

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2024-000078
Lower Case ¹ 2020-CP-07-01099

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May 16 2024

S.C. SUPREME COURT

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

State of South Carolina..... Respondent.

APPENDIX
VOLUME III

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the back of the truck matched the bullets that had been shot into Robinson's car. (R. p. 636, lines 7-14). Appellant provided statements to Investigators Seifert and Bromage with the Beaufort County Sheriff's Department. Appellant told the officers that his son shot at Robinson because Robinson was shooting at them. (R. p. 602, lines 2-5).

At the close of the State's case Appellant moved for a directed verdict of acquittal. (R. p. 654, line 13 – p. 655, lines 1-15). Defense counsel noted that there was no indication that Appellant ever fired a weapon. (R. p. 654, lines 24-25). Counsel noted that Appellant was not aiding, abetting, assisting or conspiring with Tyrone Robinson. (R. p. 654, lines 18-23). Counsel argued that the elements of murder had not been satisfied through a theory of mutual combat. (R. p. 655, lines 9-15). The judge denied the motion stating:

The law that we've already talked about, the law of mutual combat, the law of transferred intent are the sort of things that come together in a legal scenario, and they create responsibility. And, of course, laws can do that and do that quite often.

And so for the reason I feel the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that as well, that the State has satisfied its burden in that regard sufficient to sustain the motion for directed verdict at this juncture.

(R. p. 656, line 21 – p. 657, lines 1-6). 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.

Mutual combat is inapplicable under the facts of this case. In State v. Graham, 260 S.C. 449, 450–51, 196 S.E.2d 495, 495–96 (1973) the South Carolina Supreme court wrote:

The basic principles governing the doctrine of mutual combat are thus stated in 40 C.J.S. Homicide s 122, p. 996:

'Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the

course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary, ...’

In State v. Taylor, 356 S.C. 227, 231–32, 589 S.E.2d 1, 3 (2003), the South Carolina

Supreme Court wrote:

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be “mutual intent and willingness to fight” to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is “manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.” Id. Whether or not mutual combat exists is significant because “the plea of self-defense is not available to one who kills another in mutual combat.” Id. (citing State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919)). In order to claim self-defense, the defendant “must be without fault in bringing on the difficulty.” State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the “no fault” element of self-defense cannot be established.

The judge instructed the jury¹ on the law of mutual combat stating:

Now, as you know, the indictment in this case charges Mr. Young with murder in connection with mutual combat. The State, of course, has not alleged, no one alleges, that Mr. Young actually fired the fatal shot that killed Khalil Singleton. It alleges, the State does, that it is a law of mutual combat that makes him guilty of that murder. So we look at the law of mutual combat.

Mutual combat exists when there is mutual intent and willingness to fight. Mutual intent is shown by the acts and conduct of the parties and circumstances which attend and lead 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, and whether the combatants agree to be armed. Because a history of ill will and an agreement to be armed are necessary before a defendant is deemed to have engaged in mutual combat. In other words, to constitute mutual combat, it is not necessary that there is a positive agreement between the parties to enter into combat. It is enough if they willfully enter into the conflict upon the impulse of the moment.

¹ There was no objection to the instruction on the law of mutual combat. This issue may need to be raised in post-conviction relief.

And in that regard, I tell you that everyone is presumed to know the consequences of his act. And if one voluntarily enters a mutual combat, where deadly weapons are used, knowing that they're being used, and death results to one of the participating parties, everyone engaged in such combat is equally guilty regardless of whether or not he used a deadly weapon or not. And regardless of whether he was on one side or the other, it makes no difference. And where all are participating in the mutual combat, all are equally responsible for the natural consequences. In other words, where people agree to have a mutual combat, they're engaged in an unlawful act. They're all presumed to intend the consequences which naturally flow from an unlawful act. And if one of the participants be on one side himself and the other be slain by participating in the mutual combat, all are equally guilty of the killing. Therefore, it is not the identity of the victim but the intent of the perpetrator, the state of mind of the perpetrator, the existence of malice, that is determinative in that regard.

(R. p. 833, line 21 – p. 834, 835, lines 1-14).

A similar instruction was upheld in State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918). The facts in the Brown case are factually distinct from the facts in the present case. In Brown a fight broke out between striking and non-striking mill workers. One of the strikers was fatally stabbed. Two strikers who participated in the fight and three non-strikers who participated in the fight were charged with murder and convicted of manslaughter although only one of them inflicted the fatal stab wound. The Brown case is the classical example of the uncommon and outdated theory of mutual combat. If both of the Youngs had participated in mutual combat with Robinson² and Young Jr. had been fatally shot by Robinson, under the Brown theory of mutual combat both Robinson and Young Sr. could be charged with murder. In the present case, however, a non-participating innocent by-stander was fatally shot, not a mutual combatant. Mutual combat does not establish liability for Appellant under the facts of this case.

Transferred intent does not establish liability for Appellant under the facts of this case. In State v. Fennell, 340 S.C. 266, 272–73, 531 S.E.2d 512, 515–16 (2000) the South Carolina Supreme Court wrote:

² As argued in issue two, Appellant was not engaged in mutual combat with Robinson.

This Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim *273 instead), overruled on other grounds by State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, *Substantive Criminal Law*, § 3.12(d) (1986) (discussing transferred intent); McAninch & Faurey, at 17-19 (same).

Robinson was properly found guilty of the murder of Khalil Singleton under the doctrine of transferred intent. Robinson intended to kill either Appellant or his son or both but missed and killed Khalil Singleton instead. At the time Robinson fired the fatal shot, he did it with malice toward Appellant and Young Jr. Robinson's malice and intent to kill Appellant was transferred to the unintended victim. The State, however, failed to prove malice as it relates to Appellant. Robinson was the shooter, not Appellant. Transferred intent is not applicable under the facts of this case.

Accomplice liability is not applicable to establish murder under the facts of this case. Appellant was not aiding, abetting, assisting or conspiring with Tyrone Robinson. At the time Robinson shot and killed Khalil Singleton, neither Young Jr. nor Appellant were shooting.

Instead, at the time of the fatal shooting Appellant and Young Jr. were leaving the neighborhood in their truck.

In State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), the South Carolina

Supreme Court wrote:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

S.C. Code §16-3-10 defines murder as “the killing of any person with malice aforethought, either express or implied.” Viewing the evidence in the light most favorable to the State, the State failed to prove that Appellant killed Khalil Singleton with malice aforethought. Mutual combat is inapplicable under the facts of this case involving the death of an innocent noncombatant. Neither the doctrine of transferred intent nor the doctrine of accomplice liability establishes the elements necessary to submit the murder charge to the jury. The trial judge erred in refusing to direct a verdict of acquittal when the State’s evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat. The State’s hybrid theory of liability based on mutual combat, accomplice liability and transferred intent is not supported by the law.

2. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting.

As argued above in issue one, the State's theory of liability based on mutual combat is not recognized by South Carolina law and should not be. If this Court, however, decides to extend the theory of mutual combat to innocent bystander noncombatants, the theory would not apply in the present case because at the time Robinson shot Khalil Singleton, Appellant was not engaged in mutual combat. The testimony reflects that Appellant and his son were leaving the neighborhood on Allen Road in their truck when Robinson shot at them, killing Khalil Singleton.

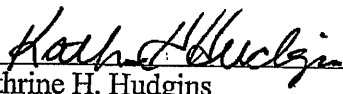
Five minutes after hearing the second set of rapid shots, Charlese Mitchell saw Appellant in his truck coming from Allen Road toward Spanish Wells. (R. p. 537, lines 1-15). Then Mitchell heard the last three shots which the evidence at trial established were shots fired by Tyrone Robinson, one of which killed Khalil Singleton. Mitchell confirmed that no one was firing weapons from the truck when it drove past her house. (R. p. 531, lines 4-6). If this Court extends the doctrine of mutual combat to apply to a noncombatant killed by a combatant, the State must still prove that two combatants were firing at each other in order to establish mutual combat. See State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). At the time Khalil was shot and killed only one person was shooting a gun, Tyrone Robinson. The State failed to prove that Appellant was engaged in mutual combat at the time of the fatal shooting.

As discussed above, on appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Viewing the

evidence in the light most favorable to the State, the State failed to prove mutual combat, the only theory upon which the State sought to impose liability upon Appellant. Tyrone Robinson, not Appellant or his son, was the shooter. Appellant was not aiding or abetting or conspiring with Robinson. The trial judge erred in refusing to direct a verdict of acquittal for the murder of Khalil Singleton because the State failed to establish mutual combat at the time of the fatal shooting.

CONCLUSION

Based on the above arguments, this Court should reverse the murder conviction and sentence.


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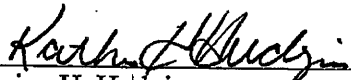
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This 18th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 18th, 2017


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v.

AARON YOUNG, SR.,

Appellant

Appellate Case No. 2016-000873

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat?
2. Did the trial judge err in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether Judge Cooper abused his discretion in finding mutual combat, transferred intent, and accomplice liability could form the basis for a murder conviction and thereby properly denied Appellant's motion for a directed verdict where the direct and substantial circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove Appellant's guilt under South Carolina law?
2. Whether Judge Cooper abused his discretion in denying Appellant's motion for a directed verdict, where the direct and substantial circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove Appellant, his son, and Tyrone Robinson were engaged in mutual combat at the time of the victim's death?

STATEMENT OF THE CASE

On September 1, 2012, Appellant, his son, and Tyrone Robinson murdered eight (8) year-old Khalil Singleton on Hilton Head Island in Beaufort County while the three (3) men were engaged in mutual combat with firearms. All three (3) defendants were arrested that same day. The Beaufort County Grand Jury indicted Appellant for the murder of Khalil Singleton (Ind. # 2012-GS-07-2173) and for the attempted murder of Tyrone Robinson (Ind. # 2014-GS-07-1941). On August 10, 2015, Appellant proceeded to a jury trial before Circuit Court Judge Thomas W. Cooper. Robert Ferguson, Esquire, represented Appellant. Solicitor Isaac McDuffie Stone and Deputy Solicitor Sean P. Thornton represented the State. On August 12, 2015, the jury returned verdicts of guilty of murder and attempted murder.¹ Judge Cooper sentenced Appellant to thirty (30) years for murder and twenty (20) years for attempted murder. The sentences were ordered to run concurrently. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments; Sentencing sheets). Appellant appeals the murder conviction only raising two (2) directed verdict issues. (IBOA, p. 1).

¹ Appellant's co-defendants, Tyrone Robinson and Appellant's son Aaron Young, Jr., were tried in separate trials before juries of their peers. Robinson was convicted of murder and sentenced to life in prison by Judge Cooper. Aaron Young, Jr. was convicted of murder and attempted murder and sentenced to thirty (30) years for murder and thirty (30) years concurrent for attempted murder by Judge Cooper.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of September 1, 2012, eight (8) year-old Khalil Singleton's life abruptly ended. Khalil, an innocent bystander, was shot to death in the midst of an ongoing running gun battle between three (3) adult men. One (1) of the three (3) men responsible for taking the child's life was Appellant, Aaron Young, Sr. (hereinafter "Appellant"). Within the course of an hour, a volatile conflict between Appellant, his son Aaron Young, Jr., and Tyrone Robinson erupted and traversed several different locations on Hilton Head Island, eventually ending in front of a group of children jumping on a trampoline. It was there that Khalil Singleton was murdered trying to flee home on foot to safety away from the running gun battle. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments; Sentencing sheets).

How the Conflict Erupted

Earlier that afternoon, Tyrone Robinson ("Robinson") and Jontu Singleton, Sr. ("Jontu") were socializing at a friend's home. Around 4:00 p.m., Jontu decided to ride with Robinson to the store in Robinson's car. On the way to the store, the two (2) men stopped by the residence of Appellant and his son Aaron Young, Jr. ("Young, Jr.") on Wild Horse Road because Jontu needed money to buy cigarettes and wanted to ask Appellant for the money. Appellant, his girlfriend Ebony Campbell ("Ebony"), and Young, Jr. were outside in the yard when Robinson and Jontu drove up. (R. 565-81; State's Ex. 17, Interview of Appellant).

Jontu exited the car and spoke with Appellant about borrowing the money. Robinson then exited his car approaching Young, Jr. with a .38 caliber revolver in his hand. Robinson and the two (2) Young(s) had animosity towards each other due to prior altercations. After seeing Robinson with the gun, Appellant moved towards Robinson and tried to take the gun away from

Robinson but it accidentally fired. Appellant backed away as Robinson fired several more shots into the ground near Appellant's feet. Robinson then got into his car and drove away. Jontu remained in the yard with Appellant and Young, Jr. Neither Appellant nor Young, Jr., Ebony, or Jontu called the police and reported the shooting. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

The Running Gun Battle or Shootout resulting in the Death of an 8 year old child

Instead of calling the police and reporting the shooting, Appellant and Young, Jr. decided to go after Robinson and shoot or kill him. Moments after Robinson left, Appellant and Young, Jr. went inside a nearby residence [either Appellant's or his mother's], and Appellant emerged with a black bag containing a "Tech Nine" 9MM semi-automatic pistol, a thirty (30) round magazine, and a box of ammunition. A "Tech Nine" resembles a small submachine gun. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

The three (3) men [Appellant, Young, Jr., and Jontu], leaving Ebony behind, got into Appellant's grey Ford F-150 pick-up truck, drove out of the yard and onto the public street in front of Appellant's home, and began searching for Robinson on the public roads of Hilton Head Island. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Appellant drove the truck while Jontu was seated in the center of the front seat and Young, Jr. was seated in the passenger seat. As he was driving, Appellant handed the bag containing the "Tech Nine" to his son, Young, Jr. The three (3) men drove down Spanish Wells Road and veered off on Oakview Road after Appellant thought he saw Robinson driving down that road. Young, Jr. then pulled the contents out of the black bag, and with Appellant giving his son instructions on how to assemble the "Tech Nine," Young, Jr. began assembling the weapon. Appellant stopped and inquired of a person who resided nearby in the Oakview community

whether that person had seen Robinson, to which he received a negative response. (R. 565-81, 727-28; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Unable to catch up with the vehicle Appellant saw earlier and unable to find Robinson, the three (3) men continued their search and headed towards Robinson's house on Allen Road located off of Marshland Road. When they arrived there, Robinson was nowhere to be found. (R. 565-81; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Jontu got out of the truck to talk to his son, who lived in that neighborhood, but no one was home. Because the three (3) men could not locate Robinson, they drove back to Appellant's home on Wild Horse Road and Jontu got out of the truck. Appellant and Young, Jr. drove off again in the grey truck, with the loaded "Tech Nine," in search of Robinson. (R. 565-81, 727-28; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Minutes later, Appellant and Young, Jr. finally tracked down Robinson on Oakview Road. Young, Jr., holding the "Tech Nine" 9 mm weapon, leaned out the passenger window of the truck with the gun, and tried to shoot Robinson, who was in his car, but the gun jammed. According to Appellant, when they saw Robinson on Oakview Road, Robinson brandished his weapon out his car window and also fired his gun at them.² Robinson left the area, and Appellant and Young, Jr. decided to continue the pursuit and drive back to Robinson's home on Allen Road. (R. 565-81, 696, 700-01, 718; State's Ex. 17, Interview of Appellant/ Interview 1 and 7; State's Ex. 3, 911 calls).

While Appellant and his son were driving down Marshland Road and eventually onto Allen Road, a group of children was playing on a trampoline a short distance away from where

² As the gun battle was occurring, one (1) witness called 911 to report the crime and told the dispatcher two (2) cars were shooting at each other near Spanish Wells Road. She identified the two (2) cars involved as a grey truck and a grey Lexus. The woman told the dispatcher the man driving the car was Tyrone Robinson. (State's Ex. 3, 911 calls).

Appellant and Young, Jr. spotted Robinson's car parked at his residence on Allen Road. Appellant was still driving the grey truck. When the two (2) men arrived at Robinson's residence, Appellant drove into Robinson's yard and Young, Jr., now alone in the passenger seat, drew his weapon again. Robinson came out of somewhere on foot and began firing bullets with his .38 revolver at Appellant and his son in the pick-up truck, and Young, Jr. began firing bullets at Robinson with the "Tech Nine." Appellant and his son drove away back up Allen Road and then onto Marshland Road. (R. 565-81, 727-28, 507-49; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

Charlese Mitchell ("Charlese"), who lived just off the beginning of Allen Road on Marshland Road, testified she heard three (3) different sets of gunshots around 4:00 p.m. that afternoon. After the first (1st) round of shots, she saw a grey truck driven by her cousin, Appellant, speeding down the road away from Allen Road with someone in the passenger seat. She testified this first (1st) set of gunshots were rapid gunshots that sounded like maybe ten (10) shots.³ (R. 507-37).

After Charlese heard the first (1st) round of gun shots and saw Appellant driving away, co-defendant Robinson, also a relative of Charlese's, came to her door. She let him in her home and observed a gun sticking out of his pocket. Robinson, who appeared scared, told Charlese, "those M.F. was shooting at me." Charlese asked Robinson to leave. (R. 507-37).

Appellant and Young, Jr. did not stop after the exchange of gunfire with Robinson at Robinson's residence. On the way up Marshland Road coming from Allen Road, Appellant

³ At approximately this same time, Kathleen Fayfich called 911 from 23 Peregrine Point off of Marshland Road. Allen Road bordered her neighborhood. She informed 911: "we just heard eight gunshots in rapid succession coming from Allen Road" right behind her neighborhood. She called because of her concern for children in her neighborhood. She informed 911 the gunfire sounded like pistol gunfire from a 9mm or .40 caliber. (State's Ex. 3, 911 calls).

forced an oncoming vehicle off the side of the road. Tyrone Delaney ("Delaney"), Charlese's boyfriend, was driving down Spanish Wells Road between 4:00 and 5:00 p.m. on his way home from work when a grey truck [Appellant's truck] sped towards him and forced Delaney to pull over to the side of the road to avoid a collision with the oncoming vehicle. When Appellant's truck forced Delaney off the road, Appellant was coming from the direction of Robinson's home on Allen Road and Charlese's and Delaney's home on Marshland Road. (R. 507-49).

Moments later, when Delaney arrived home at his and Charlese's residence, Robinson was still there in the yard [after talking to Charlese], and Robinson asked Delaney if he had seen a grey truck.⁴ Delaney told Robinson of his encounter with the grey truck. Robinson replied, "yeah they was shootin at me so I shoot back at them." Robinson was brandishing a .38 revolver when stating this. Robinson then left the yard. Charlese also confirmed when Delaney arrived home from work, Delaney and Robinson spoke in the yard briefly and Robinson then left her yard. Delaney then came inside their home. (R. 507-49).

Appellant and his son did not stop their pursuit of Robinson after running Delaney off the road. Appellant and Young, Jr. turned around and drove back down Marshland Road toward Allen Road for the third (3rd) time that day. On this occasion, with Appellant still driving the grey truck, Young, Jr. again fired out the window of the truck with the "Tech Nine." Young, Jr. fired multiple shots into Robinson's car, which was parked in a yard at the end of Marshland Road, shooting holes in the car's exterior and passenger compartment. Appellant and his son then drove down and back up Allen Road looking for Robinson. (R. 565-81, 700-04, 715-18, 720, 507-49, 550-60; State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls).

⁴ Delaney did not hear the first round of rapid shots as he was headed home from work at the time those were fired.

Charlese confirmed that minutes after Robinson left their yard, she heard another set [a second (2nd) set] of rapid gunshots [Young Jr. shooting Robinson's car]. These gunshots sounded like they were coming from the left of Charlese's home on Marshland Road. At this point, because of the gunfire, Charlese told the children playing on the trampoline to come inside. Delaney also testified that a few minutes after Robinson left his yard, and after Delaney entered his home, Delaney heard rapid gun shots [Young Jr. shooting Robinson's car] coming from near Charlese's residence. Delaney testified Charlese then told the children on the trampoline to get inside. Charlese's child came in her home. But, the other two (2) children, including eight (8) year old Khalil, headed toward their own homes on foot. (R. 507-49).

Within minutes after Appellant and Young Jr. shot up Robinson's car, Robinson fired three (3) shots at Appellant and Young, Jr. with the .38 revolver as they turned onto Marshland Road off of Allen Road. Charlese was standing in her doorway and saw Appellant in his grey truck turn onto Marshland Road off of Allen Road with his tires squealing and as this was occurring she heard three (3) distinct gunshots that sounded like they were fired from a different gun than the gun firing the earlier rapid shots. Then, Charlese heard someone screaming and discovered Khalil Singleton had been shot trying to make his way home to safety on foot from the running gun battle. Delaney also testified that minutes after the 2nd round of rapid shots, he heard three (3) separate gunshots that seemed to have come from a different type of weapon [Robinson shooting]. He then heard someone screaming outside. (R. 507-49).

Dominque Griffin, who lived at 215 Marshland Road, which is at the end of Marshland Road, testified he was at home with his three (3) week old baby son watching television at around 4:00 p.m. His step-son, Jontu Singleton, Jr. ("Little Jontu") was outside playing with Khalil and Charlese's child. While watching T.V., Mr. Griffin heard what sounded like

"machine gun fire" from the direction of Indigo Plantation [Marshland Road.] Mr. Griffin testified it sounded like a machine gun because it was continuous: "It was pow, pow, pow." Mr. Griffin got on top of his infant son on the floor of his living room to protect his son. When the gunshots ended, Mr. Griffin then ran out his back door to check on his step-son. As he came out the back door, Little Jontu was already at the back porch. Little Jontu, age nine (9), was crying and pointing at Robinson, who was in Griffin's yard, saying: "he shot Khalil, he shot Khalil." Robinson was walking near a utility shed that belonged to Griffin, i.e. Robinson had fired the three (3) shots at Appellant and his son from Griffin's yard as Appellant's truck turned onto Marshland Road, after Appellant and his son shot up Robinson's car and after they drove down and back up Allen Road looking for Robinson. Griffin then saw Robinson walking quickly toward his car which was parked near a pine tree in Griffin's yard. Griffin noticed Robinson's vehicle had bullet holes in the back window. Robinson got in his car hurriedly and backed up into some lumber Griffin had placed in his yard holding up a fig tree. When Robinson's car struck the lumber, glass fell out of Robinson's back car window into Robinson's car. Robinson then left out of Griffin's driveway and drove off toward Spanish Wells Road. (R. 550-59).

Charlese also confirmed that minutes after she heard the three (3) distinct gunshots from the left of her residence, she then saw Robinson drive by her home headed up Marshland Road toward Spanish Wells Road. Charlese testified Robinson's back car window was shot out, and Robinson drove up Marshland Road fast. (R. 526-28).

The bullets Robinson fired from Griffin's yard did not hit their intended targets, but instead one (1) found its way to eight (8) year old Khalil.⁵ Robinson fled the area in his bullet-riddled car, and Appellant and Young, Jr. absconded from the area as well in Appellant's grey truck. Khalil was struck in the chest and died within seconds or minutes. (R. 550-61, 715-17; State's Ex. 3, 911 calls; State's Ex. 17, Statements of Appellant).⁶

Between 5:00 and 5:30 p.m. that same day, Appellant and Young, Jr., and Appellant's girlfriend, Ebony, were pulled over by police in Appellant's grey truck. While on the side of the road, officers located three (3) spent shell casings matching a 9 MM firearm in the back bed of the truck. At the scene of his arrest, after Miranda warnings, when asked why his son was leaning out the truck window shooting, Appellant stated to the arresting officer that his son was shooting at Robinson because Robinson was shooting at them. Appellant and his son were then taken to the police station where they were Mirandized and interviewed. Appellant eventually told officers where they could retrieve the Tech Nine 9mm weapon. (R. 581-608, 684).

After officer's located and arrested Robinson, they processed his car for evidence. They located numerous fired bullets and a bullet fragment [five (5) in all] that were lodged in Robinson's car. These bullets and the fragment along with the shell casings found in the bed of Appellant's truck were sent off for forensic examination. Agent Dan DeFreese, an expert in

⁵ At approximately this time, another individual called 911 reporting gunshots on Allen Road. The caller stated there were "multiple gun fires." They heard six (6) or eight (8) gunshots that sounded like automatic weapons. "[T]hen it was at one end of the Road and then it sounded like they drove to the other end and...it just fired again." "It was bad." (State's Ex. 3, 911 calls).

⁶ At approximately this time, Ms. Washington [first name unknown] called 911 extremely upset because she had found a young child lying on the ground with a gunshot wound and the child was not breathing. Washington told the 911 operator: "We heard gunshots. We heard about ten gunshots." Washington became more hysterical when she realized the child was Khalil. Washington, who was nurse, was eventually able to calm herself enough to perform C.P.R. but Khalil was already dead. During the call, Washington identifies "T" [Tyrone Robinson] as being involved in the shooting of Khalil. (State's Ex. 3, 911 calls).

firearm's and tool mark examination and ballistics, with S.L.E.D., was able to determine the bullets and fragment fired into Robinson's car originated from the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. He also determined all of the fired shell casings recovered from the bed of the truck were fired by the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. DeFreese also testified the bullets fired into Robinson's car entered the car from different angles, which was consistent with Robinson's car being shot on more than one (1) occasion on the afternoon of September 1st, not just in Griffin's yard. (R. 606-14, 613-22, 623-46).

Appellant was interviewed by police at the police station after being given Miranda warnings and admitted he and his son were armed with the "Tech Nine" and went looking for Robinson to shoot and kill him. Appellant was angry because Robinson had fired in the ground at his feet at Appellant's home and Robinson was attempting to kill Appellant's son. Appellant admitted he wanted to kill Robinson. Appellant admitted he did not call police after this initial incident at his residence. Appellant also admitted there was bad blood between he and Robinson from a prior occasion. (State's Ex. 17, Interview of Appellant).

Appellant admitted he and his son first looked for Robinson in the Oakview Community because that was one (1) of Robinson's known hangouts. Appellant admitted his son, Young, Jr., attempted to shoot or kill Robinson on Oakview Road, but the "Tech Nine" jammed when Young, Jr. attempted to fire the weapon into Robinson's occupied car as Robinson drove past them headed in the opposite direction. Appellant admitted Robinson fired several times at them at this time with his weapon. (State's Ex. 17, Interview of Appellant/Interview 1 and 7).

Appellant also admitted they located Robinson on Allen Road, and Young, Jr. fired several shots at Robinson that missed. Appellant explained the reason they fired at Robinson at

Robinson's residence was because Robinson had been shooting at them at that location, when they pulled in Robinson's yard in Appellant's grey truck. (State's Ex. 17, Interview of Appellant).

According to Appellant, he and Young, Jr. then fled from Robinson's residence and as they attempted to flee the area, Robinson then fired at them several times as they turned onto Marshland Road at the end of Allen Road. (State's Ex. 17, Interview of Appellant).

The last witness to testify for the State at Appellant's trial was Dr. Lee Tormos, the forensic pathologist who performed the autopsy on eight (8) year old Khalil. She observed that one (1) bullet had entered into Khalil's chest, piercing his lungs and heart, before coming to rest in his arm. Dr. Tormos concluded the cause of death was a gunshot wound to the left lateral chest and the manner of death was homicide. The bullet was removed and turned over to the Beaufort County Sheriff's Office for analysis. Indisputably, the bullet recovered from Khalil's body was fired from Robinson's gun, a .38 caliber revolver. (R. 647-53).

Appellant called two (2) witnesses in the defense case. Appellant called Dr. Amanda Salas, who testified to her opinion that Appellant's statements were coerced; however, she gave detailed testimony about what Appellant told her about the incident that further incriminated Appellant. Appellant also testified in his own defense and further incriminated himself. (R. 674-710, 711-31).

Dr. Salas admitted Appellant told her the following: Appellant, Young, Jr., and Robinson did not get along because of a prior disagreement. Robinson came to Appellant's house earlier in the day; they got into a fight; they struggled; Robinson fired a gun at Appellant's feet, and Robinson left Appellant's yard. Appellant went and got a gun. Appellant described obtaining the gun from his mother's residence; it was in a bag, unloaded with bullets nearby, and one (1)

magazine for the gun stayed loaded with thirty (30) rounds, and there was an extra box of bullets. The gun was not kept in Appellant's residence, but in another location, his mother's residence. Appellant got in the truck with his son and they ran into Robinson at the Oakview neighborhood. When they ran into Robinson at Oakview, Young, Jr. pointed the gun at Robinson. Robinson's car was going one (1) way and Appellant's truck was going in the other direction. Young, Jr. was not able to shoot Robinson because the gun he was holding jammed or was not put together properly so it would not fire. Appellant and his son then returned to Appellant's house. Appellant and his son went back out driving to send a message to Robinson. According to this statement, they were only going to shoot up Robinson's car. Appellant and his son drove to Allen Road. Appellant was driving the truck and his son was doing the shooting. When they got to Allen Road, Appellant's son fired the weapon they were using while Appellant was driving. (R. 694-708).

Dr. Salas admitted Appellant told police, when asked why his son [Aaron Young, Jr.] was hanging out the window of the truck shooting at Robinson, that his son was shooting because Robinson was "shooting at us." Dr. Salas admitted this statement was made before any alleged element of coercion was introduced into any interrogation. (R. 706).

Appellant testified at trial as follows: Robinson came to his home on the afternoon of September 1st and stated he wanted to talk to Appellant's son. Robinson then pulled a gun and threatened to kill Appellant. Appellant claimed Robinson had been coming to his house for years just terrorizing his family. Appellant alleged Robinson had been burning down houses, hitting people with cars, and just being a menace to the community, and no one did anything about it. Appellant claimed Robinson shot at him, at his son, and at his family at his home on September 1st. Appellant admitted after Robinson shot at him in his yard that he [Appellant]

"just lost it." He claimed he was like a "battered spouse." Appellant stated he was not in his right mind psychologically. Appellant admitted he went to another residence, obtained the "Tech Nine," and brought it out and gave it to his son to use. He admitted he chased after Robinson in his truck. (R. 711-31).

Appellant testified he and his son went to Oakview and while he was driving the truck his son brandished the "Tech Nine" out the window of the truck, but Appellant claimed at trial there was no exchange of gunfire there. Appellant admitted no gunshots were fired on Oakview Road by his son because his son was having trouble assembling the weapon. (R. 711-31).

Appellant admitted he returned to his home and thought about what he was doing and whether it was wrong. Appellant admitted his son tried to talk him out of pursuing Robinson any further. Appellant admitted he did not listen to his son. (R. 711-31).

Appellant admitted during the pursuit of Robinson he came across a relative of Robinson. He asked this relative if he had seen Robinson, and the relative said no. Appellant also admitted he does not like Robinson and told police he wished Robinson were dead. (R. 727-28).

Appellant then testified he and his son then pursued Robinson in the Allen Road area but claimed they never saw him on Allen Road. Appellant claimed they pulled in a yard; he lined up his truck with Robinson's car, his son shot the car up, and they left. Appellant admitted he knew there were kids playing in the area at the time they shot up the car, but claimed he and his son were careful to only shoot the car and not endanger the children who were playing nearby. Appellant claimed what happened after that he did not know. Appellant admitted as he was leaving the area of Allen Road, he did hear gunshots. Appellant claimed they only went down Allen Road one (1) time, and then as they were leaving after shooting the car, Robinson fired at them. (R. 711-31).

ARGUMENT

- I. This issue is not preserved for appellate review; however, Judge Cooper did not abuse his discretion and properly denied Appellant's motion for a directed verdict because under South Carolina law mutual combat, transferred intent, and accomplice liability could form the basis for a murder conviction.

The first directed verdict issue raised by Appellant is not preserved for appellate review because it was not raised to Judge Cooper at the directed verdict motion. Notwithstanding Appellant's argument to the contrary, Judge Cooper did not abuse his discretion in holding mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base a murder charge and conviction. (R. 656-57). Accordingly, Judge Cooper did not abuse his discretion in denying the motion for directed verdict. This appellate issue has no merit and must be denied.

Relevant Facts and Proceedings

Motion to Quash the Indictment

After jury selection, Appellant made a motion to quash the murder indictment. (R. 481-82). Appellant claimed the indictment provided inadequate notice and was improper because of the included language regarding mutual combat. The indictment read that Appellant and his son were engaged in mutual combat with Tyrone Robinson and thereby proximately caused the death of Khalil Singleton. (R. 483-85, murder Indictment). Judge Cooper denied the motion to quash the indictment finding the indictment was sufficient because it put Appellant on notice of the charge he must meet, informed him of when the crime was alleged to have occurred, and informed him of how the crime was alleged to have occurred so Appellant could mount and present a defense. (R. 483-85). Specifically, in denying the motion to quash the indictment, Judge Cooper held:

And we know that the law is, or at least I think that the law is, that in the context of mutual combat the cases indicate that whoever is shot on either side, all who are involved can be guilty of the crime of murder if the person who is shot dies.

And we dealt last time with the case of Aaron Young, Jr. with whether or not that transferred intent that would go from one combatant to another combatant in mutual combat also transfers to an innocent victim. That matter is yet to be decided by an appellate court. It's on appeal now. But it is that particular factual distinction, I think, or that factual anomaly in this case does not render the indictment invalid, because the facts in this case indicate that there was mutual combat. Suggested there was mutual combat, and that an innocent person was killed in the course of that.

(R. 484, lines 3-19). Appellant does not appeal Judge Cooper's denial of the motion to quash the indictment. (IBOA).

Motion for Directed Verdict

At the close of the State's case and Appellant's case, Appellant made a motion for a directed verdict on murder. (R. 654-57, 749).⁷ Particularly, Appellant argued that no evidence was presented of the elements of the crime of murder; no evidence was presented of mutual combat between Appellant and Robinson; and no evidence was presented that the victim's death was a natural consequence of that mutual combat. (R. 654-57, 749.). Specifically, Appellant's directed verdict motion was as follows:

At this point, we would make a motion for a directed verdict. Essentially, it is our contention that the elements of murder have not been met. What we have is essentially Tyrone Robinson admittedly committing murder. Aaron Young, Senior is not aiding, abetting, or assisting Tyrone Robinson. He's not conspiring with Tyrone Robinson. In fact, under the State's theory, is his opposing Tyrone Robinson.

There is no indication that Aaron Young, Senior ever fired a weapon. There is no testimony that Khalil's death was a natural consequence of the actions that we allege were conducted by Mr. Young, and that being the shooting up of a car. Natural consequences, trying to predict what Tyrone Robinson is going to do is a difficult task, to say the least. He is an unpredictable individual. You know, the

⁷ At the close of the defense case, Appellant simply renewed his previous motion for directed verdict on the same basis as that made at the close of the State's case. (R. 749).

theory of the State that the Youngs shot the car to draw him out of hiding, I think is just their theory.

Your Honor, you know, we would ask that you direct the verdict at this point just based on the fact that the elements of murder have not been satisfied, that mutual combat has not been proven, and that if Your Honor finds that mutual combat, there is evidence for that, that they haven't shown that the death of Khalil Singleton was a natural consequence thereof.

(R. 654, l. 14 – 655, l. 15). The State responded to the motion as follows:

MR. STONE: Just briefly, Your Honor. I would agree that I do not believe that, nor have I argued that Tyrone Robinson and the Youngs were working in concert. It is not a theory that the hand of one is the hand of all, in that context.

I do, however, believe that there's been ample testimony that this was a shootout. I think you have heard it from witnesses describing the rapid fire shots compared to the three - - the three other shots to definite sets of shots at Allen Road. You have testimony as to different trajectories of the, which also, I think, indicates that the car may have been shot in two different locations.

Even taking Aaron Young's statement, he makes the statement that he shot back at them because they shot at - - because Tyrone Robinson was shooting at him. The son is clearly the shooter in the truck, we do not argue that Aaron Young, Senior is the shooter. However, I think that is where the hand of one is the hand of all comes into play.

I think this is a mutual combat situation. I think under a number of people's testimony, it is. And I don't think - - I think from that standpoint, that is the State's - - that's the State's theory on this.

(R. 655, l. 18 – 656, l. 16). Judge Cooper denied the motion for a directed verdict on murder holding as follows:

THE COURT: Mr. Ferguson, it is, in fact, in my view a factor of the law rather than the narrow facts themselves, which impose liability - - a potential liability on Mr. Aaron Young, Senior.

The law that we've already talked about, the law of mutual combat, the law of transferred intent are the sort of things that come together in a legal scenario, and they create responsibility. And, of course, laws can do that and do that quite often.

And so for that reason I feel that the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that

as well, that the State has satisfied its burden in that regard sufficient to sustain the motion for a directed verdict at this juncture. That's respectfully denied.

(R. 656, l. 17 – 657, l. 6). Judge Cooper correctly denied Appellant's motion for a directed verdict. Appellant now appeals the denial of the motion for directed verdict for two (2) reasons, one (1) which was not raised below at the directed verdict stage [Argument I.] and one (1) which was raised below and denied [Argument II.].

Lack of Preservation of the 1st Issue Raised on Appeal

Appellant now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal offense, but rather a bar to self-defense; transferred intent should not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. This issue is not preserved for appellate review because it was not raised to the trial court at the directed verdict motion.⁸ Instead, Appellant argued the State had not proved: (1) the elements of murder; (2) there was mutual combat at the time of Khalil's death; or (3) Khalil's death was a foreseeable-result of the mutual combat. Appellant's argument on appeal is completely different from what he raised at the directed verdict motion. Appellant now raises a legal argument not the factual argument he raised below. Appellant now argues that he could not be convicted of murder under South Carolina law under legal principles of mutual combat, transferred intent, and accomplice liability. In reviewing a denial of a directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 524 S.E.2d 837 (1999); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not

⁸ Again, although Appellant quotes Judge Cooper's ruling on the motion to quash the indictment in his brief, Appellant does not appeal Judge Cooper's denial of the motion to quash the indictment but the denial of his directed verdict motion. (IBOA).

presented to the trial court below. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.”). As a result, Appellant’s current Argument I. on appeal is not preserved for appellate review. Regardless, even if Appellant had preserved the issue he now argues to this Court, there is no merit to his argument.

***General Standard of Review
(Appellate)***

In criminal cases, this Court sits to review errors of law only and is bound by the trial court’s factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus on review, the appellate court is limited to determining whether the trial court abused its discretion. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. An abuse of discretion occurs when the trial court’s decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

***Standard of Review / Directed Verdict
(Appellate)***

A defendant may only appeal from a trial judge’s denial of a motion for a directed verdict of acquittal where there is a total failure of competent evidence tending to establish the charge laid in the indictment, and absent an error of law, the ruling must stand. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). In reviewing a denial of a directed verdict, this Court must view the evidence *and* all reasonable inferences in the light most favorable to the State. State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016); State v. Bennett, 415 S.C. 232, 781 S.E.2d 352, 753 (2016); State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014); State v. Lemire, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), *citing* State v. Weston, 367 S.C.

279, 292, 625 S.E.2d 641, 648 (2006).

The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Brown, 402 S.C. 119, 740 S.E.2d 493, 495 (2013); State v. Gilliland, 402 S.C. 389, 741 S.E.2d 521, *3 (Ct. App. 2012). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, this Court must find the trial court properly submitted the case to the jury. Brown, 740 S.E.2d at 495; State v. Rogers 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013), *citing* State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); Gilliland at *3. This Court considers only the existence or non-existence of evidence, not witness' credibility or the evidence' weight, in reviewing the denial of a directed verdict. Bennett, 415 S.C. 232, 781 S.E.2d at 353; State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478-79 (2004); Rogers *supra*, n. 5, 748 S.E.2d 265, n. 5.

Our courts have repeatedly held, where the evidence is circumstantial, the evidence will be considered as a whole, not in isolation, in determining whether there was sufficient evidence to submit the case to the jury. State v. Frazier, 386 S.C. 526, 532-33, 689 S.E.2d 610, 613-14 (2010)(viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); Cherry, 361 S.C. at 595, 606 S.E.2d at 478 (finding circumstantial evidence, when combined, was sufficient to for the fact finder to infer guilt); State v. Buckmon, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001); Rogers, 405 S.C. 554, 748 S.E.2d 265.

If the State has presented any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must affirm the trial court's decision to submit the case to the jury. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013). "The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455,

464 (Ct. App. 2005). In reviewing the trial judge's denial of a motion for a directed verdict, this Court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis. Pearson, 415 S.C. 473-74, 783 S.E.2d 907-08; Bennett, 415 S.C. 232, 781 S.E.2d at 354, *citing* State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996). If examining the evidence in the light most favorable to the State, there is evidence in the record which could induce a reasonable juror to find the defendant guilty, then this Court must affirm the trial judge's denial of the motion for a directed verdict. Pearson, 415 S.C. at 474, 783 S.E.2d 808; Bennett, 781 S.E.2d at 354.

This Court must concern itself solely with the existence of evidence from which a jury could reasonably infer guilt. Bennett, 415 S.C. at 237, 781 S.E.2d at 354. This objective test is founded upon reasonableness. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury." Weston, 367 S.C. at 292, 625 S.E.2d at 648.

The "any evidence" standard also requires that "the existence of 'any direct evidence' proving the defendant's guilt mandates the denial of a directed verdict motion." State v. Phillips, 411 S.C. 124, 133, 767 S.E.2d 444, 448 (Ct. App. 2014), *reh'g denied* (Jan. 27, 2015). Direct evidence is based on personal knowledge or observation which, "*if true*, proves a fact without inference or presumption." Id. (*quoting* Rogers, 405 S.C. at 563, 748 S.E.2d at 270 (internal quotation marks and citation omitted) (alteration in original)). This is because "[t]he presentation of direct evidence 'immediately establishes the main fact to be proved.'" Phillips at 133, 767 S.E.2d at 448 (*quoting* State v. Salisbury, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 249 n.1 (2001)).

Moreover, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. Bennett, 415 S.C. at 237, 781 S.E.2d at 354. Recently, in Pearson, our Supreme Court made it clear the State need not present evidence sufficient to exclude every other hypothesis at the directed verdict stage. Pearson, 415 S.C. 473-74, 783 S.E.2d 802.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). The United States Supreme Court noted the following:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, at 319 (second emphasis added).

Where co-defendants are not tried jointly, and the appellant testifies and calls witnesses in appellant's case in chief, the waiver rule applies and the appellate court, including this Court, will consider all the evidence in the record in determining whether or not the trial judge erred in denying the motion for a directed verdict. State v. Phillips, 416 S.C. 184, 195-97, 785 S.E.2d 448, 453-54 (2016)(explaining Hepburn waiver rule); State v. Hepburn, 406 S.C. 416, 429-42, 753 S.E.2d 402, 410 (2013), *adopting* State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996); *Cf.* State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)(citation omitted).

Discussion

Mutual combat, transferred intent, and accomplice liability are valid legal principles under South Carolina law which can form the basis of a murder conviction.

Appellant now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal offense, but rather a bar to self-defense; transferred intent should not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. However, contrary to Appellant's assertions, under South Carolina law, mutual combat is a valid recognized legal principle under which one can be charged and convicted of murder, despite the fact it has fallen out of common use. State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918); State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906). While mutual combat is a bar to a self-defense claim, the theory is not limited to that one (1) purpose. Brown, supra. In Brown, the State used mutual combat to convict multiple defendants for the death of one (1) of the combatants⁹ And, transferred intent, a valid legal principle under South Carolina law, would be applicable to Appellant's case since an innocent bystander, a child, was killed, during the mutual combat, instead of a combatant. Finally, accomplice liability, a valid legal principle under South Carolina law, would be appropriate where Appellant provided his son with the "Tech Nine" firearm to use during the running gun battle, told his son how to assemble the weapon, and drove his truck at all times while his son was firing the Tech Nine out of his truck during the ongoing running gun battle with Robinson that led to the innocent child's death.

⁹ Brown, 108 S.C. 490, 95 S.E. 61.

The doctrine of mutual combat has existed in South Carolina law since 1843. Taylor, 356 S.C. at 231. The Supreme Court in Taylor acknowledged the doctrine had “fallen out of common use in recent years” but still found it to be binding law. Id. The escalating urban warfare in present-day society has resurrected the need for the doctrine of mutual combat. Here, the State took the long-standing and viable law of mutual combat and applied it to modern day facts.¹⁰ Appellant argues the doctrine of mutual combat can only be used for the sole purpose of barring a plea of self-defense. This is an incorrect limitation of the law on mutual combat. Although mutual combat is commonly analyzed when a claim of self-defense is raised,¹¹ that is not its only application.

Numerous South Carolina cases have used the legal principle of mutual combat to hold a defendant guilty of murder. “Where two persons mutually engage in combat, and one kills the other, and at the time of the killing it be maliciously done, it is murder. If, on the other hand, it be done in sudden heat and passion on sufficient provocation without premeditation, or malice, it would be manslaughter.” Andrews, 53 S.E. at 424;¹² *see also* State v. Hammond, 36 S.C.L. 91, 102 (S.C. App. L. 1850) (“Even in cases of mutual combat, if one begin the fight with a mortal

¹⁰ Although the doctrine of mutual combat has fallen out of common use, the present case is not the only recent case in which the State has successfully prosecuted for murder both participants in armed mutual combat who were on opposite sides, where a 3rd person who was present, but not a participant in the armed mutual combat, was killed. *See e.g.* Final Brief of Respondent in State v. Eugene D. Patterson, *Unpublished Opinion* No. 2013-UP-154 (Ct. App. Filed April 17, 2013) and Final Brief of Respondent in State v. Andre Tayson Boone *Unpublished Opinion* No. 2013-UP-155 (Ct. App. Filed April 17, 2013). Respondent is not citing either of these Unpublished Opinions as precedential authority. Rule 268 (d)(2), SCACR.

¹¹ *See Taylor*, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495 (“Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat.”).

¹² Judge Cooper instructed the jury on both murder and voluntary manslaughter. The jury returned a verdict of guilty of murder.

weapon, it is murder..."); State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902) ("Where there is evidence from which a jury may infer that there was mutual combat, on a trial for murder an instruction as to such combat is not error."); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("There was evidence of threats which, if true, justified a verdict of premeditated murder. There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat.").

The 1918 case of State v. Brown utilized the doctrine of mutual combat to hold multiple defendants accountable for the death of one (1) of the combatants. 108 S.C. 490, 95 S.E. 61. Much like the facts of Appellant's case, all of the defendants were held responsible for the death of the victim even though only one (1) of them had inflicted the fatal injury. In Brown, many employees at a local mill began to strike and picket after the mill organized a labor union. Id., 95 S.E. at 62. One morning, a fight erupted between current employees and strikers. Id. One (1) of the men involved in the melee pulled out a knife and killed David Freize, another participant in the fight. Id. Two (2) of the strikers and three (3) of the employees were indicted for the murder of Freize. Id. On appeal, the defendant's alleged that it was improper to charge the law of mutual combat. Id. at 61. The Supreme Court affirmed the convictions and held, "That everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one 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 the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences." Id. at 63.

In order for the doctrine of mutual combat to apply, multiple factors must be shown. In determining whether mutual combat exists, there must be evidence of a “mutual intent and willingness to fight.” Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003), *quoting* Graham, 260 S.C. at 450, 196 S.E.2d at 495. One looks to the “acts and conduct of the parties and circumstances attending and leading up to the combat” to determine mutual intent. Id. Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of “ill-will between the parties,” threats, and an “apparent willingness of each to engage in an armed encounter with the other” Id. The parties must also be armed and know the other to be armed. Id.

