims about what types of damages would be recoverable in the lawsuit; and

(7) giving legal opinions and interpreting the terms of the contract between Restaurant and Cintas.

LAW

Pursuant to the South Carolina Constitution, this Court has the duty to regulate the practice of law in South Carolina. S.C. Const. art. V, § 4; *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124; *see also* S.C. Code Ann. § 40-5-10 (2011) (stating the Supreme Court has inherent power with respect to regulating the practice of law). The Court's duty to regulate the practice of law and the legal profession "is to protect *the public* from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 468–87, 560 S.E.2d 612, 617 (2002).

This Court has long held the practice of law is not confined to litigation, but encompasses activities and actions in other areas that "entail specialized legal knowledge and ability." *State v. Buyers Serv. Co.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). However, the Court has also recognized "it is neither practicable nor wise to attempt a comprehensive definition" of what constitutes the practice of law but, instead, "to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124.

In *Crawford v. Central Mortgage Co.*, the Court found a mortgage company's execution of loan modifications at the request of distressed borrowers did not constitute UPL because the loan modifications were merely adjustments to existing loans made to accommodate defaulted borrowers. *Crawford*, 404 S.C. 39, 47, 744 S.E.2d 538, 542 (2013). The *Crawford* Court held requiring attorney supervision over such actions would create a cost to the consumer that outweighed the benefit, and the existence of a robust regulatory regime and competent non-attorney professionals militated such requirements. *Id.* The instant matter is substantially different from *Crawford* in which the mortgage company was acting on its own behalf and not through a third party. Here, Murkin is not a party to the contract between Restaurant and Cintas, but a third-party non-lawyer attempting to negotiate a contract modification on behalf of its client.

In *Roberts v. LaConey*, the respondent and a creditor entered into an assignment wherein the respondent agreed to collect a judgment in exchange for 66.6% of the amount recovered. *Roberts*, 375 S.C. 97, 101, 650 S.E.2d 474, 476 (2007). The

respondent wrote letters to the debtor in which he offered legal opinions and made threats about the consequences the debtor would face if the debtor did not cooperate and satisfy the judgment. The respondent further threatened the debtor with legal actions, including threatening to have the debtor "ARRESTED and brought to court in restraints the way Moses was brought before Pharaoh in the movie, 'The Ten [C]ommandements.'" *Id.* at 102–03, 650 S.E.2d at 477. The *Roberts* Court found the purported "assignment" executed between the parties was actually an agreement to collect a debt for a fee; therefore, the respondent was not acting entirely on his own behalf, but on behalf of the original judgment holder. *Id.* The Court further held the respondent's preparing pleadings, filing documents with the circuit court in his own name, sending letters to the debtor that contained legal opinions, and identifying himself as "acting as 'Plaintiff's Attorney[]'" constituted UPL. *Id.* at 104–05, 650 S.E.2d at 478.

In *Linder*, the Linders hired ICC, a public insurance adjuster company, to assist with the filing of a claim with their insurance company after their home was damaged in a fire. *Linder*, 348 S.C. at 483–84, 560 S.E.2d at 615–16. ICC's advertisements described the company as a "professional Loss Consulting Firm" that represented their client's "best interest" in handling property damage claims. *Id.* at 484–85, 560 S.E.2d at 616. ICC also stated in a client fact sheet, "REMEMBER, your insurance company has already appointed a professional to protect THEIR interest. ICC WILL PROTECT YOURS!" *Id.* at 485, 560 S.E.2d at 616–17. The Linders entered into a contract with ICC in which they agreed to pay ICC a percentage of the amount the company recovered on their insurance claim. ICC notified the Linders' insurance company that ICC should be contacted for "any further information and negotiations" concerning the Linders' claim. *Id.* at 484, 560 S.E.2d at 616. When the Linders' insurance company rejected their claim for the full value of their gun collection, ICC advised the Linders the guns should be covered under their policy. *Id.* at 484, 560 S.E.2d at 616.

The *Linder* Court found public insurance adjusting was not *per se* UPL. However, the Court found ICC's adjusters impermissibly engaged in UPL when they (1) advised clients of their rights, duties, or privileges under an insurance policy regarding matters requiring legal skill or knowledge, i.e., interpreting the policy for clients; (2) advised clients on whether to accept a settlement offer from an insurance company; (3) became involved in the coverage dispute between the

client and the insurance company; and (4) utilized advertising that would lead clients to believe that public adjusters provided services that required legal skill. *Id.* at 493, 560 S.E.2d at 621.

