STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Aaron Scott Young, Jr. #363175, Applicant,	)	Case No.: 2020-CP-07-~~798~~ 792
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Aaron Scott Young, Jr. (Applicant) on March 26, 2020. On March 15, 2023, an evidentiary hearing convened before the Honorable Robert Bonds. Applicant was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. During the hearing, Applicant testified on his own behalf and called as witnesses appellate counsel Frederick Elliott Quinn and trial counsel Roberts Vaux. Respondent recalled Roberts Vaux and also called Deputy Solicitor Sean Thornton. Following a thorough review of the transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate thirty-year sentence. In October 2014, the Beaufort County Grand Jury indicted Applicant for murder (2012-GS-07-1932) and attempted murder (2014-GS-07-1940). On February 23, 2015, Applicant proceeded to a jury trial before the Honorable Thomas W. Cooper. Roberts Vaux, Esquire, represented Applicant. Solicitor Isaac McDuffie Stone and Deputy

Solicitor Sean Thornton prosecuted the case. The jury convicted Applicant as indicted, and Judge Cooper sentenced him to concurrent sentences of thirty years for each charge.

Applicant filed a timely notice of appeal, which was perfected by F. Elliotte Quinn IV and Jennifer K. Dunlap, Esquires. On appeal, Applicant argued the trial court erred in denying (1) his motion for a directed verdict on the murder charge because the State's mutual combat theory was not supported by South Carolina law or evidence; (2) his request for a jury charge on the end of mutual combat; and (3) his motion for a directed verdict on attempted murder. The Court of Appeals affirmed all issues on the merits. Applicant filed a motion to reconsider, which was denied. Applicant filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was granted. Following argument, the Supreme Court issued an opinion affirming. Notably, the Court held "mutual combat can properly serve as the basis for a murder charge for the death of a non-combatant under the 'hand of one is the hand of all' theory of accomplice liability." Applicant filed a petition for rehearing, which was denied. The remittitur was sent March 12, 2020.

BRIEF SUMMARY OF TRIAL TESTIMONY

On September 1, 2012, eight-year-old Khalil Singleton was fatally shot during an ongoing gun battle between Applicant; Applicant's father, Aaron Young, Sr.; and Tyrone Robinson. Over the course of an hour, the three men traversed several locations in Hilton Head, eventually ending in front of a group of children jumping on a trampoline. It was there Khalil was shot and killed.

The evidence indicated Robinson fired the fatal shot. (R. 281, 568). At trial, however, the State proceeded against Applicant on the murder charge under a theory of mutual combat. Trial counsel moved to quash the murder indictment, arguing mutual combat is not a crime in South Carolina, and the doctrine of transferred intend does not apply to mutual combat. The trial court

denied his motion.

At trial, Jontu Singleton testified that on the afternoon of the incident, he and Robinson drove to the Youngs' residence. When they arrived, Applicant and his father were outside; Robinson exited his vehicle carrying a .38 caliber revolver and began yelling at Applicant. Singleton testified Young, Sr. saw the gun and began struggling with Robinson. Robinson fired the gun, and Young, Sr. backed away; Robinson fired one or two more shots at the ground before returning to his vehicle and speeding away. Singleton remained at the Youngs' home.

According to Singleton, immediately after Robinson left, the Youngs went inside and retrieved a semi-automatic pistol and ammunition. The Youngs and Singleton then entered Young, Sr.'s gray truck and began to search for Robinson. Young, Sr. drove while Applicant assembled the pistol in the passenger seat. (App. 368-69). The three men drove around their neighborhood for approximately ten minutes but could not find Robinson. Singleton then exited the vehicle.

During trial the State entered four 911 calls placed that afternoon involving the shootout.[1] In the first call, the caller (Kathleen Fayfich) indicated she had just heard eight gunshots in rapid succession at the beginning of Allen Road. She relayed there were children in the area. The operator indicated she would send an officer.

In the second call, the unidentified caller relayed she heard possible gunshots somewhere on Allen Road, off Marshland Road. She relayed she heard six or eight shots that sounded like they were coming from automatic weapons. The caller stated the shots were at one end of the road, and it sounded like they drove to the other end of the road and fired again. The dispatcher asked, "Just now?" The caller replied, "Just now." The dispatcher stated officers had been dispatched to the area.

[1] These 911 calls were also entered into evidence and played at the PCR hearing. (PCR 34).