As discussed below under Argument II. of this brief, the State presented overwhelming evidence of all the factors for mutual combat and thus the legal principle was appropriately applied to this case. Appellant contends it was error for the State to use the theory of mutual combat to prove murder. Specifically, he claims the State failed to prove the elements of murder in general. However, the State did prove the elements of murder, and the jury was instructed on the law of murder and they found the State had met its burden of proof in establishing the elements of murder beyond a reasonable doubt. The State proved Appellant did act with malice by attempting to murder Robinson and in doing so engaged in a running gun battle with Robinson in residential neighborhoods in broad daylight with children playing nearby constituting a depraved and wicked heart and one acting with gross recklessness. *See* State v. Wilds, 355 S.C. 269, 276-77, 584 S.E.2d 138, 141-42 (Ct. App. 2003)(defining malice). The State proved Khalil Singleton was killed as a direct and proximate result of the running gun battle between Appellant, his son, and Robinson. *See* State v. Dantonio, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008)(“A defendant’s act may be regarded as the proximate cause if it

is a contributing cause of the death of the deceased.”); Id. (“The Defendant’s act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased.”); State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000)(“[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent.”); State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941)(“If there was malice in [defendant’s] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake.”). Judge Cooper instructed the jury, “Murder is defined in the law as the killing of any person with malice aforethought, either express or implied.” (R. 806, 832). Judge Cooper defined the terms “malice” and “aforethought”. (R. 806-07, 832-33). Further, he instructed the jury, “the state is required to prove malice beyond a reasonable doubt.” (R. 806, 808, 833). And, Judge Cooper instructed the jury Appellant did not have to prove the absence of malice, but the State had to prove the presence of malice beyond a reasonable doubt. (R. 808, ll. 7-9, 833, ll. 18-20). And, Judge Cooper instructed the jury the State must prove beyond a reasonable doubt that the Defendant killed a person. (R. 806, 832). Thereafter, Judge Cooper explained to the jury that the murder charge against Appellant rested on the theory of mutual combat. (R. 808-10, 833-34). Judge Cooper instructed the jury twice on the elements of mutual combat. (R. 808-10, 833-35). Therefore, the jury was well aware that not only must mutual combat be proven, but the elements of murder as well, and they found Appellant guilty of murder and attempted murder beyond a reasonable doubt.¹³

¹³ There was no objection to the jury charge on murder by Appellant and he does not raise a jury instruction issue on appeal. Further, as Appellant admits in his brief, there was no objection to the jury instruction on the law of mutual combat and he does not raise that issue on appeal. (IBOA, p. 8, fn. 1).

Next, Appellant asserts that it was error for Judge Cooper to consider the legal principle of transferred intent. Respondent submits Judge Cooper properly considered the law of transferred intent. The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant. Nevertheless, it is only logical that transferred intent would apply in such a situation. Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim. South Carolina recognizes that "if there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." Heyward, 197 S.C. 371, 377, 15 S.E.2d at 672. Thus, transferred intent holds the defendant liable for the harm caused to an innocent bystander. *See, e.g., Fennell*, 340 S.C. at 272, 531 S.E.2d at 515 (A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.). It would make no sense for "mutual combat" to hold participants liable for the death of another participant but not for that of an innocent bystander caused by the participants' mutual combat.

The California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting. People v. Sanchez, 26 Cal. 4th 834, 29 P.3d 209 (2001). In referencing the concurring opinion's analysis of transferred intent, the majority opinion stated in a footnote:

For purposes of applying the rule of transferred intent, it does not matter whether defendant himself fired the fatal shot or instead induced or provoked another to do so; in either situation, defendant's culpable mental state is determined as if the person harmed were the person defendant meant to harm.

26 Cal. 4th at 850, 29 P.3d at 220.

In concluding that each defendant was equally liable for the innocent bystander's death, the Court stated:

Because defendant and co-defendant, rival gang members, had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots in a gun battle, it was not unfair to hold them equally responsible for an innocent bystander's death, without regard to which of them actually fired the bullet

26 Cal. 4th at 854, 29 P.3d at 144.

Accordingly, the doctrine of transferred intent was properly applied to Appellant's case. If Young, Jr. had been killed, then there would be no question that both Appellant and Robinson would be responsible for his death under mutual combat. Since an innocent bystander was killed rather than one (1) of the combatants, the doctrine of transferred intent was properly utilized to transfer Appellant's, Young, Jr.'s, and Robinson's criminal intent to the unintended victim. Hence, there was no error in charging the jury on the law of transferred intent.

Additionally, Appellant argues that the State must present evidence of some doctrine that would allow for one (1) defendant to be responsible for another defendant's actions. Appellant's examples of such doctrines are conspiracy, accomplice liability, and felony murder. However, much like the above theories, mutual combat is a recognized doctrine in which a defendant can be held accountable for the actions of another defendant. See Brown, 95 S.E. at 63 ("[E]very one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not."); see also, Taylor, 356 S.C. at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered *when both parties contribute* to the resulting fight."). Mutual combat with firearms is an unlawful act and one inherently dangerous to others including bystanders. Further, attempting to murder someone with a firearm is also an unlawful act inherently dangerous to others.

To further counter Appellant's argument, Respondent submits a review of other states' case law on mutual combat with relation to other theories of culpability is beneficial. See State v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) ("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered."); Alston v. State, 662 A.2d 247, 254 (Md. 1995) ("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare."). See also Reyes v. State, 783 So.2d 1129, 1133 -1134 (Fla. App. 3 Dist. 2001) (noting Alston and adopting logic citing other jurisdictions with similar holdings). The logic of these cases is instructive.

In State v. Spates, 779 NW.2d at 772, the Supreme Court of Iowa reviewed a murder conviction where the victim had been a bystander killed "during a gun battle between rival groups...." The Court considered both theories of aiding and abetting and mutual combat. In light of the applicability of those theories, the court concluded:

We agree with those courts that have concluded participants in mutual combat encourage each other to engage in the potentially lethal conduct that leads to the injury of innocent bystanders, thereby supporting liability as an aider and abettor.

779 N.W.2d at 780.

Iowa had previously reached a similar conclusion in State v. Brown, 589 N.W.2d 69 (Iowa App. 1998), *reversed on other grounds*, State v. Reeves, 636 N.W. 2d 22 (Iowa 2001). In

that case, the victim was killed when she unwittingly drove between rival gangs in the midst of a shootout. However, a rival gang member, not Brown, actually fired the fatal bullet. Brown contested his second degree murder conviction as there was no evidence connecting him personally to the fatal bullet.¹⁴ The court, considering proximate cause, rejected Brown's assertion finding:

Brown's engagement in conduct that created a very high risk of death or serious bodily injury to others was a proximate cause of Davis's death. See State v. Marti, 290 N.W.2d 570, 579 (Iowa 1980). This is true whether it was the defendant or another participant in the shoot-out who fired the shot that killed the innocent bystander. See id. ("It is not essential for conviction in all cases that the accused actively participated in the immediate physical impetus of death").

589 N.W.2d 69, 74 -75.

The Maryland Court of Appeals considered similar circumstances in regard to a conviction for a "depraved murder"¹⁵ conviction, and reasoned as follows:

The "bottom line" is that when a group, or two groups, of hoodlums deliberately engage in a gang-war style of shoot-out in a crowded urban area, they collectively

¹⁴ Though "second degree murder," the malice requirement is substantially the same as South Carolina's malice requirement for murder. In Iowa, "[m]alice is required for both degrees of murder. See Iowa Code § 707.1 (1997) ('A person who kills another person with malice aforethought either express or implied commits murder.'). However, first-degree murder requires proof of deliberation and premeditation in addition to malice aforethought. See Iowa Code §§ 707.1, 707.2(1). Second-degree murder, on the other hand, does not require deliberation and premeditation; it requires only proof of malice aforethought. Compare Iowa Code § 707.2(1) with § 707.3." Reeves, 636 N.W.2d at 25. Thus, the charge would be in definition comparable to murder in this State.

¹⁵ Again, this charge appears similar to the "second degree murder" charge in Iowa, and omits only an otherwise required deliberation or premeditation element of first degree. See Owens v. State, 906 A.2d 989, 1026 (Md. App. 2006)(describing one way of proving second degree murder as "what has become known as depraved heart murder--a killing resulting from 'the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.'"). It is not, however, limited to unintentional acts, but apparently professed unintentional results. Robinson v. State, 307 Md. 738, 745-746, 517 A.2d 94, 98 (Md. 1986). The inclusion of the "depraved heart" and "reckless and wanton" aspect, places the charge on similar footing with our requirement of malice. State v. Wilds, 355 S.C. 269, 276-277, 584 S.E.2d 138, 142 (Ct.App. 2003) ("Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life'").

trigger an escalating chain reaction creating a high risk to human life. When instead of taking their gunslinging vendetta to an uninhabited island or some remote spot in the desert, they arrogantly indulge in their homicidal insanity in the middle of a crowded block of residences, each participant in such collective madness displays a wanton and depraved indifference to any human life that might randomly fall within their overlapping and deadly enfilades. Should death to one of the innocent bystanders or homeowners ensue, each participant in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.

Alston v. State, 643 A.2d 468, 469 (Md. App. 1994). The affirmance was upheld on appeal, with the higher court noting: "Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare." Alston v. State, 662 A.2d 247, 254 (Md. 1995). *See also* Reyes, 783 So.2d at 1133 -1134 (noting Alston and adopting logic citing other jurisdictions with similar holdings).

Similarly, in a 2005 case, the Court in the District of Columbia, in reviewing a causation charge, reasoned that "while proximate causation as a theory of second-degree murder liability has been recognized in our case law for some time, the factual scenario of a 'gun battle' on city streets, as in this case, is relatively new." Roy v. United States, 871 A.2d 498, 507 (D.C. 2005), *cert. denied*, 547 U.S. 1162, 126 S.Ct. 2346 (2006). The Court easily acknowledged "the application of proximate cause liability to those participants who willfully choose to engage in these battles." Id. In upholding the application in that specific case as reflected in the contested charge on causation, the Court reasoned: "While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered." 871 A.2d at 509.

Therefore, under the law of South Carolina and many other states, if both parties contributed to the mutual combat (which by definition they must), then both parties are actors in the gunfire and both parties are culpable for the resulting injury.

Furthermore, the law of parties to a criminal offense would be applicable to Appellant who retrieved the "Tech Nine" weapon from a residence, was angry at Robinson and wanted to kill him, handed the gun to his son to use, told him how to assemble the weapon, and drove his truck throughout the running gun battle with Robinson as his son fired out the passenger window of the same. "Under the 'hand of one is the hand of all' theory of accomplice liability, 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. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Gibson, 390 S.C. 347, 701 S.E.2d 766, 769 (Ct. App. 2010). It is clear there is evidence in the record from which the jury could find beyond a reasonable doubt that Appellant and his son, acting together, aiding and abetting each other, participated in a running gun battle [mutual combat] with Tyrone Robinson, attempting to murder Robinson, that proximately resulted in the death of an innocent child bystander, eight (8) year old Khalil Singleton.

Finally, Appellant argues that South Carolina should not allow for a murder conviction to rest upon the legal principles of mutual combat and transferred intent because, if the legal theory was accepted, any time an individual fought with an opponent, the individual would be criminally responsible for the harm caused by his opponent's conduct. This is simply not true. If a person was truly acting lawfully in self-defense, the legal principles of mutual combat and transferred intent would not apply. Mutual combat is different. The parties agree to fight and to

fight with firearms. They are by definition not acting in self-defense. See Taylor, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495.

Respondent submits that is the precise reason mutual combat with firearms can be and should be used for a murder conviction. Much like accomplice liability, both parties should be held equally accountable for the consequences that result from creating a zone of danger. Mutual combatants' activities are comparable to those of aiders and abettors because they encouraged each other to engage in a dangerous urban or residential conflict. Reyes, 783 So.2d at 1133-1134. Here, Appellant, his son, and Robinson encouraged each other to engage in a lethal running gun battle that resulted in the death of an innocent child. Even though Robinson fired the bullet that killed Khalil, it is just as probable that one (1) of Appellant's and Young, Jr.'s bullets could have injured or killed an innocent bystander who was merely caught in the crossfire of the havoc the men created. Further, if not for the running gun battle instigated and continued by Appellant and his son, eight (8) year old Khalil would not have been killed. Therefore, not to hold Appellant accountable for the death of Khalil would be an injustice, for this case and future cases.

In conclusion, the deep-rooted doctrine of mutual combat is a valid legal principle on which to base a murder charge or conviction. Here, Appellant, Young, Jr., and Robinson mutually engaged each other in an armed conflict with deadly weapons in which it was reasonably foreseeable that someone could be killed. The fact that an eight (8) year old child was killed, instead of one (1) of the three (3) men engaged in mutual combat, does not excuse the combatants of their culpability. In fact, it makes it more egregious. The State properly prosecuted Appellant for murder under the theory of mutual combat, transferred intent, and accomplice liability; and, Judge Cooper correctly denied the motion to quash the indictment and

the motion for a directed verdict. Judge Cooper did not abuse his discretion in holding that mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base Appellant's murder charge and conviction. The motion for directed verdict was appropriately denied, and thus, this appellate issue has no merit and must be denied.

II. Overwhelming direct and circumstantial evidence of mutual combat was presented at trial to withstand the directed verdict motion.

Appellant argued below that no evidence was produced at trial that Appellant and Robinson were engaged in mutual combat at the time of the murder. This issue was preserved for appellate review; however, there is no merit to it. Judge Cooper properly denied Appellant's motion for a directed verdict because the State presented both direct and substantial circumstantial evidence that Appellant, his son, and Robinson were engaged in mutual combat when eight (8) year old Khalil Singleton was killed. (R. 654-57, 749). In failing to view the evidence in the light most favorable to the State, Appellant's argument is wholly without merit. At trial, the State produced ample direct and circumstantial evidence showing Appellant, his son, and Robinson were engaged in mutual combat on the afternoon of September 1, 2012.

As previously stated, there must be a "mutual intent and willingness to fight" to constitute mutual combat. Taylor, 589 S.E.2d at 3. The required mutual intent can be inferred from the parties' acts and conduct, and the circumstances of the combat. Id. Mutual combat also requires the combatants to be armed and know the other to be armed with deadly weapons. Id.; *see also* State v Mathis, 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other); Brown, 95 S.E. at 63 ("That everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one 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 the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences."); *See also* 40 C.J.S. Homicide Section 197 ("Mutual combat usually arises when the parties are armed with deadly weapons and mutually agree or intend to fight with them."). In finding that evidence of mutual combat existed to submit the issue to the jury, the Court in Graham held:

There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.

260 S.C at 452, 196 S.E.2d at 496.

Mutual intent and willingness to fight

The State presented direct and substantial circumstantial evidence that Appellant and Robinson mutually intended to fight. At trial, the chain of events surrounding Appellant and Robinson's extensive armed chase and running gun battle were presented to the jury by numerous witnesses and evidence.

Robinson approached Young, Jr. with a .38 caliber gun in his hand. Appellant tried to take the gun away but it accidentally fired. Appellant backed away as Robinson fired several shots into the ground at his feet. Robinson then got into his vehicle with his gun and drove away. (R. 565-81; State's Ex. 17, Statements of Appellant).

Seconds after Robinson left, Appellant and Young, Jr. did not call police and report the shooting but retrieved a black bag containing a "Tech Nine," a 9MM semi-automatic weapon, a thirty (30) round magazine, and a box of ammunition. Appellant admitted he and his son conferred and decided to go after Robinson. Appellant admitted he wanted to kill Robinson for

firing at his feet or legs and threatening his son. Jontu testified both men were angry when they went in search of Robinson. (State's Ex. 17, Interview of Appellant, R. 565-81).

Appellant and his son got into Appellant's grey truck with Appellant driving. Appellant handed the 9mm weapon to his son. In Appellant's grey truck, Appellant and Young, Jr. began searching for Robinson on the public roads of Hilton Head Island. (State's Ex. 17, Interview of Appellant, R. 565-81).

As they were driving looking for Robinson to shoot him, Appellant handed the black bag containing the "Tech Nine" to his son; Young Jr. removed the contents of the bag, and Appellant instructed his son how to assemble the weapon for firing. Young Jr. assembled the "Tech Nine." (R. 565-81).

After one (1) failed attempt at locating Robinson, Appellant and Young, Jr. finally tracked Robinson down on Oakview Road. With Appellant's knowledge and assistance, his son, Young, Jr. pulled his weapon out, leaned out the window of Appellant's truck, and with Appellant still driving the truck, Young, Jr. tried to shoot Robinson but the gun jammed. According to Appellant's own statement to police that was admitted in evidence, at this time Robinson also brandished his .38 caliber weapon out the window of his car and fired several shots at Appellant and Young, Jr. (State's Ex. 17, Interview of Appellant/Interview 7). A woman who called 911 reported that a grey truck and a car driven by Robinson were shooting at each other near Spanish Wells Road. (State's Ex. 4, 911 calls).

Appellant and his son decided to continue the pursuit and drive back to Robinson's home on Allen Road for the 2nd time that day. Appellant drove to Robinson's residence, and with Appellant driving and with his knowledge and consent, Young, Jr. began firing numerous bullets at Robinson using the "Tech Nine" as Appellant drove into Robinson's yard. Robinson came out

of some location and fired at Appellant and his son with his .38. Appellant then drove he and his son away. (State's Ex. 17, Interview of Appellant; State's Ex. 3, 911 calls). Another citizen who lived one (1) street over from Allen Road called 911 and reported numerous shots being fired on Allen Road. Charlese Mitchell also testified to hearing what sounded like ten (10) rapid shots being fired near her home. This was the 1st set of rapid shots.

Delaney testified Robinson approached him during the running gun battle and told him that the men in the grey truck [Appellant and Young, Jr.]: "yeah they was shootin at me so I shoot back at them". The shooting at Robinson's residence would have been the 3rd time Robinson had brandished his pistol and fired bullets at or near Appellant and Young Jr.

Appellant and his son did not stop their pursuit of Robinson. They continued up Marshland Road running Delaney off the road, but they then turned around and drove back down Marshland Road. Once they arrived there, they spotted Robinson's car parked in Mr. Griffin's yard near a pine tree. Again, while Appellant was acting as the driver, Young, Jr. shot Robinson's car multiple times with the "Tech Nine." The two (2) men then turned around and drove down Allen Road again in search of Robinson. (R. 507-61, 716-17, 718)

After Robinson left Delaney's residence, Delaney entered his home and heard a series of rapid shots sounding like they came from a submachine gun [the "Tech Nine"]. His girlfriend, who had been home earlier and heard the first (1st) set of rapid shots, testified after Delaney arrived home and Robinson left, she also heard this second (2nd) set of rapid shots. She then saw Appellant coming from the direction of Robinson's residence in his grey truck. This was the 2nd time she saw Appellant coming from the direction of Robinson's residence after gunfire. Another nearby resident called 911 and reported numerous gunshots being fired on or near Allen Road. Charlese then saw Appellant with another male in the passenger seat, squeal his tires as

he turned off of Allen Road and onto Marshland Road. She then heard three (3) separate shots from a different kind of weapon [Robinson's .38] as Appellant drove away. (R. 507-50).

Charlese Mitchell and Domonique Griffin established that Robinson was in Griffin's yard when he fired the three (3) shots at Appellant and his son as they turned off of Allen Road onto Marshland Road. This was the 4th time Robinson had fired his .38 at Appellant and Young, Jr. the afternoon of September 1st. It was then that Khalil was shot and died.

Appellant and Robinson's actions and conduct that afternoon indisputably prove the required mutual intent and willingness to fight for mutual combat. This intent is further demonstrated by Appellant's own admission to participating in a running gun battle with Robinson. (State's Ex. 17, Statements of Appellant).

Agreement to Fight

Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id.

The State presented direct evidence of Appellant and Robinson's animosity towards each other. Appellant had the following conversation with police discussing his relationship with Robinson:

(A) Man, Dude started fucking with us (inaudible) is all I got to say.

(A) He came down and shot at me and my car and all I did was defend myself.
Now what happened after that, I went down there to confront him and he started shooting at us and we got the fuck from around there. And then ...

(Q) Why was your son shooting out the window?

(A) Because he was shooting at us, cause he was shooting.

(A) ...I was like ... I'm thinking ... like, I ain't even gone lie to y'all. I'm thinking I'm gone kill him. 'Cause he tried to kill me.

(A) 'Cause this ain't the first time. He shot at my car one time...

(A) ...So we went after him [Robinson]...

(A) But him [Robinson], I'll kill him in a heartbeat, because he doesn't deserve to be here. [Then discussing remorse for the death of the child].

But him [Robinson], I have no remorse. You understand I wish he was dead right now.

(State's Ex. 17, Statements of Appellant). This colloquy, coupled with the chain of events on September 1, 2012, clearly shows Appellant and Robinson had ill-will towards each other.

Appellant's incriminating statements to law enforcement, the testimony of the eyewitnesses to the running gun battle, the physical evidence, and the 911 calls admitted in evidence show each of the three (3) men agreed to and did mutually participate in running gun battle [mutual combat] on the streets, roads, and in the yards of Hilton Head Island including on Oakview Road, Allen Road, and Marshland Road.

Armed and knew the other to be armed

The parties must also be armed and know the other to be armed. *Id.* The State presented direct and circumstantial evidence that Appellant and his son were armed with a "Tech Nine", 9MM semi-automatic pistol. During Appellant's interview with police, Appellant admitted to his son using the 9MM to try to shoot Robinson on more than one (1) occasion and to shooting at Robinson. Additionally, Appellant admitted his son attempted to shoot Robinson earlier on Oakview Road with the 9 mm gun but it jammed. (State's Ex. 17, Interview of Appellant).

The State also presented evidence that Appellant and his son were armed through Jontu, Sr.'s testimony. According to Jontu, Appellant was driving and he handed his son a bag, and Appellant's son pulled a gun out of a black bag and began assembling the weapon while they

were searching for Robinson. (R. 565-81). Agent DeFreese's testimony corroborated Jontu's testimony and Appellant's admission in determining that the bullets in Robinson's car originated from Appellant's and his son's 9 MM semi-automatic pistol. (R. 626-46).

Also, the State introduced direct evidence that Appellant knew Robinson was armed with a weapon. During Appellant's interview, he discussed knowing what type of gun Robinson used during the conflict:

(Q) What ... What did he have?

(A) Who?

(Q) Tyrone.

(A) A pistol.

(A) I know what I took from him in my yard was a ... a thirty-eight. [Appellant then admits he did not actually take the .38 away from Robinson but just knocked it or slapped it away].

(State's Ex. 17, Statements of Appellant)

Furthermore, the State produced other evidence that Appellant knew Robinson was armed. Jontu testified that Robinson approached Appellant's son with a gun in his hand on Wild Horse Road. Appellant then attempted to take the gun away from Robinson but was unsuccessful. Robinson then fired the gun several times in front of Appellant. Robinson then left Appellant's home with the handgun. (R. 565-81). Appellant also confirmed Jontu's testimony in this regard. (State's. Ex. 17, Interview of Appellant).

Appellant also knew Robinson was armed after the encounter on Oakview Road. Appellant told police:

We know his usual spots. Okay, so we pass him ...and when we pass him ...he's hanging out the road...out his window brandishing his pistol again ... (motioning with hands) ...so at this point, I was like, well...I mean,, he's going to try and kill us...all right?

(State's Ex. 17, Interview of Appellant). Appellant knew Robinson was armed.

And, the State proved Robinson knew that Appellant and his son were armed. Robinson saw Appellant's son try to shoot him when he drove past them on Oakview Road. After Appellant and his son shot at Robinson on Allen Road, Robinson told Delaney and his wife separately that those "M.F.'s shooting at me, so I shoot back." And, Robinson returned fire on the last occasion minutes after Appellant and his son fired into Robinson's car. (R. 507-50, 550-61, 647-53, 696-97, 699-701, 702-03, 706). Robinson knew Appellant and his son were armed.

Natural Consequences

Additionally, Appellant admitted Khalil and the other children were playing outside. (R. 720). During Appellant's interview, he admitted multiple times to engaging in a gun fight in the area where children were present:

(A) So we went down to Allen Road and when we got down to Allen Road, I saw his car. We turned around in the driveway, and that's when he came out shooting...

(Q) Okay, how many shots did your son shoot down there on Marshland Road...on Allen, Allen, Allen Road. Whatever they call it...how many shots did he...he's right next to you in your car. I mean its all right...

(A) Probably like four or five shots, man.

(Q) Okay where at? Towards Tyron or at the car?

(A) Toward...toward's Tyrone...Tyrone was running back...

(State's Ex. 17, Statements of Appellant).

While discussing seeing the children, Appellant testified:

Because his window was down and nobody was in it. And it doesn't take a rocket scientist to see, if he was inside that car and we shot it up that many times, somebody would have been dead, you know. We made sure that, you know, it's bad that it was kids in the community playing, but we made sure that we was away from all those kids that were playing. They were playing on the trampoline when we left out.

You know, its bad that the kids were in that neighborhood, I'm not going to sit here and say that it wasn't. But we didn't put anybody in harm's way.

(R. 720, ll. 1-11). This clearly demonstrates that Appellant was aware that innocent bystanders were in the vicinity. But this fact did not stop Appellant from continuing the conflict with Robinson, shooting up his car, and driving down Allen Road and back up Allen Road in pursuit of Robinson personally. Additionally, the running gun battle occurred in broad daylight in residential neighborhoods. Furthermore, the actions of Charlese Mitchell in calling the children in during the running gun battle, and Kathleen Fayfich of Peregrine Point in calling 911 proves any reasonable person would have anticipated the danger to children in the area. Accordingly, Appellant knew the natural consequences of his actions could lead to a bystander's death.

In conclusion, overwhelming direct and circumstantial evidence was presented to the jury tending to prove Appellant, and his son, were engaged in mutual combat with Robinson. The State introduced evidence Appellant, his son, and Robinson had a mutual intent to fight, they had ill-will between each other, and all came to the fight armed and knew the other to be armed. And, they continued to engage in the running gun battle even after the first direct encounter with firearms on Oakview Road. The elements of mutual combat were clearly established. Thus, Judge Cooper did not abuse his discretion in denying Appellant's motion for directed verdict on this basis.

To the extent Appellant argues he withdrew from the mutual combat, and as a result he should have been granted a directed verdict on the murder charge, **this issue is not preserved for review since Appellant did not request a directed verdict on the basis of a withdrawal**

from mutual combat.¹⁶ From a review of the trial record, Appellant only discussed the end or withdrawal from mutual combat when he requested a jury instruction on the law after he had already argued his motion for a directed verdict and it had been denied. In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 524 S.E.2d 837 (1999); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970). A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). Here, Appellant did not argue withdrawal from mutual combat when he made a motion for a directed verdict. The trial judge only had the opportunity to consider this issue when Appellant asked for a jury charge on the law of withdrawal. Therefore, Appellant is barred from asserting this point as a basis for a directed verdict in his appeal. Id.

Regardless, Appellant would not be entitled to relief even if he properly raised this issue at the directed verdict stage. In order to bring mutual combat to an end, one (1) of the combatants must withdraw from the conflict in good faith and make that fact known to his adversary. Graham, 260 S.C. at 451, 196 S.E.2d at 495-96. Here, there was no evidence presented by the State that would allow for the judge to find definitely that Appellant withdrew from the conflict. Appellant's action of driving away after firing multiple bullets into Robinson's car, then driving down Allen Road and returning back up Allen Road to Marshland Road, and then turning onto Marshland Road and driving away when shots were fired, must be

¹⁶ Appellant does not argue in his brief either that he withdrew from the mutual combat; however, Respondent anticipates Appellant may attempt to argue this unpreserved issue at the oral argument.

taken in context with the entire conflict. The chain of events that unfolded on September 1, 2012, included numerous instances of Appellant and Robinson driving to and away from multiple locations shooting at each other or attempting to shoot at each other. Appellant's other comings and goings were not viewed as withdrawals because they were simply in furtherance of his pursuit of Robinson. This instance should not be viewed as any different. Also, Appellant's recorded statements that were published to the jury show he did not intend to withdraw. As to Appellant's claim of withdrawal from mutual combat,¹⁷ this claim is not supported by a review of the trial record. Evidence was produced at trial that Appellant did not withdraw from the combat in good faith or communicate the same to Robinson.

Discussion

According to Appellant's argument on the jury instruction below, the actions of Appellant and Young, Jr. driving down Marshland Road after shooting Robinson's car and after looking for Robinson again on Allen Road, constituted an end to the mutual combat. Essentially, Appellant's position is that driving away should be viewed as a withdrawal from the conflict entitling him to a directed verdict. Appellant is wrong.

Analysis

"Where a person voluntarily participates in mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he **withdraws and endeavors in good faith to decline further conflict, and**, either by word or act, **makes that fact**

¹⁷ Mutual combat case law uses the term "withdraw" not "ending mutual combat" when discussing this issue. See Graham, 260 S.C. at 451, 196 S.E.2d at 495-96. Therefore, Respondent shall use "withdraw" when addressing when mutual combat ends.

known to his adversary.” State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999).

Thus, two (2) elements must be satisfied in order to successfully withdraw from mutual combat.

Here, neither of these elements has been met.

Appellant argued below on the jury instruction issue that he withdrew from the conflict when he drove away after shooting holes in Robinson’s car, thereby ending the mutual combat. However, the key component to withdrawal from a conflict is that it must be done in good faith. In order to actually withdraw in good faith from a conflict, the aggressor must have truly desired to withdraw from or abandon the conflict, and must not have merely paused in his assault. *Comment Note: Withdrawal, After Provocation of Conflict, As Reviving Right Of Self-Defense*, 55 A.L.R.3d 1000, 1003 (1974). Thus, there is no withdrawal where Appellant simply steps back to assume a better strategic position or if he leaves and then returns to the scene with the same threatening or hostile intentions. Id. An aggressor does not abandon a conflict if he merely leaves to obtain a weapon, to wait for his adversary in ambush elsewhere, or because he is convinced that he has disabled or killed his adversary. Id.

Although South Carolina case law maintains that a withdrawal must be done in good faith, it does not specifically address what constitutes a “good faith withdrawal.” However, other states have addressed this very issue. In addressing this issue, the Supreme Court of Missouri explained the difference between a good faith withdrawal and a mere retreat. “There is a wide difference between a withdrawal and a mere retreat. A retreat may be and often is a continuance of hostilities. A withdrawal is the abandonment of the struggle by one of the parties, and such abandonment must be perceived by the other.” State v. Heath, 237 Mo. 255, 141 S.W. 26, 29 (Mo. 1911).

Additionally, the Kentucky Court of Appeals in Hellard v. Commonwealth rejected the defendant's assertion that he withdrew from the combat in good faith. Hellard v. Commonwealth, 84 S.W. 329, 329 (Ky. 1905). The Court held, "A retreat is not necessarily an abandonment. It may be only the falling back on a better position, or for strategic reasons, with intention to continue the battle when the advantage warranted it." Id.

Also, the Supreme Court of Louisiana, in State v Kellogg, analyzed the reinstatement of a claim of self-defense if the defendant withdrew from the combat in good faith. State v. Kellogg, 29 So. 285 (La. 1901). The Court stated that self-defense could not be asserted under the basis of withdrawal if the conduct was "a mere momentary cessation of hostilities, with no bona fide, clearly expressed intention to withdraw from the conflict." Id. at 291.

Here, there was certainly no evidence presented by the State that indicated Appellant withdrew or desired to withdraw from the conflict in good faith. Appellant's explanations or protestations at trial of his intent are irrelevant to the directed verdict analysis. State v. Larmand, 415 S.C. 23, 31, 780 S.E.2d 892, 896 (2015). Appellant's act of driving away minutes after firing multiple bullets into Robinson's car at Griffin's residence, and after driving down Allen Road and back up Allen Road in search of Robinson personally, was not a desire to end the fighting. Appellant's actions were not a withdrawal, but a continuation of the hunt for Robinson or at most a retreat when Appellant saw Robinson about to shoot at him from Griffin's yard. Appellant's act of driving away must be viewed in relation to the whole incident and all of the direct and substantial circumstantial evidence. Id. at 31-33; 780 S.E.2d at 895-896.

The entire conflict revolved around Appellant and Robinson chasing after each other. Appellant traveled down numerous roads and made many stops in his search for Robinson. These other comings and goings were not withdrawals but rather mere continuations of

Appellant's pursuit of and hunt for Robinson. Appellant's act of turning onto Marshland Road from Allen Road and driving down the road, after shooting Robinson's vehicle and then pursuing Robinson personally on Allen Road, again should not be viewed as any different. The judge or jury could infer Appellant was merely unsuccessful in locating Robinson on Allen Road, or Appellant squealed his tires and took off on Marshland Road because he saw Robinson about to fire at him from Griffin's yard. Nor should Appellant's turning onto Marshland Road from Allen Road and driving away be viewed as any different than when Appellant drove down Allen Road and later turned onto Marshland Road after shooting at Robinson the 1st time on Allen Road at Robinson's residence.

Assuming Appellant intended to withdraw, which the evidence suggests otherwise, neither his words nor actions communicated this intent to Robinson. The Court in Graham explained that a withdrawal must be "communicated to the victim by word or act". 260 S.C. at 451, 196 S.E.2d at 496. Appellant did not attempt to verbally communicate a desire to end the conflict with Robinson. Moreover, Appellant's act of driving down the road would not have been reasonably interpreted by Robinson that Appellant intended to cease fighting. Instead, Appellant's act of shooting Robinson's car, then driving down Allen Road and returning up Allen Road and turning on Marshland Road, would have communicated to Robinson that Appellant and his son were still searching for Robinson personally. As stated above, the conflict included multiple instances of driving to and from different locations that did not amount to a withdrawal. It would be unreasonable to assume Robinson viewed this instance as anything different.

Therefore, since Appellant did not withdraw from the conflict in good faith or inform Robinson of an intended withdrawal, a directed verdict was properly denied. Therefore, there was no error. Appellant's argument to the contrary, if made, should be rejected.

CONCLUSION

For all of the foregoing reasons, Appellant's conviction and sentence for murder must be affirmed.

Respectfully submitted,

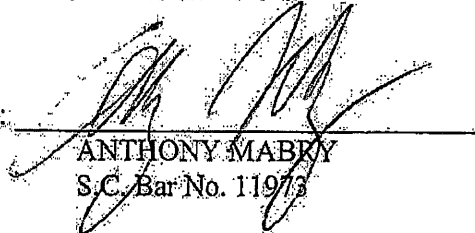
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September 19, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Thomas W. Cooper, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

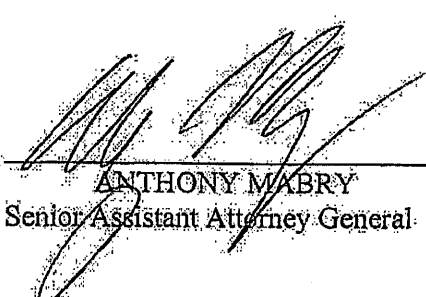
AARON YOUNG, SR.,

Appellant

Appellate Case No. 2016-000873

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



ANTHONY MABRY
Senior Assistant Attorney General

September 19, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

SEP 20 2013

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

AARON YOUNG, SR.,

PETITIONER

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Aaron Young, Sr., Appellant.

Appellate Case No. 2016-000873

Appeal From Beaufort County
Thomas W. Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-233
Submitted December 6, 2018 – Filed June 26, 2019

AFFIRMED

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Attorney General J. Anthony Mabry, and Senior
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all of Columbia; and Solicitor Isaac McDuffie Stone, III,
of Bluffton, for Respondent.

PER CURIAM: Aaron Young, Sr. appeals his conviction of murder in the death of Khalil S. (Victim). On appeal, Young, Sr. contends the trial court erred in refusing to direct a verdict of acquittal for murder (1) when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party who was not engaged in mutual combat and (2) when the State failed to establish mutual combat at the time of the fatal shooting. We affirm.

1. We find the trial court did not err in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat. In *State v. Young, Jr.*, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018), *cert. granted* (May 9, 2019), this court determined that under such a factual scenario, even though a non-participating innocent bystander was the victim, mutual combat is an appropriate basis for a murder charge. *See id.* at 434, 818 S.E.2d at 490-91 (finding, under this scenario, the trial court did not err in finding mutual combat a viable theory of prosecution for the murder charge); *id.* at 434-35, 818 S.E.2d at 491 (determining the trial court did not err in applying the doctrine of transferred intent to Young, Jr., noting there was evidence Robinson fired at the Youngs with intent to kill such that his intent was transferred to Victim, and under the theory of mutual combat, all combatants are deemed equally responsible for the natural consequences of their actions during combat and all may be held equally guilty of murder when a combatant dies, regardless of which combatant fired the fatal shot).

Additionally, there is no merit to Young, Sr.'s arguments that accomplice liability is inapplicable to establish murder because he was not aiding, abetting, assisting or conspiring with Tyrone Robinson and neither he nor his son, Aaron Young, Jr., were shooting at the time Victim was shot. The theory of criminal responsibility here was not based upon any assertion that the Youngs and Robinson were working in concert; rather, it was that *Young, Sr. and Young, Jr. aided and abetted each other* in mutual combat with Robinson in their attempt to kill Robinson, ultimately culminating in the death of Victim. *See State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017) ("Under the 'hand of one is the hand of all' theory [of accomplice liability], 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." (alteration in original) (quoting *State v. Thompson*, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05) (Ct. App. 2007))). Accordingly, the trial court properly denied Young, Sr.'s motion for directed verdict of acquittal for murder that was based upon a theory of

criminal liability drawn from a combination of the legal doctrines of mutual combat, transferred intent and accomplice liability, which established the elements necessary to submit the murder charge to the jury. *See State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When reviewing a denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the state."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury.").

2. We also find no error in the trial court's refusal to direct a verdict of acquittal for murder on the basis of Young, Sr.'s argument that the State failed to establish mutual combat at the time of the fatal shooting. On appeal, Young, Sr. contends the evidence shows he and Young, Jr. were leaving the neighborhood in his truck when Robinson shot Victim, witness Charlese Mitchell saw Young, Sr. coming from Allen Road toward Spanish Wells five minutes after hearing the second set of rapid shots—at which point she heard the last three shots fired by Robinson, one of which killed Victim—and Mitchell confirmed no one was firing from Young, Sr.'s truck at that time. Young, Sr. argues, even if this court extends the doctrine of mutual combat to apply when a noncombatant is killed by a combatant, "the State must still prove that two combatants were firing at each other in order to establish mutual combat." The specific arguments Young, Sr. made in support of his directed verdict motion were (1) that he did not aid, abet, assist or conspire with Robinson; (2) there was no indication he ever fired a weapon; (3) there was no evidence Victim's death was the natural consequence of the actions of shooting up a car; (4) the elements of murder had not been satisfied; and (5) "mutual combat has not been proven." Thus, he only *generally* asserted to the trial court in his directed verdict motion that mutual combat had not been proven, but provided no explanation for why it had not been proven. Even assuming his arguments—that there was no evidence he ever fired a weapon or that Victim's death was the natural consequence of his actions—supported his claim that the evidence was insufficient to show mutual combat, he does not argue these bases on appeal. Further, he never argued to the trial court, as he does on appeal, that the State failed to establish mutual combat because it failed to prove Young, Sr. was engaged in mutual combat *at the time of the fatal shooting*. Young, Sr. never argued to the trial court that the State was required to show he was engaged in the exchange of gunfire with Robinson at the exact moment Victim was shot by Robinson, or that the evidence showed he had withdrawn from the mutual combat at the time of the fatal shot. Accordingly, we question whether these arguments are preserved for our review. *See State v. Legg*, 416 S.C. 9, 11 n.2, 785 S.E.2d 369, 370 n.2 (2016) (noting issues

and arguments are preserved for appellate review only when they are raised to and ruled upon by the trial court).

Nonetheless, even assuming the matter is preserved, we find the State presented sufficient evidence of mutual combat such that the trial court properly presented the matter to the jury. There is evidence from witness Mitchell and witness Tyrone Delaney that Robinson indicated to them the combatants had been shooting at each other. Thereafter these witnesses heard a set of rapid gunshots and then three different sounding gun shots, ultimately resulting in Victim's death. Although Mitchell testified she thought approximately ten minutes passed between the second set of rapid shots and the three different sounding shots, Delaney testified the rapid fire shots and the set of three shots were not far apart from each other and were closer together than five to ten minutes. Additionally, there is evidence from Young, Sr.'s statement to the authorities that Robinson was walking and shooting at their truck when Young, Jr. returned gunfire at Robinson. There also is evidence in the record of Robinson being out of his truck and walking during the exchange of gunfire between the parties when he was in the Allen Road area right before Victim was shot. Accordingly, evidence was presented from which the jury could conclude the Youngs and Robinson were engaged in mutual combat around the time Victim was fatally shot. See *Weston*, 367 S.C. at 292, 625 S.E.2d at 648 ("When reviewing a denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the state."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [appellate court] must find the case was properly submitted to the jury."). The parties were not required to be shooting at each other at the exact same moment a fatal shot was delivered in order for mutual combat to apply. Further, as in *Young, Jr.*, there was evidence presented in Young, Sr.'s case that the Youngs and Robinson manifested a mutual intent and willingness to fight, an antecedent agreement to fight—shown by a pre-existing dispute and ill will between the parties—and that the Youngs knew Robinson was armed and that Robinson knew the Youngs were armed. See *Young, Jr.*, 424 S.C. at 435-36, 818 S.E.2d at 491-92 (addressing Young, Jr.'s argument there was no evidence of mutual combat because Young, Jr. and Robinson never engaged in combat "at the same time," and finding that evidence of mutual combat was presented under such factual scenario because the State presented direct and circumstantial evidence of each of the necessary elements of mutual combat, i.e. mutual intent and willingness to fight, an antecedent agreement to fight, and that the combatants be armed and know the other party is armed). Finally, no evidence suggests Young, Sr. withdrew from the conflict in good faith or that by word or act he made such known to Robinson. See

State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495-96 (1973) ("Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense . . . unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary. . . ." (quoting 40 C.J.S. *Homicide* § 122, p. 996¹)).

AFFIRMED.²

HUFF, SHORT, and WILLIAMS, JJ., concur.

¹ See also 40 C.J.S. *Homicide* § 205 (2019) ("One who voluntarily participates in a mutual combat for purposes other than protection forfeits the right of self-defense unless, before the homicide is committed, the person withdraws and endeavors to decline further combat and makes that fact known to his or her adversary.").

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

AARON YOUNG, SR.,

PETITIONER

APPELLATE CASE NO 2016-000873

Appeal from Beaufort County

Honorable G. Thomas Cooper, Circuit Court Judge

Opinion No. 2019-UP-233

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Aaron Young Sr. petitions the Court for rehearing and respectfully submits that in affirming the conviction for murder this Court misapprehended, in both this case and in the companion case of State v. Young, Jr., 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018), cert. granted (May 9, 2019), the law regarding mutual combat. By combining the law of mutual combat with the theories of transferred intent and accomplice liability this Court improperly expanded the law of mutual combat. Additionally, counsel respectfully submits that this Court, in both cases, overlooked the fact that at the time Tyrone Robinson shot and

killed Khalil Singleton, Petitioner was driving away from the scene and neither Petitioner nor Young Jr. were engaged in mutual combat with Robinson.

STATEMENT OF FACTS

Khalil Singleton was fatally shot by Tyrone Robinson. Tyrone Robinson was charged and convicted of the murder of Khalil Singleton. Khalil Singleton was not Robinson's intended victim. When Robinson fired the shot that killed Khalil Singleton, he was shooting at Petitioner and his son, Aaron Young Jr. as they were leaving the neighborhood in their truck. The Youngs and Robinson had been involved in an altercation earlier. Petitioner and his son Aaron Young, Jr. were also charged and convicted, in separate trials, of the murder of Khalil Singleton and the attempted murder of Tyrone Robinson. The State alleged that the Youngs were involved in mutual combat with Tyrone Robinson at the time that Robinson fatally shot Khalil Singleton. Khalil Singleton was an innocent third party and not involved in the earlier dispute between the Youngs and Robinson.

Jontu Singleton, Sr. testified that on September 1, 2012, he and Tyrone Robinson went to Aaron Young Sr.'s house where Robinson pointed a .38 caliber revolver at Aaron Young, Jr. (R. p. 569, line 9 – p. 570, lines 1-13). Jontu Singleton testified that as Petitioner and Robinson were struggling over the gun, Robinson shot in the air two times and then shot at Petitioner's feet. (R. p. 571, lines 1-5). Robinson left in his car, leaving Jontu Singleton behind at the Young residence. (R. p. 571, lines 6-17). According to Jontu Singleton, Petitioner retrieved a duffle bag from inside the house and then Petitioner, Young Jr. and Jontu Singleton got into Petitioner's gray pickup truck. (R. p. 571, line 20 – p. 572, lines 1-15). Jontu Singleton testified that as Petitioner was driving, Young Jr. took a gun out of the bag and was trying to put the gun

together. (R. p. 572, line 16 – p. 573, 574, lines 1-4). He described the gun as looking like a “TEC-9.” (R. p. 573, lines 6-9). Junto Singleton believed that the Youngs were looking for Tyrone Robinson. (R. p. 574, lines 20-23). The three were unable to find Robinson and returned to the Young residence where Junto Singleton got out of the truck but Petitioner and Young Jr. left again. (R. p. 576, line 2 – p. 577, lines 1-8).

Charlese Mitchell, Petitioner’s cousin, testified that on September 1, 2012, about 4:00 PM she heard a round of quick shots and then saw Petitioner pass by her house in his gray truck. (R. p. 511, line 3 – p. 512, 513, lines 1-5). Shortly after hearing the shots and seeing Petitioner, Tyrone Robinson came to Mitchell’s house and told her that the “MFs were out there shooting at him.” (R. p. 519, lines 10-19). Mitchell noticed a black handle sticking out of Robinson’s red shorts. (R. p. 520, lines 1-2). Robinson was outside using Mitchell’s phone when Mitchell’s boyfriend, Tyrone Delaney, came home. (R. p. 520, line 5 – p. 521, lines 1-13). Delaney and Robinson spoke and Robinson then left. Ten to fifteen minutes later Mitchell heard a second set of rapid shots. (R. p. 533, lines 16-24). Within five minutes of the second set of shots, Mitchell saw Petitioner again drive past her house. (R. p. 525, line 11 – p. 526, lines 1-17; p. 537, lines 1-4). As Petitioner’s truck passed her house, Mitchell heard three last shots that sounded different from the rapid shots. (R. p. 524, lines 18-25; p. 537, lines 16-18). Mitchell then saw Robinson fly past in his car with a shattered back window. (R. p. 527, lines 2-5). After hearing the last three shots, Mitchell went outside and saw that Khalil Singleton had been shot. (R. p. 528, lines 7-18).

Tyrone Delaney testified when he arrived home from work, Robinson was in the front yard using the phone. (R. p. 543, lines 3-16). Robinson asked Delaney if he had seen a gray truck and he told Delaney, “That mother was shooting at me, so I shot back.” (R. p. 543, lines

23-24). Delaney testified that Robinson was armed with a .38 revolver. (R. p. 544, lines 12-19). Delaney testified that after Robinson left Delaney heard rapid fire and asked Mitchell to call the children, his son, Xavier Delaney, Jontu Singleton Jr. and Khalil Singleton, inside. (R. p. 546, line 8 – p. 547, lines 1-8). Xavier Delaney came inside but Jontu Singleton Jr. and Khalil Singleton went the other way. (R. p. 547, lines 7-11). Delaney then heard another set of three shots that sounded different from the first set. (R. p. 545, line 24 – p. 546, lines 1-4; p. 547, line 12-14).

