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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Heath Taylor, Circuit Court Judge

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYLER JAMAL GIVENS,

APPELLANT

APPELLATE CASE NO. 2024-001995

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 5

ARGUMENTS

I.
The trial court erred in refusing to dismiss the indictments as violations of appellant's protection against double jeopardy under Article I, Section 12, of the South Carolina Constitution and the Fifth Amendment of the Constitution of the United States. 7

II.
The trial court erred in charging mutual combat as a theory of criminal liability when the State failed to provide notice of intent to rely upon mutual combat until opening statements and then failed to introduce evidence supporting all elements of mutual combat 17

III.
The trial court erred in refusing defendant's request to charge self-defense when evidence in the record supported the fact that defendant fired his weapon in response to being fired upon as he was seeking to find and aid his friend 23

IV.
The trial court err in failing to exercise discretion in sentencing appellant, who was eighteen years old at the time of the offense, to life in prison 27

V.
The trial court err in failing to grant a new trial since the mutual combat charge and resulting conviction were prohibited as violation of due process under the *ex post facto* clause of the United States and South Carolina Constitutions, requiring reversal of appellant's convictions 27

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

South Carolina

Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) 19

In re M.B.H., 387 S.C. 323, 692 S.E.2d 541 (2010) 6

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 24

Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004) 5

State v. Benton, 443 S.C. 1, 901 S.E.2d 701 (2024) 5, 12, 13

State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) 30

State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022) 21, 23

State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) 5

State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) 26

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011) 24

State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) 21

State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993) 19

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 6, 30

State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016) 5

State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934) 21

State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) 6

State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011) 13, 14, 16

State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) 5

State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) 21

State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2004) 7

State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981) 6, 27

State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010) 28, 29

State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) .... Passim

State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) 24

State v. Young, 429 S.C. 155, 838 S.E.2d 516 (2020) .... Passim

Other Jurisdictions

Brady v. Maryland, 373 U.S. 83 (1963) 11, 14

Kyles v. Whitley, 514 U.S. 419 (1995) 15

Oregon v. Kennedy, 456 U.S. 667 (1982) 14, 16

Peugh v. United States, 569 U.S. 530 (2013) 28

State v. Greenfield, 375 N.C. 434, 847 S.E.2d 749 (N.C. 2020) 25

United States v. Jorn, 400 U.S. 470, 483 (1971) 16

United States v. Rivera, 384 F.3d 49 (3d Cir. 2004) 5, 12

Constitutional Citations

Article I, Section 12, of the South Carolina Constitution 1, 7, 14

U.S. Const. amend V 1, 7, 14

U.S. Const. Art. I, § 9, cl. 3 28

U.S. Const. Art. I, § 10 28

Rules

Rule 5, SCRCrimP 15

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in refusing to dismiss the indictments as violations of appellant's protection against double jeopardy under Article I, Section 12, of the South Carolina Constitution and the Fifth Amendment of the Constitution of the United States?

2. Did the trial court err in charging mutual combat as a theory of criminal liability when the State failed to provide notice of intent to rely upon mutual combat until opening statements and then failed to introduce evidence supporting all elements of mutual combat?

3. Did the trial court err in refusing defendant's request to charge self-defense when evidence in the record supported the fact that defendant fired his weapon in response to being fired upon as he was seeking to find and aid his friend?

4. Did the trial court err in failing to exercise discretion in sentencing appellant, who was eighteen years old at the time of the offense, to life in prison?

5. Did the trial court err in failing to grant a new trial since the mutual combat charge and resulting conviction were prohibited as violation of due process under the *ex post facto* clause of the United States and South Carolina Constitutions, requiring reversal of appellant's convictions?

STATEMENT OF THE CASE

The appellant was indicted by an Orangeburg County Grand Jury for the murder of Donovan Smalls, assault and battery of a high and aggravated nature for injury to Ajulae Saddler, and possession of a weapon during the commission of a violent crime all arising from a shooting that occurred in the early morning hours of April 14, 2019. R*. Indictments. Appellant was originally tried before the Honorable Maite Murphy and a jury on February 26-29, 2024. R. *. Aimee Zmroczek represented appellant and Phil Giese and Mark Hinds appeared on behalf of the State. At the request of the State, Judge Murphy granted a mistrial. Orig. Tr. 507, l. 13 – 509, l. 5.

A second trial followed before the Honorable Heath Taylor and another jury from August 26-30, 2024. R. *. Representation for the parties remained the same, with the exception that Bethany Miles joined on behalf of the State. R. *. The jury found appellant guilty on all charges. Tr. 1031, ll. 1 – 13. Judge Taylor sentenced appellant to life imprisonment for murder, 20 years incarceration for the assault and battery charge, and five years for the weapons charge. R. * Sentence Sheets. After a hearing on October 30, 2024, Judge Taylor denied all post-trial motions by written order. R. * Order.

