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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Robert J. Bonds, Circuit Court Judge

Lower Case № 2020-CP-07-01099

Aaron Scott Young, Sr. #288580,..... Appellant,
vs.

State of South Carolina..... Respondent.

NOTICE OF INTENT TO APPEAL

Aaron Young, Sr. appeals the Order of the Honorable Robert J. Bonds dated September 25, 2023, and filed on October 2, 2023, and the Order Denying Applicant's Motion to Reconsider dated December 19, 2023, and filed on December 21, 2023. Appellate received notice on January 5, 2024.

January 18th, 2024

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OTHER COUNSEL OF RECORD

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STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) Case # 2020-CP-07-01099
Aaron Scott Young, Sr. #28858,)
)
Applicant / Petitioner)
vs.) **ORDER**
)
State of South Carolina,)
)
Respondent.)

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 The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.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

Rob Bonds
Robert J. Bonds
Presiding Judge

Date: December 19, 2023

Walterboro, S.C.

Rev 08/08/01

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

AARON SCOTT YOUNG, SR., #288580 APPLICANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 4th day of January, 2024.

Vickie Hall

Vickie Hall, Legal Assistant
for Respondent

SWORN to before me this 4th day of January, 2024.

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

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

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Aaron Scott Young, Sr., #288580, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-07-01099 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Aaron Scott Young, Sr. (Applicant) on May 14, 2020. On March 16, 2023, an evidentiary hearing convened before the Honorable Robert Bonds. Applicant was present and represented by C. Rauch Wise, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. During the hearing, Applicant testified on his own behalf and called as witnesses appellate counsel Kathrine Hudgins and trial counsel Robert Ferguson. Respondent recalled Robert Ferguson and also called Deputy Solicitor Sean Thornton. Following a thorough review of the transcript and testimony and evidence presented at the 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-07-2173) and attempted murder (2014-GS-07-1941). On August 10, 2015, Applicant proceeded to a jury trial before the Honorable Thomas W. Cooper. Robert Ferguson, 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 concurrently to thirty years for murder and twenty years for attempted murder.

Applicant filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine Hudgins. On appeal, Applicant argued the trial court erred in denying his motion for a directed verdict on murder when (1) the State's evidence of murder depended upon a combination of mutual combat, accomplice liability, and transferred intent; and (2) the State failed to establish mutual combat at the time of the fatal shooting. The Court of Appeals affirmed. See State v. Young, 2019-UP-233 (Ct. App. filed June 26, 2019). 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 also denied. The remittitur was sent March 13, 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 son, Aaron Young, Jr.; 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. At trial, however, the State proceeded against Applicant on the murder charge under a theory of mutual combat.

Jontu Singleton testified that on the afternoon of the incident, he and Robinson drove to the Youngs' residence. When they arrived, Applicant and his son were outside; Robinson exited his vehicle carrying a .38 caliber revolver and pointed at Young, Jr. Singleton testified Applicant saw the gun and began struggling with Robinson. Robinson fired the gun, and Applicant backed away; Robinson fired one or two more shots before returning to his vehicle and speeding away. Singleton remained at the Youngs' home. (App. 569-71).

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 Applicant's gray truck and began to search for Robinson. Applicant drove while Young, Jr. assembled the pistol in the passenger seat. (App. 571-77). The three men drove around for about 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 or Marshland Road. She relayed she heard six or eight shots that sounded like they were coming from an automatic weapon. The caller stated the shots began 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.