Dominique Griffin was inside of his house when he heard shots. (R. p. 553, line 6 – p. 554, lines 1-7). When the shots stopped, he went outside to check on his stepson, Jontu Singleton, Jr. (R. p. 554 lines 8-12). Griffin testified that Jontu was crying and pointing at Mr. Robinson saying, [H]e shot Khalil, he shot Khalil.” (R. p. 554, lines 17-18). The bullet removed from Khalil Singleton was “consistent with round nose plain lead bullets loaded into a .38 special caliber cartridge. . .” (R. p. 644, lines 1-12). Griffin testified that he saw Robinson’s car parked and there were bullet holes in the back window. (R. p. 555, lines 14-22). Robinson walked toward his car and looked like he was in a rush to leave. (R. p. 555, lines 20-25).

Officers initiated a traffic stop of Petitioner’s vehicle and found 9 mm shell casings in the back of the truck. (R. pp. 582-586). The SLED firearm expert testified that the casings found in the back of the truck matched the bullets that had been shot into Robinson’s car. (R. p. 636, lines 7-14). Petitioner provided statements to Investigators Seifert and Bromage with the Beaufort County Sheriff’s Department. Petitioner told the officers that his son shot at Robinson because Robinson was shooting at them. (R. p. 602, lines 2-5).

1. The trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat.

At the close of the State's case Petitioner moved for a directed verdict of acquittal. (R. p. 654, line 13 – p. 655, lines 1-15): Defense counsel noted that there was no indication that Petitioner ever fired a weapon. (R. p. 654, lines 24-25). Counsel noted that Petitioner was not aiding, abetting, assisting or conspiring with Tyrone Robinson. (R. p. 654, lines 18-23). Counsel argued that the elements of murder had not been satisfied through a theory of mutual combat. (R. p. 655, lines 9-15). The judge denied the motion stating:

The law that we've already talked about, the law of mutual combat, the law of transferred intent are the sort of things that come together in a legal scenario, and they create responsibility. And, of course, laws can do that and do that quite often.

And so for the reason I feel the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that as well, that the State has satisfied its burden in that regard sufficient to sustain the motion for directed verdict at this juncture.

(R. p. 656, line 21 – p. 657, lines 1-6). 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.

Mutual combat is inapplicable under the facts of this case. In State v. Graham, 260 S.C.

449, 450-51, 196 S.E.2d 495, 495-96 (1973) the South Carolina Supreme court wrote:

The basic principles governing the doctrine of mutual combat are thus stated in 40 C.J.S. Homicide s 122, p. 996:

'Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he withdraws and endeavors in good faith to

decline further conflict, and, either by word or act, makes that fact known to his adversary, ...’

In State v. Taylor, 356 S.C. 227, 231–32, 589 S.E.2d 1, 3 (2003), the South Carolina

Supreme Court wrote:

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be “mutual intent and willingness to fight” to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is “manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.” Id. Whether or not mutual combat exists is significant because “the plea of self-defense is not available to one who kills another in mutual combat.” Id. (citing State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919)). In order to claim self-defense, the defendant “must be without fault in bringing on the difficulty.” State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the “no fault” element of self-defense cannot be established.

In the present case the State did not argue that Petitioner was not entitled to a self-defense instruction because he was engaged in mutual combat. Instead, the State argued that mutual combat formed the basis for the murder charge. Respondent admits that, “The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant.” (Final brief of Respondent p. 27). Based on the declining use of mutual combat generally, this Court should not expand the application to innocent bystander noncombatants.

In State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918), a fight broke out between striking and non-striking mill workers. One of the strikers was fatally stabbed. Two strikers who participated in the fight and three non-strikers who participated in the fight were charged with murder and convicted of manslaughter although only one of them inflicted the fatal stab wound. The Brown case is the classical example of the uncommon and outdated theory of mutual

combat. If both of the Youngs had participated in mutual combat with Robinson¹ and Young Jr. had been fatally shot by Robinson, under the Brown theory of mutual combat both Robinson and Young Sr. could be charged with murder. In the present case, however, a non-participating innocent by-stander was fatally shot, not a mutual combatant. Mutual combat does not establish liability for Petitioner under the facts of this case.

The State stretches to hold Petitioner accountable for the actions of Robinson with a combination of theories of mutual combat, transferred intent and accomplice liability. None of these hybrid theories establish liability for Petitioner under the facts of this case.

In State v. Fennell, 340 S.C. 266, 272-73, 531 S.E.2d 512, 515-16 (2000) the South Carolina Supreme Court wrote:

This Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), overruled on other grounds by State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, *Substantive Criminal Law*, § 3.12(d) (1986) (discussing transferred intent); McAninch & Fairey, at 17-19 (same).

¹ As argued in issue two, Petitioner was not engaged in mutual combat with Robinson.

Robinson was properly found guilty of the murder of Khalil Singleton under the doctrine of transferred intent. Robinson intended to kill either Petitioner or his son or both but missed and killed Khalil Singleton instead. At the time Robinson fired the fatal shot, he did it with malice toward Petitioner and Young Jr. Robinson's malice and intent to kill Petitioner was transferred to the unintended victim. The State, however, failed to prove malice as it relates to Petitioner. Robinson was the shooter, not Petitioner. Transferred intent is not applicable under the facts of this case.

Accomplice liability is not applicable to establish murder under the facts of this case. Petitioner was not aiding, abetting, assisting or conspiring with Tyrone Robinson. At the time Robinson shot and killed Khalil Singleton, neither Young Jr. nor Petitioner were shooting. Instead, at the time of the fatal shooting Petitioner and Young Jr. were leaving the neighborhood in their truck. If Young Jr. shot Robinson, Young Sr. could be charged under the accomplice liability theory. In this case, however, Robinson shot Khalil Singleton. Neither Young Sr. or Young Jr. aided or abetted Robinson.

In State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), the South Carolina Supreme Court wrote:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

S.C. Code §16-3-10 defines murder as "the killing of any person with malice aforethought, either express or implied." Viewing the evidence in the light most favorable to the State, the State failed to prove that Petitioner killed Khalil Singleton with malice aforethought. Mutual

combat is inapplicable under the facts of this case involving the death of an innocent noncombatant. Neither the doctrine of transferred intent nor the doctrine of accomplice liability establishes the elements necessary to submit the murder charge to the jury. The trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat. The State's hybrid theory of liability based on mutual combat, accomplice liability and transferred intent is not supported by the law.

In finding that that the trial judge did not err in refusing to direct a verdict of acquittal because the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat this Court wrote:

In State v. Young, Jr., 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018), *cert. granted* (May 9, 2019), this court determined that under such a factual scenario, even though a non-participating innocent bystander was the victim, mutual combat is an appropriate basis for a murder charge. *See id.* at 434, 818 S.E.2d at 490-91 (finding, under this scenario, the trial court did not err in finding mutual combat a viable theory of prosecution for the murder charge); *id.* at 434-35, 818 S.E.2d at 491 (determining the trial court did not err in applying the doctrine of transferred intent to Young, Jr., noting there was evidence Robinson fired at the Youngs with intent to kill such that his intent was transferred to Victim, and under the theory of mutual combat, all combatants are deemed equally responsible for the natural consequences of their actions during combat and all may be held equally guilty of murder when a combatant dies, regardless of which combatant fired the fatal shot).

State v. Young Sr., Op. No. 2019-UP-233. (S.C. Ct.App. filed June 26, 2019).

Respectfully, this Court misapprehended the law of mutual combat by improperly expanding the law to apply to an innocent noncombatant.

Addressing accomplice liability, this Court wrote:

The theory of criminal responsibility here was not based upon any assertion that the Youngs and Robinson were working in concert; rather, it was that *Young, Sr. and Young, Jr. aided and abetted each other* in mutual combat with Robinson in their attempt to kill Robinson, ultimately culminating in the death of Victim. See State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017) ("Under the 'hand of one is the hand of all' theory [of accomplice liability], 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." (alteration in original) (quoting State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704 05) (Ct. App. 2007))).

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

Again, respectfully, this Court misapprehended the law of mutual combat by combining it with accomplice liability. Any accomplice liability between the Youngs did not culminate in the death of the innocent bystander. As discussed in issue two below, the State failed to establish that Petitioner was engaged in mutual combat with Robinson at the time Robinson fatally shot the innocent third party. The three sets of shots heard by Mitchell and other witnesses reflect 1.) shooting before Robinson appeared at Mitchell's home and announced that the "MFs were out there shooting at him." (R. p. 519, lines 10-19); 2.) Young Jr. shooting into Robinson's unoccupied car; and then 3.) Robinson shooting at the Youngs as they were leaving in their truck but fatally striking the innocent bystander. The improper expansion of the law of mutual combat requires rehearing.

2. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting.

As argued above in issue one, the State's theory of liability based on mutual combat is not recognized by South Carolina law and should not be. If this Court, however, decides to extend the theory of mutual combat to innocent bystander noncombatants, the theory would not apply in the present case because at the time Robinson shot Khalil Singleton, Petitioner was not engaged in mutual combat. The testimony reflects that Petitioner and his son were leaving the neighborhood on Allen Road in their truck when Robinson shot at them, killing Khalil Singleton.

Five minutes after hearing the second set of rapid shots, presumably the shots being fired into Robinson's unoccupied car, Charlese Mitchell saw Petitioner in his truck coming from Allen Road toward Spanish Wells. (R. p. 537, lines 1-15). Then Mitchell heard the last three shots which the evidence at trial established were shots fired by Tyrone Robinson, one of which killed Khalil Singleton. Mitchell confirmed that no one was firing weapons from the truck when it drove past her house. (R. p. 531, lines 4-6). If this Court extends the doctrine of mutual combat to apply to a noncombatant killed by a combatant, the State must still prove that two combatants were firing at each other in order to establish mutual combat. See State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). At the time Khalil was shot and killed only one person was shooting a gun, Tyrone Robinson. The State failed to prove that Petitioner was engaged in mutual combat at the time of the fatal shooting.

As discussed above, on appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Viewing the

evidence in the light most favorable to the State, the State failed to prove mutual combat, the only theory upon which the State sought to impose liability upon Petitioner. Tyrone Robinson, not Petitioner or his son, was the shooter. Petitioner was not aiding or abetting or conspiring with Robinson. The trial judge erred in refusing to direct a verdict of acquittal for the murder of Khalil Singleton because the State failed to establish mutual combat at the time of the fatal shooting.

In finding that that the trial judge did not err in refusing to direct a verdict of acquittal because the State failed to establish mutual combat at the time of the fatal shooting this Court first questioned whether the issue was preserved writing:

The specific arguments Young, Sr. made in support of his directed verdict motion were (1) that he did not aid, abet, assist or conspire with Robinson; (2) there was no indication he ever fired a weapon; (3) there was no evidence Victim's death was the natural consequence of the actions of shooting up a car; (4) the elements of murder had not been satisfied; and (5) "mutual combat has not been proven." Thus, he only *generally* asserted to the trial court in his directed verdict motion that mutual combat had not been proven, but provided no explanation for why it had not been proven. Even assuming his arguments—that there was no evidence he ever fired a weapon or that Victim's death was the natural consequence of his actions—supported his claim that the evidence was insufficient to show mutual combat, he does not argue these bases on appeal. Further, he never argued to the trial court, as he does on appeal, that the State failed to establish mutual combat because it failed to prove Young, Sr. was engaged in mutual combat *at the time of the fatal shooting*. Young, Sr. never argued to the trial court that the State was required to show he was engaged in the exchange of gunfire with Robinson at the exact moment Victim was shot by Robinson, or that the evidence showed he had withdrawn from the mutual combat at the time of the fatal shot. Accordingly, we question whether these arguments are preserved for our review.

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

In response to the directed verdict motion the State argued, although a mischaracterization, that this was a "shoot out." (R. p. 655, lines 23-24). The trial judge ruled that "[I]t is, in fact, in my view a factor of the law rather than the narrow facts themselves, which impose liability – a potential liability on Mr. Aaron Young, Senior." Both the State's argument

and the judge's ruling reflect that Petitioner's general challenge that the State failed to prove mutual combat included the argument that the State failed to prove that Petitioner was engaged in mutual combat with Robinson at the time Robinson fired the fatal shot. The issue is preserved for appellate review.

This Court then addressed the issue and wrote:

Nonetheless, even assuming the matter is preserved, we find the State presented sufficient evidence of mutual combat such that the trial court properly presented the matter to the jury. There is evidence from witness Mitchell and witness Tyrone Delaney that Robinson indicated to them the combatants had been shooting at each other. Thereafter these witnesses heard a set of rapid gunshots and then three different sounding gun shots, ultimately resulting in Victim's death. Although Mitchell testified she thought approximately ten minutes passed between the second set of rapid shots and the three different sounding shots, Delaney testified the rapid fire shots and the set of three shots were not far apart from each other and were closer together than five to ten minutes. Additionally, there is evidence from Young, Sr.'s statement to the authorities that Robinson was walking and shooting at their truck when Young, Jr. returned gunfire at Robinson. There also is evidence in the record of Robinson being out of his truck and walking during the exchange of gunfire between the parties when he was in the Allen Road area right before Victim was shot. Accordingly, evidence was presented from which the jury could conclude the Youngs and Robinson were engaged in mutual combat around the time Victim was fatally shot.

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

Respectfully, in finding that the State presented evidence from which a jury could conclude that the Youngs and Robinson engaged in mutual combat, this Court overlooked the fact that this was not a "shoot-out" as argued by the State. There were breaks between the three separate sets of gunshots heard by witnesses. As discussed above, the three sets of shots heard by Mitchell and other witnesses reflect 1.) shooting before Robinson appeared at Mitchell's home and announced that the "MFs were out there shooting at him." (R. p. 519, lines 10-19); 2.) Young Jr. shooting into Robinson's unoccupied car; and then 3.) Robinson shooting at the Youngs as they were leaving in their truck but fatally striking the innocent bystander. The

innocent bystander was not caught in the cross-fire between the Youngs and Robinson. Instead, the innocent bystander was shot and killed when Robinson alone fired shots at the Youngs. The State presented no evidence that the Youngs and Robinson were engaged in mutual combat at the time of the fatal shooting. The judge erred in refusing to direct a verdict of acquittal.

This Court additionally wrote:

Finally, no evidence suggests Young, Sr. withdrew from the conflict in good faith or that by word or act he made such known to Robinson. See State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495-96 (1973) ("Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense . . . unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary. . . ." (quoting 40C.J.S. *Homicide* § 122, p. 996)).

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

First, Petitioner did not need to claim self-defense as neither he nor Young Jr. were shooting at Robinson when Robinson shot at them, further illustrating that the Youngs were not engaged in mutual combat with Robinson at the time of the fatal shooting. Second, while there was evidence of exchanged gunfire before Robinson fired the fatal shot and evidence that the Young Jr. shot into Robinson's unoccupied car before Robinson fired the fatal shot, at the time of the fatal shooting, the Youngs were leaving, not engaged in mutual combat.

Based on the above arguments, Petitioner respectfully seeks rehearing.

Respectfully Submitted,


KATHRINE H. HUDGINS
Appellate Defender

This 11th day of July, 2019.

The South Carolina Court of Appeals

The State, Respondent,

v.

Aaron Young, Sr., Appellant.

Appellate Case No. 2016-000873

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

Paul E. Short, Jr.

J.

H. B. Woe

J.

Columbia, South Carolina

cc:

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FILED

August 23, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Beaufort County

Honorable Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 2019-UP-233 (S.C. Ct. App. Filed June 26, 2019)

2012-GS-07-2173; 2014-GS-07-1941

THE STATE,

RESPONDENT,

V.

AARON YOUNG, SR.,

PETITIONER

APPELLATE CASE NO 2016-000873

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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RECEIVED

SEP 20 2019

S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 22, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that the trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat?
2. Did the Court of Appeals err in failing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting?

STATEMENT OF THE CASE

On October 30, 2014, the Beaufort County Grand Jury indicted Petitioner, Aaron Young Sr., for murder and attempted murder, indictments #2012-GS-07-2173, 2014-GS-07-1941. On August 10, 2015, Petitioner proceeded to jury trial before the Honorable Thomas W. Cooper. Robert Ferguson represented Petitioner at trial. Isaac McDuffie Stone, III, and Sean Thorton prosecuted the case. The jury returned verdicts of guilty on both counts. Judge Cooper sentenced Petitioner to thirty (30) years for murder and a concurrent twenty (20) years for attempted murder. On April 18, 2016, Judge Cooper denied the timely filed motion for reconsideration of sentence. A timely notice of intent to appeal was served on April 21, 2106, and the direct appeal perfected. In an unpublished opinion filed June 26, 2019, the South Carolina Court of Appeals affirmed the sentence and conviction. A timely petition for rehearing was filed and then denied on August 22, 2019. This petition for writ of certiorari follows.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify or limit the law on mutual combat.

STATEMENT OF FACTS

Khalil Singleton was fatally shot by Tyrone Robinson. Tyrone Robinson was charged and convicted of the murder of Khalil Singleton. Khalil Singleton was not Robinson's intended victim. When Robinson fired the shot that killed Khalil Singleton, he was shooting at Petitioner and his son, Aaron Young Jr. as they were leaving the neighborhood in their truck. The Youngs and Robinson had been involved in an altercation earlier. Petitioner and his son Aaron Young, Jr. were also charged and convicted, in separate trials, of the murder of Khalil Singleton and the attempted murder of Tyrone Robinson. The State alleged that the Youngs were involved in mutual combat with Tyrone Robinson at the time that Robinson fatally shot Khalil Singleton. Khalil Singleton was an innocent third party and not involved in the earlier dispute between the Youngs and Robinson.

Jontu Singleton, Sr. testified that on September 1, 2012, he and Tyrone Robinson went to Aaron Young Sr.'s house where Robinson pointed a .38 caliber revolver at Aaron Young, Jr. (R. p. 569, line 9 – p. 570, lines 1-13). Jontu Singleton testified that as Petitioner and Robinson were struggling over the gun, Robinson shot in the air two times and then shot at Petitioner's feet. (R. p. 571, lines 1-5). Robinson left in his car, leaving Jontu Singleton behind at the Young residence. (R. p. 571, lines 6-17). According to Jontu Singleton, Petitioner retrieved a duffle bag from inside the house and then Petitioner, Young Jr. and Jontu Singleton got into Petitioner's gray pickup truck. (R. p. 571, line 20 – p. 572, lines 1-15). Jontu Singleton testified that as Petitioner was driving, Young Jr. took a gun out of the bag and was trying to put the gun together. (R. p. 572, line 16 – p. 573, 574, lines 1-4). He described the gun as looking like a "TEC-9." (R. p. 573, lines 6-9). Jontu Singleton believed that the Youngs were looking for

Tyrone Robinson. (R. p. 574, lines 20-23). The three were unable to find Robinson and returned to the Young residence where Junto Singleton got out of the truck but Petitioner and Young Jr. left again. (R. p. 576, line 2 – p. 577, lines 1-8).

Charlese Mitchell, Petitioner's cousin, testified that on September 1, 2012, about 4:00 PM she heard a round of quick shots and then saw Petitioner pass by her house in his gray truck. (R. p. 511, line 3 – p. 512, 513, lines 1-5). Shortly after hearing the shots and seeing Petitioner, Tyrone Robinson came to Mitchell's house and told her that the "MFs were out there shooting at him." (R. p. 519, lines 10-19). Mitchell noticed a black handle sticking out of Robinson's red shorts. (R. p. 520, lines 1-2). Robinson was outside using Mitchell's phone when Mitchell's boyfriend, Tyrone Delaney, came home. (R. p. 520, line 5 – p. 521, lines 1-13). Delaney and Robinson spoke and Robinson then left. Ten to fifteen minutes later Mitchell heard a second set of rapid shots. (R. p. 533, lines 16-24). Within five minutes of the second set of shots, Mitchell saw Petitioner again drive past her house. (R. p. 525, line 11 – p. 526, lines 1-17; p. 537, lines 1-4). As Petitioner's truck passed her house, Mitchell heard three last shots that sounded different from the rapid shots. (R. p. 524, lines 18-25; p. 537, lines 16-18). Mitchell then saw Robinson fly past in his car with a shattered back window. (R. p. 527, lines 2-5). After hearing the last three shots, Mitchell went outside and saw that Khalil Singleton had been shot. (R. p. 528, lines 7-18).

Tyrone Delaney testified when he arrived home from work, Robinson was in the front yard using the phone. (R. p. 543, lines 3-16). Robinson asked Delaney if he had seen a gray truck and he told Delaney, "That mother was shooting at me, so I shot back." (R. p. 543, lines 23-24). Delaney testified that Robinson was armed with a .38 revolver. (R. p. 544, lines 12-19). Delaney testified that after Robinson left Delaney heard rapid fire and asked Mitchell to call the

children, his son, Xavier Delaney, Jontu Singleton Jr. and Khalil Singleton, inside. (R. p. 546, line 8 – p. 547, lines 1-8). Xavier Delaney came inside but Jontu Singleton Jr. and Khalil Singleton went the other way. (R. p. 547, lines 7-11). Delaney then heard another set of three shots that sounded different from the first set. (R. p. 545, line 24 – p. 546, lines 1-4; p. 547, line 12-14).

Dominique Griffin was inside of his house when he heard shots. (R. p. 553, line 6 – p. 554, lines 1-7). When the shots stopped, he went outside to check on his stepson, Jontu Singleton, Jr. (R. p. 554 lines 8-12). Griffin testified that Jontu was crying and pointing at Mr. Robinson saying, [H]e shot Khalil, he shot Khalil.” (R. p. 554, lines 17-18). The bullet removed from Khalil Singleton was “consistent with round nose plain lead bullets loaded into a .38 special caliber cartridge. . .” (R. p. 644, lines 1-12). Griffin testified that he saw Robinson’s car parked and there were bullet holes in the back window. (R. p. 555, lines 14-22). Robinson walked toward his car and looked like he was in a rush to leave. (R. p. 555, lines 20-25).

Officers initiated a traffic stop of Petitioner’s vehicle and found 9 mm shell casings in the back of the truck. (R. pp. 582-586). The SLED firearm expert testified that the casings found in the back of the truck matched the bullets that had been shot into Robinson’s car. (R. p. 636, lines 7-14). Petitioner provided statements to Investigators Seifert and Bromage with the Beaufort County Sheriff’s Department. Petitioner told the officers that his son shot at Robinson because Robinson was shooting at them. (R. p. 602, lines 2-5).

ARGUMENTS

1. The Court of Appeals erred in failing to find that the trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat.

The murder indictment in the present case alleges, "That in Beaufort County on or about September 1, 2012, Aaron Scott Young Sr. did willfully, unlawfully and with malice aforethought engage in mutual combat with Tyrone Robinson and did thereby cause the victim Khalil Singleton to be shot and killed in the area of Marshland Drive and Allen Road, Hilton Head Island, SC and that Khalil Singleton did die in Beaufort County as a proximate result thereof on September 1, 2012; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended." (R. p. 874). Prior to trial Petitioner moved to quash the murder indictment. (R. p. 480, line 23 – p. 481, 482, lines 1-3). The trial judge denied the motion to quash stating:

And we know that the law is, or at least I think that the law is, that in the context of mutual combat the cases indicate that whoever is shot on either side, all who are involved can be guilty of the crime of murder if the person who is shot dies.

And we dealt last time with the case of Aaron Young, Jr. with whether or not that transferred intent that would go from one combatant to another combatant in mutual combat also transfers to an innocent victim. That matter is yet to be decided by an appellate court. It's on appeal now. But it is that particular factual distinction, I think, or that factual anomaly in this case does not render the indictment invalid, because the facts in this case indicate that there was mutual combat. Suggested there was mutual combat, and that an innocent person was killed in the course of that.

(R. p. 484, lines 3-19).

At the close of the State's case Petitioner moved for a directed verdict of acquittal. (R. p. 654, line 13 – p. 655, lines 1-15). Defense counsel noted that there was no indication that Petitioner ever fired a weapon. (R. p. 654, lines 24-25). Counsel noted that Petitioner was not

aiding, abetting, assisting or conspiring with Tyrone Robinson. (R. p. 654, lines 18-23).

Counsel argued that the elements of murder had not been satisfied through a theory of mutual combat. (R. p. 655, lines 9-15). The judge denied the motion stating:

The law that we've already talked about, the law of mutual combat, the law of transferred intent are the sort of things that come together in a legal scenario, and they create responsibility. And, of course, laws can do that and do that quite often.

And so for the reason I feel the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that as well, that the State has satisfied its burden in that regard sufficient to sustain the motion for directed verdict at this juncture.

(R. p. 656, line 21 – p. 657, lines 1-6). 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.

Mutual combat is inapplicable under the facts of this case. In State v. Graham, 260 S.C. 449, 450–51, 196 S.E.2d 495, 495–96 (1973), the South Carolina Supreme court wrote:

The basic principles governing the doctrine of mutual combat are thus stated in 40 C.J.S. Homicide s 122, p. 996:

'Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary, . . .'

In State v. Taylor, 356 S.C. 227, 231–32, 589 S.E.2d 1, 3 (2003), the South Carolina Supreme Court wrote:

The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years. The case law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). Mutual intent is "manifested by the acts and conduct of the parties and the circumstances

attending and leading up to the combat.” Id. Whether or not mutual combat exists is significant because “the plea of self-defense is not available to one who kills another in mutual combat.” Id. (citing State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919)). In order to claim self-defense, the defendant “must be without fault in bringing on the difficulty.” State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the “no fault” element of self-defense cannot be established.

In the present case the State did not argue that Petitioner was not entitled to a self-defense instruction because he was engaged in mutual combat. Instead, the State argued that mutual combat formed the basis for the murder charge. Respondent admits that, “The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant.” (Final brief of Respondent p. 27). Based on the declining use of mutual combat generally, this Court should not expand the application to innocent bystander noncombatants.

The judge instructed the jury¹ on the law of mutual combat stating:

Now, as you know, the indictment in this case charges Mr. Young with murder in connection with mutual combat. The State, of course, has not alleged, no one alleges, that Mr. Young actually fired the fatal shot that killed Khalil Singleton. It alleges, the State does, that it is a law of mutual combat that makes him guilty of that murder. So we look at the law of mutual combat.

Mutual combat exists when there is mutual intent and willingness to fight. Mutual intent is shown by the acts and conduct of the parties and circumstances which attend and lead 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, and whether the combatants agree to be armed. Because a history of ill will and an agreement to be armed are necessary before a defendant is deemed to have engaged in mutual combat. In other words, to constitute mutual combat, it is not necessary that there is a positive agreement between the parties to enter into combat. It is enough if they willfully enter into the conflict upon the impulse of the moment.

¹ There was no objection to the instruction on the law of mutual combat. This issue may need to be raised in post-conviction relief.

And in that regard, I tell you that everyone is presumed to know the consequences of his act. And if one voluntarily enters a mutual combat, where deadly weapons are used, knowing that they're being used, and death results to one of the participating parties, everyone engaged in such combat is equally guilty regardless of whether or not he used a deadly weapon or not. And regardless of whether he was on one side or the other, it makes no difference. And where all are participating in the mutual combat, all are equally responsible for the natural consequences. In other words, where people agree to have a mutual combat, they're engaged in an unlawful act. They're all presumed to intend the consequences which naturally flow from an unlawful act. And if one of the participants be on one side himself and the other be slain by participating in the mutual combat, all are equally guilty of the killing. Therefore, it is not the identity of the victim but the intent of the perpetrator, the state of mind of the perpetrator, the existence of malice, that is determinative in that regard.

(R. p. 833, line 21 – p. 834, 835, lines 1-14).

A similar instruction was upheld in State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918). The facts in the Brown case are factually distinct from the facts in the present case. In Brown a fight broke out between striking and non-striking mill workers. One of the strikers was fatally stabbed. Two strikers who participated in the fight and three non-strikers who participated in the fight were charged with murder and convicted of manslaughter although only one of them inflicted the fatal stab wound. The Brown case is the classic example of the uncommon and outdated theory of mutual combat involving participating combatants. If both of the Youngs had participated in mutual combat with Robinson² and Young Jr. had been fatally shot by Robinson, under the Brown theory of mutual combat both Robinson and Young Sr. could be charged with murder. In the present case, however, a non-participating innocent by-stander was fatally shot, not a mutual combatant. Mutual combat does not establish liability for Petitioner under the facts of this case.

The State stretches to hold Petitioner accountable for the actions of Robinson with a combination of theories of mutual combat, transferred intent and accomplice liability. This

² As argued in issue two, Petitioner was not engaged in mutual combat with Robinson.

hybrid theory of liability is not recognized by the law. The individual theories, standing alone, fail to establish liability for Petitioner under the facts of this case.

Transferred intent does not establish liability for Petitioner under the facts of this case.

In State v. Fennell, 340 S.C. 266, 272–73, 531 S.E.2d 512, 515–16 (2000), the South Carolina Supreme Court wrote:

This Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another. Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim. "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." State v. Heyward, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer). See also State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim *273 instead), overruled on other grounds by State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim); State v. Williams, 189 S.C. 19, 24, 199 S.E. 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him); LaFave & Scott, *Substantive Criminal Law*, § 3.12(d) (1986) (discussing transferred intent); McAninch & Faurey, at 17–19 (same).

Robinson was properly found guilty of the murder of Khalil Singleton under the doctrine of transferred intent. Robinson intended to kill either Petitioner or his son or both but missed and killed Khalil Singleton instead. At the time Robinson fired the fatal shot, he did it with malice toward Petitioner and Young Jr. Robinson's malice and intent to kill Petitioner was transferred to the unintended victim. The State, however, failed to prove malice as it relates to Petitioner.

Robinson was the shooter, not Petitioner. Transferred intent is not applicable under the facts of this case.

Accomplice liability is not applicable to establish murder under the facts of this case. Petitioner was not aiding, abetting, assisting or conspiring with Tyrone Robinson. At the time Robinson shot and killed Khalil Singleton, neither Young Jr. nor Petitioner were shooting. Instead, at the time of the fatal shooting Petitioner and Young Jr. were leaving the neighborhood in their truck. If Young Jr. shot Robinson, Young Sr. could be charged under the accomplice liability theory.³ In this case, however, Robinson shot Khalil Singleton. Neither Young Sr. or Young Jr. aided or abetted Robinson.

In State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), the South Carolina

Supreme Court wrote:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

S.C. Code §16-3-10 defines murder as “the killing of any person with malice aforethought, either express or implied.” Viewing the evidence in the light most favorable to the State, the State failed to prove that Petitioner killed Khalil Singleton with malice aforethought. Mutual combat is inapplicable under the facts of this case involving the death of an innocent noncombatant. Neither the doctrine of transferred intent nor the doctrine of accomplice liability establishes the elements necessary to submit the murder charge to the jury. The trial judge erred in refusing to direct a verdict of acquittal when the State’s evidence of murder was dependent

³ The jury may have found Petitioner guilty of the attempted murder of Robinson based on an accomplice liability theory.

upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat. The State's hybrid theory of liability based on mutual combat, accomplice liability and transferred intent is not supported by the law.

In finding no error in the trial judge's refusal to direct a verdict of acquittal because the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat the Court of Appeals wrote:

In State v. Young, Jr., 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018), *cert. granted* (May 9, 2019), this court determined that under such a factual scenario, even though a non-participating innocent bystander was the victim, mutual combat is an appropriate basis for a murder charge. *See id.* at 434, 818 S.E.2d at 490-91 (finding, under this scenario, the trial court did not err in finding mutual combat a viable theory of prosecution for the murder charge); *id.* at 434-35, 818 S.E.2d at 491 (determining the trial court did not err in applying the doctrine of transferred intent to Young, Jr., noting there was evidence Robinson fired at the Youngs with intent to kill such that his intent was transferred to Victim, and under the theory of mutual combat, all combatants are deemed equally responsible for the natural consequences of their actions during combat and all may be held equally guilty of murder when a combatant dies, regardless of which combatant fired the fatal shot).

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019). The Court of Appeals misapprehended the law of mutual combat by improperly expanding the law to apply to an innocent noncombatant.

Addressing accomplice liability, the Court of Appeals wrote:

The theory of criminal responsibility here was not based upon any assertion that the Youngs and Robinson were working in concert; rather, it was that *Young, Sr. and Young, Jr. aided and abetted each other* in mutual combat with Robinson in their attempt to kill Robinson, ultimately culminating in the death of Victim. *See State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017) ("Under the 'hand of one is the hand of all' theory [of accomplice liability], 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." (alteration in original) (quoting State v. Thompson, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704 05) (Ct. App. 2007))).

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

Again, the Court of Appeals misapprehended the law of mutual combat by combining it with accomplice liability. Any accomplice liability between the Youngs did not culminate in the death of the innocent bystander. As discussed in issue two below, the State failed to establish that Petitioner was engaged in mutual combat with Robinson at the time Robinson fatally shot the innocent third party. The three sets of shots heard by Mitchell and other witnesses reflect 1.) shooting before Robinson appeared at Mitchell's home and announced that the "MFs were out there shooting at him." (R. p. 519, lines 10-19); 2.) Young Jr. shooting into Robinson's unoccupied car; and then 3.) Robinson shooting at the Youngs as they were leaving in their truck but fatally striking the innocent bystander.

Neither mutual combat, nor transferred intent nor accomplice liability individually establish liability for Petitioner. The State's hybrid theory of liability combining mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat is not recognized under the law. The trial judge should have directed a verdict of acquittal for the murder charge.

2. The trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting.

As argued above in issue one, the State's theory of liability based on mutual combat, accomplice liability and transferred intent is not recognized by South Carolina law and should not be. If this Court, however, decides to extend the theory of mutual combat to innocent bystander noncombatants, the theory would not apply in the present case because at the time Robinson shot Khalil Singleton, Petitioner was not engaged in mutual combat. The testimony reflects that Petitioner and his son were leaving the neighborhood on Allen Road in their truck when Robinson shot at them, killing Khalil Singleton.

Five minutes after hearing the second set of rapid shots, presumably the shots being fired into Robinson's unoccupied car, Charlese Mitchell saw Petitioner in his truck coming from Allen Road toward Spanish Wells. (R. p. 537, lines 1-15). Then Mitchell heard the last three shots which the evidence at trial established were shots fired by Tyrone Robinson, one of which killed Khalil Singleton. Mitchell confirmed that no one was firing weapons from the truck when it drove past her house. (R. p. 531, lines 4-6). If this Court extends the doctrine of mutual combat to apply to a noncombatant killed by a combatant, the State must still prove that two combatants were firing at each other in order to establish mutual combat. See State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). At the time Khalil was shot and killed only one person was shooting a gun, Tyrone Robinson. The State failed to prove that Petitioner was engaged in mutual combat at the time of the fatal shooting.

As discussed above, on appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the

offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Viewing the evidence in the light most favorable to the State, the State failed to prove mutual combat, the only theory upon which the State sought to impose liability upon Petitioner. Tyrone Robinson, not Petitioner or his son, was the shooter. Petitioner was not aiding or abetting or conspiring with Robinson. The trial judge erred in refusing to direct a verdict of acquittal for the murder of Khalil Singleton because the State failed to establish mutual combat at the time of the fatal shooting.

In finding no error in the trial judge's refusal to direct a verdict of acquittal because the State failed to establish mutual combat at the time of the fatal shooting the Court of Appeals first questioned whether the issue was preserved writing:

The specific arguments Young, Sr. made in support of his directed verdict motion were (1) that he did not aid, abet, assist or conspire with Robinson; (2) there was no indication he ever fired a weapon; (3) there was no evidence Victim's death was the natural consequence of the actions of shooting up a car; (4) the elements of murder had not been satisfied; and (5) "mutual combat has not been proven." Thus, he only *generally* asserted to the trial court in his directed verdict motion that mutual combat had not been proven, but provided no explanation for why it had not been proven. Even assuming his arguments—that there was no evidence he ever fired a weapon or that Victim's death was the natural consequence of his actions—supported his claim that the evidence was insufficient to show mutual combat, he does not argue these bases on appeal. Further, he never argued to the trial court, as he does on appeal, that the State failed to establish mutual combat because it failed to prove Young, Sr. was engaged in mutual combat *at the time of the fatal shooting*. Young, Sr. never argued to the trial court that the State was required to show he was engaged in the exchange of gunfire with Robinson at the exact moment Victim was shot by Robinson, or that the evidence showed he had withdrawn from the mutual combat at the time of the fatal shot. Accordingly, we question whether these arguments are preserved for our review.

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

In response to the directed verdict motion the State argued, although a mischaracterization, that this was a "shoot out." (R. p. 655, lines 23-24). The trial judge ruled that "[I]t is, in fact, in my view a factor of the law rather than the narrow facts themselves, which

impose liability – a potential liability on Mr. Aaron Young, Senior.” Both the State’s argument and the judge’s ruling reflect that Petitioner’s general challenge that the State failed to prove mutual combat included the argument that the State failed to prove that Petitioner was engaged in mutual combat with Robinson at the time Robinson fired the fatal shot. The issue is preserved for appellate review.

The Court of Appeals then addressed the issue and wrote:

Nonetheless, even assuming the matter is preserved, we find the State presented sufficient evidence of mutual combat such that the trial court properly presented the matter to the jury. There is evidence from witness Mitchell and witness Tyrone Delaney that Robinson indicated to them the combatants had been shooting at each other. Thereafter these witnesses heard a set of rapid gunshots and then three different sounding gun shots, ultimately resulting in Victim's death. Although Mitchell testified she thought approximately ten minutes passed between the second set of rapid shots and the three different sounding shots, Delaney testified the rapid fire shots and the set of three shots were not far apart from each other and were closer together than five to ten minutes. Additionally, there is evidence from Young, Sr.'s statement to the authorities that Robinson was walking and shooting at their truck when Young, Jr. returned gunfire at Robinson. There also is evidence in the record of Robinson being out of his truck and walking during the exchange of gunfire between the parties when he was in the Allen Road area right before Victim was shot. Accordingly, evidence was presented from which the jury could conclude the Youngs and Robinson were engaged in mutual combat around the time Victim was fatally shot.

State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

In finding that the State presented evidence from which a jury could conclude that the Youngs and Robinson engaged in mutual combat, the Court of Appeals overlooked the fact that this was not a “shoot-out” as argued by the State. There were breaks between the three separate sets of gunshots heard by witnesses. As discussed above, the three sets of shots heard by Mitchell and other witnesses reflect 1.) shooting before Robinson appeared at Mitchell’s home and announced that the “MFs were out there shooting at him.” (R. p. 519, lines 10-19); 2.) Young Jr. shooting into Robinson’s unoccupied car; and then 3.) Robinson shooting at the

Youngs as they were leaving in their truck but fatally striking the innocent bystander. The innocent bystander was not caught in the cross-fire between the Youngs and Robinson. Instead, the innocent bystander was shot and killed when Robinson alone fired shots at the Youngs as they were leaving. The State presented no evidence that the Youngs and Robinson were engaged in mutual combat at the time of the fatal shooting. The judge erred in refusing to direct a verdict of acquittal.

The Court of Appeals additionally wrote:

Finally, no evidence suggests Young, Sr. withdrew from the conflict in good faith or that by word or act he made such known to Robinson. See State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495-96 (1973) ("Where a person voluntarily participates in . . . mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense . . . unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary. . . ." (quoting 40C.J.S. *Homicide* § 122, p. 996)).

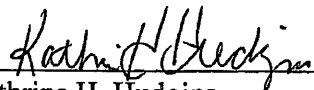
State v. Young Sr., Op. No. 2019-UP-233 (S.C. Ct.App. filed June 26, 2019).

The Court of Appeals erred. First, Petitioner did not need to claim self-defense as neither he nor Young Jr. were shooting at Robinson when Robinson shot at them, further illustrating that the Youngs were not engaged in mutual combat with Robinson at the time of the fatal shooting. Second, while there was evidence of exchanged gunfire before Robinson fired the fatal shot and evidence that the Young Jr. shot into Robinson's unoccupied car before Robinson fired the fatal shot, at the time of the fatal shooting, the Youngs were leaving, not engaged in mutual combat.

CONCLUSION

Based on the above arguments above, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of September, 2019. -

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OCT 21 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM BEAUFORT COUNTY
Thomas W. Cooper, Circuit Court Judge

Op. No. 2019-UP-233 (S.C. Ct. App. refiled June 26, 2019)

THE STATE,

Respondent,

v.

AARON YOUNG, SR.,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Appellate Case No. *2019-001595*

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PETITIONER'S QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that the trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat?
2. Did the Court of Appeals err in failing to find that the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting?

STATEMENT OF THE CASE

On September 1, 2012, Petitioner, his son, and Tyrone Robinson murdered Khalil Singleton in Beaufort County while the 3 men were engaged in mutual combat with firearms. Petitioner was indicted for Singleton's murder (Ind. # 2012-GS-07-2173) and the attempted murder of Robinson (Ind. # 2014-GS-07-1941). On August 10, 2015, Petitioner proceeded to a jury trial before Judge Thomas W. Cooper. Robert Ferguson represented Petitioner. On August 12, 2015, the jury returned verdicts of guilty of murder and attempted murder.¹ Petitioner was sentenced to 30 years for murder and 20 years for attempted murder concurrent. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments). Petitioner appealed the murder conviction only raising 2 directed verdict issues. (IBOA, p. 1). The Court of Appeals affirmed in an unpublished opinion. State v. Aaron Young, Sr., 2019-UP-233 (Ct. App. filed June 26, 2019). A petition for rehearing was denied. Petitioner filed a petition for writ of certiorari in this Court. This is Respondent's Return to the same.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of September 1, 2012, 8 year-old Khalil Singleton, an innocent bystander, was shot to death in the midst of an ongoing running gun battle between 3 men: Petitioner, Aaron Young, Sr.; his son Aaron Young, Jr., and Tyrone Robinson, which erupted on and traversed several different locations on Hilton Head Island, eventually ending in front of a group of children jumping on a trampoline. It was there Khalil was murdered trying to flee home on foot to safety from the running gun battle. (R. 354-60, 497-561, 565-608, 613-57, 674-732, 736-49, 758-94, 796-828, 830-38, 843-48, 851-61; State's Ex. 1-27; Indictments).

¹ Petitioner's co-defendants, Tyrone Robinson and Petitioner's son Aaron Young, Jr., were tried in separate trials before juries of their peers. Robinson was convicted of murder and sentenced to life in prison by Judge Cooper. Young, Jr. was convicted of murder and attempted murder and sentenced to 30 years for murder and 30 years concurrent for attempted murder by Judge Cooper.

How the Conflict Erupted

Earlier that afternoon, about 4:00 p.m., Tyrone Robinson ("Robinson") and Jontu Singleton, Sr. ("Jontu") were headed to the store in Robinson's car. The 2 men stopped by the home of Petitioner and his son Aaron Young, Jr. ("son" or "Young, Jr.") on Wild Horse Rd. because Jontu wanted to ask Petitioner for money to buy cigarettes. Petitioner and his son were in the yard when Robinson and Jontu drove up. Jontu exited the car and spoke with Petitioner about borrowing the money. Robinson then exited his car approaching Young, Jr. with a .38 revolver in his hand. Robinson and the 2 Young(s) had animosity towards each other due to prior altercations. After seeing Robinson with the gun, Petitioner tried to take the gun away from Robinson but it accidentally fired. Petitioner backed away as Robinson fired several shots in the ground near Petitioner's feet. Robinson then got in his car and drove away leaving Jontu. (R. 565-81; State's Ex. 17, Interview of Petitioner; State's Ex. 3, 911 calls).

The Running Gun Battle or Shootout resulting in the Death of an 8 year old child

Instead of calling police and reporting the shooting, Petitioner and his son decided to go after Robinson and shoot or kill him. Petitioner and his son went in a nearby home, and Petitioner emerged with a black bag containing a "Tech Nine" 9MM semi-automatic pistol, which resembles a small submachine gun, a 30 round magazine, and a box of ammo. Petitioner, his son, and Jontu got in Petitioner's grey Ford F-150 pick-up truck, drove out of the yard, and began searching for Robinson on the public roads of Hilton Head Island. Petitioner drove while Jontu sat in the center seat and Young, Jr. was in the passenger seat. Petitioner handed the bag containing the "Tech Nine" to his son. The 3 men drove down Spanish Wells Rd. and veered off on Oakview Rd. after Petitioner thought he saw Robinson driving on that road. Young, Jr. pulled the contents out of the black bag, and with Petitioner giving his son instructions on how to

assemble the gun, Young, Jr. assembled the 9mm. Petitioner stopped and inquired of someone who resided in the Oakview community if he had seen Robinson and received a negative response. Unable to catch up with the car Petitioner saw earlier and unable to find Robinson, the 3 men continued their search and headed towards Robinson's home on Allen Rd. located off of Marshland Rd. When they arrived there, Robinson was nowhere to be found. Jontu got out of the truck to talk to his son, who lived nearby, but no one was home. Because the men could not locate Robinson, they returned to Petitioner's home and Jontu got out of the truck. Petitioner and his son drove off again in the truck, with the loaded "Tech Nine," in search of Robinson. (R. 565-81, 727-28; State's Ex. 17, Int. of Petitioner).

Minutes later, Petitioner and his son finally tracked down Robinson on Oakview Rd. Young, Jr., holding the gun, leaned out the passenger window of the truck, and tried to shoot Robinson who was in his car, but the gun jammed. Robinson brandished his .38 out his car window and fired his gun at them.² Robinson left the area, and Petitioner and his son decided to continue the pursuit and drive back to Robinson's home on Allen Rd. (R. 565-81, 696, 700-01, 718; State's Ex. 17, Int. of Petitioner/ Interview 1 and 7; State's Ex. 3, 911 calls).

While Petitioner and his son were driving down Marshland Rd. and eventually onto Allen Rd., a group of children was playing on a trampoline a short distance away from where Petitioner and his son spotted Robinson's car parked at his residence on Allen Rd. Upon arriving at Robinson's home, Petitioner drove into Robinson's yard and Young, Jr. drew the Tech 9 again. Robinson came out of somewhere on foot and began firing bullets with his .38 at Petitioner and his son in the truck, and Young, Jr. began firing bullets at Robinson with the 9mm. Petitioner

² As the gun battle was occurring, 1 witness called 911 to report the crime and told the dispatcher 2 cars were shooting at each other near Spanish Wells Rd. She identified the 2 cars involved as a grey truck and a grey Lexus. The woman told the dispatcher the man driving the car was Tyrone Robinson. (State's Ex. 3, 911 calls).

and his son drove away and back up Allen Rd. and then onto Marshland Rd. (R. 565-81, 727-28, 507-49; State's Ex. 17, Int. of Petitioner; State's Ex. 3, 911 calls).

Charlese Mitchell, who lived just off the beginning of Allen Rd. on Marshland Rd., heard 3 different sets of gunshots around 4:00 p.m. that afternoon. After the 1st round of shots, she saw a grey truck driven by her cousin, Petitioner, speeding down the road away from Allen Rd. with a passenger. This 1st set of shots were rapid gunshots that sounded like 10 shots.³ (R. 507-37). Co-defendant Robinson, also a relative of Charlese's, then appeared at her door. She observed a gun sticking out of his pocket. Robinson, who appeared scared, told Charlese, "those M.F. was shooting at me." Charlese asked Robinson to leave. (R. 507-37).