In the third call, the caller (later identified as Miss Washington) screamed hysterically, "We need an ambulance. Somebody got shot." The caller—who remained hysterical—stated a boy had gotten shot and was bleeding from his mouth. The dispatcher stated offers were on the way. The dispatcher asked if the caller knew the child, where the child had been shot, and if the caller saw cars in the area. At that point, the caller hysterically yelled, "They shot my cousin! I know him! Listen, who was the guy who had on red shorts?" Shortly thereafter the call was disconnected.

In the fourth call, the caller said, "We have a lady on the line who has some information about where the shots were fired just now." In the background a voice is yelling. The caller stated, "She say a gray truck and a gray Lexus. They came towards Spanish Wells and she do know one of them." The caller further relayed the vehicles were shooting at each other. The dispatcher asked who she thought the shooter was, and a voice in the background said Tyrone Robinson.

The State also produced witnesses who testified about the shootout. Charlese Mitchell, who lived off Allen Road, testified she heard three sets of gunshots around 4:00 p.m. that afternoon. (R. 300-29). After the first round of shots, she saw a grey truck driven by Young, Sr. speeding down the road. (R. 328). Robinson, who was related to Mitchell, came to her door after she heard the first round of shots; she let him in and noticed a gun sticking out of his pocket. (R. 309-10). Robinson, who appeared scared, said, "Those M. F. was shooting at me." (R. 310). At that point, Mitchell's fiancé, Tyrone Delaney, came home and the two men stepped outside to talk. (R. 310). Robinson left the yard and minutes later Mitchell heard another set of rapid gunshots. (R. 311). A few minutes after the second round of shots, Mitchell heard three more shots and again observed Young, Sr. speeding down Allen Road. (R. 323-25).

Tyrone Delaney testified he was driving down Spanish Wells Road between 4:00 and 5:00 p.m. when a grey truck sped towards him and forced him to pull over. (R. 330-32). When he arrived home, Robinson was there and asked Delaney if he had seen a grey truck. (R. 333). After Delaney told Robinson about his encounter with the truck, Robinson replied, "Yeah they was shootin at me so I shoot back at them." (R. 333). Delaney testified he heard rapid gunshots after Robinson left their house. (R. 334). Minutes later, he heard three gunshots that seemed to come from a different type of weapon. (R. 335).

Between 5:00 and 5:30 p.m. that day, Applicant, Young, Sr., and his girlfriend, Ebony Campbell, were stopped by police in Young, Sr.'s grey truck. (R. 391, 398). While on the side of the road, Officers located spent shell casings matching a 9 MM firearm in the back of the truck. (R. 392). The two men were then taken to the police station where they were Mirandized and interviewed. (R. 394-96). Young, Sr. told officers where they could retrieve the black bag containing the gun and ammunition. (R. 401-03). Applicant gave a statement to Investigator Albertin admitting to the shootout with Robinson, firing numerous bullets into Robinson's vehicle, and his failed attempt to kill Robinson. (R. 471-493). After officers located and arrested Robinson, they processed his vehicle and located numerous bullets lodged in his car. (R. 419, 430-31). Agent Frank DeFreese, an expert of firearm's marks and ballistics, determined the bullets in Robinson's car originated from Applicant's 9 MM semi-automatic pistol. (R. 466-67).

CURRENT APPLICATION

On March 26, 2020, Applicant timely filed this PCR application alleging he is being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective for failing to move for a dismissal of Applicant's charges at the preliminary hearing when the state failed to present any evidence of probable cause
2. Trial counsel was ineffective for failing to object to the trial court's erroneous

failure to instruct "specific intent to kill" as an essential element of attempted murder