In the third call, the caller screamed hysterically, "We need an ambulance. Somebody got shot." The caller—who remained hysterical—stated a boy had been 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."[2] In the background a voice is yelling. The caller

[1] These 911 calls were also entered into evidence and played at the PCR hearing.
[2] At trial, the 911 records custodian clarified the "calm" voice in the call was "a dispatcher from [the] Hilton Head dispatch. They originally received the call and then transferred it to [Beaufort County]."

stated, "She say a gray truck and a gray Lexus. They came towards Spanish Wells and she do know one of them." The caller stated 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 ten or more rapid gunshots around 4:00 p.m. that afternoon. After the shots, she saw a grey truck driven by Young, Sr. speeding down the road. (App. 511-13). Robinson, who was related to Mitchell, came to her door shortly thereafter; she let him in and noticed something with a black handle sticking out of his pocket. (App. 518-19). Robinson, who was hyper and "amped up," said, "Those M. F. was out there shooting at him." (App. 519). At that point, Mitchell's boyfriend Tyrone Delaney came home and the two men stepped outside to talk. After Robinson left, Mitchell heard another set of rapid gunshots. A few minutes later, Mitchell heard three more shots that sounded different than the first two sets of gunshots; she then saw Applicant speeding down Allen Road. (App. 521-26).

Tyrone Delaney testified he was driving down Spanish Wells Road around 4:30 that afternoon when a grey truck almost hit him head-on. (App. 539-40). When he arrived home, Robinson was there and asked Delaney if he had seen a grey truck. (App .542-43R. 333). After Delaney told Robinson about his encounter with the truck, Robinson replied, "That mother was shooting at me, so I shot at them." (App. 543). He stated Robinson had a revolver. (App. 544). Delaney testified he heard rapid gunshots after Robinson left. (R. 334). Shortly thereafter, he heard three gunshots that seemed to come from a different type of weapon. (App. 545-546).

Later that day police stopped Applicant, Young, Jr., and Applicant's girlfriend Ebony Campbell in Applicant's grey truck. (App. 582-83). Police recovered spent 9-millimeter shell casings from the back of the truck, and an expert in firearms marks testified the casings were fired

by the same weapon as projectiles recovered from Robinson's car. (App. 584, 614, 636). Applicant was transported to the police station, where he gave a statement admitting that Young, Jr. shot at Robinson after Robinson shot at them. (App. 587, 601-02).

CURRENT APPLICATION

On May 14, 2020, Applicant timely filed this PCR application alleging he is being held in custody unlawfully for the following reasons:

1. Directed verdict violation
    a. "The trial judge erred. The State's hybrid theory of liability based on mutual combat accomplice liability and transferred intent is not supported by the Law (sic)."
2. Lesser-included offense;
    a. "The trial judge erred in not submitting the lesser included offense of murder."
3. Ineffective assistance of counsel;
4. Due Process;
5. Prosecutorial misconduct;
    a. Improper comments
6. Brady violation;
    a. "Solicitor withheld 'exculpatory evidence' that another other than petitioner may have committed the crime."
    b. "The court erred in overruling defense counsel should have moved for a mistrial (sic)."
7. Miranda right violation;
    a. "Trial counsel was ineffective for failing to file a meritorious motion to suppress unlawfully seized physical evidence."
    b. "[T]rial counsel was ineffective for failing to suppress physical evidence illegally seized as a result of his botched interrogation."
8. Illegally coercion (sic) errors;
9. Hearsay violation;
    a. "Trial counsel was ineffective for failing to object to the introduction in evidence of two third-party hearsay witnesses not presented at Applicant's preliminary hearing."
    b. "Trial counsel was ineffective for failing to subpoena Sergeant Albertin for cross examination."
10. Equal protection;
11. Promises
12. Subject-matter jurisdiction
    a. "Without a proper indictment, the court lack (sic) subject matter jurisdiction to enter conviction (sic) or impose sentence (sic) for a crime."
13. Double jeopardy violation

14. Statute issue
15. Mutual combat violation
    a. "There was no objection to the instruction on the Law of mutual combat."
    b. "Trial counsel was ineffective for not requesting a jury charge on the end of mutual combat."

Respondent filed a return requesting an evidentiary hearing.