While this was occurring, Tyrone Delaney, Charlese's boyfriend, was driving home on Spanish Wells Rd. between 4:00 and 5:00 p.m. when Petitioner's truck sped towards him and forced Delaney off the road to avoid a collision. Petitioner was coming from the direction of Robinson's home on Allen Rd. and Charlese's and Delaney's home on Marshland Rd. (R. 507-49). Moments later, when Delaney arrived home, Robinson was still there in the yard [after talking to Charlese], and Robinson asked Delaney if he had seen a grey truck.⁴ Delaney told him about being run off the road. Robinson, brandishing a .38 revolver replied, "yeah they was shootin at me so I shoot back at them." Robinson then left the yard. Charlese confirmed when Delaney arrived home, he and Robinson spoke in the yard briefly and Robinson left. Delaney then came inside. (R. 507-49).

³ At about this same time, Kathleen Fayfich called 911 from 23 Peregrine Point off of Marshland Rd. Allen Rd. bordered her neighborhood. She informed 911: "we just heard 8 gunshots in rapid succession coming from Allen Rd." right behind her neighborhood. She called because of her concern for children in her neighborhood. She informed 911 the gunfire sounded like pistol gunfire from a 9mm or .40 caliber. (State's Ex. 3, 911 calls).

⁴ Delaney did not hear the 1st round of rapid shots Charlese heard as he was headed home.

Petitioner and his son did not stop their pursuit of Robinson after running Delaney off the road. They turned around and drove back down Marshland Rd. toward Allen Rd. for the 3rd time that day. On this occasion, with Petitioner still driving, Young, Jr. again fired out the window of the truck with the "Tech Nine" firing multiple shots into Robinson's car, which was parked in a yard at the end of Marshland Rd., shooting holes in the car's exterior and passenger compartment. Petitioner and his son then drove down and back up Allen Rd. looking for Robinson. (R. 565-81, 700-04, 715-20, 507-49, 550-60; State's Ex. 17; State's Ex. 3, 911 calls).⁵

At this point, because of the gunfire, Charlese told the children playing on the trampoline to come inside. Charlese's child came in her home. But, the other 2 children, including 8 year old Khalil, headed toward their own homes on foot. (R. 507-49).

Within minutes after Petitioner and his son shot up Robinson's car, Robinson fired 3 shots at Petitioner and Young, Jr., with the .38 from a yard on Marshland Rd. as Petitioner and his son turned onto Marshland Rd. off of Allen Rd.⁶ Then, Charlese and Delaney heard someone

⁵ Charlese confirmed that minutes after Robinson left their yard, she heard another set [a 2nd set] of rapid gunshots [Young Jr. shooting Robinson's car] that sounded like they were coming from the left of Charlese' home on Marshland Rd. Delaney also confirmed a few minutes after Robinson left his yard and Delaney entered his home, he heard rapid gunshots [Young Jr. shooting Robinson's car] coming from near his home.

⁶ Charlese was standing in her doorway and saw Petitioner in his grey truck turn onto Marshland Rd. off of Allen Rd. with his tires squealing and as this was occurring she heard 3 distinct gunshots that sounded like they were fired from a different gun than the gun firing the earlier rapid shots. Delaney also testified that minutes after the 2nd round of rapid shots, he heard 3 separate gunshots that seemed to have come from a different type of weapon [Robinson shooting]. (R. 507-49). Dominique Griffin, who lived at the end of Marshland Rd., was at home with his 3 week old baby. His step-son, Jontu Singleton, Jr. was outside playing with Khalil and Charlese's child. Griffin heard what sounded like "machine gun fire" from the direction of Indigo Plantation [Marshland Rd.] Griffin testified it sounded like a machine gun because it was continuous: "It was pow, pow, pow." Griffin got on top of his baby to protect him. When the shots ended, Griffin ran out his back door to check on his step-son. When he did, Little Jontu, age 9, was already at the back porch and was crying and pointing at Robinson, who was in Griffin's yard, saying: "he shot Khalil, he shot Khalil." Robinson was walking near Griffin's utility shed, i.e. Robinson had fired the 3 shots at Petitioner and his son from Griffin's yard as

screaming and discovered Khalil had been shot trying to make his way home to safety on foot from the running gun battle.⁷ The bullets Robinson fired from Griffin's yard did not hit their intended targets, but instead 1 found its way to 8 year old Khalil striking him in the chest killing him. (R. 550-61, 715-17; 647-53; State's Ex. 3; State's Ex. 17).⁸

Robinson fled the area in his bullet-riddled car, and Petitioner and his son absconded from the area in Petitioner's truck.⁹ (R. 550-61, 715-17; 647-53; State's Ex. 3; State's Ex. 17). Between 5:00 and 5:30 p.m., Petitioner and his son were pulled over by police. Officers located 3 spent 9mm shell casings in the truck's bed. At the scene of his arrest, after Miranda warnings, when asked why his son was leaning out the truck window shooting, Petitioner stated his son was shooting at Robinson because Robinson was shooting at them. Petitioner was then taken to the police station where he was Mirandized and interviewed. Petitioner eventually told officers where they could retrieve the Tech Nine. (R. 581-608, 684).

Petitioner's truck turned onto Marshland Rd., after Petitioner and his son shot up Robinson's car *and* after they drove down and back up Allen Rd. looking for Robinson.

⁷ At about this time, another individual called 911 reporting gunshots on Allen Rd. The caller stated there were "multiple gun fires." They heard 6 or 8 gunshots that sounded like automatic weapons. "[T]hen it was at one end of the Road and then it sounded like they drove to the other end and...it just fired again." "It was bad." (State's Ex. 3, 911 calls).

⁸ At about this time, Ms. Washington [first name unknown] called 911 extremely upset because she had found a young child lying on the ground with a gunshot wound and not breathing. Washington told the 911 operator: "We heard gunshots. We heard about 10 gunshots." Washington became more hysterical after realizing the child was Khalil. Washington, a nurse, was eventually able to calm herself enough to perform C.P.R. but Khalil was already dead. She identified "T" [Tyrone Robinson] as being involved in the shooting. (State's Ex. 3, 911 calls).

⁹ After the shots were fired that caused Mr. Griffin to cover his infant son, Griffin saw Robinson walking quickly toward his car parked in Griffin's yard, which had bullet holes in the back window. Robinson got in hurriedly and backed into some lumber whereupon glass fell out of Robinson's back window into the car. Robinson then left out of Griffin's driveway and drove off toward Spanish Wells Rd. Charlese also confirmed that minutes after she heard the 3 distinct gunshots from the left of her home, she saw Robinson drive by headed up Marshland Rd. fast toward Spanish Wells Rd. and Robinson's back car window was shot out. (R. 550-59; 526-28).

After officer's located and arrested Robinson, they processed his car for evidence locating numerous fired bullets and a bullet fragment [5 in all] lodged in Robinson's car. These bullets and the fragment along with the shell casings from Petitioner's truck originated from the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. The bullets fired into Robinson's car entered the car from different angles, which was consistent with Robinson's car being shot on more than 1 occasion on September 1st, not just in Griffin's yard. (R. 606-46).

Petitioner also admitted after Miranda warnings that he and his son were armed with the "Tech Nine" and went looking for Robinson to shoot and kill him. He was angry because Robinson had fired in the ground at his feet at his home and Robinson was attempting to kill his son. He wanted to kill Robinson. He did not call police after this initial incident at his residence. There was bad blood between he and Robinson from a prior occasion. He and his son first looked for Robinson in the Oakview Community because it was 1 of Robinson's known hangouts. Young, Jr., attempted to shoot or kill Robinson on Oakview Rd., but the "Tech Nine" jammed when he attempted to fire the gun into Robinson's car as Robinson drove past headed in the opposite direction. Robinson fired several times at them at this time with his gun. They located Robinson again on Allen Rd., and Young, Jr. fired several shots at Robinson that missed. They fired at Robinson at Robinson's residence was because Robinson had been shooting at them at that location when they pulled in Robinson's yard in Petitioner's truck. He and his son then fled from Robinson's yard and as they attempted to flee the area, Robinson then fired at them several times as they turned onto Marshland Rd. at the end of Allen Rd. (State's Ex. 17).

Petitioner called 2 witnesses in the defense case. Dr. Amanda Salas testified to her opinion Petitioner's statements were coerced; however, she gave detailed testimony about what Petitioner told her about the incident that further incriminated Petitioner. Dr. Salas admitted

Petitioner told her the following: Petitioner, his son, and Robinson did not get along because of a prior disagreement. Robinson came to Petitioner's house earlier in the day; they got into a fight; they struggled; Robinson fired a gun at Petitioner's feet, and Robinson left. Petitioner retrieved a gun from his mother's home; it was in a bag, unloaded with bullets nearby, and 1 magazine for the gun stayed loaded with 30 rounds, and there was an extra box of bullets. The gun was not kept in Petitioner's home, but in another location, his mother's home. Petitioner got in the truck with his son and they ran into Robinson at the Oakview neighborhood and Young, Jr. pointed the gun at Robinson. Robinson's car was going 1 way and Petitioner's truck was going the other. Young, Jr. was not able to shoot Robinson because the gun jammed or was not put together properly so it would not fire. Petitioner and his son then returned home. Petitioner and his son went back out driving to send a message to Robinson. According to this statement, they were only going to shoot up Robinson's car. They drove to Allen Rd. Petitioner was driving and his son was doing the shooting. When they got to Allen Rd., Petitioner's son fired the weapon they were using while Petitioner was driving. Dr. Salas admitted Petitioner told police, when asked why his son was hanging out the window of the truck shooting at Robinson, his son was shooting because Robinson was "shooting at us." Dr. Salas admitted this statement was made before any alleged element of coercion was introduced into any interrogation. (R. 694-708).

Petitioner also testified in his own defense and further incriminated himself. (R. 674-710, 711-31). He testified Robinson came to his home on the afternoon of September 1st and stated he wanted to talk to Petitioner's son. Robinson then pulled a gun and threatened to kill Petitioner. Petitioner claimed Robinson had been coming to his house for years terrorizing his family. Petitioner alleged Robinson had been burning down houses, hitting people with cars, and just being a menace to the community, and no one did anything about it. Petitioner claimed

Robinson shot at him, at his son, and at his family at his home on September 1st. After Robinson shot at him in his yard, he [Petitioner] "just lost it," was like a "battered spouse," and was not in his right mind psychologically. Petitioner went to another residence, obtained the "Tech Nine," and brought it out and gave it to his son to use. He chased after Robinson in his truck. Petitioner and his son went to Oakview and while he was driving the truck his son brandished the "Tech Nine" out the window, but Petitioner claimed at trial there was no exchange of gunfire there. No gunshots were fired on Oakview Rd. by his son because his son was having trouble assembling the 9mm. Petitioner returned to his home and thought about what he was doing and whether it was wrong. His son tried to talk him out of pursuing Robinson any further, but Petitioner did not listen. (R. 711-31). During the pursuit of Robinson, Petitioner came across a relative of Robinson and asked him if he had seen Robinson, and the relative said no. Petitioner does not like Robinson and wished Robinson was dead. (R. 727-28). Petitioner and his son then pursued Robinson in the Allen Rd. area but claimed they never saw him on there. Petitioner claimed they pulled in a yard; he lined up his truck with Robinson's car, his son shot the car up, and they left. Petitioner admitted he knew there were kids in the area at the time they shot up the car, but claimed they were careful to only shoot the car and not endanger the children who were playing nearby. Petitioner claimed what happened after that he did not know. He admitted as he was leaving the area of Allen Rd., he did hear gunshots. He claimed they only went down Allen Rd. 1 time, and then as they were leaving after shooting the car, Robinson fired at them. (R. 711-31).

APPELLATE ISSUE I.

A. As an additional sustaining ground, certiorari should be denied because this directed verdict issue was not preserved for appellate review.

In his Petition for Writ of Certiorari, in Appellate Issue I., Petitioner now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal

offense, but rather a bar to self-defense; transferred intent should not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. As an additional sustaining ground, this issue was not preserved for appellate review because it was not raised to the trial court at the directed verdict motion. (R. 654-57). State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214, 221 (Ct. App. 1998), *aff'd*, 524 S.E.2d 837 (1999); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970); *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)(“A party cannot argue one ground for a directed verdict and then an alternative ground on appeal.”). Petitioner’s argument on appeal is completely different from what he raised at the directed verdict motion. Petitioner now raises a legal argument not the factual argument he raised below. Petitioner now argues he could not be convicted of murder under South Carolina law under legal principles of mutual combat, transferred intent, and accomplice liability.

B. Judge Cooper did not abuse his discretion and properly denied the motion for a directed verdict because under South Carolina law mutual combat, transferred intent, and accomplice liability can form the basis for a murder conviction.

Regardless, even if Petitioner preserved the issue he now argues to this Court, there is no merit to his argument. Judge Cooper did not abuse his discretion in holding mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base a murder charge and conviction. (R. 656-57).¹⁰ Accordingly, the Court of Appeals properly affirmed the denial of the motion for directed verdict. Therefore, certiorari should be denied.

Mutual combat, transferred intent, and accomplice liability are valid legal principles under South Carolina law which can form the basis of a murder conviction.

Petitioner now argues on appeal he was entitled to a directed verdict because he alleges mutual combat is not a criminal offense, but rather a bar to self-defense; transferred intent should

¹⁰Petitioner’s son raised the same issue on appeal to the Court of Appeals and that Court affirmed. State v. Young, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018). This Court granted certiorari May 9, 2019 to review that opinion.

not be applied to a mutual combat situation; and accomplice liability should not apply in a mutual combat situation. However, contrary to Petitioner's assertions, under South Carolina law, mutual combat is a valid recognized legal principle under which one can be charged and convicted of murder, despite the fact it has fallen out of common use. State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918); State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906). While mutual combat is a bar to a self-defense claim, the theory is not limited to that 1 purpose. Brown, supra. In Brown, the State used mutual combat to convict multiple defendants for the death of 1 of the combatants¹¹ And, transferred intent, a valid legal principle under South Carolina law, would be applicable to Petitioner's case since an innocent bystander, a child, was killed, during the mutual combat, instead of a combatant. Finally, accomplice liability, a valid legal principle under South Carolina law, would be appropriate where Petitioner provided his son with the "Tech Nine" firearm to use during the running gun battle, told his son how to assemble the weapon, and drove his truck at all times while his son was firing the Tech Nine out of his truck during the ongoing running gun battle with Robinson that led to the innocent child's death.

The doctrine of mutual combat has existed in South Carolina law since 1843. Taylor, 356 S.C. at 231. The Court in Taylor acknowledged the doctrine had "fallen out of common use in recent years" but still found it to be binding law. Id. The escalating urban warfare in present-day society has resurrected the need for the doctrine of mutual combat. Here, the State took the long-standing and viable law of mutual combat and applied it to modern day facts.¹² Petitioner argues

¹¹ Brown, 108 S.C. 490, 95 S.E. 61.

¹² The present case is not the only recent case in which the State has successfully prosecuted for murder both participants in armed mutual combat who were on opposite sides, where a 3rd person who was present, but not a participant in the armed mutual combat, was killed. See e.g. Final Brief of Respondent in State v. Eugene D. Patterson, *Unpublished Opinion* No. 2013-UP-154

the doctrine of mutual combat can only be used for the sole purpose of barring a plea of self-defense. This is an incorrect limitation of the law on mutual combat. Although mutual combat is commonly analyzed when a claim of self-defense is raised,¹³ that is not its only application.

Numerous South Carolina cases have used the legal principle of mutual combat to hold a defendant guilty of murder. “Where two persons mutually engage in combat, and one kills the other, and at the time of the killing it be maliciously done, it is murder. If, on the other hand, it be done in sudden heat and passion on sufficient provocation without premeditation, or malice, it would be manslaughter.” Andrews, 53 S.E. at 424;¹⁴ *see also* State v. Hammond, 36 S.C.L. 91, 102 (S.C. App. L. 1850) (“Even in cases of mutual combat, if one begin the fight with a mortal weapon, it is murder...”); State v. Turner, 63 S.C. 548, 41 S.E. 778 (1902) (“Where there is evidence from which a jury may infer that there was mutual combat, on a trial for murder an instruction as to such combat is not error.”); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) (“There was evidence of threats which, if true, justified a verdict of premeditated murder. There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other. There was no error in charging and arguing the law of mutual combat.”).

The 1918 case of State v. Brown utilized the doctrine of mutual combat to hold multiple defendants accountable for the death of 1 of the combatants. 108 S.C. 490, 95 S.E. 61. Much

(Ct. App. Filed April 17, 2013) and Final Brief of Respondent in State v. Andre Tayson Boone *Unpublished Opinion* No. 2013-UP-155 (Ct. App. Filed April 17, 2013). Respondent is not citing either of these Unpublished Opinions as precedential authority. Rule 268 (d)(2), SCACR.

¹³ *See* Taylor, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495 (“Whether or not mutual combat exists is significant because the plea of self-defense is not available to one who kills another in mutual combat.”).

¹⁴ Judge Cooper instructed the jury on both murder and voluntary manslaughter. The jury returned a verdict of guilty of murder.

like the facts of Petitioner's case, all of the defendants were held responsible for the death of the victim even though only 1 of them had inflicted the fatal injury. In Brown, many employees at a local mill began to strike and picket after the mill organized a labor union. Id., 95 S.E. at 62. One morning, a fight erupted between current employees and strikers. Id. One of the men involved in the melee pulled out a knife and killed David Freize, another participant in the fight. Id. Two of the strikers and 3 of the employees were indicted for the murder of Freize. Id. On appeal, the defendant's alleged that it was improper to charge the law of mutual combat. Id. at 61. This Court affirmed the convictions and held, "That everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one 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 the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences." Id. at 63.

In order for the doctrine of mutual combat to apply, multiple factors must be shown. In determining whether mutual combat exists, there must be evidence of a "mutual intent and willingness to fight." Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003), *quoting Graham*, 260 S.C. at 450, 196 S.E.2d at 495. One looks to the "acts and conduct of the parties and circumstances attending and leading up to the combat" to determine mutual intent. Id. Also, there must be an antecedent agreement to fight. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id. The parties must also be armed and know the other to be armed. Id.

As discussed under Appellate Issue II., the State presented overwhelming evidence of all the factors for mutual combat and thus the legal principle was appropriately applied to this case. Petitioner contends it was error for the State to use the theory of mutual combat to prove murder. Specifically, he claims the State failed to prove the elements of murder in general. However, the State did prove the elements of murder, and the jury was instructed on the law of murder and they found the State had met its burden of proof in establishing the elements of murder beyond a reasonable doubt. The State proved Petitioner did act with malice by attempting to murder Robinson and in doing so engaged in a running gun battle with Robinson in residential neighborhoods in broad daylight with children playing nearby constituting a depraved and wicked heart and one acting with gross recklessness. *See State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 141-42 (Ct. App. 2003)(defining malice). The State proved Khalil was killed as a direct and proximate result of the running gun battle between Petitioner, his son, and Robinson. *See State v. Dantonio*, 376 S.C. 594, 605, 658 S.E.2d 337, 343 (Ct. App. 2008)(“A defendant’s act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased.”); *Id.* (“The Defendant’s act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased.”); *State v. Fennell*, 340 S.C. 266, 272, 531 S.E.2 512, 515 (2000)(“[A] defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent.”); *State v. Heyward*, 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941)(“If there was malice in [defendant’s] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake.”). Judge Cooper instructed the jury, “Murder is defined in the law as the killing of any person with malice aforethought, either express or implied.” (R. 806, 832). He defined the terms “malice” and “aforethought”. (R. 806-07, 832-33). Further, he instructed

the jury, “the state is required to prove malice beyond a reasonable doubt.” (R. 806, 808, 833). And, he instructed the jury Petitioner did not have to prove the absence of malice, but the State had to prove the presence of malice beyond a reasonable doubt. (R. 808, ll. 7-9, 833, ll. 18-20). And, he instructed the jury the State must prove beyond a reasonable doubt that the defendant killed a person. (R. 806, 832). Judge Cooper explained to the jury that the murder charge against Petitioner rested on the theory of mutual combat. (R. 808-10, 833-34). He instructed the jury twice on the elements of mutual combat. (R. 808-10, 833-35). Therefore, the jury was well aware that not only must mutual combat be proven, but the elements of murder as well, and they found Petitioner guilty of murder and attempted murder beyond a reasonable doubt.¹⁵

Next, Petitioner asserts it was error for Judge Cooper to consider the legal principle of transferred intent. Respondent submits Judge Cooper properly considered the law of transferred intent. The law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant. Nevertheless, it is only logical transferred intent would apply in such a situation. Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim. South Carolina recognizes “if there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake.” Heyward, 197 S.C. 371, 377, 15 S.E.2d at 672. Thus, transferred intent holds the defendant liable for the harm caused to an innocent bystander. *See, e.g., Fennell*, 340 S.C. at 272, 531 S.E.2d at 515 (A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or

¹⁵ There was no objection to the jury charge on murder by Petitioner and he does not raise a jury instruction issue on appeal. Further, as Petitioner admits in his brief, there was no objection to the jury instruction on the law of mutual combat and he does not raise that issue on appeal. (IBOA, p. 8, fn. 1; See also Petition for Writ of Certiorari).

injures an unintended victim.). It would make no sense for “mutual combat” to hold participants liable for the death of another participant but not for that of an innocent bystander caused by the participants’ mutual combat.

The California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting. People v. Sanchez, 26 Cal. 4th 834, 29 P.3d 209 (2001). In referencing the concurring opinion’s analysis of transferred intent, the majority opinion stated in a footnote:

For purposes of applying the rule of transferred intent, it does not matter whether defendant himself fired the fatal shot or instead induced or provoked another to do so; in either situation, defendant's culpable mental state is determined as if the person harmed were the person defendant meant to harm.

26 Cal. 4th at 850, 29 P.3d at 220. In concluding that each defendant was equally liable for the innocent bystander’s death, the Court stated:

Because defendant and co-defendant, rival gang members, had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots in a gun battle, it was not unfair to hold them equally responsible for an innocent bystander's death, without regard to which of them actually fired the bullet

26 Cal. 4th at 854, 29 P.3d at 144.

Accordingly, the doctrine of transferred intent was properly applied to Petitioner’s case. If Young, Jr. had been killed, then there would be no question that both Petitioner and Robinson would be responsible for his death under mutual combat. Since an innocent bystander was killed rather than 1 of the combatants, the doctrine of transferred intent was properly utilized to transfer Petitioner’s, Young, Jr.’s, and Robinson’s criminal intent to the unintended victim. Hence, there was no error in charging the jury on the law of transferred intent.

Additionally, Petitioner argues that the State must present evidence of some doctrine that would allow for 1 defendant to be responsible for another defendant’s actions. Petitioner’s

examples of such doctrines are conspiracy, accomplice liability, and felony murder. However, much like the above theories, mutual combat is a recognized doctrine in which a defendant can be held accountable for the actions of another defendant. See Brown, 95 S.E. at 63 (“[E]very one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not.”); see also, Taylor, 356 S.C. at 235, 589 S.E.2d at 5 (“The mutual combat doctrine is triggered *when both parties contribute* to the resulting fight.”). Mutual combat with firearms is an unlawful act and one inherently dangerous to others including bystanders. Further, attempting to murder someone with a firearm is also an unlawful act inherently dangerous to others.

To further counter Petitioner’s argument, Respondent submits a review of other states’ case law on mutual combat with relation to other theories of culpability is beneficial. See State v. Spates, 779 N.W.2d 770, 779 (Iowa 2010) (“Our cases support a conclusion that the acts of a defendant engaged in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant.”); Roy v. United States, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) (“While the evidence was unclear as to whether Roy’s or Settles’ bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered.”); Alston v. State, 662 A.2d 247, 254 (Md. 1995) (“Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare.”). See also Reyes v. State, 783 So.2d 1129, 1133 -1134 (Fla. App. 3 Dist. 2001) (noting Alston and adopting logic citing other jurisdictions with similar holdings). The logic of these cases is instructive.

In State v. Spates, 779 N.W.2d at 772, the Supreme Court of Iowa reviewed a murder conviction where the victim had been a bystander killed “during a gun battle between rival groups....” The Court considered both theories of aiding and abetting and mutual combat. In light of the applicability of those theories, the court concluded:

We agree with those courts that have concluded participants in mutual combat encourage each other to engage in the potentially lethal conduct that leads to the injury of innocent bystanders, thereby supporting liability as an aider and abettor.

779 N.W.2d at 780. Iowa had previously reached a similar conclusion in State v. Brown, 589 N.W.2d 69 (Iowa App. 1998), *reversed on other grounds*, State v. Reeves, 636 N.W. 2d 22 (Iowa 2001). In that case, the victim was killed when she unwittingly drove between rival gangs in the midst of a shootout. However, a rival gang member, not Brown, actually fired the fatal bullet. Brown contested his second degree murder conviction as there was no evidence connecting him personally to the fatal bullet.¹⁶ The court, considering proximate cause, rejected Brown’s assertion finding:

Brown’s engagement in conduct that created a very high risk of death or serious bodily injury to others was a proximate cause of Davis’s death. *See State v. Marti*, 290 N.W.2d 570, 579 (Iowa 1980). This is true whether it was the defendant or another participant in the shoot-out who fired the shot that killed the innocent bystander. *See id.* (“It is not essential for conviction in all cases that the accused actively participated in the immediate physical impetus of death”).

589 N.W.2d 69, 74 -75.

¹⁶ Though “second degree murder,” the malice requirement is substantially the same as South Carolina’s malice requirement for murder. In Iowa, “[m]alice is required for both degrees of murder. *See* Iowa Code § 707.1 (1997) (‘A person who kills another person with malice aforethought either express or implied commits murder.’). However, first-degree murder requires proof of deliberation and premeditation in addition to malice aforethought. *See* Iowa Code §§ 707.1, 707.2(1). Second-degree murder, on the other hand, does not require deliberation and premeditation; it requires only proof of malice aforethought. *Compare* Iowa Code § 707.2(1) *with* § 707.3.” Reeves, 636 N.W.2d at 25. Thus, the charge would be in definition comparable to murder in this State.

The Maryland Court of Appeals considered similar circumstances in regard to a conviction for a “depraved murder”¹⁷ conviction, and reasoned as follows:

The “bottom line” is that when a group, or two groups, of hoodlums deliberately engage in a gang-war style of shoot-out in a crowded urban area, they collectively trigger an escalating chain reaction creating a high risk to human life. When instead of taking their gunslinging vendetta to an uninhabited island or some remote spot in the desert, they arrogantly indulge in their homicidal insanity in the middle of a crowded block of residences, each participant in such collective madness displays a wanton and depraved indifference to any human life that might randomly fall within their overlapping and deadly enfilades. Should death to one of the innocent bystanders or homeowners ensue, each participant in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.

Alston v. State, 643 A.2d 468, 469 (Md. App. 1994). The affirmance was upheld on appeal, with the higher court noting: “Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare.” Alston v. State, 662 A.2d 247, 254 (Md. 1995). *See also* Reyes, 783 So.2d at 1133 -1134 (noting Alston and adopting logic citing other jurisdictions with similar holdings).

Similarly, in a 2005 case, the Court in the District of Columbia, in reviewing a causation charge, reasoned that “while proximate causation as a theory of second-degree murder liability has been recognized in our case law for some time, the factual scenario of a ‘gun battle’ on city

¹⁷ Again, this charge appears similar to the “second degree murder” charge in Iowa, and omits only an otherwise required deliberation or premeditation element of first degree. *See Owens v. State*, 906 A.2d 989, 1026 (Md. App. 2006)(describing one way of proving second degree murder as “what has become known as depraved heart murder--a killing resulting from ‘the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.’”). It is not, however, limited to unintentional acts, but apparently professed unintentional results. Robinson v. State, 307 Md. 738, 745-746, 517 A.2d 94, 98 (Md. 1986). The inclusion of the “depraved heart” and “reckless and wanton” aspect, places the charge on similar footing with our requirement of malice. State v. Wilds, 355 S.C. 269, 276-277, 584 S.E.2d 138, 142 (Ct. App. 2003) (“Implied malice is when circumstances demonstrate a ‘wanton or reckless disregard for human life’”).

streets, as in this case, is relatively new.” Roy v. United States, 871 A.2d 498, 507 (D.C. 2005). The Court easily acknowledged “the application of proximate cause liability to those participants who willfully choose to engage in these battles.” Id. In upholding the application in that specific case as reflected in the contested charge on causation, the Court reasoned: “While the evidence was unclear as to whether Roy’s or Settles’ bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered.” 871 A.2d at 509.

Therefore, under the law of South Carolina and many other states, if both parties contributed to the mutual combat (which by definition they must), then both parties are actors in the gunfire and both parties are culpable for the resulting injury.

Furthermore, the law of parties to a criminal offense would be applicable to Petitioner who retrieved the “Tech Nine” weapon from a residence, was angry at Robinson and wanted to kill him, handed the gun to his son to use, told him how to assemble the weapon, and drove his truck throughout the running gun battle with Robinson as his son fired out the passenger window. “Under the ‘hand of one is the hand of all’ theory of accomplice liability, 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. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” State v. Gibson, 390 S.C. 347, 701 S.E.2d 766, 769 (Ct. App. 2010). It is clear there is evidence in the record from which the jury could find beyond a reasonable doubt that Petitioner and his son, acting together, aiding and abetting each other, participated in a running gun battle [mutual combat] with Tyrone Robinson, attempting to murder Robinson, that proximately resulted in the death of an innocent child bystander, 8 year old Khalil Singleton.

Finally, Petitioner argues that South Carolina should not allow for a murder conviction to rest upon the legal principles of mutual combat and transferred intent because, if the legal theory was accepted, any time an individual fought with an opponent, the individual would be criminally responsible for the harm caused by his opponent's conduct. This is simply not true. If a person was truly acting lawfully in self-defense, the legal principles of mutual combat and transferred intent would not apply. Mutual combat is different. The parties agree to fight and to fight with firearms. They are by definition not acting in self-defense. See Taylor, 356 S.C. at 232; Graham, 260 S.C. at 450, 196 S.E.2d at 495. Respondent submits that is the precise reason mutual combat with firearms can be and should be used for a murder conviction. Much like accomplice liability, both parties should be held equally accountable for the consequences resulting from creating a zone of danger. Mutual combatants' activities are comparable to those of aiders and abettors because they encouraged each other to engage in a dangerous urban or residential conflict. Reyes, 783 So.2d at 1133-1134. Here, Petitioner, his son, and Robinson encouraged each other to engage in a lethal running gun battle that resulted in the death of an innocent child. Even though Robinson fired the bullet that killed Khalil, it is just as probable that 1 of Petitioner's and Young, Jr.'s bullets could have injured or killed an innocent bystander who was merely caught in the crossfire of the havoc the men created. Further, if not for the running gun battle instigated and continued by Petitioner and his son, 8 year old Khalil would not have been killed. Therefore, not to hold Petitioner accountable for the death of Khalil would be an injustice, for this case and future cases.

In conclusion, the deep-rooted doctrine of mutual combat is a valid legal principle on which to base a murder charge or conviction. Here, Petitioner, Young, Jr., and Robinson mutually engaged each other in an armed conflict with deadly weapons in which it was

reasonably foreseeable someone could be killed. The fact that an 8 year old child was killed, instead of 1 of the 3 men engaged in mutual combat, does not excuse the combatants of their culpability. In fact, it makes it more egregious. The State properly prosecuted Petitioner for murder under the theory of mutual combat, transferred intent, and accomplice liability; and, Judge Cooper correctly denied the motion for a directed verdict. Judge Cooper did not abuse his discretion in holding mutual combat, transferred intent, and accomplice liability were valid legal principles on which to base Petitioner's murder charge and conviction. The motion for directed verdict was appropriately denied, and thus, certiorari should be denied.

APPELLATE ISSUE II.

Overwhelming direct and circumstantial evidence of mutual combat was presented at trial to withstand the directed verdict motion.

Petitioner did argue below that no evidence was produced he and Robinson were engaged in mutual combat at the time of the murder. However, as the record shows, Judge Cooper properly denied this directed verdict motion because the State presented *overwhelming* direct and substantial circumstantial evidence Petitioner, his son, and Robinson were engaged in mutual combat when 8 year old Khalil was killed. (R. 654-75, 749).

For there to be mutual combat, there must be **a mutual intent and willingness to fight**. Taylor, 589 S.E.2d at 3. The required mutual intent can be inferred from the parties' acts and conduct, and the circumstances of the combat. Id. Also, there must be an antecedent **agreement to fight**. Taylor, 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" Id. The parties must also **be armed and know the other to be armed**. Id. *see also* State v Mathis, 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony appellant and deceased were on the lookout for each other,

each was armed in anticipation of meeting the other, and each drew and fired his pistol at the other); Brown, 95 S.E. at 63 (“...if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used...”); *See also* 40 C.J.S. Homicide Section 197 (“Mutual combat usually arises when the parties are armed with deadly weapons and mutually agree or intend to fight with them.”). In finding evidence of mutual combat existed to submit the issue to the jury, the Court in Graham held:

There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination.

260 S.C at 452, 196 S.E.2d at 496.

Here, the State presented *overwhelming* direct and substantial circumstantial evidence Petitioner, his son, and Robinson (1) **mutually intended to fight**; (2) **agreed to fight**; (3) **and were armed and knew the other was armed**. As set forth in Respondent’s Statement of Facts: Petitioner’s incriminating statements to police, the testimony of the eyewitnesses to the running gun battle, the physical evidence, and the 911 calls admitted in evidence show each of the 3 men agreed to and did mutually participate in a running gun battle [mutual combat] on the streets, roads, and yards of Hilton Head Island including on Oakview Rd., Allen Rd., and Marshland Rd. (R. 507-61, 565-81; 626-63; 696-706; 716-18; State’s Ex. 3, 4 & 17). Petitioner’s, his son’s, and Robinson’s actions and conduct indisputably prove the required mutual intent and willingness to fight for mutual combat and is further demonstrated by Petitioner’s own admission to participating in a running gun battle with Robinson. (State’s Ex. 17).

Additionally, as to foreseeability, Petitioner admitted Khalil and the other children were playing outside (R. 720), and admitted multiple times to engaging in a gun fight in the area

where children were present. (State's Ex. 17; R. 720, ll. 1-11). This clearly demonstrates Petitioner was aware innocent bystanders were in the vicinity. But this fact did not stop Petitioner from continuing the conflict with Robinson, shooting up his car, and driving down Allen Rd. and back up Allen Rd. in pursuit of Robinson. Additionally, the running gun battle occurred in broad daylight in residential neighborhoods. Further, the actions of Charlese Mitchell in calling the children in during the running gun battle, and Kathleen Fayfich in calling 911 proves any reasonable person would have anticipated the danger to children in the area. Accordingly, Petitioner knew the natural consequences of his actions could lead to a bystander's death.

Petitioner's argues that driving away when being shot at the last time should be viewed as a withdrawal from the conflict entitling him to a directed verdict.¹⁸ He is wrong. In order to bring mutual combat to an end, 1 of the combatants must withdraw from the conflict in good faith and make that fact known to his adversary. Graham, 260 S.C. at 451, 196 S.E.2d at 495-96. Here, there was no evidence presented by the State that Petitioner withdrew from the conflict. The chain of events of the entire conflict included numerous instances of Petitioner and Robinson driving to and away from locations shooting at or attempting to shoot at each other. These were not withdrawals; they were simply in furtherance of his pursuit of each other. This last instance is not any different. Petitioner's recorded statements show he did not intend to withdraw. Petitioner's claim, is not supported by the record. Evidence was produced Petitioner

¹⁸ This issue is not preserved for review since Petitioner did not request a directed verdict on the basis of a withdrawal from mutual combat and only discussed the end or withdrawal from mutual combat **when requesting a jury instruction on the law**. Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. Kennerly, *supra*; Jordan, *supra*; Bailey, *supra*. Therefore, Petitioner is barred from asserting this point as a basis for a directed verdict in his appeal. Id. However, Petitioner would not be entitled to relief even if he properly raised this issue below.

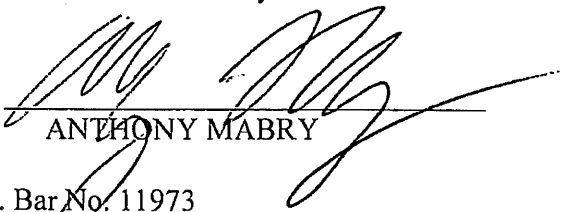
did not withdraw from the combat in good faith or communicate the same to Robinson. Petitioner's explanations or protestations at trial are irrelevant to the directed verdict analysis. State v. Larmand, 415 S.C. 23, **31**, 780 S.E.2d 892, **896** (2015). Petitioner's act of driving away minutes after firing multiple bullets into Robinson's car at Griffin's residence, and after driving down Allen Rd. and back up Allen Rd. in search of Robinson personally, was not a desire to end the fighting or a withdrawal, but a continuation of the hunt for Robinson or at most a retreat when Petitioner saw Robinson about to shoot at him from Griffin's yard.¹⁹ This act must be viewed in relation to the whole incident and all of the direct and substantial circumstantial evidence. Id. at 31-33; 780 S.E.2d at 895-896.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari must be denied.

Respectfully submitted,

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Senior Assistant Attorney General

By: 

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October 21, 2019

¹⁹ Petitioner's turning onto Marshland Rd. from Allen Rd. and driving away should not be viewed as any different than when Petitioner drove down Allen Rd. and later turned onto Marshland Rd. after shooting at Robinson the 1st time on Allen Rd. **at Robinson's residence.**

The Supreme Court of South Carolina

The State, Respondent,

v.

Aaron Young, Sr., Petitioner.

Appellate Case No. 2019-001595

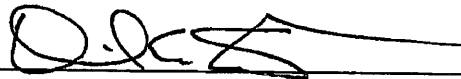
Lower Court Case No. 2012-GS-07-02173, 2014-GS-07-01914

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

March 12, 2020

cc:

Isaac McDuffie Stone, III, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

J. Anthony Mabry, Esquire

Melody Jane Brown, Esquire

Kathrine Haggard Hudgins, Esquire

The Honorable Jerri Ann Roseneau
The Honorable Jenny Abbott Kitchings

STATE OF SOUTH CAROLINA)

County of Beaufort)

Aaron Young, Sr., # 288580)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

Its Departments and agents,)

Alan Wilson, Attorney)

General For South Carolina)

IN THE COURT OF COMMON PLEAS

2020 CP07 01099

APPLICATION FOR

POST-CONVICTION RELIEF

2020 MAY 14 PM 1:01
JEROME A. ROSENHEAD
CLERK OF COURT
BEAUFORT COUNTY, S.C.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution 4460
Broad River Rd. Columbia, SC 29201
2. Name and location of Court which imposed sentence Beaufort county
General Sessions court
3. Name(s) of co-defendant(s) (if any) Aaron Scott Young, Jr.,
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: (2012-GS-07-02173), 2014-GS-07-01941)
(a) Attempted murder, and murder
(b) 20 years for attempted murder and 30 years for murder

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 26, 2016
- (b) Attempted Murder-20 years
- (c) Murder - 30 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeal
- ii. The Supreme Court of S.C.
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. March 12, 2020
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. ORDER - Appellate Case No. 2019-001595
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) My counsel filed the appeal for me
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: **Directed Verdict Violation, Lesser included offense**
(a) **Ineffective assistance of counsel, Due Process, Prosecutorial**
(b) **misconduct, Brady Violation, Miranda Right Violation, Illegally**
(c) **Coercion errors, Hearsay Violation, Equal Protection, promises**
11. State concisely and in the same order the facts which support each of the grounds set out in (10): **See Attachments 1-21**
The grounds will be Amended in this case?
(a) _____
(b) _____
(c) _____
12. Prior to this application have you filed with respect to this conviction:
(a) any petition in a State Court under South Carolina Law? **No**
(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? **This is the only PCR I have filed**
(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? **None**
(d) any other petitions, motions or applications in this or any other Court? **No**
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
(a) the specific nature thereof:
i. **None**
ii. **None**
iii. **None**
iv. **None**
(b) the name and location of the Court in which each was filed:
i. **None**
ii. **None**
iii. **None**
iv. **None**
- And 1, § 10, d. 1

1, 4

4-7 S.C. 155
8-38 S.A. 2d 511
(2020)

(c) the disposition thereof:

i. None

ii. None

iii. None

iv. None

(d) the date of each such disposition:

i. None

ii. None

iii. None

iv. None

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None

ii. None

iii. None

iv. None

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. None

ii. None

iii. None

(b) the proceedings in which each ground was raised:

i. None

ii. None

iii. None

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is my first PCR filed to the court
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
only this PCR Application
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Mr. Robert E. Ferguson, Jr., Trial Attorney, 46 Sams Point Road
#c Beaufort, South Carolina 29907
 - ii. Appeal Attorney: Kathrine H. Hugins, S.C. Commission on
Indigent Defense Division of Appellate Defense P.O. Box 11589
Columbia, SC 29211-1589
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial: Mr. Robert E. Ferguson, Jr., LLC
Appeal: Attorney Kathrine H. Hudgins,
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

vacate conviction and sentence reverse and remand

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of BEAUFORT)

VERIFICATION

I, Aaron Young, Sr., # 288580, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Aaron Young

SWORN to and subscribed before me this 10th
day of May, 2020.

[Signature] (L.S.)
Notary Public

My Commission Expires: 10/16/2026

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Aaron Young, Sr., # 288580, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Aaron Young
Applicant

SWORN or affirmed to and subscribed before me this
12 day of May, 2020.

[Signature]
Notary Public

My Commission Expires: 10/16/2026

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellate have suffered a miscarriage of justice and has conviction only stands due to denial of due process and equal protection in the State courts in multiple and gross violation of the United States supreme court precedents and the United States constitution, that constitutes an outrage of mockery of Justice that Federal courts who sworn to uphold the United States constitution should not tolerate.

Applicant's case is one of clear and plain manifest injustice, not only of his trial, but also thereafter to a gross degree. Applicant's trial was extremely unfair and than all review in the courts thereafter have not been meaningful, fair or served any degree of Justice.

No one can possible read appellant's trial transcript, records and say that appellant had anything close to a fair trial. And no one can read the records of appeals action and say that he had a full, fair and meaningful opportunity to raise his constitutional claims of being denied a fair trial, due process of Law and effective assistance of trial counsel. The appellant have suffered a miscarriage of justice and is actually innocent and why his conviction only stands due to severe denial of due process and equal protection in the State courts.

Defendant case is one of clear and plain manifest injustices not only of his trial but also thereafter to a gross degree. Defendant trial was extremely, unfair or served any degree of justice as chief Justice.

Did defendant receive effective assistance of counsel in accordance with the sixth Amendment when his trial counsel was ineffective overall, when he failed to properly prepare for trial, investigate all the elements of alleged crime, crime, scene, and challenges to the sufficiency of the indictment. Trial counsel failed to properly move to review the indictment in accordance with section 17-19-90 (2003).

Counsel assistance resulted in ineffective because he failed to render reasonably effective assistance under prevailing professional norms, and that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Porter v. State, 368 S.C. 378, 383, 629 S.E. 2d 353, 356 (2006). In order to prove prejudice, defendant will show "there is a reasonable probability that, but for counsel unprofessional errors the result of the proceeding would have been different. "Cherry v. State, 300 S.C. at 117-18 386 S.E. 2d at 625.

"A reasonable probability is a probability sufficient to undermine confidence in outcome of trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E. 2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

Applicant contends his trial counsel failed to investigate both factual and legal matter to determine if defense can be developed,

It is a definitive objective description of the competency normally demanded of counsel in certain aspects of their service.

Due to defendant's illiteracy to the Law he was entitled to rely upon his counsel to make a reasonable decision pursuant to U.S. v. Dewalt, 92 F. 301209 without some authoritative guidance, the defendant cannot know whether he understood anything correctly at his trial. In this case the question before the court was whether or not there was prejudice to the defendant as a result of insufficient factual allegations contained in the records.

Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel the State unconstitutionally deprives the defendant of his liberty, Cuyler, 446 U.S. at 343, 100 S.Ct. at 1175 the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial. United States v. Cronin, 466 U.S. 658, 104 S.Ct. 2039, 2096 (1984).

The United States supreme court have recently recognized that defense counsel must conduct a reasonable investigation to discover all reasonable available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2537, 156 L.Ed. 2d 471 (2003) (citation omitted). Particularized prejudice inquiry unnecessary. Frett v. State, 298 S.C. 54, 56, 378 S.E. 2d 249, 251 (1988).

If the attorney make a serious mistake which could effect the verdict, reversal is required even if the attorney was general competent. Tromly v. Anderson, 439 F. Supp. 1250, 1256 (1977) Aff'd 584 F. 2d 807 (6th cir. 1978); Hyman v. Aiken, 924 F. 2d 1405 (4th cir. 1987).

Defendant further, contends that the State's evidence when viewed in the light most favorable to the prosecution, was so insufficient that no rational trier of fact could have found the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2181, 61 L.Ed. 2d 560 (1991).

[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. "Strickland, 466 U.S. at 691, 104 S.Ct. 2052. {A}t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E. 2d 590, 597 (2007) (emphasis omitted) (citation omitted) "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a high measure of deference to counsel's judgments. "Strickland, 466 U.S. at 691, 104 S.Ct. 2052. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation Id. at 690-91 104 S.Ct. 2052. "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions "Id. at 691, 104 S.Ct. 2052.

what we have in this case is a failure to investigate. without investigating no real defense strategy can't be prepared. In Ard v. Catoe, 372 S.C. 318, 642 S.E. 2d 590 (2007) the court wrote:

without a doubt "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation "Thompson v. Wainwright, 787 F. 2d 1447, 1450 (11th cir. 1986); see also Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. 2052. When evaluating the reasonableness of counsel conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Trodel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), Aff'd 828 F. 2d 670 (11th cir. 1987).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case. "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. American Bar Association Guidelines for the appointment and performance of Defense counsel In death penalty cases, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) hereafter "ABA Guideline).

DUE PROCESS CLAUSE VIOLATION

The United States constitution guarantees a criminal defendant the right to present a complete defense through the Due Process clause of fourteenth Amendment and the sixth Amendment.

Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342, S.E. 2d 401, 402 (1986) (holding the sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). [T]he constitution guarantees criminal defendants a meaningful opportunity to present a

complete defense Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's constitution provides similarly. "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense "S.C. const. Art. I, § 14; See also S.C. code ANN. § 17-23-60 ("Every person accused shall at his trial be allowed to produce witnesses and proofs in his favor.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense.

Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Id. At 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question or hesitation, the United States supreme court declared [t]his right is a fundamental element of due process of Law. Id. Undermining the "ostensible integrity of the investigation is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. "Schmidt, 288 S.C. at 303, 342 S.E. 2d at 403 (citing Assoc. Mgmt. v. E.D. Seals Constr. Co., 279 S.C. 219, 305 S.E. 2d 236 (1983)); See also Rule 401, SCRE (defining relevant evidence). Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. citing Toole v. Salter, 249 S.C. 354, 154 S.E. 2d 434 (1967)); See also Rule 402, SCRE (" All relevant evidence is admissible, except as otherwise provided Evidence which is not relevant is not admissible).

In State v. Page, 406 S.C. 272, 287, 750 S.E. 2d 623, 631 (Ct. App. 2013), this court held the trial judge abused his discretion by finding the proffered testimony offered by the defendant was not relevant. Page sought to introduce a text message and testimony by a witness that the alleged victim had admitted to the witness that she had lied to the police. Id. at 288, 750 S.E. 2d at 632.