This appeal follows.

STATEMENT OF FACTS

On April 14, 2019, numerous people were engaged in a party in downtown Orangeburg, South Carolina. During the early morning hours, shots were initially fired outside a residence that was the center of some of the party activity that evening. Tr. 242-248. These initial shots were followed by several more shots, from various locations, causing party goers to flee, including running up a hill towards appellant's parked car. Tr. 249-250; 296-299; State's Ex. 2 (0:00:09).[1] One shooter, appellant, was captured on video discharging his weapon in the direction of those initial shots. State's Ex. 2 (0:00:50-00:56). Additional video showed appellant initially running with the crowd towards his vehicle, retrieving a handgun, and moving back towards the initial shots before opening fire. State's Ex. 4 (0:01:30-0:01:57).

Evidence presented at trial showed at least two 9 mm firearms were discharged in different locations, including from the area in which appellant fired his own weapon. Tr. 589, 646. A .380 caliber handgun was fired in the party house[2] yard at least twice. Tr. 593. Additional rounds were fired by .40 and .45 caliber firearms in the vicinity of the party house. Tr. 598. Some of the shooters were identified. Amber Green was identified as firing the .380 rounds in the yard of the party house. Tr. 471. Ozante Fields was identified as one of the shooters in the general location of some of the 9 mm and the .40 and .45 caliber rounds.[3].

At some point during the firing, Donovan Smalls was struck in the head and killed by a round fired by one of the firearms and Ajulae Saddler was struck in the chest and injured by another round. The identity of which type of weapon fired these two rounds remains unknown. According

[1] State's Exhibit 2 has been designated as part of the Record on Appeal and will be transported to this Court for review if required.

[2] The party house was located on Summers street and was "down the hill" from the area captured on State's Ex. 2.

[3] State's Exhibit 19 shows the location of the shell casings found by investigators.

to the appellant's expert on crime scene reconstruction, it was "nearly impossible" for appellant to have fired the round that struck and killed Smalls based upon the physical evidence, including the positioning of Smalls following the fatal shot. Tr. 764, l. 8 – 767, l. 14.

During his recorded interview, appellant told officers that he and Smalls were friends and planned to meet at the "after party" house location. State's Ex. 21 (07:54:00 – 07:55:00)[4]. Appellant indicated he ran upon hearing the initial shots being fired, but returned to the area in search of Smalls who was initially running away with him. State's Ex. 21 (07:58:00 – 07:59:00). Upon returning to the area in search of Smalls, appellant saw figures shooting in his direction and fired his weapon in response. State's Ex. 21 (08:06:40 – 08:10:00).

[4] State's Ex. 21 has been designated to be included in the Record on Appeal and will be transported for this Court's review if required.

STANDARDS OF REVIEW

As to Issue One

"When a defendant's first trial ends in a mistrial, the double jeopardy clause bars a second prosecution unless the mistrial was declared due to 'manifest necessity,' that is a 'high degree' of necessity to further the ends of justice and preserve public confidence in fair trials." State v. Benton, 443 S.C. 1, 6, 901 S.E.2d 701, 703 (2024). "The question of whether 'manifest necessity' existed in the case before us is a mixed question of law and fact over which we exercise plenary review." United States v. Rivera, 384 F.3d 49, 55 (3d Cir. 2004).

As to Issues Two and Three

"[T]he trial court is required to charge only the current and correct law of South Carolina." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (alteration in original) (*quoting* Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)).

> An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. The law to be charged must be determined from the evidence presented at trial.

State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) (internal citations omitted). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (*quoting* State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011).

As to Issue Four.

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

As to Issue Five

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017).

ARGUMENTS

I. The trial court erred in refusing to dismiss the indictments as violations of appellant's protection against double jeopardy under Article I, Section 12, of the South Carolina Constitution and the Fifth Amendment of the Constitution of the United States.

The original trial court's decision to grant the State's motion for a mistrial due to the State's own misconduct was not declared due to "manifest necessity" thus barring retrial of appellant.[5]

A. Relevant facts.

In appellant's original trial, the State sought to establish that appellant fired the fatal shot that killed Donovan Smalls.

> But what's suppose to be a night of fun turned into a night of chaos. Shots started to ring out. It was at that point, that this man right here, Tyler Givens, pulled out a handgun and fired shot after shot after shot into a crowd of people. And he struck Ajulae Saddler, a Claflin student in the right breast and she was rushed to the hospital and thankfully she survived. But he also struck 20-year-old Donovan Smalls in the head and it killed him instantly. And after that, Tyler Givens walked back to the car he arrived in and he drove off.