On March 16, 2023, Applicant, through Counsel, filed an Amended Application raising the following issues:

> 1. Trial counsel failed to raise a double jeopardy argument at my second trial;
>
> 2. Trial counsel failed to object to testimony from a co-defendant and the 911 call that violated the Confrontation Clause and the rule against hearsay;
>
> 3. Appellate counsel failed to argue in the petition for rehearing or in the petition for writ of certiorari that the decision of the South Carolina Supreme Court in State v. Young, 429 S.C. 155, 838 S.E.2d 516 (2020) violated the *ex post facto* provision of the federal and state constitution;
>
> 4. Trial counsel was ineffective in failing to introduce the audio recording of the statements I made under promises of no murder charge being placed against me;
>
> 5. Trial counsel was ineffective in not objecting to the use of implied malice as part of the definition of attempted murder;
>
> 6. Trial counsel failed to request a jury charge as to the withdrawing from mutual combat;
>
> 7. If appellate counsel is found not to have been ineffective in failing to raise the *ex post facto* issue, the decision of the South Carolina Supreme Court in extending the law as to mutual combat to include an innocent third party constitutes new law.

At the hearing, Applicant indicated he was no longer moving forward on the double jeopardy issue. Specifically, counsel for Applicant relayed that upon further review of the transcript, he realized the jury was never sworn at the first hearing. Based on this, this Court finds Applicant waived any

argument related to the double jeopardy issue. Applicant proceeded on the remaining grounds raised in his Amended Application.

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.[3] 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). In a PCR action, an applicant bears the burden of proving the allegations. 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.

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

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

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.

911 calls and Robinson's statements

Applicant first contends counsel was ineffective for failing to object to hearsay statements from Robinson and the 911 call that violated the Confrontation Clause and the rule against hearsay. This Court finds Applicant did not meet his burden of proof in this regard.

At trial, Mitchell testified Robinson went to her house and told her "those MFs was out there shooting at him." The trial court overruled Applicant's hearsay objection. (App. 519). Likewise, Delaney testified Robinson—who was "pretty excited"—asked Delaney if he saw a gray truck and said "That mother was shooting at me, so I shot at them." (App. 542-43).

At the PCR hearing, Applicant averred hearsay testimony about them shooting at each other hurt his case, and counsel should have objected. When asked whether he believed Mitchell's testimony about things Robinson said hurt his case, he replied, "Well, it . . . was like the splitting the baby in that situation, because she also testified later on in trial . . . to us leaving ten minutes prior to the final shot." Applicant averred the outcome would have been different if the court had excluded hearsay statements from Robinson and the 911 calls.

Ferguson testified he listened to the 911 calls prior to trial and recalled discussing whether they created a confrontation clause issue. He testified he was concerned about statements that two cars were shooting at each other because that supported the State's theory that this was a running gun battle. However, Ferguson testified no one identified Applicant as a shooter in the 911 calls, and he was less concerned about information regarding Robinson. Ferguson averred the calls would come in under a business records exception, and he was not aware of an objection he could have made. He testified that in his experience 911 calls are often entered into evidence.

Ferguson testified he made a hearsay objection when Mitchell testified about Robinson's statements, but the court overruled his objection. When asked if he made any further objection, Ferguson explained it was his practice to not continue arguing after a judge has ruled. Ferguson agreed he did not object when Delaney testified about Robinson's statements.

This Court finds Applicant has failed to meet his burden of proving counsel was ineffective for not objecting to the 911 calls and testimony about Robinson's statements. Initially, this Court finds the 911 calls met several exceptions to the rule against hearsay. See 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).

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.

Likewise, this Court finds Applicant did not prove counsel was ineffective for not further objecting to Mitchell and Delaney's testimony about Robinson's statements. Notably, counsel *did* object during Mitchell's testimony, but the court overruled that objection based on testimony that Robinson's statement fit the excited utterance exception. Although counsel did not object during Delaney's testimony, this Court finds it is not reasonably likely a hearsay objection here would have excluded the statement when Delaney testified Robinson was "pretty excited" at the time.

See 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). Further, this Court finds this testimony was cumulative to Mitchell's testimony, such that it is not reasonably likely the outcome would have been different had any objection to Delaney's testimony been sustained. Finally, this Court finds testimony about Robinson's statements did not violate the confrontation clause because the statements were non-testimonial. See Crawford, 541 U.S. 36 (providing the confrontation clause bars *testimonial* statements of a non-testifying witness).