DISCUSSION

In the instant case, Murkin—similarly to the respondent in *Roberts* and ICC in *Linder*—engaged in UPL when it interpreted Cintas' service contract with Restaurant, gave legal opinions as to what damages were recoverable under the Cintas-Restaurant contract, sought to negotiate the contract dispute between Cintas and Restaurant, and purported to advise Cintas on whether to accept a settlement offer and to negotiate the amount of settlement.

Other states have addressed the issue of whether a collection agency engages in UPL when an agency specifically claims it controls, or implies it has the right to control, the actions of a licensed attorney. *See J.H. Marshall & Assocs. v. Burleson*, 313 A.2d 587, 594–95 (D.C. 1973) (finding collection agency that was, in essence, selling the services of a lawyer whom it controlled and directed engaged in UPL, and holding the agency could not "properly interpose itself between a creditor and an attorney seeking to collect the creditor's claim. To do so either directly or indirectly, by assignment or otherwise, has been held to be the unauthorized practice of law"); *see also State ex rel. State Bar of Wis. v. Bonded Collections, Inc.*, 154 N.W.2d 250, 256–59 (Wis. 1967) (holding collection agency that advised creditor when to file a lawsuit, hired an attorney, directed the attorney when to file suit, and directed the lawsuit, engaged in UPL); *Richmond Ass'n of Credit Men v. Bar Ass'n*, 189 S.E. 153, 158 (Va. 1937) (holding collection agency that (1) hired an attorney to perform collections, (2) retained the right to discharge him, (3) supervised his conduct, (4) gave him orders, and (5) received reports from him engaged in UPL).

In the instant case, Murkin similarly engaged in UPL when it purported to advise Cintas when to file suit, gave legal opinions on what types of damages would be sought, and purported to control the actions of the attorney and to direct the attorney not to settle the case or accept payment arrangements.

Finally, while Murkin characterizes its action as "debt collection," we agree with Judge Curtis' conclusion that the true nature of the underlying matter is a contract dispute. Restaurant was not delinquent in paying an invoice, nor had it refused to

pay for services rendered. Restaurant terminated the service contract with Cintas prior to its expiration and, while the contract contained a liquidated damages clause, these alleged damages were not an admitted debt but a contract dispute. As Judge Curtis concluded:

> At the very [least], once Restaurant expressed issues with Cintas' performance under the Agreement and disputed whether it owed any additional monies to Cintas under the Agreement, this became a contract dispute. Murkin's agents then continued to represent Cintas in the matter, advising Cintas on what legal action to take, advising Cintas when to turn the matter over to an attorney, interpreting the contract provisions, recommending settlement figures and purporting to advise Cintas on when to accept settlement, giving legal opinions as to what damages would be recoverable in a lawsuit, and purporting to control and direct any future attorneys who would work at Murkin's direction. All of these actions constitute the unauthorized practice of law.

CONCLUSION

Based on the forgoing, we find the record supports Judge Curtis' findings and hold Murkin's actions constituted UPL. *See Buyers Serv. Co.*, 292 S.C. at 430, 357 S.E.2d at 17; *see also Crawford*, 404 S.C. at 47, 744 S.E.2d at 542; *Roberts*, 375 S.C. at 104–05, 650 S.E.2d at 478; *Linder*, 348 S.C. at 560 S.E.2d at 617. We enjoin Murkin from engaging in any further such conduct.

JUDGMENT DECLARED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur. KITTREDGE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Juan Smith, Petitioner.

Appellate Case No. 2018-002050

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 27958
Heard December 12, 2019 – Filed March 18, 2020

REVERSED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General William M. Blitch Jr., and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

PER CURIAM: In October 2013, a young woman (the victim) was shot by Petitioner Michael Smith in the Five Points area of Columbia. It was undisputed

Smith did not intend to harm her. Rather, Smith claimed he was acting in self-defense by shooting at a group of men who had threatened him. Smith missed his intended target and hit the victim by accident. Smith was subsequently charged with the attempted murder of the victim and a host of other gun-related charges, including possession of a firearm by a person convicted of a felony.