3. Trial counsel was ineffective for failing to move the courts for a mistrial after trial courts prejudicial ruling in regards to the burden shifting instruction as it related to the murder charge
4. Trial counsel was ineffective for failing to test the voluntariness of Applicant's statement
5. Trial counsel was ineffective for failing to object to trial court's erroneous failure to charge only the current and correct law of South Carolina
6. Trial counsel was ineffective for failing to object to trial courts biased and prejudicial remarks while on Applicants directed verdict motion for murder
7. Trial counsel was ineffective for failing toz investigate whether the county grand jury had been legally impaneled
8. Trial counsel was ineffective for failing to object to the fatal variance at trial between the murder indictment and the jury instructions which permitted conviction for transferred intent
9. Trial counsel was ineffective for failing to object to the trial courts erroneous burden ruling in regards to Applicants motion to quash the murder indictment when failed to include essential element of the offense charged
10. Trial counsel was ineffective for failing to file a meritorious motion to suppress unlawfully seized statements
11. Trial counsel was ineffective for failing to object to the introduction of evidence regarding two third party hearsay witnesses not presented at Applicants preliminary hearing
12. Trial counsel was ineffective for failing to object to the trial courts erroneous failure to give jury instructions that fit the facts of the case as it related to the murder charge
13. Trial counsel was ineffective for failing to file a meritorious motion to suppress unlawfully seized physical evidence.

Respondent filed a return requesting an evidentiary hearing.

On March 14, 2023, Applicant, through Counsel, filed a "Statement of the Issues for Trial," setting forth the following issues:

> 1. Counsel failed to properly advise about a ten year plea offer;
>
> 2. Counsel failed to object to introduction of 911 calls on the grounds of hearsay and confrontation clause: the 911 calls establish a timeline that benefited the State's argument that there was no retreat by the Youngs;
>
> 3. Double jeopardy attached after the first attempt to try all co-defendants in a single trail and was later abandoned;
>
> 4. Appellate courts ruling produced an ex post facto violation;

5. Trial counsel failed to preserve the 911 calls issue for appeal.

6. Trial counsel was ineffective in handling an objection to a change in jury charge from the initial charge to the recharge after a jury question.

At the hearing, Applicant proceeded on the grounds raised in his Statement of the Issue for Trial and raised as an additional ground whether Applicant was advised of his Miranda rights.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony.[2] After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies

[2] This Court will reference PCR testimony where relevant below.

the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to properly advise about ten-year plea offer

Applicant first contends counsel was ineffective for not properly advising him about a ten-year plea offer. This Court finds Applicant has not met his burden of proof in this regard.

At the PCR hearing, Applicant testified he was not guilty of murder or attempted murder because he never pointed or fired a weapon at Robinson or the young child. He recalled counsel advising him of a ten-year offer, but he testified he did not accept it because he believed he was innocent. Specifically, he stated he did not attempt to kill anyone. Applicant testified counsel told him it would be crazy for him not to take the plea, but he stated it was a one-time conversation. Applicant averred he did not believe he could be convicted because, in his eyes, he was innocent. He clarified he did not accept the plea because he thought the facts didn't support the law.

Vaux testified "the facts were largely not in dispute"; the confrontation began at the Youngs' house, moved to Bryant Road, and ended at Allen Road, where the fatal shooting occurred. He recalled testimony that the Youngs shot at Robinson's car so many times that it looked like Swiss cheese. Vaux agreed the evidence showed Robinson fired the fatal shot. Vaux testified he thought they had a fair chance at winning the legal issue he raised regarding mutual combat, but he had concerns about the facts if they did not win the legal argument. He explained mutual combat and transferred intent had never been merged in South Carolina, and he researched those doctrines in every jurisdiction in the United States to prepare for trial. Vaux was concerned that if they did not win the legal argument, Applicant would likely be convicted based on the facts.

Vaux testified the State offered a plea to manslaughter with concurrent sentences of ten years on the two charges. He testified he attempted to persuade Applicant to take the deal but was unable to. Vaux testified the trial judge had agreed he would accept the negotiation, and he recommended Applicant take the plea, but Applicant would not agree. Vaux testified he spent hours explaining this case to Applicant and did his best to ensure Applicant understood the complexities of it. He stated he explained it to Applicant to the best of his ability and did not have concerns with Applicant's ability to understand their conversations.

This Court finds the foregoing testimony by counsel **credible**. This Court further finds that under these circumstances, counsel's advice to Applicant to accept the plea was reasonable under prevailing professional norms. Applicant acknowledged being apprised of the plea but refusing to accept it because he believed he was innocent. Ultimately, it was Applicant's decision to turn down the plea and proceed to trial, and Applicant has not shown counsel's advice regarding the plea was deficient. Likewise, Applicant has not shown what more counsel should have said or

done to persuade Applicant to accept the plea. Based on the foregoing, Applicant has not proven deficiency or prejudice, and this claim is denied.