On the other hand, this court affirmed a trial judge's preclusion of evidence that was irrelevant and unfairly prejudicial. State v. Lyles, 379 S.C. 328, 344, 665 S.E. 2d 201, 209 (Ct. App. 2008). Lyles sought to introduce evidence of prior drug sale solicitations at the apartment where the shooting occurred and the presence of drugs next to the deceased. Lyles claimed the proffered testimony established that drugs were being sold from the deceased's apartment and bolstered the credibility of Lyles by supporting his claim that he went to the apartment merely to purchase drugs. Id. at 336, 665 S.E. 2d at 205. This court held the evidence was properly excluded because there existed no probative link between the proffered testimony and the pending charges. The proffered testimony established that drugs were offered for sale outside of the apartment several months prior to the shooting by an unknown individual. Id. at 349 665 S.E. 2d at 20.

LESSER INCLUDED OFFENSE

The trial judge erred in not submitting the lesser included offense of murder. In South Carolina it is well established that the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge it should be given. State v. Burriss, 334 S.C. 256, 262, 513 S.E. 2d 104, (1999) (the trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence); The evidence presented might well establish a violation of S.C. code section 16-3-50, or 16-3-60; but it did not establish the elements of malice aforethought required by S.C. code section 16-3-10, or 17-19-30 in order to convict an accused of the offense of murder.

The State failed to present credible evidence to establish that the defendant acted with malice aforethought at the time of the shooting and thus, the State failed to prove the elements of malice aforethought alleged in the indictment for the crime charged. See; State v. Bathea, 120 S.E. 2d 239 91923); and State v. Sumpter 286 S.C. 150, 322 S.E. 2d 774 (S.C. App. 1985); State v. Robinson, 307 S.C. 169, 404 S.E. 2d 142 (1992), in reference.

SUBJECT MATTER JURISDICTION

A applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown-v.-State, 343 S.C. 342, 540 S.E. 2d 846 (2001), Overrule- in part by Gentry, 610 S.E. 494. However, "[C]ircuit courts obviously have subject matter jurisdiction to try criminal matter. "Gentry, 610 S.E. 2d 494; see also S.C. const. Art. v § 7. Thus, the applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The applicant's conviction involved a criminal charge in General Sessions court. Thus, the circuit court had subject matter jurisdiction.

One of our South Carolina court's primary functions in the interpreting of a statute is to ascertain the direct intention of the Legislative intent and apply the statute according to its literal meaning. In construing such a statute, the words or its language must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Statutes 24(1). The literal meaning and Legislative intent of our common Law statute section 17-19-30 (1976) is quite clear cut by it's language. The common Law requirements in South Carolina remain the same on every particular as they stood at common Law of older times State v.-Judges, 208 S.C. 497, 38 S.E. 2d 715, 7119 (1946).

As Stated in State-v.-Smalls, 364 S.C. 343, 613 S.E. 2d 754 (2005), Although, an indictment does not confer subject matter jurisdiction, due process requires that a criminal defendant be properly served with a valid indictment, State-v.-Coleman, 17 S.C. 473, 1882 WL5605 (1882). The indictment in question here was not valid and the circuit court lacked subject matter jurisdiction in this particular case. State-v.-Berry, 70 S.E.304 (1911).

The applicant is entitled to vacation of the conviction and sentence as a matter of pure Law and justice in this instant case. State v. Smalls, 613 S.E. 2d 754 (2005). Without a proper indictment, the court lack subject matter jurisdiction to enter conviction or impose sentence for a crime. S.C. code of Law -Ann. § 17-19-10, S.C. const. Art. I § 11. An indictment is proper if it is sufficient in charging the elements of the offense and is returned true billed by the grand jury, or presentment is waived. State v. Beacham, 342 S.E. 2d 597 (1986).

For Example: If a prosecutor simply draw up an "indictment" had a grand jury foreperson sign it and then used it to charge the defendant with a criminal offense, it would clearly be dismissed, as a violation of the fifth Amendment. This is because the indictment would in no sense be the product of a constitutionally required grand jury proceeding. So would an indictment issued by a kangaroo grand jury one whose deliberations were so overborne by a prosecutor or judge that the indictment was, in effect the prosecutor's or judge's handiwork, and not the result of a considered judgment by an independently functioning grand jury.

Under the South Carolina constitution, no person may be tried for any crime in circuit court except on a presentment of an indictment of a grand jury of the county where the crime has been committed or unless he waives presentment or is tried for an offense whose elements are included within a properly indicted S.C. const. Art. I § 11. Joseph v. State, 351 S.C. 571 S.E. 2d 280 (2002). Additionally, a person may not be convicted with irrelevant, prejudicial evidence of uncharged had Act. Rule 404(b) SCRE. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Without a proper indictment, the court lack subject matter jurisdiction to enter conviction impose sentence for a crime. S.C. code of Lawa Ann. 17-19-10, S.C. const. Art. I § 11. An indictment is proper if it is sufficient in charging the elements

of the offense and is returned true billed by the grand jury, or presentment is waived. State v. Beacham, 342 S.E. 2d 597 (1986).

Further as stated in U.S. v. Cotton, 122 S.Ct. 1781 (2002), the subject matter jurisdiction of a circuit court is both mandatory and jurisdictional, and it is fundamental. Citing, State v. Bryson, 357 S.C. 106, 591 S.E. 2d 637 (S.C. App. 2003), Mathis v. State, 335 S.C. 87, 584 S.E. 2d 366 (2003); U.S. v. Daniels, 973 F. 2d 272, 274 (4th cir 1992). When an indictment does not contain essential elements of the offense charged, the indictment is invalid, and a circuit court, then has no subject matter jurisdiction over the criminal matter, in which to enter a conviction or impose a sentence upon such an indictment, as they are void. Carter v. State, 495 S.E. 2d 773 (1998); Brown v. State, 540 S.E. 2d 846 (2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916).

PROSECUTORIAL MISCONDUCT

The prosecutor's duty in a criminal prosecution is to seek justice. Although the prosecutor should "prosecute with earnestness and vigor," he or she may not use "improper methods calculated to produce a wrongful conviction. 1742 Generally, the use of such methods is grounds for mistrial or reversal of a conviction if it results in an unfair trial violating the due process. If the prosecutorial misconduct is intended to cause a mistrial, the double jeopardy clause may bar further prosecution.

Improper comments to justify reversal of a conviction, it is not enough that the prosecutor's remarks or conduct were improper [t]he relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Due process as guaranteed by the fourteenth Amendment requires that no person shall be

made to suffer the ~~onus~~ of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of facts beyond a reasonable doubt of the existence of every element of the offense. Jackson-v.-Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979). A strong case of ineffective representation of counsel must appear to warrant the intervention by the trial judge since such intervention itself may invade the accused's constitutional rights. State-v. Lewis, 179 S.E. 2d 616, 255 S.C. 466. When an accused's representation is patently inadequate and incompetent, trial judge is under a duty to interfere to extent of insuring that rights of accused are afforded adequate protection State-v. Lewis, 179 S.E. 2d 616, 255 S.C. 466.

EXCULPATORY EVIDENCE

In petitioner's case the solicitor would not even comply with discovery requests, for trial counsel filed a motion to compel the solicitor for all materials in this case after requesting discovery. And it is a fact of record that solicitor withheld "exculpatory evidence" that another other than petitioner may have committed the crime. (Tr. p. 295, lines 1-25. and 296, 97, 98, 99, 300. So if the solicitor withheld evidence in this case. In United States-v. Higgs, 713 F. 2d 39, at 42 (3rd cir. 1983), cert denied 104 S.Ct. 725 (1984), the court held that exculpatory evidence applies both to materials going to the heart of a defendant's guilt or innocence and to materials that Might well alter the jury's judgment of the credibility of a criminal prosecution. (citing Giglio-v.-United-States, 405 U.S. at 154). Conviction must be set aside if false testimony was not corrected by prosecutor that could have effected the judgment of the jury. Hernandez-v.-Estelle, 624 F. 2d 313 (5th cir. 1981).

BRADY MATERIALS VIOLATION

The court erred in overruling defendant's counsel should have moved for a mistrial. Brady v. Maryland, 373 U.S. 83 (1963). prohibits the State from withholding evidence that is materials and exculpatory of an accused. When a specific request for exculpatory evidence is made reversal is required if the evidence might have affected the outcome of the trial. United States v. Agurs, 427 U.S. 97 (1976).

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is discovered, there is justification for a new trial.

Here, defendant request this court to evaluate the strength of the additional evidence, because the solicitor's conduct precluded counsel from investigating the exculpatory information. He would point out, however, that the case against defendant was entirely unfair.

DOUBLE JEOPARDY CLAUSE VIOLATION

CONTINUED THE TRIAL UNFAIR

Tr. P. 294, lines 1-25. April 23, 2014, proceedings

THE COURT: Good morning, Mr solicitor, from our conference yesterday, I understood that you want now to join in the motion to sever; is that right?

MR. STONE: I think, with the new evidence and some other issues, I think that the proper thing at this point would be to sever these Defendants. The only concern that I have at that point is that with the number of witnesses that we have and

restructuring, I don't believe that it would be possible for us to complete this trial within this week. That is a consideration that I would just offer up to your Honor, to determine the best way to structure this.

THE COURT: All right. thank you, Sir. Mr. Vaux and Mr. Ferguson, I take it that you have no objection joining in the motion?

MR. VAUX: We have no objection.

MR. FERGUSON: No, Sir.

THE COURT: Mr. Robinson, You understand that the State is now also asking me to sever the two case, that is two separate the trial against you from trial against Mr. Young Junior and Young senior do you understand that?

MR. ROBINSON: Yes, Sir.

THE COURT: I'll be glad to hear from you in that regard. What is your position?

MR. ROBINSON: I would like to object to the point that Mr. Senior and Mr. Junior, they want to sever this to do discovery. I respect that. They should have enough time.

THE COURT: I am sorry?

MR. ROBINSON: I respect their wish for the sever. And they should have enough time to prepared for their defense. This is a serious case. But as far as me, I'm ready to go to trial, we have picked a jury and you have all of these people here and the court and jury. I have been going on almost two years preparing for this case sitting in this jail. I think what they have going on between them shouldn't affect me. I'm ready to go to trial. I would like to proceed with the jury.

THE COURT: I understand. The difficulty with continuing the trial at this point in time, Mr. Robinson, has to do with re-preparing a good part of this case from the State's perspective. They have prepared this case all along for trial with all of you together. That means that they have taken out of the various statements that have been made any reference to Mr. Young against you, any reference by you against the Youngs. If this case is tried separately, as it will be, then what you say against the Youngs may be admissible and what they say against you may be admissible.

It is impossible in the time that we have to undo all of that and to redo it in such a way that those tapes and those videos that you have seen are put back into another fashion. They spent yesterday, as you know, because you spent a lot of time looking at them yourself, five or six hours looking at various tapes. That has to be redone. All of that new information now has to be embodied into this record, somehow or another, so that the jury can hear it in the fashion that they should hear it. It is impossible for us, in the time that we have left this week, in the time it would take to try this case, to do all of that.

And I would agree with you, we have all spent a lot of time getting ready for this trial. We have spent a lot of time getting a jury in place to do this. And frankly, everybody was prepared to try this case. Everybody in this room was prepared to try it. The disclosure of those additional taped conversations from certain of the patrol cars, which the solicitor knew about but still withheld the evidence. Under the United States supreme court decision in Brady v. Maryland, 373 U.S. 83 S.Ct. 1194 (1963) the solicitor has an obligation to produce all Brady material for the defendant well in advance of the scheduled trial date.

Pr. p. 151, lines 1-25. DEPUTY EVANS TESTIMONY

ON DIRECT EXAMINATION:

Q. Officer Evans, who do you work for?

A. Port Royal Police Department.

Q. And who did you work for back on September 1, 2012?

A. Beaufort county Sheriff's office.

Q. And do you recall your involvement that day into the investigation and interrogation of Aaron Young, Senior?

A. Oh, yes.

Q. Okay, And do you recall what your first contact with Mr. Aaron Young, Senior was?

A. I believe it was a traffic stop.

Q. Do you know approximately what time that was?

A. Somewhere between five and 10:30.

Q. okay. would it benefit you to see a copy of your incident report?

A. yes, it would.

MR. FERGUSON: May I approach the witness, your Honor?

Tr. p. 151- 152,

THE COURT: yes, you may.

MR. FERGUSON: Thank you.

By MR. FERGUSON:

Q. Officer Evans, if you'll take a look at that and see if it refreshes your recollection as to what time the traffic stop was.

A. 16:58.

Q. And what's that in normal people time?

A. 6:58 -- I'm sorry, 4:58.

Q. Thank you. would you like to hold onto that?

A. If I could.

Q. Sure. And do you recall how long you were at the roadside?

A. It was over an hour.

Q. okay. what -- do you recall that your call sign was back then?

A. I do not.

Q. Was it B38?

A. That's possible.

Q. Does that sound familiar?

A. Yes.

Q. Okay.

Are you familiar with the CAD system, officer Evans?

A. I am.

Q. Okay. may I approach your Honor?

THE COURT: Yes, Sir.

By defense counsel: officer Evans, I'm going to hand you two sheets of paper that are a CAD run report, and essentially what it is, listing out the units and identifying who that unit number belongs to. And I'll ask you to review that and I have highlighted it for your benefit.

A. Okay.

THE COURT: He's seen it.

Q. By defense counsel: And so does that refresh your recollection as to what your call sign was at the time?

A. Yes, it does.

Q. What was it?

A. Bravo 38.

Q. Okay. And now, what did you do after you left the traffic stop?

A. I transported -- I believe it was Ebony Campbell, to the Sheriff's office -- the substation on Hilton Head. The office on Hilton Head.

Q. Okay. And what did you do with her once you got there?

A. I released her to someone in investigations.

Q. Okay. And from your recollection what did you do next?

A. I left the office for a while and then I was called back to guard Mr. Young.

Q. Okay. And do you recall what time that was ?

A. Some where between seven and 8:00 or 9:00.

Q. Okay. Now, you no longer work for Beaufort county Sheriff's office, and essentially was that a result of events that occurred that day?

A. Could you repeat the question?

Q. Sure. Now you currently work for Port Royal Police Department and you formerly worked for Beaufort county Sheriff's. is that as a result of the events that occurred on September the 1st of 2012?

A. Are you asking me if I was fired, basically?

Q. I am.

A. That is correct.

Q. Okay. And specifically, you know you had certain recordings that were subsequently produced?

is that correct?

A.

MIRANDA WARNINGS

In *Miranda v. Arizona*, the supreme court held that custodial interrogations have the potential to undermine the Fifth Amendment privilege against self-incrimination by possibly exposing a suspect to physical or psychological coercion. To guard against such coercion the court established a prophylactic procedural mechanism that requires a suspect to receive a warning before custodial interrogation begins. the court held that unless the suspect is warned of his Fifth Amendment rights, any pretrial statements elicited from the suspect are inadmissible at trial.

Under miranda, before questioning suspect in custody, Law enforcement officials must inform them that: (1) they have the right to remain silent: (2) their statements may be used against them at trial: (3) they have the right to the presence of an attorney during questioning: and (4) if they cannot afford an attorney, one will be appointed for them. No additional warnings are required. Warnings do not have to be given exactly as written in miranda opinion, but Law enforcement officials must convey miranda's essential message suspect and procedures must be "at least as effective [as miranda warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.

Miranda warnings must be given only when a suspect is both in custody and about to be subject to government interrogation. To introduce at trial a defendant's statements made in response to custodial interrogation, the prosecution must demonstrate either that the statements were obtained in compliance with miranda or if miranda's requirements were not satisfied, that an exception applies.

Miranda, 384 U.S. at 467; see also Fla. v. Powell, 130 S.Ct. 1195, 1204-05 (2011) waives form stating that defendant had both "the right to talk to a lawyer before answering any questions and the right to use any of those rights at any time during the interview "reasonably conveyed defendant's "right to have an attorney present, not only at the outset of interrogation but at all times"); Duckworth-v.-Eagan, 492 U.S. 195, 203-04 (1989).

COERCION VIOLATION

Tr. p. 117, lines 2025, Direct Examination

By MR. FERGUSON:

Q. All right, Dr. Salas, do you recall reviewing the documents and the disc and the interviews that were given to you way back when -- prior to your testimony in April of 2014?

Tr. p. 118, lines 1-25.

A. Yes.

Q. Okay. And do you recollect what your findings were at that time?

A. I don't have a copy of the transcript in its entirety.

Can you hear me okay:

can y'all hear me okay if I speak up maybe? I don't have a copy of the transcript. I don't recall what I said word, but I remember the gist of it.

Q. Okay. That will be just fine. If you could tell or remind the court of what your findings were prior to receiving the new information.

A. that time, it was my professional opinion that the disc that I had reviewed at that point in time showed elements of coercion, when Aaron Young, senior was being interviewed at the Hilton Head substation, that influenced his statements such they were false statements, in my professional opinion.

Q. Okay. And was the same interview that we observed today?

A. one of those interviews was the same, that's correct.

Q. Okay. And I believe you examined an additional interview that may have occurred like a week later?

A. There was an additional interview that occurred on September 6.

Q. Okay. thank you.

And so your findings relate to the interview with Deputy Seifert that we reviewed in the courtroom today?

A. My findings from then, is that what you're asking about?

Q. Yes, Yes.

A. Yes, that's correct.

Q. Okay. And, you know what were the actual findings? what did you observe in terms of coercive behavior on the part of Law enforcement that you reported?

A. According to what I reviewed in the conversations and the interview I'd had with Mr. Young, senior is that the coercion was in effect the promise of leniency, exoneration, not only for himself but for himself and his son if he would offer up a statement that was compatible with there being a shootout and the production of a 9 millimeter gun that he was needing to give to the police at that time.

Q. And what is that called, in your field?

A. What is --

Q. Is it called a coercive error?

A. Yes. Errors of coercion, and it leads to the production of false statements.

Q. And were there other errors that were observed?

A. At that time, there were concerns that I had that other errors had been made. When you look at a process of determining if a statement is more or less likely to be a false statement, meaning the narrative of, I did this and this is my description of what has happened, if it's more truthful or if it's false, you look to three different factors. One of those factors is going to be along the lines of a misclassification error, which is to the police go and find the person and bring them into the interrogation room, and that person never should have been there in the first place, but they were misclassified into being in the category of a suspect, that errors does not exist in this case.

There is the error of coercion, which is are promise given, leniencies or threats or psychological pressures that are put on somebody that make's it more or less likely for them to - give a false statement. And what I had reviewed at that time indicated that yes, coercion was reviewed records, and then there's an issue of contamination error.

These errors are not purposeful. I guess you can argue that a coercion error could be done on purpose, but most of the time these are are not done with the intent of subotaging a confession because I don't think that any police officer or investigative team wants to erode that investigation on purpose.

So the concerns that came up when I reviewed the materials is that there were those elements of coercion, there was concern about contamination being present in the statement that was given, the narrative. And what has happened since then is that new material has been brought out so that what I could not review and I think I commented on it, when you may have asked me a question, judge, is that if we had those statements then it would be a benefit that I could go review them. And now those statements have come back, and I have found an introduction of the contamination error at the very beginning of what was going on the roadside. And I can outline that for you if you would like me to do so.

Tr. p. 121, lines 1-25. THE COURT: Please. Thank you.

The witness: So there are two issues that I find that kind of stand out one is not as big of an issue as I think the other issue is, but I am not somebody who does transcription, so please bear with me. But in the video that we saw a part of, which was the roadside video today, does not include all of the information that I have reviewed. But at about nine minutes an 37 seconds is when I think there was some traffic that came across the radio indicating that there was a shootout on Allen Road. That is the first time that I could hear the word "shootout" being referred to in the context of the statements that were recorded by those devices recording today.

All right, Let's take take about ten minutes or 15 and let this be the morning break and then we'll have two more witnesses, and then whatever reply there is. And I didn't get any requests to charge today other than the mutual combat charge yesterday, so I assume that I've got everything that I need.

MR. FERGUSON: I do have some, your Honor.

THE COURT: Okay.

MR. STONE: The -- I know, and this is me remembering this from last trial. I know you have a standard, hand of one is hand of all --

THE COURT: I do.

MR. STONE: --Charge as well as transferred intent. And I think the way you put those together last time -- I don't have it with me the way you did it last time, but I thought it was very clear as far as transfer intent.

THE COURT: I remember I had it lined up in my mind. I wish I had thought to tell Ms. Manley to print out my charge from the last time I was giving -- but I think I know how it was structured. So I'll go with that.

MR. STONE: So I would not offer anything else on that because I think you covered it well, and you already have it. So I don't have any additional on that.

EQUAL PROTECTION OF THE LAW

Equal protection clause protects all persons the equal protection of the Laws extends to the guilty as well as the innocent, and to the criminal as well as the Law abiding citizen. State v. Middleton, 207 S.C. 478, 36 S.E. 2d 742 (1946). the equal protection clause of the fourteenth Amendment was passed originally to secure the rights of new negro citizen but it is obviously applicable to all citizens. Eslinger v. Thomas, 340 F. Supp. 886 (DSC 1972), aff'd 476 F. 2d 225 4th cir. 1993).

STATUTE ISSUE

It is well established that interpreting a statute, the court's primary function is to ascertain the intention of the legislature when the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. See State v. Blackmon, 304 S.C. 270, 273, 403 S.C. 2d 660, 662 (1991), accord Kerr v. State, 345 S.C. 183, 547 S.E. 2d 494 (2001).

MUTUAL COMBAT - VIOLATION

Tr. p. 540, lines 21-25, Now, as you know the indictment in this case charges Mr. Young with murder in connection with mutual combat. The State, of course, has not alleged, no one alleges, that Mr. Young actually fired the fatal shot that killed Khalil Singleton. It alleges, the state does, that it is a Law of mutual combat that makes him guilty of that murder. So we look at the Law of mutual combat.

Mutual combat exists when there is mutual intent and willingness to fight. Mutual intent is shown by the acts and

conduct of the parties and circumstances which attend and lead 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, and whether the combatants agree to be armed. Because a history of ill will and agreement to be armed are necessary before a defendant is deemed to have engaged in mutual combat.

In other words, to constitute mutual combat, it is not necessary that there is a positive agreement between the parties to enter into combat.

It is enough if they willfully enter into the conflict upon the impulse of the moment. And in that regard, I tell you that everyone is presumed to know the consequences of his act. And if one voluntarily enters a mutual combat, where deadly weapons are used, knowing that they're being used, and death results to one of the participating parties, everyone engaged in such combat is equally guilty regardless of whether or not he used a deadly weapon or not. And regardless of whether he was on one side or the other, it makes no difference. And where all are participating in the mutual combat, all are equally responsible for the natural consequences.

DIRECTED VERDICT

At the close of the State case Appellant moved for a directed verdict of acquittal. (tr. p. 361, line 13-p. 362, lines 1-15). Defense counsel noted that there was no indication that Appellant never fired a weapon. (Tr. p. 361, lines 24-25). Counsel noted that Appellant was not aiding, abetting, assisting or conspiring with Tyrone Robinson. (Tr. p. 361, lines 18-23). Counsel argued that the elements of murder had not been satisfied through a theory of mutual combat. (Tr. p. 362, lines 9-15). The judge denied the motion stating.

The Law that we've already talked about, the Law of mutual combat the Law of transferred intent and the sort of things that come together in a legal scenario, and they create responsibility. And, of course, Laws can do that and do that quite often.

And so for the reason I feel the elements of murder as they apply in this particular case of mutual combat, along with the transferred intent aspect of that as well, that the state has satisfied its burden in the regard sufficient to sustain the motion for directed verdict at this juncture.

Tr. p. 363, line 21- p. 364, lines 1-6). 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.

Mutual combat is inapplicable under the facts of this case. In State v. Granad, 260 S.C. 449, 450-51, 196 S.E. 2d 495, 495-96 (1973) the South Carolina supreme court wrote:

The basic principles governing the doctrine of mutual combat are thus stated in 40C.J. S. Homicides 122, p.996: Where a person voluntarily participates in ... mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self - defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and either by word or act, makes that fact known to his adversary.

There was no objection to the instruction on the Law of mutual combat. This issue may need to be raised in post - conviction relief.

And in that regard, I tell you that everyone is presumed to know the consequences of his act. And if one voluntarily enters a mutual combat, where deadly weapons are used, knowing that they're being used, and death results to one of the participating parties, everyone engaged in such combat is equally guilty regardless of whether or not he¹⁰⁷ used a deadly weapon or not

and regardless of whether he was on one side or the other, it makes no difference. And where all are participating in the mutual combat, all are equally responsible for the natural consequences. In other words, where people agree to have a mutual combat, they're engaged in an unlawful act. They're all presumed to intend the consequences which naturally flow from an unlawful act. And if one of the participants is on one side and is killed, either he slain by participating in the mutual combat, all are equally guilty of the killing.

Trial counsel was ineffective for not requesting for a jury charge on the end of mutual combat.

In addition to moving for a directed verdict on the murder charge in part on the grounds that any mutual combat had ended at the time Robinson fired the fatal shot. Along with the State being unable to prove the elements of murder. Appellant trial counsel should have also requested a jury charge on the end of mutual combat. A trial judge must give a requested jury charge if there is any evidence to support the charge. See State v. Buriss 334 S.C. 256, 262, 513 S.E. 2d 104, 108 (1999) a trial judge refusal to give a requested jury charge supported by some evidence is a Reversible error. Id as set forth in the previous section the evidence presented at trial supported a conclusion that any mutual combat had ended at the time Robinson fired the fatal shot. Moreover, the trial judge acknowledge there there was some evidence from which a jury could find the mutual combat had ended. The shooting of the car and then leaving is withdrawal from conflict given that there was at a minimum some evidence to support a conclusion that any mutual combat had ended the trial counsel's failure to request a jury charge constitutes ineffective assistance of counsel a trial judges failure to give the requested charge constitutes Reversible error, and because appellant's murder conviction turned on whether the parties were engaged in mutual combat, a failure to not give a charge is prejudicial. In addition to relying on defense counsels ostensible concession, the majority (The S.C. State of appeals and the South Carolina supreme court seem to imply that the charge was wholly unnecessary as a matter of Law because there was no indication of withdrawal. However unlike the cases on which the majority relies there is no evidence to support that a simultaneous exchange of bullets occurred and caused the victims death rather a considerable amount of time passed between Young Jr. attack on Robinsons empty car and Robinsons retaliatory shooting which killed the victim. Indeed, a neighbor testified at trial that approximately ten minutes elapsed between these two events, even the trial court's

reasoning for charging mutual combat contemplated only the scenario where multiple people are shooting at each other. Moreover, at oral arguments counsel for both parties (at the supreme court) acknowledged that a concrete lapse of time in which the warfare had subsided would prevent the State from charging a defendant with murder under a mutual combat theory. Justice Hearn cited while it may be sound public policy to extend the doctrine under circumstances analogous to those in the cases cited, and I would be inclined to do so in the proper case. I disagree with the application of the doctrine under the facts presented here. Even if the mutual combat charge was appropriate the trial court erred in failing to instruct the jury on the end of mutual combat as the majority notes, the trial court believed the facts evidenced a temporary retreat rather than a withdrawal ending the combat. While this may have been the case, and the the jury could have agreed the fact remains that if there was any evidence to support withdrawal the trial judge should have given the charge State-v.-Smith, 391 S.C. 408, 412 706 S.E. 2d 12, 14 (2011). If there is any evidence to warrant a jury instruction, a trial court must upon request give the instruction State-v.-Shuler, 344 S.C. 604, 632, 545, S.E. 2d 805 819 (2001) If there is any evidence to support a charge, the trial judge should grant the Request. State-v.-Buriss, 334 S.C. 256, 262 513 S.E. 2d 104, 108 (1999) It is well-settled the Law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge it should be given. The trial court commits reversible error if it fails to give a requested charge on a issue raised by the evidence at minimum the Young's conduct of driving away constituted some evidence of their withdrawal such that a charge on this issue was warranted. The State hyothetical as the majority notes, the trial court believed the facts evidenced a temporary Retreat"

RETREAT

It is one's duty to retreat from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would

be increased State-v.-Jackson, 227 S.C. 271, 279, 87 S.E. 2d
681 (1955) State-v.-Fuller, 297 S.C. 440 377 S.E. 2d 328 (1989)

If one can with reasonable safety to himself retreat and thusly
avoid the necessity to strike in self-defense, then the necessity
for which the Law will excuse him from striking cannot be said
to exist Sate-v.-Jones, 90 S.C. 290, 293, 73 S.E. 177 (1912).

DIRECTED VERDICT VIOLATION

When considering a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non existence of evidence not it's weight. State-v.-Burdette, 335 S.C. 34, 46, 515 S.E. 2d 525, 531 (1999); State-v.-Morgan, 282 S.C. 409, 411, 319 S.E. 2d 335, 336 (1984). It has been recently held that this remains true even when the state relies exclusively on circumstantial evidence. State-v.-Mitchell, 341 S.C. 406, 409, 535 S.E. 2d 126 127 (2000), other case indicates that where the evidence is circumstantial these must be substantial circumstantial evidence which reasonable tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State-v.-Martin, 340 S.C. 597, 602 533 S.E. 2d 572, 574 (2000). Citing State-v.-Williams, 321 S.C. 327, 468 S.E. 2d 626 (1996). Still other cases indicate some distinction between direct evidence and circumstantial in considering whether a directed verdict should be Granted.

When reviewing the denial of a directed verdict, this court must view the evidence and all reasonable inferences in the light most favorable to the state. State-v.-Weston, 367 S.C. 279, 292, 625 S.E. 2d 641, 648 (2006). If there is direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an Appellate court must find the case was properly submitted to the jury ID at 392-93, 625 S.E. 2d at 648. When the state relies exclusively or circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or non existence of evidence, not with it's weight. State-v.-Cherry, 361 S.C. 588, 594, 606 S.E. 2d 475, 478 (2004). The court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. ID "suspicion implies a belief or opinion as to guilt based upon facts or circumstances.

At the close of the State's case and Appellant's case, Appellant made a motion for a directed verdict on murder. (Tr. p. 361-64, 456). Particularly, Appellant argued that no evidence was presented of the elements of the crime of murder; no evidence was presented of mutual combat between Appellant and Robinson; and no evidence was presented that the victim's death was a nature consequence of that mutual combat. (Tr. p. 361-364, 456). Specifically, Appellant's directed verdict motion was as follows:

At this point, we would make a motion for a directed verdict. Essentially, it is our contention that the elements of murder have not been met. What we have is essentially Tyrone Robinson admittedly committing murder, Aaron Young, senior is not aiding, abetting, or assisting Tyrone Robinson. He's not conspiring with Tyrone Robinson. In fact, under the State's theory, is his opposing Tyrone Robinson.

There is no indication that Aaron Young, senior ever fired a weapon. There is no testimony that Khalil's death was a natural consequence of the actions that we allege were conducted by Mr. Young, and that being the shooting up of a car. Natural consequences, trying to predict what Tyrone Robinson is going to do is a difficult task, to say the least. He is an unpredictable individual. You know, the theory of the State that the Youngs shot the car to draw him out of hiding. I think is just their theory.

Your Honor, you know, we would ask that you direct the verdict at this point just based on the fact that the elements of murder have not been satisfied, that mutual combat has not been proven, and that if your Honor finds that mutual combat, there is evidence for that they haven't shown that the death of Khalil Singleton was a natural consequence thereof.

STATEMENT OF THE CASE

On October 30, 2014, the Beaufort county Grand jury indicted Appellant Aaron Young, senior for murder and attempted murder, indictments #(2012-GS-07-2173, (2014-GS-07-1941. On August 10, 2015, Appellant proceeded to jury trial before the Honorable Thomas W. Cooper, Robert Ferguson represented Appellant at trial. Isaac McDuffie Stone, III, and Sean Thorton prosecuted the case. The jury returned verdicts of guilty on both counts. Judge Cooper sentenced Appellant to thirty (30) years for murder and a concurrent twenty (20) years for attempted murder, on April 18, 2016, judge Cooper denied the timely filed motion for reconsideration of sentence. A timely notice of intent to appeal was served on April 21, 2016. This appeal follows.

STATEMENT OF FACTS

Khalil Singleton was fatally shot by Tyrone Robinson. Tyrone Robinson. Tyrone Robinson was charged and convicted of the murder of Khalil Singleton. Khalil Singleton was not Robinson intended victim, when Robinson fired the shot that killed Khalil Singleton, he was shooting at Appellant and his son, Aaron Young Jr. as they were leaving the neighborhood in their truck, Appellant and his son Aaron Young, Jr. were also charged and convicted, in separate trials, of the murder of Khalil Singleton and the attempted murder of Tyrone Robinson. The State alleged that the Youngs were involved in mutual combat with Tyrone Robinson at the time that Robinson fatally shot Khalil Singleton. Khalil Singleton was an innocent third party and not involved in the earlier dispute between the young and Robinson.

On appeal from the denial of a directed verdict, this court must view the evidence in the light most favorable to the state. State-v.-Lollis, 343 S.C. 580, 583, 541 S.E. 2d 254, 256 (2001) (citing State-v.-Burdette, 335 S.C. 34, 46, 515 S.E. 2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State-v.-McHoney, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001).

S.C. code § 16-3-10 defines murder as "the killing of any person with malice aforethought, either express or implied "viewing the evidence in the light most favorable to the state, the state failed to prove that Appellant killed Khalil Singleton with malice aforethought. Mutual combat is inapplicable under the facts of this case involving the death of an innocent non combatant. neither the doctrine of transferred intent nor the doctrine of accomplice liability establishes the elements necessary to submit the murder charge to the jury. The trial judge erred in refusing to direct a verdict of acquittal when the state's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat. The state's hybrid theory of liability based on mutual combat, accomplice liability and transferred intent is not supported by the Law.

The trial judge erred in refusing to direct a verdict of acquittal for murder when the state failed to establish mutual combat at the time of the fatal shooting.

As argued above in issue one, the state's theory of liability based on mutual combat is not recognized by South Carolina Law and should not be. If this court, however, decides to extend the theory of mutual combat to innocent bystander non combatants, the theory would not apply in the present case because at the time Robinson shot Khalil Singleton, Appellant was not engaged in mutual combat. The testimony reflects that Appellant and his son were leaving the neighborhood on Allen Road in their truck when Robinson shot at them killing Khalil Singleton.

Five minutes after hearing the second set of rapid shots, Charlese Mitchell saw Appellant in his truck coming from Allen Road toward Spanish wells. (Tr. p. 244, lines 1-15). Then Mitchell heard the last three shots which the evidence at trial established were shots fired by Trone Robinson, one of which killed Khalil Singleton. Mitchell confirmed that no one was firing weapons from the truck when it drove past her house. (Tr. p. 338, lines 4-6). If this court extends the doctrine

of mutual combat to apply to a non combatant killed by a combatant, the state must still prove that two combatants were firing at each other in order to establish mutual combat.

See State v. Graham, 260 S.C. 449, 196 S.E. 2d 495 (1973).

At the time Khalil was shot and killed only one person was shooting a gun, Tyrone Robinson. The state failed to prove that Appellant was engaged in mutual combat at the time of the fatal shooting.

As discussed above on appeal from the denial of a directed verdict, this court must view the evidence in the light most favorable to the state.

CONFESSION VIOLATION

This court is not now called upon to decide the guilt or innocence of the defendant, but only to determine from the preponderance of the evidence whether the defendant's statements were voluntarily made. Jackson-v.-Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L. Ed. 2d 908 (1964); Lego-v.-Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed. 2d 618 (1972). The truth or falsity of a confession is not at issue here, for it is well established that the fifth Amendment of the constitution dictates that a defendant in a criminal case is deprived of due process when his conviction is based in whole or in part, upon an involuntary confession. Rogers-v.-Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L. Ed. 2d 760 (1961).

The supreme court has established many standards for voluntariness. No single Litmus-paper test for constitutionality impermissible interrogation has been envolved *** [t]he ultimate test remains *** the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he is willed to confess, it may be used against him. If it is not, his will has been overborne and his capacity for self-defense mination critically impaired, the use of his confession offends due process [cites omitted.] The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession. Culombe-v.-Connecticut 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961).

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda-v.-Arizona, 384 U.S. 436 (1966). The voluntariness of a statement is determined from the totality of the circumstances. Schneckloth-v.-Bustamonte, 412 U.S. 218 (1973). Furthermore, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.

State v. Kennedy, 333 S.C. 426, 429, 510 S.E. 2d 714, 715 (1998). When a suspect invokes his right to remain silent, Law enforcement officers must scrupulously honor it. Michigan v. Mosley, 423 U.S. 96 (1975). However, before Law enforcement officers are required to discontinue questioning the suspect the suspect must clearly articulate his desire to end the interrogation. Davis v. United States, 512 U.S. 452 (1994); State v. Reed, 332 S.C. 35, 42 503 S.E. 2d 742, 750 (1998).

UNLAWFUL WHEN POLICE PROMISE LENIENCY FOR CONFESSION

Moore v. Czerniak, 534 F. 3d 1128

During interrogation the police officers told Moore ... that they "would go to bat for [him] as long as [they] got the truth: to which Moore responded. See that's what I went to hear, at this point [ofc.] Raymond interrupted the questioning to vouch for the officers assurances [.] § Moore proceed to give a confession of knowing Rogers was accidently shot.³

We hold that counsel's failure to file a meritorious motion to suppress Moore's confession "fell below an objective standard of reasonableness" and thus constituted deficient performance.

POLICE OFFER OF IMMUNITY FOR CONFESSION

STATE v. RALSTON, 225 P. 3d 741

Ralston contends the district erred by denying his motion to dismiss the charges because he had a contract or agreement with the Ottawa police officers that provided him with immunity from prosecution if he was honest and provided them with the names and addresses of drug dealers.

We conclude that Law enforcement officers, absent the prior knowledge and approval of county and district attorneys, are without authority to enter into immunity agreements.

We acknowledge distinctions between the authority of the police and that of the prosecutor mean little to a defendant negotiating with government officer. State v. Sturgill, 121 N.C. App. 629, 643, 469 S.E. 2d 557 (1996). We also recognize that a police officer is just as capable of implicating defendants constitutional rights as the district attorneys who refused to honor the police promise to defendant. [omitted] yet. In the present case, where a defendant relies upon the unauthorized promise of a Law enforcement officer, the remedy which accords substantial justice to defendant is that which returns him to his position prior to the confession. Thus, since suppression or exclusion of the confession cured defendants detrimental reliance, specific performance is unwarranted and court's suppression of the confessions was correct, but the conviction was confirmed on other evidence.¹⁰⁸³

Trial counsel was ineffective for failing to file a meritorious motion to suppress unlawfully seized physical evidence.

On September 1, 2012, Curtis Evans, a Corporal with the Beaufort county Sheriff's office chatted with applicant inside the Hilton Head Island police substation. Evans was supposed to simply stand guard of applicant who was being held in the shooting death of the victim Khalil Singleton. But Evans chatter with applicant turned into unauthorized questioning that gave away to false promise.

In the recording captured on Evans body microphone, he can be heard telling applicant he could avoid the murder charge if he cooperated with detectives. And when applicant requested a attorney, Evans continued his questioning failing to relay applicant's request to investigators. Applicant did cooperate revealing were a gun, a key piece of evidence was hidden.

Where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect the suspect has been taken into police custody the police carry out a process of interrogations that lead itself to eliciting incriminating statements.

The suspect has requested and been denied an opportunity to consult with his Lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent the accused has been denied the assistance of counsel in violation of the sixth Amendment to the constitution as made obligatory upon the states by the fourteenth Amendment and that no statement elicited by the police during the interrogation may be used at trial. *Escobedo v. State of Illinois*, 378 U.S. 478.

We conclude that Law enforcement officers absent the prior knowledge and approval of the county and district attorneys are without authority to enter into immunity agreements. *State v. Ralston*, 225 P.3d 741.

Applicant asserts trial counsel was ineffective for failing to suppress physical evidence illegally seized as a result of his botched interrogation.

The "fruit of the poisonous tree doctrine" holds that where evidence would have not come to light but for the illegal actions of police and evidence has been obtained by exploitation of that illegality evidence "must" be excluded. *Brown v. Illinois*, 442 U.S. 590.

Applicant asserts trial counsel's failure to file a meritorious motion to suppress the physical evidence fell below an objective standard of reasonableness and thus constituted deficient performance.

The fourth Amendment violation, however, occurred at the moment the police seized the statement from applicant without Miranda warning. Every thing that followed after that was the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1981). The lower court is then asked to determine if the error is harmless. But a trial judge is not to sit in judgment of his own decision. *State v. Floyd*, 303 S.C. 10, 732 S.E. 2d 880 (2012); *State v. Salley*, 398 S.C. 160 727 S.E. 2d 740 (2012); *Ex parte Crymes*, 630 So. 2d 125 (Ala. 1993); *Driven v. Com.*, 361 S.W. 3d 877 (Ky. 2012).

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 on September 28, 2012 applicant appeared before the Honorable Richard A. Brooks, at approximately 9:00 A.M. to conduct a preliminary hearing on the merits of whether any probable cause existed on the offenses ~~Charged~~.

At the hearing the State failed to present any witnesses who could have given sworn testimony and under go cross-examination to suffice evidence of probable cause to support the offenses charged.

However at trial the State produced the testimony of two third party hearsay witnesses that applicant wasn't prior noted of or afforded the opportunity to cross-examine at the critical preliminary hearing stage violating his sixth Amendment right to confront his accusers.

Trial counsel was ineffective for failing to motion for a directed verdict on the attempted murder charge.

The supreme court has repeatedly affirmed the principle when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict State v. Odema, 395 S.C. 582, 586, 720 S.E. 2d 48, 50 (2011) specifically, the trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty" Id (internal citation omitted) In this case, even when viewed in the light most favorable to the State, the evidence presented in support of the attempted murder charge merely raises a suspicion and falls far short of reasonably tending to prove guilt, accordingly if trial counsel motion for a directed verdict on the charge was not ineffective at trial the State failed to produce a single witness who saw applicant fire, or even point a gun at Robinson, or his co-defendant. To the contrary, the evidence showed appellants co-defendant gun was jammed and he did not try to shoot at Robinson or even point the gun at him.

Moreover, Sergeant Albertin testified that she had no evidence that appellant co-defendant ever pointed a gun or shot at Robinson. Although appellant co-defendant admittedly shot at Robinson's car, the records is clear that Robinson was not in the car at the time and the car's windows were not tinted so appellant could see that there were no occupants. Additionally, sergeant. Albertin confirmed that she had no evidence that appellant even saw Robinson on Allen Road.

Trial counsel was ineffective for failing to subpoena sergeant Albertin for cross-examination the scant circumstantial evidence the State presented as to appellant's guilt on attempted murder consists only of the following (1) Robinson's statement to Mitchell that "those MF was shooting at him (2) Robinson's statement to Delany that " yeah they was shooting at me so I shot back at them. (3) the 911 calls, notably the State chose not to call Robinson who presumably may have been the only person who could have corroborated it's theory that appellant tried to kill him.

The sixth Amendment confrontation clause made applicable to the States through the fourteenth Amendment, Pointer-v.-Texas, 380 U.S. 400; Davis-v.-Alaska, 415 U.S. 308 provides in all criminal prosecutions the accused shall enjoy the right to confronted with the witnesses against him.

Trial counsel is unreasonable failure to object to the testimony of the State's third party witnesses permitted conviction of evidence at trial when formally there was none.

Mr. Aaron Young, Sr., # 288580
Broad River Correctional Institution
Marion Unit B - 213
4460 Broad River Rd.
Columbia, SC 29210

Date: 5/12/20

Beaufort County Clerk Of Court
P.O. Box 1128
102 Ribaut Road Rm. 208
Beaufort, South Carolina 29901

2020 MAY 14 PM 1:04
JERRY ANN ROSEBEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Enclosed please find the original copy of an Application for Post-Conviction-Relief Action for filing with the Beaufort county clerk of court office. After you have filed the Application please return the clocked stamped copy to me.

Sincerely,

S/ Aaron Young

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)

2020 OCT 20 PM 1:33

Aaron Scott Young, Sr., #288580,

) Case No.: 2020-CP-07-01099
)

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
Applicant, CLERK OF COURT

) RETURN
)

v.)
)

State of South Carolina,)
)

Respondent.)
)
_____)

The State (Respondent), making its Return to the application for Post-Conviction Relief (PCR) filed May 14, 2020, would respectfully show this Court:

PROCEDURAL HISTORY

Aaron Scott Young, Sr. (Applicant) is presently confined pursuant to orders of the Beaufort County Clerk of Court. On October 30, 2014, the Beaufort County Grand Jury indicted Applicant for the 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 P. Thornton represented the State. On August 12, 2015, the jury returned verdicts of guilty on both indictments.¹ Judge Cooper sentenced Applicant to thirty years for murder and twenty years for attempted murder. The sentences were ordered to run concurrently. Tr. pp. 1-7, 204-68; 272-315; 320-364; 381-439; 443-56; 465-501; 503-35; 537-45; 550-55, 558-68.

¹ Applicant's co-defendants, Tyrone Robinson and Applicant's son, Aaron Young, Jr., were tried in separate trials, both also before Judge Cooper. Robinson was convicted of murder and sentenced to life in prison. Aaron Young, Jr. was convicted of murder and attempted murder and sentenced to thirty years for each count, to be run concurrent.

Applicant appealed only his murder conviction. Applicant raised two issues: (1) whether the trial judge erred in refusing to direct a verdict of acquittal when the State's evidence of murder was dependent upon a combination of mutual combat, accomplice liability and transferred intent to an innocent third party not engaged in mutual combat; and (2) whether the trial judge erred in refusing to direct a verdict of acquittal for murder when the State failed to establish mutual combat at the time of the fatal shooting.

On June 26, 2019, the Court of Appeals issued an unpublished opinion affirming the convictions. On July 11, 2019, Applicant sought rehearing, which the Court of Appeals denied on August 22, 2019. On September 20, 2019, Applicant filed a petition for a writ of certiorari in the South Carolina Supreme Court. The State filed a return to the petition on October 21, 2019. On March 12, 2020, the South Carolina Supreme Court denied the petition. The Remittitur was issued to the lower court on March 13, 2020.

SUMMARY OF FACTS ESTABLISHED AT TRIAL

On the afternoon of September 1, 2012, eight-year-old Khalil Singleton's life abruptly ended. Khalil, an innocent bystander, was shot to death in the midst of an ongoing running gun battle between three adult men. One of the three men responsible for taking the child's life was Applicant, Aaron Young, Sr. (hereinafter "Applicant"). Within the course of an hour, a volatile conflict between Applicant, his son Aaron Young, Jr., and Tyrone Robinson erupted and traversed several different locations on Hilton Head Island, eventually ending in front of a group of children jumping on a trampoline. It was there that Khalil Singleton was murdered trying to flee home on foot to safety, away from the running gun battle. Tr. pp. 1-7, 204-68, 272-315, 320-364, 381-439, 443-56, 465-501, 503-35, 537-45, 550-55, 558-68; State's Ex. 1-27.

How the Conflict Erupted

Earlier that afternoon, Tyrone Robinson ("Robinson") and Jontu Singleton, Sr. ("Jontu") were socializing at a friend's home. Around 4:00 p.m., Jontu decided to ride with Robinson to the store in Robinson's car. On the way to the store, the two men stopped by the residence of Applicant and his son Aaron Young, Jr. ("Young, Jr.") on Wild Horse Road because Jontu needed money to buy cigarettes and wanted to ask Applicant for the money. Applicant, his girlfriend Ebony Campbell ("Ebony"), and Young, Jr. were outside in the yard when Robinson and Jontu drove up. Tr. pp. 272-88; State's Ex. 17.