Orig. Tr. 138, ll. 6 – 17.[6]

After jury selection, counsel for appellant emphasized the lack of disclosure of critical impeachment evidence against Ozante Fields, who was also charged in the death of Smalls for murder.

> MS. ZMROCZEK: Thank you. And, Your Honor, obviously, we will be proceeding on a third-party guilt claim because of that indictment. But also, Your Honor, just so I can make sure it's preserved and I don't get in trouble down the road, under *Crosby v. Whitley*, I understand that Mr. Giese, and I'm not saying that he has not given me everything he has, that's not what I'm saying here. But what I'm saying is, that as I'm watching the interview with Mr. Fields

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[5] Our courts have treated Article I, Section 12, of the South Carolina Constitution and the Fifth Amendment of the Constitution of the United States as mirrored rights. "The Double Jeopardy Clauses of the United States and South Carolina Constitutions are in accord." State v. Robinson, 360 S.C. 187, 192, 600 S.E.2d 100, 102 (Ct. App. 2004).

[6] This Brief references appellant's original trial (February 26-29, 2024) as "Orig. Tr." and his retrial (August 26-30, 2024) as "Tr." and the post-trial hearing as "Motion Tr." Upon completion of the Record on Appeal, all citations will be to the Record and this footnote will be deleted from the Final Brief.

> and they're literally you can hear them playing the cell phone video. So it's not that it doesn't exist, it's just never been turned over. And so I think as the trial progresses, we'll probably have some motions about spoliation and things like that.

Orig. Tr. 103, ll. 6 – 20.

The solicitor made affirmative representations to the trial court that all relevant material had been provided.

> MR. GIESE: Your Honor, may it please the Court. Everything that I have in my possession I have given to Ms. Zmroczek and I've actually -- and I think she would agree with me on that. There's a list that I made of my entire file that I sent to her. She responded back that she was missing one thing. I think after I dropped some stuff off, I sent that back to her.
>
> This other stuff, it either does not exist or is not relevant evidence. And the State will not be, obviously, I'm not going to present any evidence that I don't have. So that's kind of my take on it. We have an open file policy. I'm not in any way diminishing Ms. Zmroczek's argument. I mean, she understands that as well and she's been very helpful in, you know, us kind of come together on it.
>
> But, I've given her everything I have. I'm not -- there's no surprise witnesses or anything like that that I'm going to produce or surprise evidence I'm going to produce. And, absolutely, if I tried to produce something or enter something into evidence that she does not have, I think it absolutely should be suppressed. I think that's absolutely appropriate.
>
> As far as it being dismissed, I don't think that is the appropriate remedy.
>
> Now, as far as Ozante Fields is concerned, it was after my and my staff, my bosses, really, after our kind of in-depth look at this case that we thought it would be proper to have the Department of Public Safety present indictments on Ozante Fields and that's what we did. The grand jury true billed those. I told that to Ms. Zmroczek in January. Obviously, she was in trial, but I did email her that in January. But as far as like new evidence goes, it's nothing that I haven't -- like, I didn't gather new information or anything like that. If I did, I would have turned it over.

Orig. Tr. 100, l. 19 – 102, l. 8.

As the case proceeded, the State called Ozante Fields to stand to demonstrate that, while he did fire a gun that evening, he could not have fired the fatal shot.

> Q. Okay. After making that left, what happened next?
>
> A. After I made the left, I stopped my car because my car was getting shot and I got out my car and I shot in the air.
>
> Q. Okay. How did you know your car was getting shot?
>
> A. I heard it.
>
> Q. Okay. And where did you stop approximately to fire those shots in the air?
>
> A. It had to be right here. I didn't make it far at all. In this area.
>
> Q. Okay. When you fired those shots in the air, could you see back down Summers Avenue?
>
> A. Yes, sir.
>
> Q. Was anything blocking your view?
>
> A. It was just people, people that was running.

Orig. Tr. 268, l. 20 – 269, l. 12. Fields denied owning the gun he fired, identifying it as a black .45 caliber handgun that was left in his car by a friend. Orig. Tr. 271, ll. 1 – 10.

Fields testified on behalf of the State, despite being indicted for the same crime, on February 27, 2024, the second day of the original trial. The State called multiple additional witnesses on February 28, 2024. Between the close of testimony on February 28 and the start of trial the next morning, the State disclosed to counsel for appellant that Fields' cell phone data was in fact available. In an effort to explain the failure to provide the material, and in fact live up to the solicitor's affirmative representation to the trial court at the start of trial, investigator Danny Brightwell indicated the phone data had been neglected since it was originally taken from Fields' phone.