Failure to object to introduction of 911 calls and preserve issues for appeal[3]

Applicant next contends counsel was ineffective for failing to object to introduction of 911 calls on the grounds of hearsay and confrontation clause, which established a timeline that benefited the State's argument that there was no retreat by the Youngs. He likewise contends counsel was ineffective for not preserving this issue for appeal. This Court finds Applicant has not met his burden of proof on this allegation.

At the PCR hearing, Vaux testified he did not object to the 911 calls and could not think of any ground to object. He explained the State authenticated the calls through the 911 operator, and although they were hearsay, he believed they were admissible under the business records exception. Vaux recalled discussing whether the prejudicial value of the videos outweighed their probative value. When questioned about the third call, Vaux stated he heard both the caller and the operator speaking. When asked whether that call was the first time evidence was introduced showing the parties were shooting at each other, Vaux replied that he believed the call was helpful in that he used it to argue the State did not prove its case. Vaux further explained that the evidence showed three shooting incidents: one at the Young's house, where Robinson shot at the Youngs; one at Bryant Road; and one at Allen Road, where the Youngs shot Robinson's car, and Robinson shot and hit the victim. Vaux explained the solicitor had a model of the area that was drawn to scale, which helped show "how far it was from where the car was that was shot up to . . . where the child was shot." He stated the 911 calls were all placed in approximately the same timeframe, which was to their advantage. Vaux recalled arguing the Youngs had retreated by the time the

[3] This section combines issues two and five from Applicant's statement of issues for trial.

victim was shot, and he was able to use the model to show the distance. Vaux also averred the 911 calls did not support mutual combat. He agreed he could not cross-examine all the 911 callers.

This Court finds Applicant has failed to meet his burden of proving counsel was ineffective for not objecting to the 911 calls. Initially, this Court finds counsel articulated a valid reason for not objecting to the calls in that he was able to use them to support his defense. Further, this Court finds (1) the calls were properly authenticated through the 911 operator, (2) the calls met several exceptions to hearsay, and (3) the probative value of the calls outweighed the danger of unfair prejudice such that it is not reasonably likely the calls would have been excluded on that basis. See 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what is proponent claims."); Rule 803(1), SCRE (providing "[a] statement describing or explain an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not excluded by the rule against hearsay); Rule 803(2), SCRE (providing "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the rule against hearsay); Rule 803(6), SCRE (providing "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity" is not excluded by the rule against hearsay); Rule 403, SCRE (providing relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

Additionally, this Court finds the 911 calls were non-testimonial and thus would not be barred by the confrontation clause. See Crawford v. Washington, 541 U.S. 36 (2004) (providing the confrontation clause bars *testimonial* statements of a non-testifying witness unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination); Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). Here, the 911 callers reported hearing multiple sets of gunshots in a broad area, and police were gathering information to address an ongoing emergency. Thus, these calls were nontestimonial and would not have been excluded by the confrontation clause. See also State v. Thompson, 420 S.C. 386, 401-02, 803 S.E.2d 44, 52 (Ct. App. 2017) (finding 911 call nontestimonial when victim's "statements on the 911 call were made to obtain police assistance, and the questions during the call were to elicit more information to enable police to assist her").

Based on the foregoing, this Court agrees with counsel's assessment that there was not a viable basis to object that would have excluded the 911 calls. Thus, counsel's performance in this regard was reasonable within prevailing professional norms and not deficient. Likewise, this Court finds Applicant has not set forth an objection that would make it reasonably likely the calls would have been excluded and thus did not prove prejudice. Thus, this claim is denied.

Double jeopardy

Applicant next contends jeopardy attached after the State's first attempt to try all codefendants together, and his subsequent trial violated double jeopardy. Applicant has failed to prove counsel was ineffective or any constitutional violation in this regard.

"The Double Jeopardy Clause of the South Carolina Constitution and the Fifth Amendment to the United States Constitution protect all citizens from being twice put in jeopardy of life or liberty." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 718 (Ct. App. 2000). "A defendant, therefore, may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." Id. "Generally, jeopardy attaches when a jury is sworn and impaneled, unless prior to reaching a verdict, the jury is discharged with the defendant's consent or upon some ground of legal necessity." Id.