Jontu exited the car and spoke with Applicant about borrowing the money. Robinson then exited his car approaching Young, Jr. with a .38 caliber revolver in his hand. Robinson and the two Youngs had animosity towards each other due to prior altercations. After seeing Robinson with the gun, Applicant moved towards Robinson and tried to take the gun away from Robinson but it accidentally fired. Applicant backed away as Robinson fired several more shots into the ground near Applicant's feet. Robinson then got into his car and drove away. Jontu remained in the yard with Applicant and Young, Jr. Neither Applicant, nor Young, Jr., Ebony, or Jontu called the police and reported the shooting. Tr. pp. 272-88; State's Ex. 17; State's Ex. 3.

The Running Gun Battle or Shootout resulting in the Death of an 8 year old child

Instead of calling the police and reporting the shooting, Applicant and Young, Jr. decided to go after Robinson and shoot or kill him. Moments after Robinson left, Applicant and Young, Jr. went inside a nearby residence [either Applicant's or his mother's], and Applicant emerged with a black bag containing a "Tech Nine" 9MM semi-automatic pistol, a thirty round magazine, and a box of ammunition. A "Tech Nine" resembles a small submachine gun. Tr. pp. 272-88; State's Ex. 17; State's Ex. 3.

The three men [Applicant., Young, Jr., and Jontu], leaving Ebony behind, got into Applicant's grey Ford F-150 pick-up truck, drove out of the yard and onto the public street in front of Applicant's home, and began searching for Robinson on the public roads of Hilton Head Island. Tr. pp. 272-88; State's Ex. 17; State's Ex. 3.

Applicant drove the truck while Jontu was seated in the center of the front seat and Young, Jr. was seated in the passenger seat. As he was driving, Applicant handed the bag containing the "Tech Nine" to his son, Young, Jr. The three men drove down Spanish Wells Road and veered off on Oakview Road after Applicant thought he saw Robinson driving down that road. Young, Jr. then pulled the contents out of the black bag, and with Applicant giving his son instructions on how to assemble the "Tech Nine," Young, Jr. began assembling the weapon. Applicant stopped and inquired of a person who resided nearby in the Oakview community whether that person had seen Robinson, to which he received a negative response. Tr. pp. 272-88, 434-35; State's Ex. 17; State's Ex. 3.

Unable to catch up with the vehicle Applicant saw earlier and unable to find Robinson, the three men continued their search and headed towards Robinson's house on Allen Road located off of Marshland Road. When they arrived there, Robinson was nowhere to be found. Tr. pp. 272-88; State's Ex. 17; State's Ex. 3.

Jontu got out of the truck to talk to his son, who lived in that neighborhood, but no one was home. Because the three men could not locate Robinson, they drove back to Applicant's home on Wild Horse Road and Jontu got out of the truck. Applicant and Young, Jr. drove off again in the grey truck, with the loaded "Tech Nine," in search of Robinson. Tr. pp. 272-88, 434-35; State's Ex. 17; State's Ex. 3.

Minutes later, Applicant and Young, Jr. finally tracked down Robinson on Oakview Road. Young, Jr., holding the "Tech Nine" 9 mm weapon, leaned out the passenger window of the truck with the gun, and tried to shoot Robinson but the gun jammed. According to Applicant, when they saw Robinson on Oakview Road, Robinson brandished his weapon and also fired his gun at them.² Robinson left the area, and Applicant and Young, Jr. decided to continue the pursuit and drive back to Robinson's home on Allen Road. Tr. pp. 272-88, 403, 407-08, 425; State's Ex. 17; State's Ex. 3.

While Applicant and his son were driving down Marshland Road and eventually onto Allen Road, a group of children was playing on a trampoline a short distance away from where Applicant and Young, Jr. spotted Robinson's car parked at his residence on Allen Road. Applicant was still driving the grey truck. When the two men arrived at Robinson's residence, Applicant drove into Robinson's yard and Young, Jr., now alone in the passenger seat, drew his weapon again. Robinson came out of somewhere on foot and began firing bullets with his .38 revolver at Applicant and his son in the pick-up truck, and Young, Jr. began firing bullets at Robinson with the "Tech Nine." Applicant and his son drove away back up Allen Road and then onto Marshland Road. Tr. pp. 272-88; 434-35; 214-256; State's Ex. 17; State's Ex. 3.

Charlese Mitchell ("Charlese"), who lived just off the beginning of Allen Road on Marshland Road, testified she heard three sets of gunshots around 4:00 p.m. that afternoon. After the first round of shots, she saw a grey truck driven by her cousin, Applicant, speeding down the

² As the gun battle was occurring, one witness called 911 to report the crime and told the dispatcher two cars were shooting at each other near Spanish Wells Road. She identified the two cars involved as a grey truck and a grey Lexus. The woman told the dispatcher the man driving the car was Tyrone Robinson. State's Ex. 3.

road away from Allen Road with someone in the passenger seat. She testified this first set of gunshots were rapid gunshots that sounded like maybe ten shots.³ Tr. pp. 214-44.

After Charlese heard the first round of gun shots and saw Applicant driving away, co-defendant Robinson, also a relative of Charlese's, came to her door. She let him in her home and observed a gun sticking out of his pocket. Robinson, who appeared scared, told Charlese, "those M.F. was shooting at me." Charlese asked Robinson to leave. Tr. pp. 214-44.

Applicant and Young, Jr. did not stop after the exchange of gunfire with Robinson at Robinson's residence. On the way up Marshland Road coming from Allen Road, Applicant forced an oncoming vehicle off the side of the road. Tyrone Delaney ("Delaney"), Charlese's boyfriend, was driving down Spanish Wells Road between 4:00 and 5:00 p.m. on his way home from work when a grey truck [Applicant's truck] sped towards him and forced Delaney to pull over to the side of the road to avoid a collision with the oncoming vehicle. When Applicant's truck forced Delaney off the road, Applicant was coming from the direction of Robinson's home on Allen Road and Charlese's and Delaney's home on Marshland Road. Tr. pp. 214-56.

Moments later, when Delaney arrived home at his and Charlese's residence, Robinson was still there in the yard [after talking to Charlese], and Robinson asked Delaney if he had seen a grey truck.⁴ Delaney told Robinson of his encounter with the grey truck. Robinson replied, "Yeah they was shootin at me so I shoot back at them." Robinson was brandishing a .38 revolver when stating this. Robinson then left the yard. Charlese also confirmed when Delaney arrived home from work,

³ At approximately this same time, Kathleen Fayfich called 911 from 23 Peregrine Point off of Marshland Road. Allen Road bordered her neighborhood. She informed 911: "we just heard eight gunshots in rapid succession coming from Allen Road" right behind her neighborhood. She called because of her concern for children in her neighborhood. She informed the 911 operator the gunfire sounded like pistol gunfire from a 9mm or .30 caliber. State's Ex. 3.

⁴ Delaney did not hear the first round of rapid shots as he was headed home from work at the time those were fired.

Delaney and Robinson spoke in the yard briefly and Robinson then left her yard. Delaney then came inside their home. Tr. pp. 214-56.

Applicant and his son did not stop their pursuit of Robinson after running Delany off the road. Applicant and Young, Jr. turned around and drove back down Marshland Road toward Allen Road for the third time that day. On this occasion, with Applicant still driving the grey truck, Young, Jr. again fired out the window of the truck with the "Tech Nine." Young, Jr. fired multiple shots into Robinson's car, which was parked in a yard at the end of Marshland Road, shooting holes in the car's exterior and passenger compartment. Applicant and his son then drove down and back up Allen Road looking for Robinson. Tr. pp. 272-88; 407-11; 422-25; 427; 214-256; 257-67; State's Ex. 17; State's Ex. 3.

Charlese confirmed that minutes after Robinson left their yard, she heard another set [a second set] of rapid gunshots [Young Jr. shooting Robinson's car]. These gunshots sounded like they were coming from the left of Charlese' home on Marshland Road. At this point, because of the gunfire, Charlese told the children playing on the trampoline to come inside. Delaney also testified that a few minutes after Robinson left his yard, and after Delaney entered his home, Delaney heard rapid gun shots [Young Jr. shooting Robinson's car] coming from near Charlese's residence. Delaney testified Charlese then told the children on the trampoline to get inside. Charlese's child came in her home. But, the other two children, including eight-year-old Khalil Singleton, headed toward their own homes on foot. Tr. pp. 214-56.

Within minutes after Applicant and Young Jr. shot up Robinson's car, Robinson fired three shots at Applicant and Young, Jr. with the .38 revolver as they turned onto Marshland Road off of Allen Road. Charlese was standing in her doorway and saw Applicant in his grey truck turn onto Marshland Road off of Allen Road with his tires squealing and as this was occurring she heard

three distinct gunshots that sounded like they were fired from a different gun than the gun firing the earlier rapid shots. Then, Charlese heard someone screaming and discovered Khalil Singleton had been shot trying to make his way home to safety on foot from the running gun battle. Delaney also testified that minutes after the second round of rapid shots, he heard three separate gunshots that seemed to have come from a different type of weapon [Robinson shooting]. He then heard someone screaming outside. Tr. pp. 214-56.

Dominique Griffin, who lived at 215 Marshland Road, which is at the end of Marshland Road, testified he was at home with his three-week-old baby son watching television at around 4:00 p.m. His step-son, Jontu Singleton, Jr. ("Little Jontu") was outside playing with Khalil and Charlese's child. While watching T.V., Mr. Griffin heard what sounded like "machine gun fire" from the direction of Indigo Plantation [Marshland Road.] Mr. Griffin testified it sounded like a machine gun because it was continuous: "It was pow, pow, pow." Mr. Griffin got on top of his infant son on the floor of his living room to protect his son. When the gunshots ended, Mr. Griffin then ran out his back door to check on his step-son. As he came out the back door, Little Jontu was already at the back porch. Little Jontu, age nine, was crying and pointing at Robinson, who was in Griffin's yard, saying: "He shot Khalil, he shot Khalil." Robinson was walking near a utility shed that belonged to Griffin, i.e. Robinson had fired the three shots at Applicant and his son from Griffin's yard as Applicant's truck turned onto Marshland Road, after Applicant and his son shot up Robinson's car and after they drove down and back up Allen Road looking for Robinson. Griffin then saw Robinson walking quickly toward his car which was parked near a pine tree in Griffin's yard. Griffin noticed Robinson's vehicle had bullet holes in the back window. Robinson got in his car hurriedly and backed up into some lumber Griffin had placed in his yard holding up a fig tree. When Robinson's car struck the lumber, glass fell out of Robinson's back

car window into Robinson's car. Robinson then left out of Griffin's driveway and drove off toward Spanish Wells Road. Tr. pp. 257-66.

Charlese also confirmed that minutes after she heard the three distinct gunshots from the left of her residence, she then saw Robinson drive by her home headed up Marshland Road toward Spanish Wells Road. Charlese testified Robinson's back car window was shot out, and Robinson drove up Marshland Road fast. Tr. pp. 233-35.

The bullets Robinson fired from Griffin's yard did not hit their intended targets, but instead one found its way to eight-year-old Khalil.⁵ Robinson fled the area in his bullet-riddled car, and Applicant and Young, Jr. absconded from the area as well in Applicant's grey truck. Khalil was struck in the chest and died within seconds or minutes. Tr. pp. 257-268; 422-424; State's Ex. 3; State's Ex. 17.⁶

Between 5:00 and 5:30 p.m. that same day, Applicant and Young, Jr., and Applicant's girlfriend, Ebony, were pulled over by police in Applicant's grey truck. While on the side of the road, officers located three spent shell casings matching a 9 mm firearm in the back bed of the truck. At the scene of his arrest, after Miranda warnings, when asked why his son was leaning out the truck window shooting, Applicant stated to the arresting officer that his son was shooting at

⁵ At approximately this time, another individual called 911 reporting gunshots on Allen Road. The caller informed 911 there were "multiple gun fires." The caller stated they heard six or eight gunshots that sounded like automatic weapons. The caller stated that "then it was at one end of the Road and then it sounded like they drove to the other end and...it just fired again." The caller also stated "It was bad." State's Ex. 3.

⁶ At approximately this time, Ms. Washington [first name unknown] called 911 extremely upset because she had found a young child lying on the ground with a gunshot wound and the child was not breathing. Ms. Washington told the 911 operator: "We heard gunshots. We heard about ten gunshots." Ms. Washington became more hysterical when she realized the child was Khalil. Ms. Washington, who was nurse, was eventually able to calm herself enough to perform C.P.R. but Khalil was already dead. During the call, Ms. Washington identifies "T" [Tyrone Robinson] as being involved in the shooting of Khalil. State's Ex. 3.

Robinson because Robinson was shooting at them. Applicant and his son were then taken to the police station where they were Mirandized and interviewed. Applicant eventually told officers where they could retrieve the Tech Nine 9mm weapon. Tr. pp. 288-315; 391.

After officer's located and arrested Robinson, they processed his car for evidence. They located numerous fired bullets [five] that were lodged in Robinson's car. These five bullets along with the shell casings found in the bed of Applicant's truck and those found in Robinson's yard were sent off for forensic examination. Agent Dan DeFreese, an expert in firearm's and tool mark examination and ballistics, with S.L.E.D., was able to determine the bullets fired into Robinson's car originated from the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. He also determined all of the fired shell casings recovered from the bed of the truck and from Robinson's yard were fired by the same weapon, a 9 MM semi-automatic weapon, not a .38 caliber weapon. DeFreese also testified the bullets fired into Robinson's car entered the car from different angles, which was consistent with Robinson's car being shot on more than one occasion on the afternoon of September 1, not just in Griffin's yard. Tr. pp. 313-14; 320-29; 330-53.

Applicant was interviewed by police at the police station after being given Miranda warnings and admitted he and his son were armed with the "Tech Nine" and went looking for Robinson to shoot and kill him. Applicant was angry because Robinson had fired in the ground at his feet at Applicant's home, which was disrespectful to Applicant, and Robinson was attempting to kill Applicant's son. Applicant admitted after Robinson shot at him and after Applicant retrieved the Tech Nine, Applicant wanted to kill Robinson. Applicant admitted he did not call police after this initial incident at his residence. Applicant also admitted there was bad blood between he and Robinson from a prior occasion.

Applicant admitted he and his son first looked for Robinson in the Oakview Community because that was one of Robinson's known hangouts. Applicant admitted his son, Young, Jr., attempted to shoot or kill Robinson on Oakview Road, but the "Tech Nine" jammed when Young, Jr. attempted to fire the weapon into Robinson's occupied car as Robinson drove past them headed in the opposite direction. Applicant admitted Robinson fired several times at them at this time with his weapon. State's Ex. 17.

Applicant also admitted they located Robinson on Allen Road, and Young, Jr. fired several shots at Robinson that missed. Applicant explained the reason they fired at Robinson at Robinson's residence was because Robinson had been shooting at them at that location, when they pulled in Robinson's yard in Applicant's grey truck. State's Ex. 17.

According to Applicant, he and Young, Jr. then fled from Robinson's residence and as they attempted to flee the area, Robinson then fired at them several times as they turned onto Marshland Road at the end of Allen Road. State's Ex. 17.

The last witness to testify for the State at Applicant's trial was Dr. Lee Tormos, the forensic pathologist who performed the autopsy on eight-year-old Khalil. She observed that one bullet had entered into Khalil's chest, piercing his lungs and heart, before coming to rest in his arm. Dr. Tormos concluded the cause of death was a gunshot wound to the left lateral chest and the manner of death was homicide. The bullet was removed and turned over to the Beaufort County Sheriff's Office for analysis. Indisputably, the bullet recovered from Khalil's body was fired from Robinson's gun, a .38 caliber revolver. Tr. pp. 354-60.

Applicant called two witnesses in the defense case. Applicant called Dr. Amanda Salas, who testified to her opinion that Applicant's statements were coerced; however, she gave detailed testimony about what Applicant told her about the incident that further incriminated Applicant.

Applicant also testified in his own defense and further incriminated himself. Tr. pp. 381-417; 418-38.

Dr. Salas admitted Applicant told her the following: Applicant, Young, Jr., and Robinson did not get along because of a prior disagreement. Robinson came to Applicant's house earlier in the day; they got into a fight; they struggled; Robinson fired a gun at Applicant's feet, and Robinson left Applicant's yard. Applicant went and got a gun. Applicant described obtaining the gun from his mother's residence; it was in a bag, unloaded with bullets nearby, and one magazine for the gun stayed loaded with thirty rounds, and there was an extra box of bullets. The gun was not kept in Applicant's residence, but in another location, his mother's residence. Applicant got in the truck with his son and they ran into Robinson at the Oakview neighborhood. When they ran into Robinson at Oakview, Young, Jr. pointed the gun at Robinson. Robinson's car was going one way and Applicant's truck was going in the other direction. Young, Jr. was not able to shoot Robinson because the gun he was holding jammed or was not put together properly so it would not fire. Applicant and his son then returned to Applicant's house. Applicant and his son went back out driving to send a message to Robinson. According to this statement, they were only going to shoot up Robinson's car. Applicant and his son drove to Allen Road. Applicant was driving the truck and his son was doing the shooting. When they got to Allen Road, Applicant's son fired the weapon they were using while Applicant was driving. Tr. pp. 401-15.

Dr. Salas admitted Applicant told police, when asked why his son [Aaron Young, Jr.] was hanging out the window of the truck shooting at Robinson; that his son was shooting because Robinson was "shooting at us." Dr. Salas admitted this statement was made before any alleged element of coercion was introduced into any interrogation. Tr. p. 413.

Applicant testified at trial as follows: Robinson came to his home on the afternoon of September 1 and stated he wanted to talk to Applicant's son. Robinson then pulled a gun and threatened to kill Applicant. Applicant claimed Robinson had been coming to his house for years just terrorizing his family. Applicant alleged Robinson had been burning down houses, hitting people with cars, and just being a menace to the community, and no one did anything about it. Applicant claimed Robinson shot at him, at his son, and at his family at his home on September 1. Applicant admitted after Robinson shot at him in his yard that he [Applicant] "just lost it." He claimed he was like a "battered spouse." Applicant stated he was not in his right mind psychologically. Applicant admitted he went to another residence, obtained the "Tech Nine," and brought it out and gave it to his son to use. He admitted he chased after Robinson in his truck. Tr. pp. 418-38.

Applicant testified that he and his son went to Oakview and while he was driving the truck his son brandished the "Tech Nine" out the window of the truck, but Applicant claimed at trial there was no exchange of gunfire there. Applicant admitted no gunshots were fired on Oakview Road by his son because his son was having trouble assembling the weapon. Tr. pp. 418-38.

Applicant admitted he returned to his home and thought about what he was doing and whether it was wrong. Applicant admitted his son tried to talk him out of pursuing Robinson any further. Applicant admitted he did not listen to his son. Tr. pp. 418-38.

Applicant admitted during the pursuit of Robinson he came across a relative of Robinson. He asked this relative if he had seen Robinson, and the relative said no. Applicant also admitted he does not like Robinson and told police he wished Robinson were dead. Tr. pp. 434-35.

Applicant then testified that he and his son then pursued Robinson in the Allen Road area but claimed they never saw him on Allen Road. Applicant claimed they pulled in a yard; he lined up

his truck with Robinson's car, his son shot the car up, and they left. Applicant admitted he knew there were kids playing in the area at the time they shot up the car, but claimed he and his son were careful to only shoot the car and not endanger the children who were playing nearby. Applicant claimed what happened after that he did not know. Applicant admitted as he was leaving the area of Allen Road, he did hear gunshots. Applicant claimed they only went down Allen Road one time, and then as they were leaving after shooting the car, Robinson fired at them. Tr. pp. 418-38.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges 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 jurisdiction⁷
 - 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 violation⁸
14. Statute issue⁹
15. Mutual combat violation¹⁰
 - 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."

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

RESPONSE TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant's claims of ineffective assistance of counsel for failure "to object to the jury charge on mutual combat" and failure to "subpoena Sergeant Albertin for cross examination" are without merit. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. See generally

⁷ Although this allegations is not listed in section 10 of the application, it is included under its own subheading in the attachment to the application setting forth the details of Applicant's claims. Out of an abundance of caution, because Applicant filed this application pro se, Respondent will address this issue below.

⁸ See FN 7, supra.

⁹ See FN 7, supra.

¹⁰ See FN 7, supra.

S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1) their attorney’s performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). Id. at 690–95; Butler, 286 S.C. at 442, 334 S.E.2d at 814. The defendant’s burden for proving both of these components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. Strickland, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Id. at 700.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler,

286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Harrington, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Strickland, 466 U.S. at 689. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court “must judge the reasonableness of counsel’s challenged conduct on the

facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate 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. A reasonable

probability is a probability “sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695.

Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” Id. at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Id. at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Strickland, at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Respondent submits Applicant cannot satisfy either requirement of Strickland. However, the record likely does not refute or disprove Applicant’s allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. See

Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

MOTION TO DISMISS DIRECT APPEAL ALLEGATIONS AS NOT COGNIZABLE IN PCR

Applicant alleges “[t]he 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).” Applicant further asserts “The trial judge erred in not submitting the lesser included offense of murder.”

Applicant’s claims should be summarily dismissed because they both raise a direct appeal issue that is procedurally barred by section 17-27-20(b) of the South Carolina Code of Laws. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). “In a direct appeal, the focus generally is upon the propriety of rulings made by the circuit court in response to a party’s motions or objections. In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel.” Id. at 363-64, 527 S.E.2d at 747. A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues on appeal, and he may not do so now as grounds for relief in this action.

MOTION FOR DISMISSAL AS A MATTER OF LAW

Applicant's claim alleging the circuit court was without subject-matter jurisdiction due to alleged defects in the indictment is without merit and should be summarily dismissed. Applicant may challenge the subject-matter jurisdiction of the trial court at any time. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). However, "circuit courts obviously have subject-matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Therefore, Applicant must present evidence his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in General Sessions Court, the indictments at issue were true-billed by a Grand Jury, and thus the circuit court had proper subject-matter jurisdiction.

Further, the indictment is a notice document, and any challenges to its sufficiency "shall be taken by demurrer or on motion to quash . . . before the jury shall be sworn and not afterwards." S.C. Code § 17-19-20 (2003). Therefore, in post-conviction relief, an applicant wishing to raise challenges to the sufficiency of an indictment must do so by alleging his trial counsel failed to properly move to quash the indictment in accordance with section 17-19-90 of the South Carolina Code. Applicant has made no such allegation in this case, and therefore, the portion of Applicant's claim objecting to the subject-matter jurisdiction of the circuit court should be summarily dismissed because Applicant has not raised any issue of material fact which would require an evidentiary hearing on this issue. See S.C. Code Ann. § 17-27-70(c) (authorizing the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.").

MOTION FOR A MORE DEFINITE STATEMENT

Respondent also hereby moves for a more definite statement as to Applicant's allegations

regarding prosecutorial misconduct, Brady violation, Miranda violation and seizure of evidence, “illegally coercion violation,” “equal protection question,” statutory interpretation, and hearsay objections. Applicant has failed to set forth any facts to “support each ground” or to explain with any specificity whatsoever the facts upon which his claims are based. It is unclear from Applicant’s application whether Applicant is even raising issues appropriate for post-conviction relief. The Uniform Post-Conviction Procedure Act requires the Applicant to “specifically set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (emphasis added). Therefore, Respondent requests Applicant be required to amend his application to set forth specifically the grounds on which his claims are based, so Respondent may properly prepare for the evidentiary hearing and respond to Applicant’s claims appropriately.

ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. See Love (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C.

Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP. See also Rules 15(a)-(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. See Rule 15(a), SCRCP.

Pursuant to section 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

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CONCLUSION

WHEREFORE, the State respectfully requests this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel as to trial counsel's failure "to object to the jury charge on mutual combat" and failure to "subpoena Sergeant Albertin for cross examination." As Applicant's allegations regarding a "lesser included offense" and "directed verdict violation," Respondent moves for summary dismissal as those are trial court error allegations which are not cognizable in a PCR action. As to Applicant's allegation the trial court lacked subject-matter jurisdiction, Respondent moves for summary dismissal as a matter of law. As to all remaining allegations, Respondent moves for a more definite statement of the issues so Respondent may properly respond to Applicant's claims.

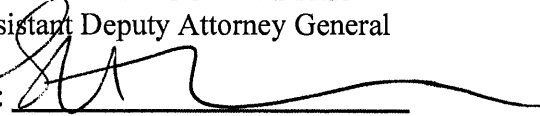
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

October 14, 2020

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2020-CP-07-1099

Aaron Young, Sr., SCDC № 288580)

v.)

AMENDED
APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

2023 MAR 16 PM 12:20
JERRI M. ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention: Broad River Correctional Institution, Broad River Road, Columbia, SC
2. Name and location of Court which imposed sentence: General Session Court for Beaufort County

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3. Name(s) of co-defendant(s) (if any): Aaron Young, Jr. and Tyrone Robinson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-07-02173 (murder)
 - (b) 2014-GS-07-01941 (attempted murder)
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 26, 2016 - 30 years
 - (b) August 26, 2016 - 20 years
 - (c) _____
6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - © after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - I. Convictions affirmed
 - ii. Petition for writ of certiorari denied
 - iii. _____
 - © the date of each such result:
 - I June 26, 2019 .
 - ii. March 12, 2020
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:

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- i. S. C. Ct. App. 2019-UP-233 (June 26, 2019)
 - ii. No citation
 - iii.
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a)
 - (b)
 - ©
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Trial counsel failed to raise a double jeopardy argument at my second trial.
 - (b) Trial counsel failed to object to testimony from a co-defendant and the 911 call that violated the confrontation of witnesses provision of Article 1, § 14 of the Constitution of the State of South Carolina and the 5th Amendment of the Constitution of the United States of America. Furthermore, the testimony violated the Rule 802 against hearsay testimony.
 - (c) 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 Surpeme Court in *State v. Young*, 429 S.C. 155, 838 S.E.2d 516 (2020) violated the *ex post facto* provision Article I, § 4 of the Constitution of the State of South Carolina and Artilce I, § 10, cl 1 of the Constitution of the United States of America.
 - (d) 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.
 - (e) Trial counsel was ineffective in not objecting to the use of implied malice as part of the definition of attempted murder.
 - (f) Trial counsel failed to request a jury charge as to the withdrawing from mutaul combat.
 - (g) If appeallate counsel is found not to have been ineffective in failising to raise the *ex post facto* issue, the the decision of the South Carolina Surpeme Court in extending the law as to mutual combat to include an innocent thirrd part constitutes new law.
11. State concisely and in the same order the facts which support each of the grounds set out

in (10):

(a) The first trial ended when the state requested a mistrial because they discovered evidence which showed promises were made to me not to charge me with murder if I told them where the firearm we used was located. This mistrial was not required. The trial could have continued after my attorney had had time to review the audio recording. I never consented to having my trial end in a mistrial. At the second trial my counsel should have objected to the trial being conducted on the ground of double jeopardy.

(b) At the trial in this case, trial counsel failed to object the hearsay statements of Tyrone Robinson, the 911 caller and others. This testimony violated the confrontation clause of both the state and federal constitutions. It also violated the state court rule against hearsay.

(c) In the decision in *State v. Young*, 429 S.C. 155, 838 S.E.2d 516 (2020) the South Carolina Surpeme Court specifically stated they were extending the law as to mutual combat to include any shooting of an innocent third party not involved inthe shooting. By extending the application of the law in this case, the court, the impact of the decision is to create a new crime that was not a crime when the incident occurred. This violates the ex post facto provisions of the state and federal constitutions.

(d) At the first trial the state learned of an audio recoding in which the officer interviewing me made promises to me that he would not charge me with murder if I told him where the weapon my son used was located. Relying upon these promises, I disclosed the location of the weapon. At my second trial, counsel did not use the recoding to support my position that I was promised not to be charged if I dislcosed the weapon. This recoding could have been used by the jury as further evidence that the statements I made were not voluntary and were the result of improper promises.

(e) Trial counsel was ineffective in failing to condcut basic reserach that would have shown the law is that malice cannnot be implied in an attempted murder case. The law was then and is today that the state must prove expressed malice to convcit of attempted murder.

(f) At the trial the testimony established that at the time of the fatal shooting, I was driving away from the automobile owned by Mr. Robinson. From the facts prove at trial, the jury could have concluded that I had withdrawn from mutual combat, if such combat had been proven.

(g) In affirming the conviction of my co-defendant the South Carolina Supreme Court

Revised 3/2003

extended the law as to mutual combat and an innocent third party. By extending the law, the Court recognized that it had not been applicable at the time of the trial. Extending the law to apply to my case constitutes a change in the law which makes applicable the *ex post facto* provisions of the state and federal constitutions. This change in the law that was applied retroactively to my case constitutes a change in the law that should entitle me to relief on the *ex post facto* grounds stated earlier.

12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law?
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. _____
 - ii. _____

iii. ____

iv. ____

(d) the date of each such disposition:

i. ____

ii. ____

iii. ____

iv. ____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. ____

ii. ____

iii. ____

iv. ____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. ____

ii. ____

iii. ____

(b) the proceedings in which each ground was raised:

i. ____

ii. ____

iii. ____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Trial Counsel raised no objection_

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- (b) same
 - (c) The issue of ex post facto did not exist until the South Carolina Supreme Court made its ruling in the *Young* decision.
 - (d) Trial counsel raised no objection.
 - (e) same
 - (f) same
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Robert E. Ferguson, Jr., P. O. Box 845, Beaufort, SC 29901
 - ii. Kathrine Hudgins, S.C. Commission of Indigent Defense, P. O. Box 11589, Columbia, SC 29211
 - iii. C. Rauch Wise, 305 Main Street, Greenwood, SC
 - (b) the proceedings at which each such attorney represented you:
 - i. initial plea, pretrial motions, trial and sentencing
 - ii. appeal to the South Carolina Court of Appeals
 - iii. preparation of this amended application for Post Conviction Relief
19. State clearly the relief you seek in filing this application:
dsimissal of the charges on double jeopardy grounds or new trial

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20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA

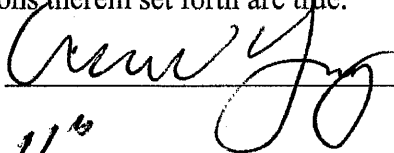
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VERIFICATION

County of Beaufort

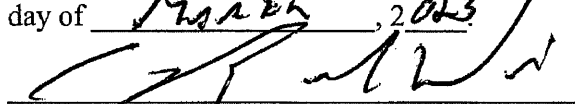
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I, Aaron Young, Sr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this
day of March, 2023

16th



Notary Public (L.S.)

My Commission Expires:

5/18/2030

Revised 3/2003

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
2020-CP-07-01099

Aaron Young, Sr.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT OF HEARING
	)	
State of South Carolina,	)	
	)	
Defendant.	)	
-----	)	

March 16, 2023
Beaufort, South Carolina

B E F O R E:

The Honorable Robert Bonds, Judge Presiding

A P P E A R A N C E S:

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THE COURT: All right. Attorney General, what do we have?

MS. DIXON: Your Honor, next up today, we have Aaron Young, Sr. v. State; Docket Number 2020-CP-07-1099. Mr. Young is serving a 30-year sentence. He was indicted by the Beaufort County Grand Jury in October of 2014 for murder and attempted murder. Those are indictment numbers 2012-GS-07-2173, 2014-GS-07-1941. His co-defendants for the murder charge were his son, Aaron Young, Jr. and Tyrone Robinson. And these arose from the fatal shooting of an eight-year-old on September 1st, 2012. Mr. Young proceeded to a jury trial before the Honorable Thomas Cooper August 10, 2015. He was represented by Robert Ferguson. Prior to this, the State had planned to try all three co-defendants together, and actually began a pre-trial hearing August 21st of 2014. But during the course of that discovered some audiotapes or videotapes from the law enforcement that had not been handed over, and so the trial actually -- or the hearing actually reconvened and then came back the next day, and the State joined into the Defendant's motion to sever,

1 and at that time, the motion to sever was granted
2 and the Court continued the case. The State's
3 theory at trial was that the Youngs were involved in
4 a shootout with Robinson, and the child was hit by
5 gunfire from Robinson's gun. The State tried the
6 Youngs under a theory of mutual combat, and Mr.
7 Young was convicted as indicted and sentenced to 30
8 years for murder and 20 years for attempted murder
9 to be served concurrently. He did file a direct
10 appeal. Kathrine Haggard Hudgins filed a brief on
11 his behalf and argued that the Court erred in
12 denying his motion for a directed verdict to murder
13 when the State's evidence of murder was intended
14 upon a combination of mutual combat, accomplice
15 liability, and transferred intent. And she also
16 argued the State failed to establish mutual combat
17 at the time of the shooting. The Court of Appeals
18 affirmed on the merits, and he filed a Petition for
19 Rehearing which was denied. He also filed a
20 Petition for Writ of Certiorari which was I have
21 also denied. The remitturer was sent March 13,
22 2020. He timely filed this PCR application on
23 October 20, 2020. I will note we did get a new
24 amendment this morning that adds one additional
25 ground that I did not have notice of before today.

1 I would just ask if Your Honor would allow me ten
2 days to do some legal research and submit a brief on
3 that issue, that would be the last issue on the most
4 recently amended application, which is Allegation G:
5 If appellate counsel is found to not have been
6 ineffective in failing to raise the ex post facto
7 issue, the decision of the South Carolina Supreme
8 Court in extending the law as to mutual combat to
9 include an innocent third party constitutes a new
10 law. I would just like some time ---

11 THE COURT: Constitutes what? I'm sorry.

12 MS. DIXON: New law. I would just like
13 some time to research that issue.

14 MR. WISE: And I have no objections. I
15 need time to research the issue too, that was raised
16 simply listening to her argument yesterday.

17 MS. DIXON: And, Your Honor, then the
18 remaining allegations on this amendment that I
19 received today are ones I have previously had notice
20 of, and I will allow counsel to state for the record
21 what he's going forward on today.

22 THE COURT: All right. Counsel, yes, sir.

23 MR. WISE: First of all, I'd like to file
24 the amended PCR that is signed by my client on that.

25 THE COURT: Yes sir.

1 MR. WISE: We are not going forward today
2 on the double jeopardy ground. In reviewing the
3 transcript, I was mistaken and realized that the
4 jury was never sworn in the first case. Mr. Young
5 and I talked about it, and we -- I was under the
6 impression they were, and under further review, they
7 were not sworn. It's really no question about that.
8 And that would be the only issue that's not being
9 raised in the amended PCR.

10 I'd also like to request, Your Honor, that
11 if Mr. Young's right hand could be unhandcuffed so
12 he can make notes. It's just easier for me if he
13 makes notes rather than whispers in my ear to
14 conduct the hearing.

15 THE COURT: That's a matter, Counsel, that
16 I'm -- I mean I leave that up to court security
17 and/or SCDC.

18 MR. WISE: Okay.

19 THE COURT: I don't really take a position.
20 I'm not -- I don't object to that, but at the same
21 time, I'm not a safety expert, and I'm not the
22 person to make that decision. And if they don't
23 have a problem with it, I don't have a problem with
24 it. That's up to these gentlemen.

25 MR. WISE: They usually grant it, but ---

1 THE COURT: And I understand, but that's
2 just -- I'm not going to take a position on it ---
3 MR. WISE: Right.
4 THE COURT: --- on a security matter.
5 (PAUSED WHILE HANDCUFF ON MR. YOUNG'S RIGHT HAND IS
6 REMOVED)
7 MR. WISE: And with that, we would call Mr.
8 Ferguson.
9 THE COURT: Yes, sir.
10 MR. WISE: Now, what are we going to do
11 about Kat Hudgins?
12 MS. DIXON: She isn't here.
13 MR. WISE: Right, but time-wise, do we
14 know, is it scheduled?
15 MS. DIXON: She's on standby and I was
16 going to let her know.
17 THE COURT: Okay.
18 MS. DIXON: I guess -- do you intend to
19 call her?
20 MR. WISE: I had, yeah.
21 THE COURT: Well, whenever you want to call
22 her, we'll take -- we'll stand down, and the Court
23 can get all that ready and -- at your convenience.
24 Is that all right?
25 MR. WISE: Yep. That'd be fine. And we

1 should probably put on the record that you've
2 basically heard much of this yesterday, including
3 the 911 calls. And I can take notice of the fact
4 that you listened to the 911 ---

5 THE COURT: That's fine. I'm very familiar
6 with the case, as the latest I've heard, I believe
7 his son's case yesterday.

8 MR. WISE: Right.

9 THE COURT: And as I also put on the
10 record, I have just recently as last week tried a
11 mutual combat case in Jasper County. So, I am
12 somewhat familiar with this case, yes, sir.

13 MR. WISE: Okay.

14 (WITNESS SWORN)

15 Robert E. Ferguson, Jr,
16 having been duly sworn,
17 testifies as follows:

18 * * * * *

19 THE COURT: All right. Your witness,
20 Counselor.

21 MR. WISE: Thank you.

22 DIRECT EXAMINATION OF ROBERT FERGUSON

23 BY MR. WISE:

24 Q. Let's give us your full name.

25 A. Sure. My -- Robert E. Ferguson, Jr.

1 Q. And you are licensed to practice law in the
2 State of South Carolina?

3 A. Yes, sir. I am.

4 Q. And if you would, how did you come to represent
5 Aaron Young, Sr.?

6 A. Yes, sir. To my recollection, I was appointed
7 due to a conflict several months after the initial
8 charges were brought against Mr. Young.

9 Q. Okay. This case has somewhat of a long history.

10 A. Yes, sir.

11 Q. Including a trial that started with all three
12 that ended up not happening?

13 A. Yes, sir.

14 Q. And what happened in that particular case?

15 A. So we were noticed for trial, all three
16 defendants, and then to my recollection, we came on
17 the Monday and started -- at some point picked a
18 jury and started with pre-trial motions. I think we
19 got through a Jackson v. Denno hearing. I remember
20 there was a break of some time, and then we were
21 approached about some discovery that had been
22 located involving this case. Specifically,
23 statements that had been previously requested by the
24 defense.

25 Q. And the statements that came at the last minute

1 involved Aaron Young, Sr.?
2 A. They did. Yes, sir.
3 Q. Do you remember basically what they were?
4 A. I do. And so, it was the in-car camera and body
5 camera of Deputy Evans. And so, it's my
6 understanding now that Deputy Evans had turned on
7 his body camera, at some point escorted Mr. Young,
8 Sr., into I think the Hilton Head branch of the
9 Sheriff's Department, and his body camera continued
10 recording audio.
11 Q. Let me correct you.
12 A. Sure.
13 Q. It was the camera in the car, and he had the
14 audio ---
15 A. That's correct.
16 Q. --- miked on his body.
17 A. Yes, sir. You are correct.
18 Q. Okay.
19 A. The footage I recall was just a stationary
20 picture of the outside of the building, and you're
21 correct, his microphone continued to pick up the
22 conversations. And I believe what it was is they
23 were in -- they were outside of the interrogation
24 room, so Mr. Young, Sr., was waiting to give an
25 official statement, I believe.

1 Q. And what was the case and context of that audio
2 that sent the first trial into a tailspin.

3 A. Well -- and so the part that I was particularly
4 interested in were -- it was an exchange between, I
5 believe, Deputy Evans and my client to the effect of
6 just tell them where the gun is, you know, you won't
7 be charged with murder and subtle variations
8 thereof. And so there was an extensive exchange all
9 along the same vein.

10 Q. Okay. And I believe you actually subpoenaed the
11 deputy, too, at the actual trial of this case?

12 A. I did, yes, sir.

13 Q. And he basically testified to that?

14 A. He did.

15 Q. All right. Didn't help Mr. Young but still it
16 was helpful to do it?

17 A. I'm sorry. Could you repeat that for me?

18 Q. It didn't help Mr. Young, but you got out of it
19 what you could?

20 A. Absolutely. And so, what I -- so, I recall
21 reviewing it. I want to say we were in a jury
22 deliberation room and ultimately the State kind of
23 joined in our motion to sever, and it was an
24 agreement to continue the matter, so that we could
25 all have an opportunity to review the discovery.

1 Q. Okay. Now, this trial presented some unique
2 legal issues to say the least.

3 A. It did.

4 Q. All right. And researching -- well, just tell
5 me what research did you do in preparation for this
6 case?

7 A. Well, it's kind of hard to summarize. We
8 researched -- and a lot of this was done in
9 conjunction with Mr. Young, Jr.'s attorney, Roberts
10 Vaux. And so I recall that we had researched the
11 law of felony murder, you know, the mutual combat,
12 what we could find. You know, we didn't have a lot
13 of law in South Carolina, and so, I recall that we
14 extended our review to adjacent jurisdictions. And
15 so, primarily it was figuring out in mutual combat
16 as a theory and the way the indictment was
17 originally drafted, the language was felony murder.
18 And so the research that was done at that point was
19 the interaction between felony murder, transferred
20 intent, mutual combat, etc. And so we certainly
21 were working to try to and challenge the indictment
22 on legal grounds, and also the State's kind of
23 theory changed over time. They presented a new
24 indictment and then an additional indictment, but
25 I'd say the majority of our research was trying to

1 figure out how mutual combat was going to come into
2 play, because we had never come across it before in
3 any other trial.

4 Q. Right. You never found -- or the cause mutual
5 combat as it relates to an innocent third party.

6 A. Correct. Yes, sir.

7 Q. In South Carolina?

8 A. And most of our research had to do -- regarding
9 mutual combat was that it was a bar to raising the
10 defense of self-defense.

11 Q. And I believe in Georgia, that's correct.

12 A. Yes, sir.

13 Q. I mean -- that's true in South Carolina with
14 State v. Title.

15 A. I do not recall the name off the top of my head,
16 but I do recall that being the legal principle, yes,
17 sir.

18 Q. Okay. So, in Title that -- the research you
19 found showed that traditionally mutual combat is a
20 bar to self-defense?

21 A. Yes, sir.

22 Q. Had you ever seen any research when mutual
23 combat was used affirmatively by the State to make
24 one guilty of an innocent person?

25 A. Not to my knowledge, no.

1 Q. Okay. Did you do any research on the issue of
2 attempted murder?

3 A. Well, certainly. That was not originally
4 indicted, and so that was a subsequent indictment.
5 And in sitting here, my biggest concern about the
6 attempted murder were statements about -- about an
7 exchange, I want to say, on Oakview Road or
8 somewhere to that effect, that there was an attempt
9 by Junior to fire the weapon and it jammed. I was
10 concerned about that being viewed as an attempted
11 murder, and that Mr. Young, Sr., would then be --
12 you'd have some accessory liability. So I do
13 remember being very concerned about that, even early
14 on, that the State could perceive, you know, could
15 pursue an indictment for attempted murder against
16 Mr. Robinson.

17 Q. Did you find any cases about the mens rea
18 required as to attempted murder?

19 A. Well, I can't recall specifically sitting here.
20 I do know that there was an issue with implied
21 versus expressed malice, you know. And I recall,
22 you know, having concerns about some of Mr. Young,
23 Sr.'s, statements about how he wanted to kill Mr.
24 Robinson. And so I was concerned about both express
25 and potentially implied malice. I don't recall the

1 specific research, but certainly it was something
2 that we looked into a good deal, yes, sir.
3 Q. You didn't make a motion in this case to strike
4 from the indictment the use of word implied?
5 A. I don't think I did. I can't recall.
6 Q. And are you aware that subsequent to this trial
7 the South Carolina Supreme Court ruled that you have
8 to have express malice, not implied?
9 A. I'm aware of it, yes, sir.
10 Q. Okay. But you haven't found any research on
11 that before?
12 A. I cannot recall sitting here.
13 Q. All right. Now during the trial there was some
14 -- do you got a copy of the transcript in front of
15 you?
16 A. I do not. I know that it's very large, and so I
17 brought the index in case, you know, it'd be
18 beneficial to me, but ---
19 Q. I'm going to hand you my copy of the transcript.
20 A. Okay.
21 Q. And I'm looking at the big numbers pages, not
22 the small numbers.
23 A. All right. Yes, sir.
24 Q. Do you recall the 911 tape being introduced in
25 this case?

1 A. I recall there being numerous 911 calls.

2 Q. I think there are four.

3 A. Okay. Yes, sir.

4 Q. All right. And you recall -- and one of them
5 made reference to the fact that there was a shooting
6 battle between a truck and a car?

7 A. Okay.

8 Q. Now we don't have the woman we had yesterday
9 running the 911 tapes.

10 THE COURT: I mean they can run it.

11 MR. WISE: Yeah.

12 MADAM CLERK: Where are they at?

13 THE COURT: Oh, well, you know, I think --
14 I think the 911 tape -- somebody had filed a motion
15 to actually pull that piece of evidence out of the
16 original trial. It was entered into evidence at the
17 original trial. The court reporter then -- they
18 used it -- the court reporter marked it and returned
19 it to our junior attorney yesterday to there. So,
20 it's not here. It would be wherever she returned it
21 to. I guess there's one in each case.

22 MR. WISE: Then, I apologize. I thought we
23 were going to bring this back today, too.

24 THE COURT: Well, they asked for it. But
25 we can get the disk. I think we can. She can do

1 anything, I promise you.

2 (MADAM CLERK GOES TO RETRIEVE DISK FROM
3 ORIGINAL FILE.)

4 THE COURT: Counsel, you plan on making
5 this an exhibit in your case?

6 MR. WISE: I had -- I mean if you ---

7 THE COURT: That's fine. Would you like to
8 do that?

9 MR. WISE: I would.

10 THE COURT: At the appropriate time, just
11 go ahead and do it, and what we'll do is we'll
12 return it to the same box where we returned it to
13 from the one yesterday, okay? Is that -- and
14 actually, I think that's technically Mr. Young,
15 Jr.'s file. So is that satisfactory with you?

16 MR. WISE: That's fine. Yes.

17 THE COURT: Attorney General, is that
18 satisfactory with you? See, what we're going to do
19 is at the appropriate time, I think, we're just
20 going to enter this into evidence. And what we'll
21 do is we'll mark it. And then what we'll do is
22 we'll return the original, because that's the same
23 one we used yesterday. We'll return it to Mr.
24 Young, Jr.'s file. That's where it will remain,
25 okay?

1 MS. DIXON: That works for us, Your Honor.

2 THE COURT: All right. Great. So at the
3 appropriate time, sir, you can move to put that into
4 evidence.

5 MR. WISE: Okay. And, Your Honor, I would
6 like -- I want to compliment Beaufort County for
7 that sound system in here. We heard it yesterday, I
8 was -- that's better than in most courtrooms I've
9 been in.

10 THE COURT: All right. Yes, sir?

11 MR. WISE: Your Honor, I would move to
12 introduce this as Applicant's Exhibit 1 and
13 recognize it's going to be returned to Aaron Jr.'s
14 file.

15 THE COURT: All right. And that is the --
16 that's the video, or that's the audio of the 911
17 call?

18 MR. WISE: That's correct.

19 THE COURT: Any objection, Attorney
20 General?

21 MS. DIXON: No objection, Your Honor.

22 THE COURT: All right.

23 (Applicant's Exhibit Number 1, Audio of 911
24 Call, is marked and entered without objection.)

25 BY MR. WISE:

1 MR. WISE: If you would, I believe it's
2 number two is the one we want to play first. And if
3 you would listen to this. Perfect.

4 (911 AUDIO NUMBER TWO IS PLAYED.)

5 MR. WISE: I apologize, that wasn't the one
6 I was looking for. Let's go to number four. I
7 think four is the one that has the hearsay.