Based on the foregoing, counsel's performance in this regard was reasonable within prevailing professional norms and not deficient. Likewise, Applicant did not set forth an objection that would make it reasonably likely the 911 calls or Robinson's statements would have been excluded upon further objection and thus did not prove prejudice. Thus, this claim is denied.

Ex post facto issue[4]

Applicant next contends appellate counsel was ineffective for failing to argue in the petition for rehearing or in the petition for writ of certiorari that the decision of the South Carolina Supreme Court in State v. Young, 429 S.C. 155, 838 S.E.2d 516 (2020) violated the *ex post facto* provision of the federal and state constitution.[5] Alternatively, Applicant contends that if appellate counsel is found not to have been ineffective, the decision of the South Carolina Supreme Court in

[4] This section combines issues three and seven, as set forth above.

[5] On direct appeal in Young, Jr.'s case, our supreme court found the theories of mutual combat and accomplice liability could combine to make the Youngs criminally responsible for the murder of an innocent bystander during a gun battle. See State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 521-22 (2020) ("Given the Youngs and Robinson's collective actions in carrying out the gun battle, it is reasonable for the law of mutual combat to serve as the foundation of a murder charge—to hold each one responsible for both his own actions and the actions of the others. Because we find the deadly force used in this case was the result of collective action, we hold the responsibility for the victim's death was collective as well. Accordingly, we hold Young Jr. was properly charged with the victim's murder under the theory of mutual combat."); id. at 162-65, 838 S.E.2d at 519-21 (examining other jurisdictions and concluding the "aiding and abetting approach" used to establish criminal liability for the death of an innocent bystander in a mutual combat situation "dovetails with [South Carolina's] 'hand of one is the hand of all doctrine'").

extending the law as to mutual combat to include an innocent third party constitutes new law and thus violates the *ex post facto* clause. This Court finds Applicant has not shown a violation of the *ex post facto* clause and thus has not proven this claim.

At the PCR hearing, appellate counsel Kathrine Hudgins testified the Supreme Court's extension of mutual combat to these facts did not raise any *ex post facto* concerns to her at the time she was working on this appeal, although it probably should have. She testified she did not consider amending the petition for a writ of certiorari to raise an *ex post facto* issue.

Initially, 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.

Further, the application of mutual combat to these facts did not violate the *ex post facto* clause.[6] 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

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

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 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.

Failure to introduce Applicant's recorded statements

Applicant next contends counsel was ineffective for failing to introduce the audio recording of statements Applicant made under promises that he would not be charged with murder. This Court finds Applicant has not met his burden of proof in this regard.

At the PCR hearing, Applicant testified the audio recording of his conversation with Deputy Evans would have created a defense for him and his son. He explained the sheriff promised leniency for him and his son if Applicant showed him where the gun was. Applicant testified counsel retained an expert to testify about how Applicant was coerced.

Ferguson testified the State initially planned to try Robinson and the Youngs together. He stated they picked a jury and began pre-trial motions; during pre-trial motions, they discovered "some discovery that had been located involving this case." Specifically, Deputy Evans had a body camera with an audio recording of a conversation he had with Applicant wherein he told Applicant he would not be charged with murder if Applicant told him where the gun was. Ferguson

testified the State joined in the defense motion to sever after the recording was discovered, and the trial was continued.

Ferguson testified he subpoenaed Deputy Evans at trial, and Deputy Evans testified about this conversation. He explained,

> [M]y recollection is that the statements that were turned over after the initial joint trail primarily consisted of Deputy Evans, but I think there was also Deputy Siefert on there. And, I believe, we elicited testimony from Curtis Evans that, you know, that he did say, if you tell us where the gun is, we're not going to charge you with murder. So, I believe, at the very least, it came in through Deputy Evans. I think the State had agreed not to put in any of those statements that occurred to Evans because of the promises and the concerns. And so I think there was, you know, a line drawn between the statements associated with those promises, and then everything moving forward.

(PCR 39). He stated the entire recording was about two hours, and he considered playing it at trial. He testified he discussed this with Applicant, but after Evans readily admitted to the conversation, they decided not to play the recording.