At the PCR hearing, Applicant testified he believed the jury may have been empaneled when they had the Jackson v. Denno hearing, although he was not sure. Vaux testified the State initially planned to try all codefendants together, but during a pretrial Denno hearing "it came to light that there was . . . an undisclosed video." (PCR 24-25). He explained the trial was subsequently severed. Vaux did not recall whether the jury had been empaneled. He recalled discussing with co-counsel whether jeopardy had attached, and they concluded it had not.

Assistant Solicitor Thornton confirmed the State planned to try all three co-defendants together, but during a pretrial hearing, the solicitor learned of the existence of an audio recording wherein an officer promised Young, Sr. that he would receive a benefit if he took them to the gun. Thornton explained that after that tape was discovered, the State agreed the trial should be severed because it would not be able to use the gun as evidence against Young, Sr. Thornton stated that although a jury had been selected, it had not yet been sworn. He explained it was common for

judges to select a jury and then hold pretrial hearings before swearing the jury. Thornton stated after the State joined in the defendant's motion to sever, the trial court continued the hearing.

This Court finds **credible** Thornton's testimony that the jury had not been sworn at the time the trial court severed and continued the first trial. This Court further finds this testimony consistent with the April 2014 transcript, which does not indicate the jury was sworn.[4] Because the jury was not sworn, jeopardy did not attach. See Rowlands, 343 S.C. at 457, 539 S.E.2d at 718 ("Generally, jeopardy attaches when a jury *is sworn* and impaneled . . . ." (emphasis added)). Thus, Applicant failed to prove counsel was ineffective for not raising a double jeopardy issue. For the same reason, Applicant did not prove any constitutional violation, and this claim is denied.

Ex post facto

Applicant contends the appellate court's ruling here violated the *ex post facto* clause. This Court finds Applicant has not met his burden of proof on this allegation.

At the PCR hearing, Vaux testified he did not consider or raise an *ex post facto* argument. He did, however, move to quash the indictments, arguing mutual combat is not a crime in South Carolina, and the doctrine of transferred intend does not apply to mutual combat.

Appellate counsel Frederick Elliott Quinn testified that when he prepared the brief, it was unclear whether South Carolina appellate courts would recognize the interplay of mutual combat, transferred intent, and accomplice liability. He stated he raised this issue on appeal, although he

[4] This transcript of the April 2014 hearing is part of Young, Sr's Record on Appeal and is before this Court as part of Applicant's case. On April 21, 2014, a jury was selected and then released for the remainder of the day without being sworn. (R. 165-68). Thereafter, the Court held a Denno hearing as to statements made by all three codefendants. (R. 168-331). At the conclusion of the first day, the Court stated, "In recess until 9:30 in the morning, at which time I'll deal with the evidentiary issues. We will bring the jury in. I'll appoint a foreperson and **the jury will be sworn at that time**." (R. 331, emphasis added). The following day, court began with argument from counsel; the jury was not present. (R. 332-339). During argument, the Court noted there was a "late development which comes at the surprise of everybody"; the Court released the jury and recessed until the following morning. (R. 339-45). Notably, the jury was not sworn. Thereafter, court resumed the following day, and the State joined the motion to sever. The Court granted the motion, continued the case, and released the jury without swearing it. (R. 346-52).

did not frame it as an *ex post facto* violation. Quinn testified he did not consider this an *ex post facto* issue; rather he considered "extensively" whether South Carolina law would recognize murder under a theory of mutual combat as set forth in this case. He testified that in hindsight he would not raise an *ex post facto* issue because (1) it was not preserved and (2) his argument was that South Carolina law did not recognize this legal theory. Quinn testified South Carolina had "numerous cases" recognizing mutual combat, but he did not find any that combined mutual combat, transferred intent, and accomplice liability. He had no criticism of Vaux's argument to the trial court related to mutual combat. When asked whether the appellate court's opinion created new law, Quinn replied, "I cannot go that far. I can say that in my opinion this extends the mutual combat jurisprudence to a new factual situation." (PCR 23).

This Court finds the application of mutual combat to these facts did not violate the *ex post facto* clause.[5] The United States Constitution prohibits states from passing *ex post facto* laws. U.S. Const. Art. I § 10. "[A]n *ex post facto* law 'is an enactment, criminal or penal in nature, which is retrospective and disadvantages the offender affected by it.'" State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990) (quoting United States v. Mest, 789 F.2d 1069, 1071 (4th Cir.1986), Weaver v. Graham, 450 U.S. 24 (1981)). The following constitute *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 171, 394 S.E.2d at 487 (quoting Calder v. Bull, 3 U.S. 386, 390 (1798)). A statutory change

[5] The attempted murder charge related to the Youngs' attempt to kill Robinson and did not rely on mutual combat.

to the rules of evidence that would allow a conviction "upon less proof . . . than was required when the offense was committed, might, in respect to that offense," violate the provision against *ex post facto* laws. Hopt v. People, 110 U.S. 574, 590 (1884). However, changes that

> do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which . . . . the state . . . may regulate at pleasure.