8 (911 AUDIO NUMBER FOUR IS PLAYED)

9 MR. WISE: All right. Stop it right there.

10 BY MR. WISE:

11 Q. All right. There's a comment there the two
12 vehicles were shooting at each other, all right?

13 A. Yes, sir.

14 Q. And actually, as I hear it, the most distinct
15 comment you hear is from the 911 operator, not the
16 person alleged reporting it.

17 A. Okay.

18 Q. Unless you could hear it better than I could.

19 A. I'm sorry, could you repeat the question?

20 Q. The comment was made two vehicles were shooting
21 at each other.

22 A. Mmm-hmm.

23 Q. All right?

24 A. Yes, sir.

25 Q. And -- let me just rephrase the whole process.

1 A. Okay.

2 Q. Did you raise an objection to that statement as
3 being hearsay?

4 A. Sitting here, I don't recall if we made a
5 specific objection to that particular 911 call.

6 Q. All right. Had you done any research concerning
7 911 calls and Crawford vs. United States?

8 A. I do remember, you know, I do remember the issue
9 coming up in regards to, you know, the confrontation
10 clause, you know. I don't recall specifically doing
11 any research on that issue. I do know as I was
12 reviewing my file that I found -- do we know who
13 that caller is? Sorry, I'm asking you questions.

14 Q. Okay. That's -- we'll get to that in a minute,
15 too.

16 A. So, your question was did I do any research
17 regarding the confrontation clause issues ---

18 Q. Right.

19 A. --- and the 911 calls?

20 Q. Right.

21 A. I think we discussed it. I don't recall any
22 specific research in that regard.

23 Q. Did you listen to the 911 calls prior to the
24 trial?

25 A. Absolutely.

1 Q. All right. So would it be accurate to say then
2 that you knew there was going to be a statement
3 about the two cars shooting at each other?

4 A. It was certainly a concern that I had, yes, sir.

5 Q. All right. And that was a concern because of
6 what?

7 A. Well, that tends to show that it was a running
8 gun battle which was the State's theory all along.

9 Q. Okay. All right. And that -- was that comment
10 be harmful to your case?

11 A. Certainly.

12 Q. All right. Are you aware even today of the line
13 of cases that distinguish between 911 calls asking
14 for help and 911 calls reporting a crime?

15 A. I'm familiar with it, but not something that I
16 could recite to you.

17 Q. Okay. But there's no objection raised to that,
18 correct?

19 A. Not that I recall, no, sir.

20 Q. All right.

21 MR. WISE: That's going to be all for right
22 now.

23 MADAM CLERK: Okay.

24 MR. WISE: We may need it again in a
25 minute.

1 MADAM CLERK: Okay.
2 MR. WISE: All right.
3 MADAM CLERK: I'll just keep it here.
4 BY MR. WISE: Okay.
5 Q. Now, there was also some comments made, some
6 hearsay statements by Mr. Robinson.
7 A. Yes, sir.
8 Q. And if you turn to page 519 of the transcript, I
9 believe that's where it was admitted in this case.
10 A. Okay. I'm on large numbers, page 519.
11 Q. Okay. And it's -- look at line 14, and I
12 believe that was a statement that -- a hearsay
13 statement made by Mr. Robinson.
14 A. Okay. So you said line 14?
15 Q. Well, it starts at 14 and runs ---
16 A. Mmm-hmm.
17 Q. maybe a few page -- lines.
18 A. All right.
19 Q. And, in that Mr. Robinson said they were
20 shooting at him.
21 A. Yes.
22 Q. Correct?
23 A. Yes, sir.
24 Q. All right. Was there an objection to that?
25 A. I do recall objecting to any statements by Mr.

1 Robinson and specifically that statement on the
2 grounds of hearsay. I recall Judge Cooper
3 patiently, calmly ruling that it was an excited
4 utterance or present sense impression, because I
5 remember strongly disagreeing with that.

6 Q. Did you -- but after he made the comment that
7 it's, I believe, an excited utterance, did you raise
8 any further objection that it wasn't an excited
9 utterance?

10 A. I mean I know that we objected -- I want to say
11 prior to -- I knew that it was coming and it was a
12 concern and then I want to say we objected
13 contemporaneously as well as hearsay.

14 Q. All right.

15 A. I'm sorry, I'm missing your question.

16 Q. All right. Well, page 519.

17 A. Yes, sir.

18 Q. After Judge Cooper -- I believe -- I can't
19 remember whether it was Judge Cooper or Judge -- or
20 Mr. Stone says it's an excited utterance, was there
21 any further objection made against it being an
22 excited utterance?

23 A. If you'll give me one second.

24 Q. Sure.

25 A. All right. So you know, I see that I object and

1 the Court says all right, I think how do you avoid
2 the hearsay objection?

3 "Mr. Stone: it would be an excited
4 utterance. He's amped up. I can go
5 further, explain the excitement if
6 necessary."

7 "The Court: Okay. She's testified that he
8 was hyper and that he -- I think she said
9 cloud nine or ramped up, I can't remember
10 that. That would appear to be the basis of
11 the excited utterance. I'll allow it."

12 And so, it's my practice not to continue arguing
13 after a judge has ruled on an issue. So you're
14 right. After that, I don't see any further argument
15 once the judge has said I'll allow it.

16 Q. Did you make any argument against it being an
17 excited utterance?

18 A. I don't see that in this transcript. No, sir.

19 Q. And Mr. Robinson at this time -- who was he
20 exactly? What had he done earlier in the day?

21 A. Well, he was another individual known to law
22 enforcement from or on Hilton Head. He had come to
23 Mr. Young, Sr. and Jr.'s home and fired a weapon at
24 them.

25 Q. So Mr. Robinson -- all right, let's go back a

1 little bit, too.

2 A. Sure.

3 Q. Before he made the statement about they were
4 shooting at me, what was the first thing Mr.
5 Robinson asked when he got there according to that
6 witness? If you go back and look at the line 14, I
7 believe is where it is.

8 A. Sure. Okay, let's see. So line 14 is an
9 answer. It says he came to my house to look for my
10 cousin Patrick Young. I told him Patrick was not
11 home. He then applied to me that those mf's was out
12 there shooting at him.

13 Q. So he asked for Patrick Young first?

14 A. Okay.

15 Q. Okay. Correct?

16 A. Yes, sir. That's what it says.

17 Q. Okay. And this was literally a co-defendant,
18 correct?

19 A. Yes, sir.

20 Q. And did you have concern with that coming in
21 against your client?

22 A. Absolutely.

23 Q. Okay. Had you done any research about excited
24 utterances under these circumstances? Well, first
25 of all, let me back up a second.

1 A. Sure.

2 Q. When the statement was admitted, was there

3 anything in the record about when this allegedly

4 occurred?

5 A. Say that one more time.

6 Q. Is there anything in the record about when this

7 shooting at him allegedly occurred?

8 A. No, sir. Not from the transcript that's -- no,

9 sir, there's not.

10 Q. So you don't know if it was 30 minutes earlier,

11 or an hour earlier, or two minutes earlier?

12 A. Correct.

13 Q. All right. And would that be important in

14 determining whether or not it's an excited

15 utterance?

16 A. Yes, sir.

17 Q. Okay. Now, look at page 543, at line 23. Was

18 there another statement made in reference to Mr.

19 Robinson?

20 A. Mmm-hmm. I'm on page 543, and you said at line

21 -- which line, I'm sorry?

22 Q. Twenty-three.

23 A. Twenty-three, okay. He told me that mother was

24 shooting at me, so I shot at them.

25 Q. Okay. And that -- was there an objection raised

1 to that comment by Mr. Robinson?

2 A. I don't see an objection contemporaneously. I
3 mean, I think that we objected to all statements
4 coming in by Tyler and Robinson, but I don't see one
5 right after that statement that you just asked me to
6 look at.

7 Q. Okay. And was there anything about that being
8 necessary or an excited utterance?

9 A. I don't see the Court state anything about it
10 right there, no, sir.

11 Q. Okay. And there's no -- and was that harmful to
12 Mr. Young?

13 A. It was.

14 Q. Okay. Now, let's go back to a question about
15 this -- you did some research of mutual combat?

16 A. Yes, sir.

17 Q. All right. Are you familiar with the Supreme
18 Court opinion in Mr. Young, Jr.'s case?

19 A. I'm not, no, sir.

20 Q. Okay. Let me hand that up to you. And
21 actually, believe it or not, I want to call your
22 attention to this dissenting opinion.

23 A. Okay.

24 Q. Let me get it. And I'm showing you the
25 dissenting opinion and look at the paragraph that

1 begins with even.

2 A. Okay. Yes, sir.

3 Q. With Justice Hearn. All right. And that
4 paragraph, what issue does Justice Hearn raise?

5 A. It says she says, even if the mutual combat
6 charge was appropriate, the trial court erred in
7 failing to instruct the jury on the end of mutual
8 combat.

9 Q. Okay. Or withdrawal from mutual combat?

10 A. Yes, sir.

11 Q. Okay. Did you make a specific request for such
12 a charge?

13 A. I can't recall sitting here. I know that that
14 issue was something that I spent a lot of time on,
15 in my brain and in my analysis.

16 Q. All right.

17 A. They were, you know, withdrawing from the
18 situation, and so, yes, I believe that we did argue
19 withdrawal. What I can't recall is, you know, when
20 it was raised. I do recall Judge Cooper essentially
21 ruling that they were fleeing a crime and not
22 withdrawing. I do recall that, but that was
23 certainly not our position.

24 Q. Right. But there's no specific request for the
25 charge on that issue?

1 A. I don't remember to tell you the truth. I ---
2 Q. Now -- and there was -- as Justice Hearn pointed
3 out in her opinion, there was a some timely
4 difference between the rapid shots and the free
5 shots. Is that correct?
6 A. Are you asking me what Judge Hearn found?
7 Q. No, no. I'm just saying that ---
8 A. Absolutely, there was. Yes, sir.
9 Q. That's your recall of the case.
10 A. And so, yeah, the State always summarized it as
11 an on-going gun battle. That there was no break in
12 these chain of events. My analysis saw it as almost
13 -- three or more multiple events with clear
14 beginnings and endings. And so, you know, we spent
15 a lot of time arguing that it was not one continuous
16 chain of events and focusing on kind of the
17 beginning and endings as we saw them.
18 Q. All right. And there's some undisputed facts in
19 this case involving Mr. Aaron Sr. isn't it?
20 A. Yeah. Sure.
21 Q. That's favorable to him.
22 A. Okay.
23 Q. Such as, is there any proof that Mr. Aaron Sr.
24 ever fired a gun?
25 A. No, sir.

1 Q. And it's undisputed that, I believe, that the
2 child was killed by Tyrone Robinson's gun?

3 A. Correct.

4 Q. That fact's beyond dispute, so to speak?

5 A. Yes.

6 Q. All right. And, if there was a break in the
7 mutual combat, is that what Justice Hearn would be
8 talking about withdrawal from the mutual combat?

9 A. I assume, yes, sir.

10 Q. Yeah. And was there testimony that there was
11 such a break?

12 A. I believe Mr. Young testified to it.

13 Q. Excuse me?

14 A. I said I believe Mr. Young himself testified to
15 it.

16 Q. Mmm-hmm. And I believe the witnesses -- what
17 about them? Did they have time as to when all this
18 occurred?

19 A. I'm certainly, you know, that a lot of this was
20 lay witnesses that were given estimations of times.
21 And so, yes, there were, you know, in my
22 recollection definitive gaps in the timeline, you
23 know. At least, you know, to be comfortable for me
24 that they were separate events.

25 Q. Right. Look at page 524.

1 A. Yes, sir.
2 Q. Line 18.
3 A. Okay.
4 Q. And was there testimony there about the shooting
5 being several minutes later?
6 A. Yes, sir there is.
7 Q. Okay. And if you had requested a charge of
8 withdrawal ---
9 A. Mmm-hmm.
10 Q. --- would there have been some evidence in the
11 record to indicate that Mr. Young and his son had
12 withdrawn from any mutual combat?
13 A. I'd certainly remember that that was our
14 position.
15 Q. Right.
16 A. That was what we were arguing. I recall Judge
17 Cooper -- I can't remember the exact posture of the
18 argument, but I do recall feeling strongly that they
19 had withdrawn and arguing that and that Judge
20 Cooper, you know, ultimately disagreed and felt like
21 they were fleeing the threat as opposed to
22 withdrawing.
23 Q. But in the light most favorable to Mr. Young,
24 Sr. ---
25 A. Okay.

1 Q. --- would there have been evidence in the record
2 that would indicate they had in fact withdrawn?

3 A. Yes. In my opinion, yes, sir.

4 Q. Okay. And had you therefore requested a charge
5 on withdrawal under that theory would Judge Cooper
6 have been required to charge it, even if he believed
7 it wasn't accurate?

8 A. I don't know.

9 Q. All right, let me rephrase it.

10 A. Sure.

11 Q. All right. In determining whether or not a
12 judge charges something to the jury ---

13 A. Mmm-hmm.

14 Q. -- from the defense perspective, you agree that
15 the evidence is looked at in the light most
16 favorable to the defendant to see if you get that
17 charge?

18 A. Sure. Yes, sir.

19 Q. All right. And therefore, since have you said
20 there is evidence, factual evidence, ---

21 A. Yes.

22 Q. -- of a break that would indicate a withdrawal,
23 would he have been required to charge legally
24 required to charge withdrawal had you requested it?

25 A. I don't really know how to answer that question.

1 I do -- I don't know that -- my recollection is that
2 we were arguing about charging -- we were talking
3 about the charge, and that there was an indication
4 from Judge Cooper that he did not believe that it
5 was a withdrawal. And so, you know, I don't know if
6 that's the reason why I didn't specifically request
7 the withdrawal charge ---

8 Q. Mmm-hmm.

9 A. --- or whether it was argued at the charge
10 conference, but I agree with you, you know. I
11 wanted a charge on withdrawal, yes, sir.

12 Q. And you thought that would -- that the Judge
13 charge it and you go argue that to the jury?

14 A. Yes, sir. And I believe I still did argue that
15 they were withdrawing at the time.

16 Q. But it would have been better if the Judge had
17 of charged, too?

18 A. Agreed. Yes, sir.

19 Q. Give me a second.

20 A. Sure.

21 Q. Do you remember what kind of car Tyrone Robinson
22 was driving?

23 A. I believe it was an Acura.

24 Q. Acura, not a Lexus?

25 A. Correct.

1 Q. So the statement in the 911 call is inaccurate?

2 A. It is, yes, sir.

3 Q. Thank you. That's all I have.

4 A. Yes, sir.

5 THE COURT: Cross-examination?

6 CROSS-EXAMINATION OF ROBERT FERGUSON

7 BY MS. DIXON:

8 Q. May it please the Court? How are you doing
9 today?

10 A. Hey, doing well. Thank you.

11 Q. Good. Real quick, I'm going to touch on some
12 things he questioned you about, and then I may go up
13 and go back just kind of tie up some loose ends.

14 A. Yes, ma'am.

15 Q. Going back to the issue with Deputy Evans and
16 the alleged promises he made, is that something you
17 brought up to the Court?

18 A. Absolutely. Yes, ma'am.

19 Q. Is that something to the jury's attention?

20 A. Yes, ma'am. I believe so.

21 Q. Okay. Did Deputy Evans testify about that at
22 trial?

23 A. He did.

24 Q. He did? Okay. So this is something that the
25 jury was aware of and the Court was aware of?

1 A. Yes, ma'am. I believe so.
2 Q. Going on to the 911 calls themselves, you've
3 been asked about a speaker on the fourth 911 call.
4 Do you have a copy of the transcript?
5 A. I believe I have Mr. Wise's copy of the
6 transcript.
7 Q. Okay.
8 MS. DIXON: Is it okay if we use it?
9 MR. WISE: Yes.
10 MR. FERGUSON: Thank you.
11 Q. Can you go to page 502 ---
12 A. Sure.
13 Q. --- and start kind of at the bottom of the page,
14 and then going into 503.
15 A. Yes, ma'am.
16 Q. And just review that.
17 A. You said 502 at the top of the page?
18 Q. Yes, 502, and you can go start at line 24.
19 A. Okay. Okay, yes, ma'am.
20 Q. And does that indicate who that other caller in
21 that 911 call may have been?
22 A. Yes, ma'am, it does.
23 Q. And who -- what does the record reflect based on
24 that testimony?
25 A. It states that it's thought that it was a

1 dispatcher from Hilton Head dispatch that originally
2 received the call and then transferred it to us.
3 Q. Okay. Okay. So based on that testimony it was
4 two dispatchers and then a third person in the
5 background.
6 A. I believe so, yes, ma'am.
7 Q. Okay. And then, let's see. Going on to the end
8 of the mutual combat charge, this is something you
9 do recall discussing with the Judge?
10 A. I did, yes, ma'am.
11 Q. And you recall the Judge was not inclined to
12 charge it?
13 A. Say that one more time.
14 Q. The judge was not willing to charge it?
15 A. Charge what?
16 Q. Mutual -- the end of mutual combat?
17 A. I know that I had -- that we had submitted
18 proposed charges, and that I felt like the State's
19 proposed charge omitted a very key phrase of it, and
20 I assume that had to do with withdrawal. And so,
21 you know, I recall proposing a complete charge, but
22 I can't remember a hundred percent. You referenced
23 a page. I'm happy to try and flip to it, if
24 necessary.
25 Q. I don't have it ---

1 A. Okay.

2 Q. -- readily available, I apologize.

3 A. What was your question again?

4 Q. Let me ask you this. Do you recall Judge Cooper

5 was not inclined to charge the end of mutual combat?

6 A. I do. Yes, ma'am.

7 Q. So based on your conversations, it was apparent

8 he was not going to give that charge?

9 A. That's my recollection. Yes, ma'am.

10 Q. Okay. And then going on to your representation

11 with Mr. Young, do you know about how many times you

12 met with him?

13 A. Mr. Young and I spent an awful lot of time

14 together. And so, I can't give you a specific

15 number. I did -- I was appointed, and so I kept

16 track of my time and reported it to the Office of

17 Indigent Defense. And so, in preparation, I did

18 review some of my time entries. And so, between

19 February 27th of 2013 and May 8th of 2014, I met

20 with Mr. Young 15 times at the detention center.

21 And so this would have been about a year -- over a

22 year or more prior to the trial. So I know that we

23 met 15 times between that little over a year at the

24 detention center. At some point, Mr. Young was

25 released on bond. And so we then met in person at

1 my office -- my former office on Lady's Island.

2 Q. Okay. And, in your opinion, what was the most
3 damaging evidence the State had against Mr. Young?

4 A. It was his plethora of statements.

5 Q. Okay. And did you challenge those statements
6 through a Jackson v. Denno hearing?

7 A. Yes, ma'am.

8 Q. And what steps did you take to challenge them?

9 A. Well, we retained an expert who reviewed all of
10 the discovery and was able to provide some insight
11 and information as to potentially coercive elements
12 found in the statements as she reviewed them. So,
13 we had an expert that was retained to look at the
14 voluntariness of those statements, but really I felt
15 the biggest challenge was trying to address all of
16 the inconsistent statements and, you know, be able
17 to explain why something was said at this point in
18 time, and then it's different a very short time
19 period later. And so, I was very concerned about
20 the sheer volume than the number of statements, the
21 duration of statements, and the context of the
22 statements. Mr. Young was certainly very concerned
23 about protecting his son. And so that led to, I
24 think, certain statements that were given in an
25 attempt to protect that just made credibility more

1 difficult. So, yes, ma'am. We spent a lot of time
2 on the statements. That was always my biggest
3 concerns were those statements. I felt like we
4 would be in much different situation if we didn't
5 have all those statements.

6 Q. Did your expert testify in front of the jury as
7 well?

8 A. She did. Yes, ma'am.

9 Q. Okay. So the jury had this information as well?

10 A. Yes, ma'am.

11 Q. And did you have an opportunity to review all of
12 this evidence with Mr. Young?

13 A. I did. Yes, ma'am.

14 Q. And how about the video and audio? Was he able
15 to listen to all of that?

16 A. Yes ma'am. We were able to review it at the
17 detention center on my laptop. And then once he was
18 released, we were able to review it in my private
19 office. But yeah, we spent a good bit of time, a
20 lot of those visits, the 15 detention center visits
21 were he and I sitting and reviewing recordings,
22 reviewing discovery.

23 Q. Okay. And going to the 911 calls, did you see a
24 objection to those?

25 A. You know, I don't recall at the time, you know.

1 I don't remember that being, you know, a big concern
2 in, number one, because nobody -- there was no
3 incriminating information given to 911. Nobody ever
4 said Mr. Young, Sr. shot somebody. And so, you
5 know, I was less concerned about information about
6 Tyrone Robinson, you know, -- but so, you know, in
7 our possession that they were going to come in under
8 any kind of business records exception, they did lay
9 a foundation and authenticate the record and played
10 them. And so I remember thinking that it was --
11 yes, there were concerns based on the language of
12 those 911 calls, but I don't remember, you know,
13 talking about -- I don't remember challenging it
14 prior -- I don't remember challenging it pretrial.
15 I don't recall that.

16 Q. Do you have a good bit of experience doing
17 criminal trials?

18 A. I do. Yes, ma'am.

19 Q. In your experience, do these often come in?

20 A. They do.

21 Q. 911 calls?

22 A. Yes, ma'am. They do.

23 Q. And then they've got an allegation that you
24 failed to introduce the audio recording of

25 statements Mr. Young made under promises of no

1 charge being placed against him. In your opinion,
2 were those statements admissible?

3 A. Can you say that one more time?

4 Q. They have an allegation that you failed to
5 introduce audio recording of statements that Mr.
6 Young made under promises of no murder charge being
7 placed against him. Do you believe those statements
8 were admissible?

9 A. I'm still not sure. It's -- okay. All right.
10 So my recollection is that the statements that were
11 turned over after the initial joint trial primarily
12 consisted of Deputy Evans, but I think there was
13 also Deputy Siefert on there. And, I believe, we
14 elicited testimony from Curtis Evans that, you know,
15 that he did say, if you tell us where the gun is,
16 we're not going to charge you with murder. So, I
17 believe, at the very least, it came in through
18 Deputy Evans. I think the State had agreed not to
19 put in any of those statements that occurred to
20 Evans because of the promises and the concerns. And
21 so I think there was, you know, a line drawn between
22 the statements associated with those promises, and
23 then everything moving forward.

24 MS. DIXON: One moment, Your Honor.

25 THE COURT: Yes, ma'am.

1 A. Well, if I could add -- sorry. You know, I also
2 believe Mr. Young touched on it in his own testimony
3 as well, the promises that were made to him.

4 Q. Okay. So that was actually put before the jury?

5 A. As far as I can recall. Yes, ma'am.

6 MS. DIXON: Nothing further, Your Honor.

7 THE COURT: Redirect?

8 MR. WISE: Just a few.

9 THE COURT: Yes, sir.

10 **REDIRECT EXAMINATION OF ROBERT FERGUSON**

11 BY MR. WISE:

12 Q. And you can check your transcript on this.

13 A. Yes, sir.

14 Q. Do you recall making any objection after the
15 Judge's charge as to his not charging withdrawal
16 from the mutual combat?

17 A. Okay. So you're asking if I objected after the
18 charge was read?

19 Q. To preserve it for the record, yes?

20 A. I don't remember sitting here, but I'm happy to
21 look if you know where to point me.

22 Q. It's toward the end of the last ---

23 A. I understand. That's fair enough. That is fair
24 enough. If you will bear with me one second.

25 MS. DIXON: I may know, Your Honor, if you

1 want me to look.

2 BY THE WITNESS:

3 A. All right. Let's see.

4 MS. DIXON: 830 might be the right page.

5 A. Okay. All right. You said 820, 830?

6 MS. DIXON: 830.

7 MR. WISE: 830.

8 BY THE WITNESS:

9 A. Thank you, and I apologize. All right. All
10 right. Yes, sir. I see the Court's asking except
11 as previously requested are there any exceptions or
12 requests for additional change from the State. No,
13 sir, from Mr. Stone. Thank you. Mr. Ferguson? No,
14 sir. Thank you. All right.

15 Q. Do you know if there was a specific objection on
16 the record to his failure to charge withdrawal prior
17 to the jury charge?

18 A. I don't know. I know that we argued it. I
19 don't know how it's reflected in the transcript
20 though.

21 Q. Did you have a specific charge on withdrawal
22 drawn up and ready to present?

23 A. I did. Yes, sir.

24 Q. Do you happen to have it in your file?

25 A. I can look.

1 Q. Can you find it quickly?

2 A. Probably not, but I can certainly try. Now, I
3 say that, and not to make light of this situation,
4 you know, certainly I remember discussions with the
5 State, the solicitors, about the charge. I recall
6 asking for the State's requested charge to be
7 extended to include information that I think was
8 relevant. I just don't -- it was eight years ago. I
9 have a hard time remembering exactly.

10 Q. The reason I ask ---

11 A. Sure.

12 Q. --- is that pertaining to my practice I'm going
13 to definitely notice.

14 A. Yes, sir.

15 Q. If I have a charge prepared that isn't given, I
16 usually present it to the Court as a Court's
17 exhibit ---

18 A. Yes, sir.

19 Q. --- for what the charge would have been, and I
20 didn't see that in this record.

21 A. Yeah. And I can only tell you what I remember.

22 And I remember Mr. Thornton, and Mr. Stone and
23 myself, Judge Cooper's on the bench, we were talking
24 about the charge. I remember there was some

25 discussion about whether or not we needed to have a

1 formal charge conference. I can't remember other
2 than I think we discussed the charge on the record,
3 and I just remember that I didn't get what I wanted,
4 which was the language of withdrawal, I believe, or
5 the extension of the State's proposed charge.

6 Q. Okay. The record's going to speak for itself.

7 A. Absolutely. Yes, sir.

8 Q. I mean if it's in there. I just don't recall
9 finding it, that's all.

10 A. Understood.

11 Q. All right. Did you discuss the Evans audio with
12 Mr. Young?

13 A. Yes, sir.

14 Q. And y'all sat and looked over it together?

15 A. Yes, sir.

16 Q. And I believe you testified that the State's
17 position was nothing he said in there is going to
18 come in against him.

19 A. I believe that's correct. I remember them not
20 seeking to put those statements in.

21 Q. And I believe they also agreed not to introduce
22 the gun ---

23 A. Correct.

24 Q. --- itself.

25 A. Yes, sir.

1 Q. Did you discuss with Mr. Young, the possibility
2 of his wanting that to come into evidence?

3 A. The -- well, so yes. You know, we certainly had
4 Evans subpoenaed and, you know, considered playing
5 all of the recorded statement, all two hours of it.
6 I do remember he and I talking about that, and I
7 think we, you know, after questioning Evans, who
8 readily admitted to making the promises, we chose
9 not to.

10 Q. Okay. And, I believe, another officer also
11 admitted the same promise was made or roughly the
12 same.

13 A. I think so, yes, sir.

14 Q. Bromage?

15 A. Yes, sir. Okay, Investigator Bromage, yes, sir.
16 I do recall that as well.

17 Q. And he confirmed what Evans said?

18 A. Yes, sir.

19 Q. Okay. And what Mr. Young said?

20 A. Yes, sir.

21 Q. Okay. Thank you.

22 A. Yes, sir.

23 THE COURT: Anything else?

24 MS. DIXON: Nothing further.

25 THE COURT: All right. Thank you. Thank

1 | you so much, Mr. Ferguson.
2 | MR. FERGUSON: Absolutely.
3 | MS. DIXON: Your Honor, we would ask can he
4 | just remain until after they present their case,
5 | just in case there's something that comes up?
6 | THE COURT: Yes.
7 | MR. FERGUSON: Yes, sir. I couldn't get
8 | out of here fast enough.
9 | THE COURT: (Chuckles)
10 | MR. FERGUSON: I'll be in the back. Yes,
11 | sir.
12 | MR. WISE: And we have Kat Hudgins.
13 | THE COURT: Yes, sir. You may call your
14 | next witness.
15 | MR. WISE: I think she's going to be on big
16 | screen.
17 | THE COURT: Oh, this is the Webex?
18 | MS. DIXON: Yes, Your Honor.
19 | THE COURT: All right. Let's just stand
20 | down for a minute and get that done. Y'all going to
21 | bring Mr. Jones back up. Come on up Mr. Jones and
22 | we'll take a break for a minute and get that
23 | straight, okay?
24 | (COURT TAKES A BRIEF RECESS)
25 | THE COURT: Are we ready to proceed with

1 the next witness?

2 MS. DIXON: The State's ready, Your Honor.

3 MR. WISE: We are.

4 THE COURT: Okay. Great. You want to
5 swear the witness in?

6 (WITNESS SWORN APPEARING VIA WEBEX)

7 Katherine Hudgins,
8 having been duly sworn,
9 testifies as follows:

10 * * * * *

11 MADAM CLERK: Ma'am, can you state your
12 name for the record and spell it please?

13 THE WITNESS: Katherine Hudgins, it's K-A-
14 T-H-E-R-I-N-E and H-U-D-G-I-N-S.

15 **DIRECT EXAMINATION OF KATHERINE HUDGINS**

16 BY MR. WISE:

17 Q. All right, Ms. Hudgins, where are you employed?

18 A. I'm at the South Carolina Commission on Indigent
19 Defense in the Appellate division.

20 Q. And how long have you been employed there?

21 A. I started here in 2006.

22 Q. All right. And did you have a case or handle a
23 case that was The State vs. Aaron Young, Sr.

24 A. I did.

25 Q. All right. Did the case present any unusual or

1 interesting issues?
2 A. Yes, it did.
3 Q. All right. And what were they?
4 A. It seemed that the State was stretching the
5 ideas of mutual combat and accomplice liability and
6 transferred intent and assigning the murder charge
7 to Mr. Young, Sr.
8 Q. Okay.
9 A. I've never seen a stretch like that before.
10 Q. Okay. All right. Which gets to my next
11 question. Did you do some research on whether or
12 not that had been done before in South Carolina?
13 A. I did.
14 Q. All right. And what did you find?
15 A. I -- my research didn't turn up any case where
16 this sort of hybrid liability was used.
17 Q. All right. And on the -- were you aware of the
18 case of Aaron Young, Jr. that was slightly ahead of
19 you in the Appellate process?
20 A. I believe I was.
21 Q. All right. And that was his son who had the
22 same case?
23 A. Correct.
24 Q. All right. Now ultimately the Court of Appeals,
25 I believe, in an unpublished opinion ruled against

1 you basically citing to the error in Young Jr.'s
2 case.

3 A. That's correct.

4 Q. All right. And did you file a petition to the
5 South Carolina Supreme Court after that?

6 A. I did.

7 Q. All right. Well, first of all did you file a
8 petition for rehearing?

9 A. I did.

10 Q. All right. The -- were you aware that the
11 Supreme Court had granted cert in the Aaron Young,
12 Jr. case.

13 A. I'm not sure if I was aware of that or not?

14 Q. All right. Did you ultimately become aware?

15 A. Yes.

16 Q. All right. And do you recall when you became
17 aware?

18 A. I don't.

19 Q. All right. If you were -- what was the basis of
20 the Court of Appeals ruling, and do you remember
21 whether it was any different from the Supreme Court
22 ruling in Aaron Young, Jr.?

23 A. You know, I would have to go back. I did not
24 review Aaron Young, Jr. this morning.

25 Q. Mmm-hmm.

1 A. I probably should have, but I didn't. So, it's
2 hard for me to answer that question.

3 Q. Okay. Were you aware that the Supreme Court in
4 Aaron Young, Jr. basically affirmed the conviction
5 by stating -- let me get to it -- make sure I'm
6 getting the majority opinion -- after reciting
7 several other cases, in the Aaron Young, Jr. case
8 they said as a result we extend our mutual combat
9 jurisprudence to permit finding all mutual
10 combatants criminally liable in situations where an
11 innocent bystander is killed by one of the
12 cohabitants -- or combatants. Do you remember that
13 from the case?

14 A. I do now that you've refreshed my memory.

15 Q. Okay. And did that extension raise any ex post
16 facto concerns?

17 A. It did not at the time. It probably should
18 have. It's really an interesting issue.

19 Q. All right. When a Court -- are you familiar
20 with the case The State vs. Horne from back in 1980
21 something where the Court extended a homicide to
22 include the killing of a viable fetus?

23 A. Generally I'm aware of it.

24 Q. Okay. Well, when the Court extends a concept,
25 what does that mean to you as whether or not that

1 concept has been in existence before?

2 A. Well, if it's extended then obviously it
3 probably had not been in existence before.

4 Q. And what is the basic premise of ex post facto?

5 A. That it wasn't in existence before, then it
6 can't be applied retroactively, basically.

7 Q. And I believe if you look at the dates, you had
8 a cert petition pending before the South Carolina
9 Supreme Court when the Young, Jr. case was decided,
10 and it was decided on February the 5th of 2020.

11 A. That sounds correct.

12 Q. Okay. Did you consider calling attention to the
13 South Carolina Supreme Court in your amended --
14 back up a second. Did you consider doing an amended
15 petition of the cert calling attention to the South
16 Carolina Supreme Court that they were violating the
17 ex post facto provisions of the state and federal
18 constitutions?

19 A. It didn't even occur to me.

20 Q. Okay. As you sit here today, what is your
21 opinion on whether or not that would have been a
22 prudent thing to do?

23 A. I think it would have been a prudent thing to
24 do, and it probably -- I mean in all likelihood, I
25 would have hoped that the correct Court would have

1 granted my cert petition rather than denied it, if I
2 had amended that cert petition.

3 Q. Okay. All right. Thank you very much.

4 THE COURT: Cross-examination?

5 MS. DIXON: The State has no questions,
6 Your Honor.

7 THE COURT: All right. Okay. Thank you so
8 much, ma'am. Have a great day.

9 THE WITNESS: Thank you.

10 THE COURT: All right. Counsel, you can
11 call your next witness.

12 MR. WISE: Just one second. I call Aaron
13 Young, Sr.

14 THE COURT: All right. Come on around Mr.
15 Young.

16 (WITNESS IS SWORN)

17 Aaron Scott Young, Sr.,
18 having been duly sworn,
19 testifies as follows:

20 * * * * *

21 MADAM CLERK: Okay. Could you state the
22 name for the record?

23 THE WITNESS: Aaron S. Young, Sr.

24 MR. WISE: All right. Can you speak up
25 just a little bit?

1 THE WITNESS: All right.

2 MR. WISE: Not to get closer, just raise
3 your voice level a little bit.

4 THE WITNESS: No problem. No problem.

5 **DIRECT EXAMINATION OF AARON YOUNG, SR.**

6 BY MR. WISE:

7 Q. Mr. Young, you were convicted in Beaufort County
8 of this mutual combat shooting years ago, correct?

9 A. Yes, sir.

10 Q. All right. And first of all, you heard Mr.
11 Ferguson testify that you and he met a good many
12 times?

13 A. Yes, sir.

14 Q. Is that correct?

15 A. Yes, sir.

16 Q. All right. So you're not here complaining about
17 he didn't prepare for your case?

18 A. No.

19 Q. As a general concept?

20 A. No, sir.

21 Q. He's subpoenaed the witnesses you wanted and Mr.
22 Evans, and the psychologist in all this, correct?

23 A. Yes, sir.

24 Q. Okay. Now did you have a discussion with him
25 about introducing, excuse me, the videotape of --

1 well, it wasn't a videotape, the audio of your
2 conversation with Mr. Evans?

3 A. Yes, sir.

4 Q. And what did y'all decide on that?

5 A. It was basically trying to create a defense for
6 me and my son.

7 Q. So when you say create a defense for you and
8 your son, exactly what did you mean?

9 A. Well, at that point in time, it was a bunch of
10 evidence that wasn't part of our discovery.

11 Q. Mmm-hmm.

12 A. They'd of came into light later on.

13 Q. And that's the evidence that came to light right
14 after or during your first trial, when all three of
15 you were tried together?

16 A. Yes, sir.

17 Q. Okay. All right. And what did you what did you
18 learn in that -- well, I don't know if you learned
19 it, because you were there --- what did your counsel
20 learn in that video?

21 A. Well, at that point in time, we got together and
22 decided that were going to retain a expert.

23 Q. Mmm-hmm.

24 A. And we were trying to go over the facts of
25 letting them know that I was coerced in a situation

1 as far as getting -- obtaining a weapon.

2 Q. Mmm-hmm.

3 A. With promises from the sheriff department for
4 lenancy for me and my son.

5 Q. All right. So when you say you and your son,
6 exactly what was the promise made to you?

7 A. If I was to give up a weapon, and the Beaufort
8 County Sheriff's Department would do the ballistics
9 on the weapon, then they could determine which
10 bullet was fired from the weapons at hand that would
11 exonerate me and my son.

12 Q. All right.

13 A. From any charges.

14 Q. All right. And I mean you were there. Were you
15 confident -- what was your opinion as to whether --
16 what the weapon would show?

17 A. I had no problem retaining a weapon and handing
18 it over, because I know very well that me and my son
19 didn't participate in any murder.

20 Q. Okay. All right. Now, during the trial, you --
21 in working on this case with me you have educated
22 yourself on some legal principles.

23 A. Yes, sir.

24 Q. That you previously did not know?

25 A. Yes, sir.

1 Q. And do you now understand the nature of ex post
2 facto law?

3 A. Yes, sir.

4 Q. And was that anything you understood at the
5 trial?

6 A. No, sir. It wasn't.

7 Q. All right. And what do you understand now about
8 ex post facto?

9 A. Well, at the time, we had no idea what the ex
10 post facto violation was, but now, being
11 incarcerated and looking over laws and cases, I've
12 learned that certain laws can't be extended to fit a
13 circumstance to force a conviction.

14 Q. Mmm-hmm.

15 A. And in our situation, it wasn't any mutual
16 combat at all.

17 Q. Mmm-hmm.

18 A. The State pretty much created a mutual combat
19 instance and extended our situation to force a
20 conviction.

21 Q. Okay. All right. In your testimony, you
22 actually testified you never found Mr. Robinson.

23 A. We never saw Mr. Robinson. He was hiding.

24 Q. All right. And also, you heard the 911 tape at
25 trial, and you heard it in the courtroom today, and

1 do you think that the hearsay testimony about
2 shooting at each other hurt your case?
3 A. Yes, it damaged me, me and my son ---
4 Q. Yeah.
5 A. --- tremendously.
6 Q. Right. Should have been an objection raised to
7 that you believe?
8 A. Yes, sir.
9 Q. Okay. And you also in trial heard testimony
10 saying that Mr. Robinson allegedly made.
11 A. Can you repeat the question?
12 Q. During the trial, Mr. Robinson also made some
13 statements, well, Mr. Robinson didn't testify ---
14 A. Exactly.
15 Q. --- is the problem. Some witnesses testified as
16 to what Mr. Robinson said.
17 A. Well, at trial we didn't have any witnesses that
18 came forth.
19 Q. Right.
20 A. It was just basically a 911 tape that was
21 admitted, and the courts pretty much pursued from
22 off of that.
23 Q. And I believe that there was a statement from --
24 I can't remember her name now -- the lady whose
25 house Mr. Robinson went to.

1 A. Ms. Charlese Mitchell.
2 Q. Right. And she testified to things Mr. Robinson
3 said.
4 A. Yes, sir.
5 Q. And do you think they hurt your case?
6 A. Well, it kind of -- it was like the splitting
7 the baby in that situation, because she also
8 testified later on in trial that she knowed -- she
9 testified to us leaving ten minutes prior to the
10 final shot.
11 Q. Mmm-hmm.
12 A. So, it kind of like split the baby ---
13 Q. Right.
14 A. --- around the whole situation.
15 Q. And you knew Mr. Robinson, didn't you?
16 A. Yes, sir.
17 Q. And how long had you known him?
18 A. We were pretty much classmates.
19 Q. All right.
20 A. Ever since grade school.
21 Q. You know his reputation in the community?
22 A. He was the neighborhood terrorist.
23 Q. All right. And if we -- if you'd been able to
24 exclude the hearsay statements from Mr. Robinson and
25 the hearsay statement on the 911 call, do you think

1 there's a reasonable chance then you could have won
2 that case?

3 A. Yes, sir. I do.

4 Q. Thank you. Answer any questions the State may
5 have.

6 THE COURT: Cross-examination?

7 CROSS-EXAMINATION OF AARON YOUNG, SR.

8 BY MS. DIXON:

9 Q. How are you doing today, Mr. Young?

10 A. I'm fine. And you?

11 Q. Good. Thank you. I just want to make sure your
12 lawyer did discuss with you the type of relief that
13 could be available today.

14 A. Yes, ma'am.

15 Q. And so you understand that if you get relief
16 today you're charges don't go away. You understand
17 that?

18 A. Yes, ma'am.

19 Q. So, the State can come back and retry you for
20 murder?

21 A. Yes, ma'am.

22 MR. WISE: And there would be one exception
23 to that to clarify, if I may. I don't mean to --
24 well, but on the ex post facto, that would end that
25 case. You couldn't retry him on that.

1 THE COURT: All right. Well, you can clear
2 that up, and I'll note that for the record, sir. Go
3 ahead.

4 BY MS. DIXON:

5 Q. And if the State re-tries you for murder, do you
6 know if you are convicted what the maximum sentence
7 would be could be?

8 A. Can you say that one more time? I got
9 sidetracked.

10 Q. Sure, absolutely. If the State -- if you were
11 to get relief today and the State came back and re-
12 tried you for murder, and the jury convicted you, do
13 you know what the maximum sentence could be?

14 A. Yes, ma'am.

15 Q. What is that?

16 A. Thirty to life.

17 Q. Thirty to life. Okay, and what are you serving?

18 A. Thirty-year sentence, mandatory minimum.

19 Q. Thirty years. So you got the minimum sentence
20 for murder that you can have right now.

21 A. Yes, ma'am.

22 Q. And knowing that, you wish to proceed?

23 A. Yes, ma'am.

24 MS. DIXON: If I could have just a moment,
25 Your Honor.

1 BY MS. DIXON:

2 Q. Just want to confirm you did testify on direct
3 examination that your lawyer was very prepared?

4 A. To ---

5 Q. He was prepared?

6 A. Yeah. To a certain degrees, yes, ma'am.

7 Q. And he looked into this mutual combat issue?

8 A. Well, as far as the actual meetings and
9 appointments, yeah, but as -- certain things that
10 should have been objected to at trial, you know, I
11 feel that he pretty much dropped the ball on certain
12 issues, but at the same time, I can't complain about
13 the appointments, 'cause appointments were made.

14 Q. Okay. Do you agree that he did extensive
15 research on this mutual combat issue?

16 A. No, I don't.

17 Q. You don't agree. Do you recall him discussing
18 it at trial?

19 A. Well, we went over the actual mutual combat, but
20 the law wasn't prevalent with me at the time. So,
21 me being a layman, I didn't understand the court
22 system. So I kinda like went along with everything
23 that he said, not knowing that it was certain things
24 that should have been objected to at trial at trial.
25 So, I was depending on the courts to uphold my due

1 process, and I pretty much got screwed in a sense,
2 in my opinion.

3 MS. DIXON: Nothing further, Your Honor.

4 THE COURT: All right. Yes, sir.

5 **REDIRECT EXAMINATION BY MR. WISE:**

6 Q. Did you and Mr. Ferguson ever discuss the
7 concept of withdrawal from mutual combat?

8 A. No, sir.

9 Q. Okay. Thank you. That's all I have.

10 THE COURT: All right. Anything else?

11 MS. DIXON: Nothing further.

12 THE COURT: All right. Thank you, Mr.
13 Young.

14 MR. WISE: And with that, the Applicant
15 rests, Your Honor.

16 THE COURT: All right. You can call your
17 first witness.

18 MS. DIXON: Your Honor, we would like to
19 recall Mr. Ferguson just for a very brief point.

20 THE COURT: All right. Mr. Ferguson, come
21 on around, sir. All right, Mr. Ferguson, you're
22 still under oath.

23 MR. FERGUSON: Yes, sir, Your Honor.

24 **RECALL DIRECT EXAMINATION OF ROBERT FERGUSON**

25 BY MS. DIXON:

1 Q. How are you doing?

2 A. Hey. Doing well, thank you, ma'am.

3 Q. And just briefly, you did testify earlier that
4 you did a lot of research on this mutual combat
5 issue?

6 A. Yes, ma'am.

7 Q. Do you recall whether you knew to quash the
8 indictment?

9 A. Yes, ma'am, we did.

10 Q. Was it -- what was your primary argument on
11 that?

12 A. Based on, you know, this novel application of
13 multiple theories of law.

14 Q. Okay. So that was presented to the trial court?

15 A. Yes, ma'am.

16 Q. On a motion to indict -- I'm sorry, on a motion
17 to quash the indictment?

18 A. Yes, ma'am.

19 Q. The Court denied that motion?

20 A. It did.

21 Q. Okay. And ---

22 MS. DIXON: Nothing further, Your Honor.

23 THE COURT: All right. Anything on cross.

24 **RECALL CROSS-EXAMINATION OF ROBERT FERGUSON**

25 BY MR. WISE:

1 Q. Just one quick question, and I believe we
2 covered this in your direct testimony. So you made
3 a motion to quash and on the theory that this hadn't
4 been done in South Carolina before?

5 A. I don't recall ---

6 Q. In essence?

7 A. Yeah, well, I don't recall. I recall we made a
8 motion to quash the indictment. I can't recite the
9 specific basis, but I know we were challenging the
10 State's legal theory.

11 Q. All right. Did you do a written motion?

12 A. I think we did do a written motion that was more
13 notice, and then we did an oral motion. I don't
14 think we did a memo -- well, I know I didn't
15 personally do a memorandum in support of that issue.
16 I know we argued orally about it. I want to say at
17 multiple proceedings, but I can't recall sitting
18 here.

19 Q. But your motion to quash dealt with the fact
20 that you can't extend mutual combat to include an
21 innocent third person?

22 A. Yes, sir, essentially.

23 Q. And I think Mr. Vaux made a great statement
24 yesterday when he said that what you had here is you
25 had mutual combat and the hand of one hand of all,

1 and the Supreme Court married them.

2 A. Yes, sir.

3 Q. Would that be an accurate way of looking at it?

4 A. I think that's a fair way to look at it, yes,
5 sir.

6 Q. Okay. And y'all basically tried to prevent that
7 marriage on the motions below?

8 A. We were trying to prevent the State from
9 proceeding on a theory that we didn't really think
10 had a basis in South Carolina law.

11 Q. Thank you.

12 A. All right. Yes, sir.

13 THE COURT: Anything else?

14 MS. DIXON: Just quickly.

15 THE WITNESS: Sure.

16 **RECALL REDIRECT EXAMINATION OF ROBERT FERGUSON**

17 BY MS. DIXON:

18 Q. You would agree that all these arguments were
19 presented to the trial court?

20 A. I do, yes, ma'am.

21 Q. And affirmed by the Court of Appeals?

22 A. I assume. I wasn't involved in that process.

23 Q. Okay. And also affirmed by the Supreme Court?

24 A. That's my understanding.

25 Q. Well, I guess not in this case, as ---

1 A. Okay. I don't know about the appellate process,
2 ma'am.

3 Q. Gotcha. Okay, nothing further.

4 A. All right.

5 Q. Thank you.

6 THE COURT: Thank you, sir.

7 THE WITNESS: Absolutely.

8 THE COURT: Have a great day.

9 THE WITNESS: Yes, sir.

10 THE COURT: Can he be excused?

11 MS. DIXON: Yes, sir.

12 THE COURT: All right.

13 THE WITNESS: Thank you.

14 THE COURT: Great. Have a good one.

15 Attorney General, you can call your next
16 witness.

17 MS. DIXON: We would call Sean Thornton.

18 THE COURT: All right.

19 (WITNESS IS SWORN)

20 Sean Thornton,
21 having been duly sworn,
22 testifies as follows:

23 * * * * *

24 MADAM CLERK: Have a seat, and state for
25 the record your name and spell please.

1 THE WITNESS: My name is Sean Thornton.
2 First name is S-E-A-N, last name is T-H-O-R-N-T-O-N.

3 DIRECT EXAMINATION OF SEAN THORNTON

4 BY MS. DIXON:

5 Q. Mr. Thornton, how are you today?

6 A. Fine.

7 Q. And just going back, there's been some
8 discussion today about whether the Court was asked
9 to charge a withdrawal from mutual combat charge.
10 Do you recall that being something discussed?