At the outset of trial, in opening statements, counsel for Smith conceded guilt to the felon-in-possession offense, but denied the attempted murder charge and asserted a claim of self-defense. In doing so, Smith implicitly acknowledged he had an express intent to kill the men at whom he was shooting, but asserted his actions were justified given his belief that he faced an imminent threat to his own life. The State ultimately conceded Smith presented evidence he acted in self-defense, and that therefore a jury charge to that effect must be given. Nonetheless, the State inexplicably requested the trial court charge the jury on implied malice.[1] The law at the time of trial precluded an implied malice jury charge (based on the use of a deadly weapon) when a viable self-defense claim existed.[2] Perhaps recognizing this, the State sought to create a new category of implied malice for "felony attempted-murder," with the predicate felony being the felon-in-possession charge. As noted, Smith had already conceded guilt to this charge. Thus, in

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[1] *See, e.g.*, *State v. Wilds*, 355 S.C. 269, 276–77, 584 S.E.2d 138, 142 (Ct. App. 2003) (explaining malice must be implied when there is *no positive evidence* of a deliberate intention to unlawfully take the life of another (i.e., when there is no evidence of express malice), but instead circumstances demonstrate that a reasonably prudent man would have known there was a strong likelihood death would follow his actions (citing 40 C.J.S. *Homicide* § 34–35 (1991))).

[2] *See, e.g.*, *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009) (holding that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide"), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) (extending the holding in *Belcher* to prohibit trial courts from ever instructing juries that malice may be inferred from the use of a deadly weapon, "[r]egardless of the evidence presented at trial").

requesting the new felony attempted-murder charge, which the trial court accepted over Smith's objection, the State essentially circumvented then-existing law expressly precluding an implied malice charge. Consequently, the trial court erred in accommodating the State's request for an implied malice charge. The error was compounded, for the State relied on a crime—the so-called crime of felony attempted-murder—which South Carolina has not adopted.

Adhering to the majority approach, we find felony attempted-murder is not a recognized crime in South Carolina, and, therefore, any jury charge to that effect was error. Likewise, we hold trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense.[3] We therefore reverse Smith's convictions and remand for a new trial.

FACTS/PROCEDURAL HISTORY

On the night in question, Smith and four companions were in the Five Points area of Columbia. While waiting on a street corner for the traffic signal, Smith's group was approached by two men (the rival group) who called Smith a "slob"—a derogatory name for a member of the Bloods street gang.[4] The two groups parted without exchanging any additional words or insults.

Several minutes later, Smith's group began walking back toward their car. On the way, they were again confronted by the rival group, who had been joined by a third man. The two groups began posturing and exchanging insults.

At this point, the testimony at trial diverged significantly between the State's witnesses and the defense witnesses. According to the State's witnesses, following the verbal altercation, the rival group turned their backs and attempted to leave, and Smith pulled out a gun and fired several shots at the rival group while they were walking away. According to the defense witnesses, following the verbal

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[3] This is a slightly different holding than the one we reached in *Burdette*, where we found an implied malice charge *based on the use of a deadly weapon* could never be given. Here, we find *any* implied malice charge cannot be given if there is also evidence presented that the defendant acted in self-defense.

[4] Smith is a self-professed member of the Bloods.

altercation, an unidentified individual yelled that a member of the rival group had a gun, the rival group began shooting at Smith's group, and Smith pulled out his own gun and fired one shot in return.

Regardless of who shot first, Smith's shot missed the rival group and hit the victim, who was waiting for a taxicab nearby. The bullet severed her spinal cord, causing instant, irreversible paralysis. Law enforcement caught Smith fleeing the scene within seconds of the shooting.

Smith was indicted for the attempted murder of the victim and four gun charges: (1) possession of a weapon by a person convicted of a prior violent felony;[5] (2) unlawful possession of a weapon by a person convicted of a prior crime of violence;[6] (3) unlawful carrying of a handgun; and (4) possession of a weapon during the commission of a violent crime.[7] During opening statements, Smith twice conceded guilt to the first two gun charges, telling the jury he had already pled guilty to those same offenses in federal court.

The State conceded during the trial there was sufficient evidence of self-defense to charge the jury. However, the State additionally requested the trial court charge the jury on felony attempted-murder, claiming it was "another way to infer malice." The State argued that "a person who is not allowed by law to carry a gun would be" committing an inherently dangerous felony, and thus—as in the ordinary application of the felony-murder rule—the jury could infer malice because the attempted murder occurred during the commission of a felony.

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[5] *See* S.C. Code Ann. § 16-23-500 (Supp. 2019). Unrelated to this incident, Smith had been previously convicted of burglary in the second degree.

[6] *See* S.C. Code Ann. § 16-23-30(B) (2015). Smith's same conviction for burglary in the second degree served as the "crime of violence" element for this crime as well.

[7] Smith was also indicted on a fifth gun charge, possession of a stolen handgun. However, the trial court later granted Smith's motion for a directed verdict on this charge because the State did not present any evidence Smith knew he was in possession of a stolen firearm. *See* S.C. Code Ann. § 16-23-30(C) ("A person shall not *knowingly* . . . possess any stolen handgun . . . ." (emphasis added)).