Id.

Here, the murder statute predated the underlying incident. The fatal shooting of the eight-year-old bystander occurred on September 1, 2012, during an ongoing gun battle between the Youngs and Robinson. As to the murder charge, Applicant was indicted under sections 16-3-10 and 16-3-20 of the South Carolina Code. Each of these statutes existed prior to the 2012 incident.

Further, the application of mutual combat under these facts was not a law applied retroactively to Applicant's disadvantage. Mutual combat is a theory of liability; it is not a change in the statutory definition of murder. Further, both the doctrines of mutual combat and accomplice liability existed prior to the 2012 incident. See Young, 429 S.C. at 160, 838 S.E.2d at 518 (2020) ("The doctrine of mutual combat has existed in South Carolina since at least 1843 . . . ."); State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the "hand of one is the hand of all" theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."). Although our Supreme Court held that it would "extend our jurisprudence" to reach the death of innocent bystanders, that extension was based on well-established and pre-existing legal theories. In fact, it was well-established that one engaged in criminal activity was criminally liable for the actions of co-defendants, and actors engaged in mutual combat were "presumed to

know and intend the consequences that naturally flow from their unlawful acts." Young, 429 S.C. at 161, 838 S.E.2d at 519. Thus, the application of mutual combat to this set of facts did not violate the *ex post facto* clause.

Likewise, the application of mutual combat did not alter the State's burden of proof or the requisite criminal intent. Specifically, the application of mutual combat did not "change the ingredients of [murder] or the ultimate facts necessary to establish guilt." Hopt, 110 U.S. at 590. Rather, the State's burden of proof remained "beyond a reasonable doubt," and the requisite criminal intent remained malice aforethought. Thus, the State was required to prove—beyond a reasonable doubt—that Applicant had malice aforethought. Killing an innocent bystander is a consequence that naturally flows from actors engaged in an ongoing gun battle. Combining the theories of mutual combat and accomplice liability did not alter the State's burden of proof or the requisite criminal intent and thus did not violate the *ex post facto* clause.

Finally, the application of mutual combat to these facts did not increase the penalty. The maximum penalty for murder prior to Applicant's conviction was life. Applicant was sentenced to the minimum sentence for murder—thirty years' imprisonment. Nothing about the application of mutual combat to these facts increased Applicant's penalty for murder.

Based on the foregoing, the application of mutual combat to this fact pattern did not violate the *ex post facto* clause. The statute upon which Applicant was indicted predated the underlying offense, and the theories of liability (mutual combat and accomplice liability) applied by our Supreme Court in Young, Jr.'s case predated the underlying offense. Nothing about this extension was novel or unexpected. Ultimately, the Supreme Court's decision did not "change the ingredients of [murder] or the ultimate facts necessary to establish guilt." Hopt, 110 U.S. at 590.

Thus, it did not violate the *ex post facto* clause.[6]

Jury Charge

Applicant contends counsel was ineffective in handling an objection to a change in the jury charge from the initial charge to the recharge after a jury question. This Court finds Applicant did not meet his burden of proof in this regard.

At trial, the court charged the jury on murder, malice, aforethought, the theory of mutual combat, mutual intent, criminal intent, transferred intent, attempted murder, and first-degree assault and battery. (App. 571-77). In charging mutual combat, the court instructed:

> [M]utual combat exists when there is a mutual intent and willingness to fight between persons or groups of people.
>
> Mutual intent is shown by acts and conduct of the parties and circumstances attending and leading up to the combat. The circumstances necessary to establish mutual combat include whether there is any evidence of preexisting evil or ill will between the parties, or, any dispute between the parties, and whether the combatants agree to be armed because the history of ill will and an agreement to be armed are necessary before a defendant is engaged or deemed to have been engaged in mutual combat.
>
> Now if you find that mutual combat exist in this particular case I tell you that everyone is presumed to know the consequences of his acts. And if one voluntarily enters a mutual combat where deadly weapons are used, know then that they are being used, and if death results to one of the participating parties, everyone engaged in such combat is equally guilty. Regardless of whether he used a deadly weapon or not and regardless of whether he was on one side or another that is, on the side of the one who fires the shot or not, all are equally responsible for the act where all are participating in