> Q. When -- describe why both myself and Ms. Zmroczek did not get that cell phone evidence, the actual dumps until yesterday?
>
> A. So apparently when the phone is placed into evidence, then a search warrant is obtained. The phone will be dumped and then the actual download is loaded onto a server that we have access to under the case number. It has always been my understanding that when y'all get the evidence or whoever gets the evidence that everything from that case would go. So I guess at that moment there was not a separate item number for the download.

Orig. Trial Tr. 459, l. 20 – 460, l. 7. However, Brightwell acknowledged obtaining the cell data in April of 2019. Orig. Trial Tr. 466, ll. 11 – 25. Brightwell acknowledged being present in the Courtroom on Monday when the issue regarding Fields' cell phone was raised by appellant's counsel. Orig. Trial Tr. 475, ll. 15 – 23. He acknowledged telling the solicitor's office there was nothing on the phone. Orig. Trial Tr. 467, ll. 13 – 18. In fact, the State acknowledged the Fields phone contained substantial evidence which impacted on Fields' credibility. Orig. Trial Tr. 495, ll. 2 – 18.

B. The State requested the mistrial.

The State asked for the mistrial as an alternative remedy to other "suggestions" to dealing with the problem it created by allowing an indicted co-defendant to testify before the jury while withholding evidence which had been in the State's possession for years before the start of trial and directly contradicted the claims made by the co-defendant. Orig. Trial Tr. 495, ll. 2 – 18. Counsel for appellant objected and argued that dismissal was the appropriate remedy for the violation. Orig. Trial Tr. 495, l. 24 – 497, l. 6.

C. The trial court granted the State's motion for a mistrial.

Before ruling, the trial court watched the video of appellant firing his own weapon on the night of shootings. Orig. Trial Tr. 484, ll. 7 – 15. Ultimately, the trial court found that "Investigator Brightwell's testimony does not establish that the conduct of the State was willful. However, I find extremely disturbing the failure of the State to diligently review the evidence in its preparation or lack thereof for trial. The State has wasted time and resources and prolonged justice in this matter." Orig. Trial Tr. 508, ll. 5 – 11. The trial court then granted the State's motion for a mistrial holding "[t]he public's interest and a fair adjudication necessitates that a mistrial be declared." Orig. Trial Tr. 509, ll. 1 – 3.

D. Appellant's motion to dismiss subsequent prosecution.

At retrial, counsel for appellant moved to dismiss the indictments as barred by double jeopardy. Tr. 67, l. 3 – 71, l. 13. Counsel for appellant focused on the fact that the mistrial was declared without consent of the appellant and due solely to the neglect of the State, through its agents, to turn over material required under Brady v. Maryland, 373 U.S. 83 (1963). While the discovery issues prior to the original trial were not limited to Fields' cell phone data, that was the "straw that broke the camel's back" for the original trial court. Orig. Trial Tr. 508, ll. 5 – 11. It was never disputed, at the original trial or during the subsequent trial, that the Fields' cell phone data was not subject to disclosure. It was not disputed that the information would have been particularly relevant concerning Fields' credibility and the general credibility of investigators in failing to examine the data for years before trial.

E. The trial court's ruling.

> This gets us into the confusing issues of how I – or whether I am authorized to even evaluate another circuit court judge's order, but I think I have to. And we – I was looking back, I think her ruling was basically that it was not fair to the defendant – it wouldn't have been fair to move forward. So, basically, the – based on the ends of justice and to preserve public confidence in a fair trial, which I think is the standard because the evidence that the defendant did not have in its possession with regard to the cell phone dump, which obviously proved to be a fruitful area of cross-examination.
>
> I'm finding that Judge Murphy's order to grant a mistrial was due to manifest necessity and – for the higher degree of necessity to further the ends of justice and preserve public confidence in fair trials.

Tr. 122, l. 25 – 123, l. 17.[7]

F. Argument.

Here, the sole cause of the mistrial was the inappropriate conduct of the State. By design, neglect, or incompetence, the State allowed a witness to take the stand and provide testimony that was clearly contradicted by evidence the State had in its possession for significant time before trial. The State was made aware of the lack of production of the Fields cell phone prior to the start of testimony and affirmatively made representations to the trial court that were in fact false, even if the "fault" of the misrepresentation could be placed in the lap of law enforcement rather than the solicitor.