Ferguson averred the most damaging evidence against Applicant was his statements, which he challenged at a Jackson v. Denno hearing. Ferguson stated they hired an expert for the Denno hearing to testify about potentially coercive elements of the statements.

Deputy Solicitor Sean Thornton testified that after the State discovered the audio recording of the conversation between Applicant and Evans, the State agreed not to introduce evidence about the gun itself at Applicant's trial. Thornton explained the gun itself "looked like a machine pistol with an extended magazine on it," which would not have looked good to the jury because "it doesn't look like grandpa's hunting rifle." Thornton averred that if counsel had "gone into a great extent of detail about trying to introduce all that recorded statements, then that would have opened the door for [the State] to introduce the firearm.

Critically, Applicant did not enter the audio recording into evidence at the PCR hearing and thus did not prove prejudice from counsel's failure to introduce it at trial. Without the audio recording, any analysis of whether the recording would have benefitted Applicant's case is speculative. Cf. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("[T]o support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Further, this Cout finds **credible** counsel's testimony that he was able to elicit testimony at trial about Evans' "promise" and thus did not need to introduce the two-hour recording.[7] This Court finds counsel's assessment here reasonable under prevailing professional norms; thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Implied malice charge

Applicant argues counsel was ineffective for not objecting to the use of implied malice as part of the definition of attempted murder. This Court finds Applicant has not met his burden of proof in this regard.

At trial, the trial court charged the jury, "So what is attempted murder? It's the attempt to kill another person with malice aforethought, either expressed or implied."[8] (App. 813). At the PCR hearing, Ferguson acknowledged that *after* this trial, the South Carolina Supreme Court held attempted murder requires express malice rather than implied malice. He testified he did not

[7] At trial, Evans testified he told Applicant that "if he would talk to investigators and tell him where him and his son had hid their guns, that—and that the bullets from the guns, if they didn't match up what were used on the little boy, that he wouldn't be charged with murder." Evans agreed he did not have any authority over what Applicant was charged with. He testified he was fired as a result of this conversation. (App. 737, 741).

[8] Pursuant to the attempted murder statute, which was enacted in 2010, "A person who, with intent to kill, attempts to kill another person with *malice aforethought, either expressed or implied*, commits the offense of attempted murder. S.C. Code Ann. § 16-3-29 (emphasis added). The trial court went on to charge the jury on attempt. (App. 813-14).

believe he moved to strike from the indictment the use of the word implied.

Applicant did not point to any law that existed at the time of his August 2015 trial that rendered the trial court's charge incorrect and thus did not meet his burden of proof on this claim. Although the Court of Appeals concluded attempted murder is a specific intent crime in 2015, it did not address whether malice could be implied. State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) ("King I"). On certiorari, our supreme court agreed attempted murder is a specific intent crime but averred the Court of Appeals' analysis was incomplete:

> [T]he Court of Appeals focused on the phrase "with intent to kill" in isolation and did not consider the remainder of the statute concerning "malice aforethought." Had the court done so, the decision would have been much clearer as to why attempted murder requires a specific intent to kill.
>
> Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language "with intent to kill" to "malice aforethought, either express or implied" to require a higher level of *mens rea* for attempted murder than that of murder.

State v. King, 422 S.C. 47, 56, 61, 810 S.E.2d 18, 22, 25 (2017) ("King II"). In expanding on King I's analysis, the Supreme Court "acknowledge[d] the ambiguity created by the language in section 16-3-29." Id. at 62, 810 S.E.2d at 25-26. The Court thus "respectfully suggest[ed] to the General Assembly to re-evaluate the language following 'malice aforethought' as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime." Id. at 64 n.5, 810 S.E.2d at 27 n. 5.

Although dicta in King II suggests malice cannot be implied in attempted murder, this opinion was decided *after* Applicant's trial. At the time of Applicant's trial, only King I—which did not address whether malice could be inferred in attempted murder—had been decided.