[6] To the extent Applicant's claim can be construed as an allegation that appellate counsel was ineffective for not raising this issue, this Court notes the Sixth Amendment right to the effective assistance of counsel does not extend to petitions for rehearing from the Court of Appeals or to petitions for certiorari to the state supreme court. See Folkes v. Nation, 34 F.4th 258, 273 (4th Cir. 2022) ("The Supreme Court [of the United States] has drawn a bright line regarding the constitutional right to counsel between an initial appeal as of right and a subsequent, discretionary appeal. Defendants do not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in the supreme court."); id. (explaining an ineffective assistance of counsel claim cannot be brought based on counsel's failure to file a petition for rehearing form a Court of Appeals decision); Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) ("We decline to impose a duty on appellate counsel to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal."). Thus, Applicant has not shown a constitutional violation by appellate counsel related to this issue.

mutual combat.

(App. 573). Thereafter, the jury asked to be recharged on murder, attempted murder, assault and battery, and mutual combat. (App. 588). The court again charged the jury on murder, malice, aforethought, mutual combat, mutual intent, criminal intent, transferred intent, attempted murder, and first-degree assault and battery. (App. 588-95). Each time, in charging attempted murder, the court referenced its prior definitions of intent and malice aforethought from its murder charge. (App. 575-76, 593). In recharging mutual combat, the trial court charged:

> [M]utual combat exist when there is a mutual intent and a willingness to fight. Mutual intent is manifested or shown by acts and conduct of the parties and the circumstances attending and leading up to the combat itself. The circumstances necessary to establish mutual combat include whether there is any evidence of preexisting ill will or dispute between the two parties; that is, Mr. Young in this case and Mr. Robinson; and whether the combatants agreed to be armed. It requires a history of ill will and an agreement to be armed before a defendant is deemed to have engaged in mutual combat.
>
> Because under the law of mutual combat everyone is presumed to know the consequences of his acts. And if one voluntarily enters into a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, *or in this case under the State's theory an innocent third party*, everyone engaged in such combat is equally guilty. Regardless of whether he used a deadly weapon or not and regardless of whether he was on one side or another it makes no difference where all are participating in mutual combat all are equally responsible for the natural consequences that are incurred.

(App. 590-91, emphasis added).

Following the recharge, Vaux objected, first requesting the court reinstruct the jury on malice and intent. (App. 595). The Court explained it *did* recharge malice and intent, and its reference to its previous definitions in the attempted murder charge was a reference to the recharge of murder—not a reference to the first charge. (App. 596-97). Vaux then objected to the recharge,

arguing, "Then this time you added in the portion about mutual combat, you added portions of third party which I don't believe you included the first time." (App. 597). The Court agreed it added language. (App. 597). Vaux replied, "And I think that's a comment on the facts and it's an unfair burden if you will on the defendant and I would take exception to that." (App. 597).

At the PCR hearing, Vaux testified Judge Cooper had to fashion a jury charge related to mutual combat, which was discussed at trial. He averred that when the jury requested a recharge, Judge Cooper "realized that he had done something that he needed to adjust a little bit." Vaux believed the charge was a comment on the facts.

This Court finds Applicant has not met his burden of proving counsel was ineffective in this regard. Counsel *did* raise an objection to this charge and argued it was a comment on the facts. Applicant has not set forth what more he believes counsel should have argued and thus did not meet his burden of proving deficiency. Likewise, this Court finds that here, where counsel *did* raise a contemporaneous objection to the recharge—which added additional language—it is not reasonably likely the outcome would have been different had he *further* objected. Overall this Court finds Applicant did not meet his burden of proof in this regard, and this claim is denied.

***Miranda* issue**

At the PCR hearing, Applicant raised as an additional ground an issue related to "whether Miranda rights were actually given" to him. This Court construes this as an allegation that counsel was ineffective for not raising a Miranda challenge to Applicant's statement. This Court further finds Applicant did not prove counsel was ineffective in this regard.