Notwithstanding then-existing law which expressly disallowed an implied malice charge when evidence of self-defense existed, the trial court relented to the State's request for a charge on felony attempted-murder, instructing 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 firearm by a person convicted of a crime of violence and possession of
>
> a weapon by a person 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.

The jury found Smith guilty of attempted murder and the gun charges. Smith appealed, and the court of appeals affirmed. *State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018). This Court granted Smith's petition for a writ of certiorari to review the decision of the court of appeals.

LAW/ANALYSIS

There were multiple errors in the trial below that require reversal. First, as a majority of states have found, felony attempted-murder is not a recognized crime. *Cf. State v. Sanders*, 827 S.E.2d 214, 219–22 & n.9 (W. Va. 2019) (collecting an extensive list of cases, all of which note the "logical absurdity" of recognizing the crime of felony attempted-murder). As a result, the trial court's instruction to the jury regarding the requirements and consequences of felony attempted-murder was erroneous.

Additionally, the State argued the felony attempted-murder charge was permissible because it was merely "another way to infer malice." 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. *See, e.g.*, *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (defining express malice as the deliberate intention to unlawfully kill another (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988))). In either case, an implied malice charge was wholly unnecessary to the jury's decision. *Cf. id.* at 64 n.5, 810 S.E.2d at 27 n.5 (asking the General Assembly to re-evaluate the language in section 16-3-29 of the South Carolina Code (2015) that the malice aforethought necessary for attempted murder could be "expressed or implied," "as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime. *See Keys*[, 766 P.2d at 273] (stating, '[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result' . . .)."); *see also Wilds*, 355 S.C. at 276–77, 584 S.E.2d at 142 (explaining malice need be implied only if there is no positive evidence of express malice). The State's unrelenting quest to obtain an implied malice charge is troubling.

Of course, erroneous jury instructions are subject to a harmless error analysis. *See Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (citation omitted). Here, however, the felony attempted-murder charge cannot be considered harmless. During his opening statement, Smith twice conceded guilt to the two felon-in-possession charges. By requesting the felony attempted-murder charge after Smith had already conceded guilt to the predicate felonies, the State essentially eliminated its own burden to prove all of the elements of attempted murder beyond a reasonable doubt, specifically that Smith acted with malice aforethought. For a constitutional error of this magnitude, "We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809 ("[W]e are firmly convinced that instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.").

CONCLUSION

In accordance with the majority approach, we hold that felony attempted-murder is not a recognized crime in South Carolina. Likewise, we hold an implied malice

charge should not be given if there has been evidence presented that the defendant acted in self-defense. Accordingly, we reverse Smith's convictions and remand for a new trial.[8]

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[8] Smith also contends the court of appeals erred in finding the doctrine of transferred intent applied to attempted murder because it is a specific-intent crime. In particular, Smith argues the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person*. Smith points out the "State elected to prosecute [him] for the attempted murder of [the victim] instead of the attempted murder of [the men in the rival group]," and he "was not tried (nor has ever been tried) for any crime related to [the rival group]." We need not address this issue because the prior issues are dispositive. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). 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. *See State v. Williams*, 427 S.C. 148, 157, 829 S.E.2d 702, 707 (2019) ("It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.").

Finally, while not necessary to the disposition of this appeal, we note our concern with the scope of the medical testimony elicited by the State and admitted by the trial court at Smith's trial. To be sure, the facts of this case are tragic and heartbreaking. That reality would be evident even if the State had not sought to improperly appeal to the emotions of the jury. Here, for example, the State called a witness to testify about the possibility that the victim may suffer future injuries due to the shooting. That witness testified in detail about things such as the victim's future bathroom habits; the difficulty she will have doing everyday tasks (such as climbing in and out of bed); the possibility she will suffer from recurrent urinary tract infections, sepsis, and osteoporosis; and other similar issues that may affect her future health. Upon Smith's objection to the relevance of this testimony, the State justified it to the trial court by claiming: (1) "the fact that [the victim] could have recurrent infections, that this injury could still cost her her life [was important]"; and (2) "when we -- the State of South Carolina, when we accuse

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

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someone of attempted murder, *we have to prove the injuries*." (Emphasis added.) We note the attempted murder statute does not require an injury to the victim at all, much less for future *possible* injuries to be described in such graphic detail. *See* S.C. Code Ann. § 16-3-29 ("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."); *Williams*, 427 S.C. at 154, 158, 829 S.E.2d at 705, 707 (affirming three attempted murder convictions in a case in which the defendant shot at three people repeatedly, injuring none of them). The gross prosecutorial overreach manifested here further supports our decision not to rely on harmless error to rescue this conviction.