11 A. I do, ma'am. I know it was done in a charge
12 conference, and I went back through, as Mr. Wise was
13 asking questions of Mr. Ferguson, I kind of went
14 back through the record. I don't see anything in
15 the record as far as a formal request or objection
16 to it, other than the fact that he did, I think, say
17 I think in right before he charged I believe that
18 Judge Cooper said other than the, you know,
19 objections already discussed, is there anything
20 else?

21 I will say that on the withdrawal charge,
22 and you'll have to forgive me, obviously I tried
23 this case a total of three times, Tyrone Robinson,
24 then Mr. Young, Jr. and Mr. Young, Sr. And I say I
25 tried it, obviously my boss, the solicitor, was lead

1 counsel, but I assisted each time.

2 In one of the transcripts, and I'm thinking
3 because I didn't see it today in Mr. Young, Sr.'s,
4 it may have been Mr. Young, Jr.'s transcript, the
5 Judge actually specifically mentions the withdrawal
6 charge and says I'm not charging that, and I didn't
7 charge it in the other one either, and I think I
8 have good reasons for that. So I know that's in the
9 other transcript, because I remember reading it when
10 we were talking about the case yesterday, I was
11 going back through it. So I know for a fact it was
12 brought up in both of the trials. Again, this one I
13 believe it was during the charge conference. I
14 don't see it anywhere in addition to what we would
15 have discussed in charge conference, but I am
16 confident that it was discussed and that the Judge
17 simply refused to -- refused to charge it. Our
18 argument was that they in fact were not -- they were
19 not retreating or withdrawing that would be required
20 under the stat -- you know, one of the things that's
21 required under mutual combat is that either by word
22 or by deed that you communicate your intent to
23 withdraw from the conflict to the opposing party.
24 And in our position was and our [argument] was that
25 they had not done that, that this was a running

Commented [D1]: Ony

1 issue that as there was testimony yesterday,
2 occurred on three roads. And for -- I think that
3 Mr. Vaux is probably right, obviously he's from this
4 area, it may have been Bryant Road. For the life of
5 me, I was thinking Wild Horse was one of the -- it
6 was on Wild Horse somewhere, Wild Horse Lane, but I
7 know it was three separate locations. One of them
8 being the location where Mr. Young, Sr. was driving
9 the car, Mr. Young, Jr. was in the vehicle with the
10 -- what I would call a MAC-10 -- what looked like a
11 MAC-10 submachine gun and that he tried to shoot
12 him, but the gun jammed. It wasn't getting put
13 together right, something about it jammed up, or
14 they would have done it there, so. Because there
15 was three separate things and our position was
16 they'd shot up the car to try to lure him out, and
17 then as they turned the corner, there was testimony
18 about the model we used. The FBI came down from
19 Quantico and did a scale model, which I thought was
20 helpful for the jury to be able to see it, and
21 basically, as they drove down, I want to say it was
22 Allen Road, and then turned, and that, maybe that's
23 Wild Horse. But anyway, they turned onto another
24 road, and as they're driving out, Tyrone Robinson
25 then returns fire. This is not something where they

1 were gone, you know, had gone home to eat dinner and
2 then came back and then there was something. I mean
3 this is all an on-going process, and they had
4 basically chased him, you know, through three
5 different scenes once he left their house.

6 Q. Gotcha. And just to clarify for the record, did
7 the same judge preside over all of these trials?

8 A. Yes, ma'am, Judge Tommy Cooper. He was the
9 judge originally when we were trying all of them
10 together. When the -- when we joined in the motion
11 for severance, because of the tape that got given to
12 us and then turned over after the judge had already
13 started with the pre-trial hearings, once it got
14 severed, my recollection is that Judge Cooper did
15 all three of these separate trials as well.

16 Q. Okay. And then going back to there's been some
17 testimony today that trial counsel should have moved
18 certain statements by the Defendant into evidence at
19 trial.

20 A. Mmm-hmm.

21 Q. Do you recall as a result of the stuff that came
22 out at the Jackson v. Denno hearing pretrial, did
23 the State do anything differently than trying ---

24 A. We actually did this well before the Denno
25 hearing. I actually spoke to Mr. Wise about this

1 yesterday afternoon. Pretty much immediately that
2 once we found out that what Mr. Young, Sr. had said
3 was in fact correct, that he had been made promises
4 that obviously we were unaware of because we didn't
5 have the tape yet. Once we got the tape and found
6 out that what he said was in fact accurate, the
7 Solicitor and I right then decided we would not seek
8 to introduce the actual pistol that he led them to
9 as a result of them saying we want -- obviously law
10 enforcement doesn't have the authority to charge or
11 -- well charge, but not indict or not indict
12 somebody, that's left to the Solicitor's Office, but
13 we felt like it would be inappropriate to attempt to
14 introduce the gun as to Mr. Young, Sr. So we did
15 not -- we never sought to introduce it against him
16 once the cases were severed. We didn't wait on a
17 Denno for that, and we also didn't try to -- we had
18 already agreed not to introduce any of the
19 statements. He had already given a great deal of
20 the pre-story. So anything he said once they made
21 that promise to him then on we didn't -- my
22 recollection is we didn't even attempt to try to
23 introduce it. So in my opinion, had Mr. Ferguson --
24 had they gone into a great extent of detail about
25 trying to introduce all that recorded statements,

1 then that would have opened the door for us, in my
2 opinion, to then introduce the firearm. Which would
3 have been bad in my opinion for Mr. Young, Sr. I
4 mean, it was -- it looks like something off of
5 Scarface. I mean it looks like a MAC-10. I don't
6 think it was -- it wasn't a MAC-10, but it had an
7 extended clip that held about 33 rounds. It had a
8 flash suppressor on the end of it, screwed into it,
9 which made it look like a silencer. It wasn't. It
10 was a flash suppressor, but the suppressor was about
11 that long, so. I mean it looked like a machine
12 pistol with an extended magazine on it which, as I'm
13 sure Mr. Wise knows, anytime that goes in front of a
14 jury, that tends to be bad for the Defendant,
15 because it doesn't look like grandpa's hunting
16 rifle. So I think he got a benefit from not seeking
17 to introduce all those things. And they did get
18 into it enough to -- so that they showed that he had
19 been made promises which we obviously did not object
20 to, because he had been. He was telling the truth
21 about that part.

22 Q. Gotcha. Nothing further.

23 THE COURT: Cross-examination?

24 MR. WISE: Just a few questions, yes, sir.

25 CROSS-EXAMINATION OF SEAN THORNTON

1 BY MR. WISE:

2 Q. You don't have to worry about preserving the
3 record, so I may be testing your knowledge here.

4 A. Okay. Well, I'll go as best I can, but I will
5 say at the outset, Mr. Wise, if anything I say
6 differs from the record, then by all means go with
7 the record.

8 Q. I understand.

9 A. I think it's been about eight years ago.

10 Q. I gather from what you said, that y'all had a
11 charge conference off the record?

12 A. Yes, sir. I -- yes, sir. We had a -- I
13 remember specifically, and I was trying to think. I
14 heard Mr. -- obviously, I was in here and I heard
15 Mr. Ferguson testify. I don't remember whether they
16 had a written motion on the charge or not. And I
17 say that, I know there was one done, the problem is
18 that he and Mr. Vaux were working together on the
19 outset, and then we split the trials. I know
20 somebody had one. I can't -- I couldn't swear to
21 you today that it was Mr. Ferguson, but I do know
22 that we had a charge conference, and I do know that
23 in each trial they wanted withdrawal.

24 Q. All right. And you would concede that what is
25 said off the record, if it's not objected to on the

1 record, doesn't get preserved?

2 A. Yes, sir, I understand. And you've now reached
3 the extent of my knowledge on appellate review, Mr.
4 Vau -- Mr. Wise, yes, sir.

5 Q. I won't test you any further. So how long does
6 it take a person to withdraw from mutual combat?

7 A. I don't know that there is any definitive -- any
8 definitive timeframe, but I think there has to be
9 some sort of communication by word or deed that they
10 intend to withdraw. And our position was that they
11 had not done this, that this was simply a continuing
12 -- in other words, our position was -- I think what
13 we argued to the Judge was that, you know, this
14 started at their house. They cha -- they, and I
15 apologize, I don't mean to play the pronoun game.
16 Mr. Young, Sr. and Mr. Young, Jr. then went after
17 Mr. Robinson, which they both gave statements to
18 indicate that they went after him, and that they
19 were, you know, going to do him in if they found
20 him. There was certainly evidence that they had
21 crossed paths on -- and again, Mr. Vaux said Bryant
22 Road, and I have no reason to dispute him, I don't
23 live on the on Hilton Head, so I don't know.

24 Q. Let me refresh your memory. Wild Horse Road is
25 where the Youngs live.

1 A. Okay. That's what it was, I apologize. So I
2 knew that was the other -- I knew that name for some
3 reason. Anyway, that they had crossed paths on
4 another road, separate and apart from that first
5 situation, and that they were looking for him. And
6 I believe that their statements indicated they were
7 looking for him. And then they went to Allen Road
8 looking for him. So the fact that they had shot the
9 car up and turned a corner in our opinion and what
10 we argued to the State was not, was not evidence of
11 them withdrawing.

12 Q. And just as easily the Defendants could argue
13 shooting the car up and then leaving was evidence of
14 a withdrawal?

15 A. I mean they could argue that, but my position
16 would be they didn't leave.

17 Q. Well ---

18 A. I mean they were driving on another road that
19 was right in front of Allen Road, and they weren't
20 -- they didn't get far enough that Tyrone didn't
21 shoot back at them with a pistol.

22 Q. All right. Now Tyrone Robinson didn't have a
23 good reputation.

24 A. I will say -- to be fair, I will tell you
25 that ---

1 THE COURT: Hold on. Hold on.

2 MS. DIXON: I'm going to object. This is
3 getting outside the scope. This is I'm not sure
4 relevant to the questions before the Court today.

5 THE COURT: I'll overrule your objection.
6 Go ahead. You can answer the question if you know,
7 sir.

8 A. I don't know personally what Mr. Robinson's
9 reputation is, as far as me personally. I do know
10 that what Mr. Young, Sr. had indicated was that the
11 same thing that he testified to today was that they
12 had had numerous problems with him in the past.

13 Q. All right. And other people had, too, as far
14 as ---

15 A. That's -- as far as what he has indicated, yes,
16 sir. I think that's consistent with the statement
17 he gave originally.

18 Q. And you will agree that a jury charge for the
19 defense, the evidence is looked at in the light most
20 favorable to the defense to see if the jury charge
21 would be given.

22 A. I think that if a -- I think if the De -- I
23 don't know that I'd phrase it that way, but I'd
24 phrase it close. What I would say is my
25 understanding is that if a defense or the State,

1 either one asks for it, if there's any evidence that
2 the Judge feels supports it, that I think it's
3 appropriate to charge.

4 Q. Okay. Good enough. Thank you.

5 THE COURT: Anything else?

6 MS. DIXON: Nothing further.

7 THE COURT: All right. Thank you,
8 Solicitor.

9 THE WITNESS: Thank you. Yes, sir.

10 MS. DIXON: Your Honor?

11 THE COURT: Yes, ma'am.

12 MS. DIXON: We have no other witnesses,
13 Your Honor. I don't know if you want closing
14 arguments?

15 THE COURT: Yeah. What I want to do is I
16 want to go ahead and if y'all want to present any
17 arguments, I want to go ahead and hear them. But
18 for the G argument that's on page three of the
19 Amended -- and actually, this is the Court's and it
20 needs to be filed, but this Amended Application for
21 Post Conviction Relief that I was handed today, want
22 it to get filed today. G if appellate counsel is
23 found not to have been ineffective in failing to
24 raise the ex post facto issue, the decision of the
25 South Carolina Supreme Court and extend the law as

1 to mutual combat to include an innocent third party
2 constitutes a new law.

3 As I understand it, each side would like
4 ten days to provide me their thoughts on that?

5 MS. DIXON: Yes, Your Honor.

6 MR. WISE: Yes, that -- and like I say, I
7 put that in simply because I heard that argument
8 yesterday, and I didn't want to ---

9 THE COURT: That's fine. I going to give
10 this to the Clerk, so that needs to be filed. The
11 memorandum or whatever you want to provide me
12 concerning that needs to be provided, I guess, no
13 later than Monday a week, okay? That's the 27th.

14 MR. WISE: I know that I'm on vacation that
15 week, that's why I know that date.

16 MS. DIXON: Oh, okay.

17 THE COURT: And I only want the memorandum
18 to concern that sub-issue. As it relates to other
19 matters, the closings or arguments that you want to
20 present, I'm happy to -- I want to hear from counsel
21 on those today, and I'm happy to hear from -- from
22 the State or from Mr. Wise, yes, sir.

23 MR. WISE: We're the moving party, so we'll
24 go first.

25 THE COURT: All right. That's fine.

CLOSING ARGUMENTS BY MR. WISE

MR. WISE: As to ex post facto, Your Honor, I'm going to in addition to the Horne Case which was passed up to the Court yesterday, I want to pass up the US Supreme Court Case of Bouie vs. City of Columbia. And I apologize for not having another copy, and I thought I had stapled this from the central part of it, but it's 84 S.C. 1697, and let me see if I can get the U.S. cite.

MS. DIXON: Okay. So United States vs. ---

MR. WISE: It's 378 U.S. 347. Pass that up to the Court. That case clearly says that even when the South Carolina Supreme Court extends the concept or extends the criminal code, it violates ex post facto laws, and clearly here it does. Everybody in this courtroom that's testified just about has said that the South Carolina Supreme Court said they extended the concept of mutual combat. And when you extend something, you put it where it'd never been before. And so if they extended the law, which they said they did, both the dissent and the majority say we're extending mutual combat law, they are then making criminal as it relates to the unfortunate young man who died, as to Mr. Young and his son, that had never been done before. And that violates

1 ex post facto. It seems very clear to me about
2 that. And granted appellant defendant doesn't have
3 a right to appellate counsel filing a petition for
4 certain all that, but once the decision is made to
5 file that petition for cert, it has to be done
6 competently. And when the Aaron Young, Jr. case
7 came down, she actually admitted that she should
8 have re-done her petition for cert and said you're
9 making this ex post facto against my client, and
10 that's not proper. And she was even -- Ms. Hudgins
11 was even frank enough to admit that had she done it,
12 she would have hoped the Supreme Court would have
13 corrected that error and reversed the conviction,
14 but announce they were extending it forward just as
15 they did in Horne back in the 1980s. So I think
16 that's to be pretty clear.

17 As to the issue of our 911 calls, I want to
18 pass up three cases that are from different
19 jurisdictions because it's outside of South
20 Carolina. And I can represent to the Court that
21 those cases were representative of many cases I
22 found in this country simply putting into Westlaw
23 Crawford and 911. And what you find from reading
24 those cases is not every 911 call is admissible
25 period. Many are. Many are not. And the Courts

1 seem to break it down in this category. When
2 someone is calling for help, that's not testimonial.
3 When someone is reporting a crime, that is
4 testimonial. And that's exactly what was happening
5 here, because these people were reporting a crime of
6 gunshots being fired. And to let in under those
7 circumstances testimony about the cars shooting at
8 one another, that becomes a violation of Crawford
9 decision. They needed to bring the person in who
10 saw the cars shooting each other. And to point out
11 in this case why it's even a little more egregious,
12 one of the cars was clearly not a Lexus, was clearly
13 not the car of Tyrone Robinson, because it was an
14 Acura, not a Lexus. Whether the -- whoever saw it
15 was mistaken, I have no clue, nor does this Court,
16 nor does that jury in Mr. Young's case from many
17 years ago. I also point out that it was quite
18 obvious to me that defense counsel was aware of the
19 need for a withdrawal charge to the jury. So that
20 he could argue accurately or preserve it for appeal.
21 The testimony is clear that if there was an
22 objection raised to Judge Cooper on his failure to
23 charge withdrawal from mutual combat, then it's not
24 on the record, it was done off the record, and trial
25 counsel was ineffective in failing to preserve that

1 issue for appellate review. Justice Hearn clearly
2 would have granted relief on that, from her opinion,
3 because she says right out the trial judge erred in
4 failing to charge withdrawal and that was in the
5 Aaron Young's case. And apparently, I get the
6 impression there was a request to the charge in that
7 case. But, you know, then you can't preserve it if
8 it's not objected to on appeal. I point that out.
9 Second and lastly, I want to point out that, you
10 know, in King the South Carolina Supreme Court said
11 attempted murder is a specific intent crime, but you
12 can't do it implied. It's that the indictment in
13 this case, which led to the malice that was
14 expressed or implied, would have been quashed under
15 King as it existed there. There's no question about
16 that. But I want to point out one thing to this
17 Court that, again, this is not difficult research to
18 do. In 1973, there was an AR adaptation titled What
19 Constitutes Attempted Murder and 54 AR.3d 612. It's
20 an easy AR to find. It talks about attempted murder
21 being a specific intent crime. If you go read the
22 King case, it cites a case out of Nevada that was
23 years before this. The research needed to determine
24 the mens rea for attempted murder was not difficult
25 to find, even before the King decision. And I think

1 a reasonably competent trial lawyer should have done
2 some basic research to determine the mens rea
3 required on attempted murder and would have raised
4 the issue in this case that the indictment was wrong
5 because they allowed a conviction for attempted
6 murder on implied matters. And that is, I think,
7 ineffective assistance of counsel. I understand the
8 argument that counsel is not supposed to be
9 clairvoyant, but we're not talking about counsel
10 being clairvoyant, we talk about counsel doing some
11 honest and serious research on a new law in South
12 Carolina that was in existence in many states, and
13 many states were required a specific intent. We're
14 not asking the Court -- the trial counsel to
15 anticipate the Supreme Court overturning their
16 decision because King did not overturn any decision.
17 We're asking the trial counsel to simply be diligent
18 enough to do some basic research to determine what
19 the proper mens rea is in an attempted murder case.
20 And is a specific intent to kill. And that was not
21 done in this case. And had that been done in this
22 case, the Supreme Court clearly would have reversed
23 the attempted murder conviction.

24 THE COURT: All right. Thank you.
25 Attorney General?

CLOSING ARGUMENTS BY MS. DIXON

MS. DIXON: May it please the Court? I'm going to start with the attempted murder, just because it's the freshest on my mind. So first of all, I want to note for the record, the 1973 case would have been under the common law attempted murder. In 2010, the South Carolina legislature enacted an attempted murder statute, and the language of that statute includes the language must include malice of forethought expressed or implied. So that is the plain language of the 2010 statute. Now in State vs. King, which the Court of Appeals first had and issued an opinion in 2015, the issue that the Court of Appeals addressed was whether the intent for attempted murder was specific intent or general intent. The Court of Appeals determined it was a specific intent crime, and they only took it that far. That case went up to cert to the Supreme Court, and I do want to note for the record that opinion was issued after Mr. Young's trial. So, trial counsel did not have the benefit of the Supreme Court's decision in Young. But what the Supreme Court did is it confirmed the Court of Appeals finding that it was a specific intent crime, but it took it a step further and it did note the

1 ambiguity created, because the statute contains the
2 language malice of forethought, expressed or
3 implied. The statute itself contained that
4 language. Our Supreme Court noted the ambiguity
5 there. Our Supreme Court did take it a step further
6 and determine that because attempted murder is a
7 specific intent crime, that malice cannot be
8 inferred. However, as noted by that opinion, it was
9 ambiguous, it was unclear. It's a very long,
10 thorough opinion, and I would submit they do a much
11 better job of explaining it than I am right now, but
12 we would submit that at the time of this trial, no
13 Court had said that malice cannot be inferred for
14 attempted murder. And the statute itself using
15 malice of forethought expressed or implied made that
16 very ambiguous. So we would submit counsel was not
17 deficient in that regard. We'd also note for the
18 record under Teemer v. State, 416 S.C. 171,
19 attorneys are not required to anticipate changes in
20 the law. And in that case, the Supreme Court found
21 that the PCR Court erred in finding trial counsel
22 ineffective for failing to object to jury
23 instructions when no case law existed rendering the
24 instruction improper per se. And we would just
25 submit that at the time of Mr. Young's trial, there

1 was no case law rendering that jury charge improper
2 per se.

3 Moving on to the issue of failure to object
4 to hearsay testimony and -- and also the
5 confrontation clause issue, we would just note he's
6 handed up cases from other jurisdictions. Of
7 course, in South Carolina we are governed by South
8 Carolina law, especially when it comes to criminal
9 matters. And I would note that our courts have
10 addressed a very similar issue and that is State v.
11 Thompson, 420 S.C. 386. So we would just submit
12 that under the facts of that case, this call itself
13 would not be -- would be a non-testimonial call. It
14 would not violate the confrontation clauses. We
15 would also submit that it's not hearsay. It comes
16 under the business record exception. The other
17 speaker based on the testimony of this trial was a
18 911 dispatcher. And then, you know, to the extent
19 the voice in the background was very excited, we
20 submit it comes under the excited utterance rule.
21 We would also submit as to the confrontation clause
22 issue, we would point the Court to Davis v.
23 Washington, 547 U.S. 813. Statements are non-
24 testimonial when made in the course of a police
25 interrogation under circumstances objectively

1 indicating the primary purpose of the interrogation
2 is to enable police assistance to meet an ongoing
3 emergency. That is a 2006 case from the United
4 States Supreme Court, and we would submit this was
5 an ongoing emergency. These shots were coming out
6 at different periods of time. One of the 911
7 callers actually testified, I believe it was in
8 Young, Jr.'s trial, that we was in his trailer with
9 his newborn and had to like jump on top of him and
10 cover him when all the shots were fired for fear
11 that he was going to -- that his child was going to
12 get hit by a stray bullet. So this, we submit, was
13 an ongoing emergency. Police needed to figure out
14 who these shooters were and stop this ongoing threat
15 to this community.

16 MS. DIXON: One moment, Your Honor.

17 THE COURT: Yes, ma'am.

18 MS. DIXON: Regarding the ex post facto
19 argument, we would submit, you know, at its core,
20 this is a murder. This is a statute that's been
21 around for a long time, much longer than Mr. Young's
22 trial. Counsel did move to quash the indictment.
23 That was denied. We would submit the murder statute
24 itself is not new law. That is what he was charged
25 with. That's what he was convicted of. We would

1 also note for the record that the doctrine of mutual
2 combat has existed in South Carolina since at least
3 1843. That is a quote from our Supreme Court in
4 State v. Taylor 356 S.C. 227. This was not new law
5 either, so we would submit there is no ex post facto
6 violation here. To the extent that counsel believes
7 that appellate counsel was ineffective for not
8 filing an Amended Petition for Writ of Cert., we
9 would submit that the sixth amendment right to the
10 effective assistance of counsel does not extend to
11 discretionary review, and a Petition for a Writ of
12 Cert. is discretionary review. The case that we
13 would rely on for that are Folks v. Nation. That's
14 34 F.4th 258. That is a 2022 4th Circuit case, and
15 then Douglas v. State 369 S.C. 213. That is a 2006
16 from our Supreme Court that basically says no right
17 to ineffective assistance -- no right to effective
18 assistance of counsel when seeking discretionary
19 review. And the quote, "We decline to oppose a duty
20 on appellate counsel to pursue re-hearing and/or
21 cert. following the decision of the Court of Appeals
22 in a criminal direct appeal." So we would submit
23 that there is no sixth amendment violation to
24 anything that appellate counsel may have done after
25 the initial direct appeal to the Court of Appeals up

1 to the point where the Court of Appeals submitted
2 their opinion.

3 Just one moment, Your Honor. In terms of
4 the trial counsel fails to introduce audio
5 recordings of applicable statements, I would submit
6 first of all, those haven't been entered into the
7 record today, so I think it's going to be
8 speculative at best to determine any prejudicial
9 value from those statements, but we would also
10 submit that, you know, based on the Solicitor's
11 statement that if those had been admitted, they
12 could have opened the door to the State entering
13 this gun into evidence. That would have been
14 damaging to Mr. Young's case. So we submit that he
15 cannot show a reasonable likelihood that the outcome
16 would have been different had these been admitted.

17 The final issue that I have before me -- or
18 that I have is that counsel was ineffective for
19 failing to request a jury charge as to withdrawing
20 from mutual combat. There was testimony that this
21 was discussed with the judge. The judge was not
22 inclined to grant it or to charge it. We would
23 submit that if this was not properly preserved, Mr.
24 Young still cannot demonstrate prejudice from that.
25 The reason being first of all, it was the same judge

1 who had declined to charge it in the other cases.
2 It's not likely he would have charged it here.
3 Second of all, this was an issue that was addressed
4 by both our Court of Appeals and our Supreme Court
5 in Mr. Young, Jr.'s case. Our Court of Appeals
6 found that the trial court did not err in declining
7 to give this charge, and the majority of the Supreme
8 Court affirmed that. It was only one dissenter who
9 disagreed with that particular portion.

10 THE COURT: All right. Anything in reply?

11 **REBUTTAL CLOSING ARGUMENTS BY MR. WISE**

12 MR. WISE: Just briefly in reply. I point
13 out the 1973 A.R. annotation not to talk about the
14 law back then, but to point out that that's how long
15 information had been out there as to the specific
16 intent requirement on attempted murder. I would
17 also say when the South Carolina Supreme Court says
18 we now extend our mutual combat jurisprudence, they
19 are literally making the law go where no law had
20 gone before. And therefore, that is new law. We
21 filed it ex post facto. And then lastly, I will
22 agree that there's no constitutional right to
23 require an appellate lawyer to seek discretionary
24 review, but if you seek discretionary review, there
25 is a requirement that you do it properly. And

1 that's why I think that this case is different from
2 the others.

3 MS. DIXON: I would submit the sixth
4 amendment does not go that far.

5 THE COURT: Okay. All right. All right,
6 what I'm going to do is I'm going to wait ten days
7 to hear -- to receive the information you're going
8 to present me on subsection G in the amended
9 application that was filed today, and thereafter
10 I'll make a ruling. All right? Thank you very
11 much.

12 MS. DIXON: Thank you, Your Honor.

13 MR. WISE: Thank you.

14 - - -END OF TRANSCRIPT- - -

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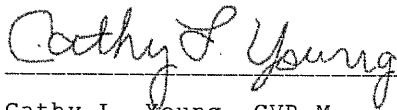
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CERTIFICATE OF REPORTER

I, Cathy L. Young, CVR-M, for the
Fourteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate and complete Transcript of Record of
the proceedings had and evidence introduced in the
trial of the captioned case, relative to appear, in
the Circuit Court for Beaufort County, South
Carolina, on the 16th day of March, 2023.

I do further certify that I am neither of
kin, counsel nor interest to any party herein.



Cathy L. Young, CVR-M

Court Reporter and Notary

Public in and for South Carolina

My Commission expires: 3-28-2029

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Aaron Scott Young, Sr., #288580,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-07-01099

MEMO IN SUPPORT OF DISMISSAL

APR - 3 PM 3: 00
AM ROSENEAU
COUNTY, S.C.
CLERK OF COURT

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 J. Bonds. That same day, Applicant amended his application to add a new allegation: "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."¹ Because this allegation was first raised on the day of the evidentiary hearing, Respondent requested time to submit a memo addressing this sole issue. As set forth below, the application of mutual combat to the murder charge² under the facts of this case did not violate the *ex post facto* clause.

¹ Applicant initially framed this as an issue of whether appellate counsel was ineffective for not raising a violation of the *ex post facto* clause in a petition for rehearing to the Court of Appeals or in a petition for certiorari to the Supreme Court of South Carolina. However, as Respondent argued at the evidentiary hearing, 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 from 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.").

² Respondent notes the argument related to whether the application of mutual combat violated the *ex post facto* clause relates only to the murder charge and not the attempted murder charge. As noted by our supreme court in Young, Jr.'s case (Applicant's co-defendant), "any argument that Young, Jr. did not attempt to murder Robinson is manifestly without merit" because evidence was submitted that "[a]t one point in the combat, Young Jr. had his gun pointed at

THE APPLICATION OF MUTUAL COMBAT AND ACCOMPLICE LIABILITY TO MURDER DID NOT VIOLATE THE EX POST FACTO CLAUSE

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 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.

Robinson. When Young, Jr. pulled the trigger, the gun jammed and did not fire.” State v. Young, 429 S.C. 155, 158 n.2, 838 S.E.2d 516, 517 n.2 (2020). Because evidence showed Applicant was acting in concert with Young Jr. by (1) providing the gun and (2) driving the vehicle, Applicant was as culpable as Young Jr. in attempting to murder Robinson under an accomplice liability theory. The attempted murder charge did not rely on a theory of mutual combat.

*Murder and the doctrines of Mutual Combat and Accomplice Liability
Predated the Underlying Incident*

The underlying incident giving rise to Applicant's murder charge occurred on September 1, 2012, when an eight-year-old was fatally shot during an ongoing gun battle between the Youngs and Tyrone 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.³

On direct appeal in Young, Jr.'s case,⁴ 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'").

The application of mutual combat here 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

³ The common law offense of murder existed long before the legislative enactment.

⁴ Young, Jr. is Applicant's son and co-defendant.

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. Thus, the application of mutual combat to this set of facts did not violate the *ex post facto* clause.

*The application of mutual combat to this fact pattern did not alter
the State’s burden of proof or the requisite criminal intent*

Importantly, the application of mutual combat to this fact pattern 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.

The doctrine of mutual combat existed prior to this 2012 incident and made an actor engaged in mutual combat liable for the death of others engaged in mutual combat. See, e.g., Young, 429 S.C. at 161, 838 S.E.2d at 519 (“South Carolina law has long recognized that criminal liability may be imposed on all combatants for the death of one of the participating parties because all are presumed to know and intend the consequences that naturally flow from their unlawful acts.”). The doctrine of accomplice liability existed prior to this 2012 incident and made an actor engaged in a criminal activity liable for the actions of others engaged in that criminal activity. See Condrey, 349 S.C. at 194, 562 S.E.2d at 324 (“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.”). Here,

our Supreme Court found these doctrines make actors criminally liable for the death of innocent bystanders. Although these doctrines had never been extended in South Carolina to a situation involving parties engaged in mutual combat and the death of an innocent bystander, there was nothing novel about this extension. 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. 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.

The application of mutual combat to the facts of this case 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.

CONCLUSION

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.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

By: s/Danielle Dixon
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March 27, 2023

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort

Aaron Young, Sr.

vs.

State of South Carolina,

Applicant / Petitioner

Respondent.

COURT OF COMMON PLEAS

Case # 2020 CP 07 01099

ORDER

2023 APR -5 AM 11:50
JENNIFER A. 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)
- ☐ 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 ☐ other reason as follows:

- ☐ 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 45 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.

Date: 3/31, 2023

Walterboro S.C.

Court Reporter:

Robert J. Bonds

Robert J. Bonds
Presiding Judge

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
2023 OCT -2 PM 12:23)
Aaron Scott Young, Sr., #288580)
BEAUFORT COUNTY, S.C.)
Applicant,)
) **ORDER OF DISMISSAL**
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
BEAUFORT COUNTY, S.C.
2023 OCT -2 PM 12:23
Case No.: 2020-CP-07-01099

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 officers 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 issue⁴

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 from 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 trial 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 Court 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

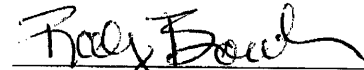
Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

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

Welford, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT) IN THE COURT OF COMMON PLEAS
Aaron Scott Young, Sr. No. 288580)
Applicant,)
- vs -) Case No 2020-CP-07-01099
State of South Carolina,) Rule 59 Motion to Alter or Amend Judgment
Respondent.)

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Aaron Scott Young, th Applicant above named, hereby moves this Court to alter or amend the judgement issued in this matter based upon the following:

1. This Court erred in concluding that the 911 call was admissible as a business record under Rule 803(6). As stated by a New York Court, "In order for proof to qualify for admission into evidence under the business record exception to the hearsay rule (CPLR-4518[a]), it must be demonstrated that the declarant was under a duty to report the occurrence to the entrant." *People v. Wilson*, 123 A.D.2d 457, 506 N.Y.S.2d 760, 761 (1986). No caller was under a duty to report the shooting to the 911 operator.

2. This Court erred in finding that the hearsay statement of the co-defendant was admissible as an excited utterance. In making this finding, the Court failed to consider the record fails to establish time since the co-defendant had seen what he alleges in his statement. In addition, this Court failed to consider that co-defendant had the reason to distort the truth as to what allegedly happened on the road as he had been the primary aggressor at the residence of Mr. Young when the co-defendant fired his weapon at the Youngs.

3. This Court erred in holding other 911 calls admissible when the 911 call establishes that the caller was obtaining information from a third party who appears not to have been identified. The record in this case does not establish that the 911 caller was excited or otherwise within an exception to the hearsay rule. As the responses to the questions by the 911 operator show that the answers were given in response to interrogation by the 911 operator and thus were testimonial in nature.

4. In ruling upon the *ex post facto* issue, this Court failed to consider *State v. Horne*, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) where our Supreme Court said, “However, at the time of the stabbing, no South Carolina decision had held that killing of a viable human being in utero could constitute a criminal homicide. The criminal law whether declared by the courts or enacted by the legislature cannot be applied retroactively.” In *State v. Young*, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020) the South Carolina Supreme Court said, “Today, we extend our jurisprudence and hold that each participant who willingly engages in mutual combat may be held accountable for the death or injury of an innocent bystander resulting from that confrontation.” When a court elects to extend its jurisprudence, they are taking the law beyond where it was before the ruling. This is a classic example of *ex post facto*. This Court should modify the order and hold the decision in *Young* did violate the *ex post facto* provisions of Article I, § 4 of the Constitution of the State of South Carolina and Art I, § 9 of the Constitution of the United States of America as applied to the States through the 14th Amendment.

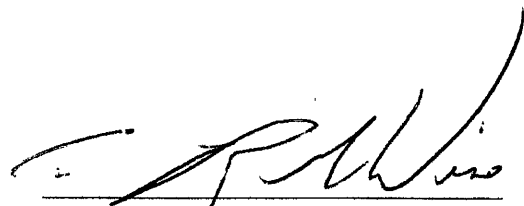
5. In holding that trial counsel was not ineffective for failing to object to the charge to the jury on attempted murder which permitted the jury to infer malice, this Court failed to consider that in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), the South Carolina Supreme Court

stated what attempted murder meant. They did not modify any previous decision. Therefore, the decision in *King* should be applied retroactively. As Mr. Young was convicted of attempted murder under a definition that does not properly define attempted murder, Mr. Young should be given a new trial.

6. This Court erred in failing to grant a new trial based upon trial counsel's failure to request a charge on withdrawal from mutual combat. No objection was raised at the trial to the failure to give a jury charge as to withdrawal from mutual combat. Tr. 537, ll 5-6. The Court erred in finding, "Initially, this issue was raised to the trial court, and Applicant has not set forth what more should have been argued that would have reasonably likely to change the court's decision." Oder at 20. What this Court failed to consider was that trial counsel failed to object to the failure to give the charge and therefore the issue was not preserved for appellate review. In her dissent, Justice Hearn said, "Moreover, even if the doctrine applied here, the trial court erred in failing to charge the jury on the end of mutual combat." *Young*, 429 S.C. at 167, 838 S.E.2d at 522 (Hearn, dissenting). This dissent is strong evidence that has an objection been raised, the case had a reasonable probability of being reversed.

For the forgoing reasons, this Court should alter or amend the order and grant Aaron Scott, Young, Sr. a new trial.

November 19, 2023



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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Aaron Scott Young, Sr., #288580,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-07-01099

**Respondent's Return to Applicant's
Motion to Reconsider**

2023 DEC 11 PM 12:38
CLERK OF COURT
JOHN ROSENEAU
JANUARY 11 AM 10:00
CLERK OF COURT

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. Following the hearing, Judge Bonds issued an order denying relief and dismissing the application with prejudice. Applicant has now filed a motion to reconsider the Order of Dismissal. Respondent submits the Order of Dismissal properly applied the law and considered the evidence before it, and Applicant failed to identify anything the order overlooked or misapprehended. Thus, Respondent requests the Court deny this motion.

911 call - business record

Applicant first contends the PCR Court erred in concluding the 911 call was admissible as a business record under Rule 803(6), SCRE. In support, Applicant cites a New York case for the proposition that the business record exception does not apply when the declarant is not under a duty to report the occurrence. Applicant further contends no caller was under a duty to report the shooting to the 911 operator.

Initially, Applicant relies on an out-of-State case that is not interpreting a South Carolina rule of evidence and is not binding precedent on South Carolinian courts. Applicant does not point to any South Carolina case to support the proposition that the business record exception does not

apply when the declarant is not under a duty to report the occurrence.¹ Under the plain language of South Carolina's rule, a 911 call fits the business record exception to hearsay.²

Further, given the regularity with which 911 calls are admitted in criminal trials in South Carolina, and the regularity with which appellate courts affirm the admissibility of 911 calls, counsel's failure to challenge the admissibility of this call using this novel argument did not fall below prevailing professional standards and was not deficient. See, e.g., State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017) (finding trial court did not abuse its discretion in admitting 911 call in criminal trial when call was properly authenticated and did not violate the Confrontation Clause); State v. Sledge, 428 S.C. 40, 53–54, 832 S.E.2d 633, 640–41 (Ct. App. 2019) (finding trial court did not abuse its discretion in admitting 911 call in criminal trial when statements fit excited utterance exception to hearsay and were not unduly prejudicial); c.f. Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) (“Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective *at the time of the alleged error*. . . [W]e do not require attorneys to be clairvoyant in anticipating changes to the law . . .”). The PCR court properly concluded Applicant did not prove counsel was ineffective for not objecting to the 911 call based on hearsay.

Robinson's statements

Applicant next contends the PCR court erred in finding co-defendant Robinson's statements were admissible as an excited utterance. He avers the Court failed to consider (1) the

¹ Respondent further submits the 911 operators have a duty to record/report the 911 calls as part of their job.

² Respondent concedes that that statements *within* a 911 call could be excluded by hearsay. However, the call itself fits the business record exception. Respondent further submits the PCR court properly found exceptions to hearsay for the statements made within the call.

record did not establish the time since Robinson had seen what he alleged and (2) Robinson had a reason to distort the truth.

Initially, as this Court found, counsel *did* object based on hearsay to Mitchell's testimony that Robinson said "those MFs was out there shooting at him." However, the trial court overruled this objection. (App. 519). Applicant has not set forth what more counsel should have done other than to raise an objection that counsel did raise. Although counsel did not object when Delaney testified Robinson said "That mother was shooting at me, so I shot at them," the PCR court properly found that statement would have come in under the excited utterance exception, especially in light of Delaney's testimony that Robinson was "pretty excited." (App. 542-43). Further, the PCR court properly found the statement was cumulative to Mitchell's testimony, such that it is not reasonably likely the outcome would have been different had any objection to the testimony been sustained.

Contrary to Applicant's assertion, the record establishes that Robinson made this statement during the course of the shootout. Specifically, Mitchell testified she heard ten or more rapid gunshots and saw Young, Sr. driving a gray truck prior to Robinson arriving at her house. (App. 511-13). She further stated that after Robinson left, she heard another set of rapid gunshots, followed by three more shots that sounded different than the first set of shots. (R. 310-11, 323-35). Likewise, Delaney testified to seeing the gray truck shortly before arriving at his home, where he spoke to Robinson. He further stated after Robinson left, he heard rapid gunshots followed by three gunshots that seemed to come from a different weapon. (App. 539-40, 545-46). The only reasonable inference from the foregoing is that Robinson made the statement *during* the course of the shootout. Finally, although Robinson admittedly had a reason to distort the truth, that does not preclude this statement from coming in under the excited utterance exception—especially when,

as the PCR court found, the statement itself was non-testimonial and did not violate the Confrontation Clause.³ Ultimately, the PCR court properly found Applicant did not prove deficiency or prejudice in this regard.

911 call – hearsay

Applicant next contends the Court erred in finding other 911 calls admissible when the caller was obtaining information from a third party who was not identified.⁴ He avers the record does not establish that the caller was excited or the statements otherwise fit an exception to the hearsay rule. He further contends that responses to the questions by the 911 operator show the answers were given in response to an interrogation and thus were testimonial.

At the PCR hearing, in the context of specific statements in the 911 calls, Applicant only took issue with the statement “the two vehicles were shooting at each other” from the fourth call. (PCR 16-19). The crux of Applicant’s argument related to the 911 calls dealt with his contention that the statements were testimonial and violated the Confrontation Clause. (PCR 18-19, 79-80). To the extent Applicant now contends the 911 dispatcher’s statements about what the hysterical person was reporting constituted inadmissible hearsay, such statement met the present-sense impression to hearsay because the dispatcher was relaying the information as she heard it. Additionally, given the stress and excitement generated by the ongoing gun battle and the dispatcher’s attempts to calm the woman so she could obtain additional information to aid police, such statements by the dispatcher would also fit the excited utterance exception to hearsay. Thus, the PCR court properly found the 911 call was admissible under these exceptions to hearsay.

³ Notably, Applicant does not challenge the Court’s ruling that this statement did not violate the Confrontation Clause.

⁴ At trial, the 911 records custodian was asked about two voices on the fourth 911 call: one that was “relatively excited” and another that was “calmer.” She explained the calm voice was “a dispatcher from [the] Hilton Head dispatch. They originally received the call and then transferred it to us.” She agreed that “in the ordinary course of business this . . . 911 operator would actually be contacting Beaufort County and [they] would work together. (R. 502-03).

Further, the statement in the fourth call that “the two vehicles were shooting at each other”—the only statement Applicant took issue with from the 911 calls at the PCR hearing—was cumulative to other testimony and evidence before the jury such that it is not reasonably likely the outcome would be different without this statement.⁵

Finally, the PCR court properly determined the 911 calls were non-testimonial and thus did not violate the Confrontation Clause. Applicant’s assertion that “responses to the questions by the 911 operator show the answers were given in response to an interrogation and thus were testimonial” is directly refuted by State v. Thompson, 420 S.C. 386, 401-02, 803 S.E.2d 44, 52 (Ct. App. 2017), wherein our Court of Appeals determined a 911 call was nontestimonial when the 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, the PCR court properly denied relief on this ground.

Ex post facto issue

Applicant next contends that in ruling on the *ex post facto* issue, the PCR court failed to consider State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984). However, Horne is inapposite. In Horne, the South Carolina Supreme Court considered whether an unborn, viable fetus was a “person” within the statutory definition of murder. Id. at 446, 319 S.E.2d at 704. After concluding an unborn, viable fetus was a “person” within the statutory definition of murder, the Court reasoned that because “no South Carolina decision had held that killing a viable human being *in utero* could constitute criminal homicide,” the decision should not be applied

⁵ In the second 911 call, the caller indicated she heard gunshots and “at one end of the road and then it sounded like they drove to the other end.” Mitchell testified to hearing shots fired before and after speaking to Robinson, and she testified Robinson stated “Those MFs were shooting at me.” Most critically, however, the undisputed forensic evidence showed the victim was shot by Robinson’s gun, but Robinson’s car was “swiss-cheesed” by another weapon. The only reasonable inference to draw from this forensic evidence was that the individuals in the two vehicles were shooting at each other.

retroactively. Id. at 447, 319 S.E.2d at 704.

Here, the issue is not whether the eight-year-old victim is a “person” under the murder statute. Without a “person,” there can be no crime. It is undisputed the eight-year-old victim of this murder is a “person”—and thus the crime of murder was committed.

Unlike Horne, the issue in Young concerned liability—not whether a murder even occurred. Using pre-existing theories of mutual combat and accomplice liability, the South Carolina Supreme Court determined the Youngs could be liable for the death of the eight-year-old innocent bystander. This was not new law.

The PCR court properly found the criminal statute for murder and 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 the 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 PCR court properly found the application of mutual combat did not alter the State’s burden of proof or the requisite criminal intent. Rather, the State’s burden remained

“beyond a reasonable doubt,” and the criminal intent remained 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 or the requisite criminal intent and thus did not violate the *ex post facto* clause. Finally, the application of mutual combat did not increase the penalty. Based on the foregoing, the PCR court properly found the application of mutual combat did not violate the *ex post facto* clause, and the Court should deny Applicant’s motion to reconsider.

Implied malice charge

Applicant next contends that in finding counsel was not ineffective for failing to object to the attempted murder charge that allowed the jury to infer malice, the PCR court failed to consider that in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), the South Carolina Supreme Court stated what attempted murder meant. He further avers the opinion did not modify any previous decision and thus should be applied retroactively.

However, the PCR court properly considered King—which had not been published at the time of Applicant’s trial. As the PCR court noted, the Court of Appeals’ prior opinion concluding attempted murder is a specific intent crime *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 went on to conclude that because attempted murder is a specific intent crime, malice could not be implied—notwithstanding the plain language of the state, which included the phrase “malice aforethought, either express or implied.” Critical to the analysis of whether counsel was ineffective, the Supreme Court “acknowledge[d] the ambiguity created by the language” of the attempted murder statute Id. at 62, 810 S.E.2d at 25-27.

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. In arguing King should be applied retroactively, Applicant attempts to circumvent Strickland, which requires “a court deciding an actual ineffectiveness claim [to] judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time* of counsel's conduct.” See also 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). Based on the foregoing, the PCR court properly denied relief.

End of mutual combat charge

Finally, Applicant contends the PCR court erred in finding counsel was not ineffective for failing to request a jury charge on withdrawing from mutual combat. Applicant contends the PCR court failed to consider that trial counsel did not preserve an objection to the court's decision to not charge withdrawal. He points to a dissent as evidence that had an objection been raised, it is reasonably likely the conviction would have been reversed. However, Applicant overlooks the fact that the Court of Appeals—when deciding this issue in Young, Jr.'s case under similar facts—found 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. and Robinson communicated verbally at any point in the conflict after the initial encounter in the Youngs' yard. 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). Applicant has not pointed to evidence in the

record that would show the Youngs made their purported withdrawal known to Robinson.

The PCR court properly found it is not reasonably likely the appellate court would have reversed this conviction. 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 decision to not give this charge, 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, the PCR court properly denied relief.

Conclusion

Based on the foregoing, the Court should DENY Applicant’s motion to reconsider.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

By: s/Danielle Dixon
ATTORNEYS FOR RESPONDENT

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December 6, 2023

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:

 X **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.

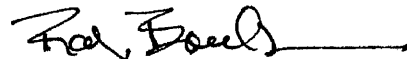
_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____ days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

Date: December 19, 2023

Walterboro, S.C.



Robert J. Bonds
Presiding Judge

2023 DEC 21 PM 2:22
JERMI AMOROSO
CLERK OF COURT
BEAUFORT COUNTY, S.C.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jan 18 2024

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

S.C. SUPREME COURT

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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