At the pretrial Jackson v. Denno hearing, Investigator Doug Seifert testified he advised Applicant of his Miranda rights by reading them from a card, and he believed Applicant understood them. Investigator Seifert further testified he did not threaten Applicant or make any promises.

(App. 244-48). The State indicated it sought to enter a video recording of Applicant alone in an interrogation room wherein he essentially had a conversation with himself. (App. 256-58). Vaux objected, arguing the probative value of the video was outweighed by the danger of undue prejudice. (App. 258-60). The trial court overruled the objection. (App. 261-62).

At the PCR hearing, Vaux recalled a video of Applicant sitting alone; he stated police were not there questioning him, but they left the video running and Applicant had an incriminating conversation "with himself." He explained was not a confession per se, but it did not help. Vaux stated the statement hurt Applicant's defense of the attempted murder charge specifically. He recalled law enforcement did not have a written Miranda waiver, but an officer testified at the Jackson v. Denno hearing that Applicant was advised of his Miranda rights when he was arrested. Vaux averred the video would not have been excluded based on Miranda because Applicant was not being questioned when he provided the statement; rather, he was in a room alone.

Thornton recalled Applicant was alone in a room and made statements that he "knew how to use a gun very well." Thornton stated the statements indicated Applicant would have shot Robinson if his gun had not jammed. He clarified law enforcement was not in the room when Applicant made the statement.

This Court finds Applicant did not meet his burden of proving counsel was ineffective in for not raising a Miranda issue. Although counsel did not challenge the statement based on Miranda, this Court finds that because the State met its burden by a preponderance of the evidence through Investigator Seifert's testimony, it is not reasonably likely an objection based on Miranda would have led to the exclusion of the statement. Further, this Court finds credible Vaux and Thornton's testimony that Applicant was not being questioned at the time he made the incriminating statements. Based on Investigator Seifert's pretrial testimony that Applicant was

advised of his Miranda rights and the credible testimony that Applicant was not being questioned at the time he made the incriminating statements, this Court agrees with counsel's assessment that the video would not have been excluded based on Miranda. In light of this, this Court finds counsel's decision to challenge the statement through a Rule 403 objection rather than a Miranda challenge was reasonable within prevailing professional norms and not deficient. Thus, Applicant has not shown deficiency or prejudice, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 25 day of Sept, 2023.

ROBERT J. BONDS
Presiding Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

AARON SCOTT YOUNG, JR., #363175 APPLICANT,

V.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Tommy Arthur Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

This 6th day of October, 2023.

Vickie Hall

Vickie Hall, Legal Assistant
for Respondent

SWORN to before me this 6th day of October, 2023.

Notary Public for South Carolina.
My Commission Expires: 3/29/2032

JORDAN BAIRD HICKMAN
NOTARY PUBLIC
MY COMMISSION EXPIRES
03/29/2032
STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) Case # 2020-CP-07-798
Aaron Scott Young, Jr. #363175,) 792
)
Applicant / Petitioner)
vs.) **ORDER**
)
State of South Carolina,)
)
Respondent.)

2023 DEC -4 PM 12:19
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

_____ 1. The application for post-conviction relief is hereby: _____denied _____granted _____under advisement; a formal order will be filed (see below - No.6)

___X__2. Motion(s) was/were heard in this case and the court orders:

_____ The motion to dismiss and/or for summary judgment is hereby _____granted _____denied _____under advisement based upon the _____statute of limitations and/or_____the successive nature of the application or __X___other reason as follows:
__**The Motion to Reconsider is Denied.**

____ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:

_____ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.

_____ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or _____no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.

____ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.

5. Other: _____

_____

____ 6. The court further orders:

____ The ___Attorney General _____Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 30 days.

_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

Robert J. Bonds
Presiding Judge

Date: November 28, 2023

Walterboro, S.C.

Rev 08/08/01

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

AARON SCOTT YOUNG, JR., #363175 APPLICANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order Denying Applicant's Motion to Reconsider has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Tommy Arthur Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 6th day of December, 2023.

Vickie Hall

Vickie Hall, Legal Assistant
for Respondent

SWORN to before me this 6th day of December, 2023.

Joann Baird Hickman

Notary Public for South Carolina.
My Commission Expires: 3/29/2032

JORDAN BAIRD HICKMAN
NOTARY PUBLIC
MY COMMISSION EXPIRES
03/29/2032
STATE OF SOUTH CAROLINA