Applicant has not pointed to any law in existence at the time of Applicant's trial that found the trial court's charge—which tracked the language of the attempted murder statute—was improper. Thus, Applicant did not prove counsel was ineffective for not objecting to the court's attempted murder charge. See Teamer v. State 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) (finding PCR court erred in finding counsel deficient for not objecting to charge that had not yet been found improper); Strickland, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

End of mutual combat charge

Finally, Applicant contends trial counsel was ineffective for failing to request a jury charge as to the withdrawing from mutual combat. This Court finds Applicant has not met his burden of proof in this regard.

"A combatant may withdraw from mutual combat if he 'endeavors in good faith to decline further conflict, and, *either by word or act, makes that fact known to his adversary.*'" State v. Young, 429 S.C. 155, 161, 838 S.E.2d 516, 519 (2020) (quoting State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495-96 (1973) (emphasis added)).

During a charge conference, the trial court indicated it would not be charging withdrawal, as requested by counsel. Specifically, the Court reasoned:

> It says: Unless before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and either by word or act made that fact known to his adversary.
>
> That is the missing link I see in this particular case. As I ruled in earlier cases, shooting up the car and then getting away is not the same as withdrawing and endeavoring in good faith to decline further conflict. And either by word or by act making that fact known to his adversary, because as they said, they didn't even know that Mr.—at the time they were leaving, that Mr. Tyson Robinson

was there. They shot up the car, and that was the end of it.

(App. 753-54).[9] At the PCR hearing, Ferguson recalled arguing that Applicant withdrew from mutual combat, although he could not recall when it was raised. Ferguson recalled the trial judge found the Youngs were fleeing a crime and not withdrawing. When asked whether there was testimony of a break, Ferguson recalled Applicant may have testified to that. He averred there was evidence to support a finding that the Youngs had actually withdrawn.

This Court finds Applicant did not prove counsel was ineffective for not further objecting to the court's refusal to charge withdrawal. Initially, this issue was raised to the trial court, and Applicant has not set forth what more should have been argued that would have been reasonably likely to change the trial court's decision. Likewise, this Court finds it is not reasonably likely the appellate court would have reversed this conviction based on the merits. Specifically, although Applicant testified he and Young, Jr. "left" after shooting up Robinson's car, he never testified that he relayed to Robinson that they were withdrawing from the conflict. (App. 715-22). Consistent with the trial court's ruling, no evidence in the transcript shows that this purported withdrawal was relayed to Robinson. See id. ("A combatant may withdraw from mutual combat if he 'endeavors in good faith to decline further conflict, and, *either by word or act, makes that fact known to his adversary.*" (emphasis added)). Thus, this Court finds the trial court properly declined to charge withdrawal, it is not reasonably likely the outcome would have been different upon further objection, and Applicant did not prove prejudice. See State v. Young, 424 S.C. 424, 438, 818 S.E.2d 486, 493 (Ct. App. 2018), aff'd, 429 S.C. 155, 838 S.E.2d 516 (2020) (finding the trial court properly refused to charge the end of mutual combat when "no evidence suggested Young, Jr. made his withdrawal known to Robinson, either by word or act" or "showed Young, Jr.

[9] Following the jury charge, counsel did not object to the charge. (App. 830).

and Robinson communicated verbally at any point in the conflict after the initial encounter in the Youngs' yard").

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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2020CP0701099

Aaron Young Sr		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Order of Dismissal

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ R. J. Bonds	2770	9/25/2023
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **October 2, 2023**, and a copy mailed first class or placed in the appropriate attorney's box on **October 4, 2023**, to attorneys of record or to parties (when appearing pro se) as follows:

Aaron Young Sr #288580 Broad River Corr. Inst. 4460 Broad River Road, Marion Unit B-213 Columbia, SC 29211

Danielle Dixon PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MK

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Aaron Scott Young, Sr. #28858,)
)
Applicant / Petitioner)
vs.)
)
State of South Carolina,)
)
Respondent.)

COURT OF COMMON PLEAS

Case # 2020-CP-07-01099

ORDER

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: December 19, 2023

Walterboro, S.C.

Rev 08/08/01