Guidance on the impact of the fault in discovery disclosures resulting in a mistrial is provided by our Supreme Court in State v. Benton.[8] In Benton, our Supreme Court reviewed

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[7] As a matter of appellate review, this portion of the argument centers on whether the original trial judge's declaration of a mistrial was the result of "manifest necessity" and therefore centers on the original trial judge's declaration of a mistrial. While the original trial court's factual findings are given deference, the ultimate question (whether the mistrial was justified under "manifest necessity" should be a question of law, reviewed *de novo* by this Court. *See* United States v. Rivera, 384 F.3d 49, 55 (3d Cir. 2004) ("The question of whether 'manifest necessity' existed in the case before us is a mixed question of law and fact over which we exercise plenary review.").

[8] 443 S.C. 1, 901 S.E.2d 701 (2024).

whether the trial court's grant of a mistrial as a result of late disclosure of alibi witnesses by the defense qualified as "manifest necessity" thus allowing a retrial. The Supreme Court noted that defense counsel and "the solicitor shared fault perhaps for the circumstances and apparent misunderstandings that led to the mistrial." Id., 443 S.C. at 7, 901 S.E.2d at 704. By contrast, active prosecutorial misconduct alone leading to a mistrial of the nature presented in this case would not create a "manifest necessity" analysis allowing for retrial. The conduct here more closely resembles that outline in State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011). While Parker dealt with the concept of goading, discussed below, the nature of the misconduct in this case more closely aligns with Parker than Benton.

Here, the lower court erred in failing to dismiss the indictment under double jeopardy since the mistrial was not declared due to "manifest necessity" but was instead caused by the sole action of the State.

> The defendant's interest in having his fate determined by the first impaneled jury is therefore "a weighty one." *Somerville*, 410 U.S. at 471, 93 S. Ct. 1066. As such, "the lack of apparent harm to the defendant from the declaration of a mistrial [does] not itself justify the mistrial[.]" Further, in Jorn, a plurality of the Supreme Court noted inquiries into who benefits from a mistrial are "pure speculation." 400 U.S. at 483, 91 S. Ct. 547. Therefore, the *Jorn* plurality concluded that to allow a retrial "based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision."

Benton, 443 S.C. at 8, 901 S.E.2d at 704. The trial court's decision to grant a mistrial in the face of the specific discovery abuse in this case was not the result of "manifest necessity." Rewarding the State for conduct the trial court found "extremely disturbing" that caused "wasted time and resources and prolonged justice in this matter"[9] does not rise to the level of manifest necessity and

[9] Orig. Trial Tr. 508, ll. 5 – 11.

thereby allow the State to profit from its own misconduct. That the State has profited from this misconduct, in altering its theory of criminal liability, as discussed below, cements that the grant of the mistrial was not the result of manifest necessity and that the subsequent trial of appellant was barred as a matter of law under Article I, Section 12, of the South Carolina Constitution and the Fifth Amendment of the Constitution of the United States.

G. *The goaded factor.*

When the State intentionally "goads" the defendant into moving for a mistrial, jeopardy attaches, and retrial is barred. Oregon v. Kennedy, 456 U.S. 667, 676 (1982). Whether jeopardy attaches "depends upon whether the prosecutorial conduct was undertaken with the intent to subvert the Double Jeopardy Clause." State v. Parker, 391 S.C. 606, 613, 707 S.E.2d 799, 802 (2011). The question turns on "the prosecutor's subjective intent to cause a mistrial in order to retry the case." Id. (*quoting* United States v. Williams, 472 F.3d 81, 85-86 (3rd Cir. 2007)). This "goaded mistrial" concept is an exception to the general rule that a defendant who requests a mistrial may not assert double jeopardy when such a request is granted.

Here, this Court could apply the goaded mistrial concept as further support for the double jeopardy argument.[10] Analyzed under Parker, this Court should treat the matter as a goaded mistrial and reverse appellant's conviction. Appellant would acknowledge that Brightwell's testimony claimed inadvertent error on the glaring abuse of the protections outlined in Brady v. Maryland, 373 U.S. 83 (1963) as well as those in Rule 5, SCRCrimP.[11] The original trial court

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[10] Importantly, the State sought the mistrial and counsel for appellant never consented or joined that request. As such, appellant would not have to establish goading for relief under double jeopardy as argued *supra*, but it provides further guidance due to the State's actions between trials, supporting the assertion that the misconduct in the original trial was less inadvertence and more an intentional act.

[11] Whether the mistake was directly on the prosecutor or on the police is not truly relevant, since they are bound together to comply with the fundamental discovery obligation the government owes the accused. "Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for

accepted that claim at face value. However, the State then altered the theory of criminal liability at the start of the second trial, relying on "mutual combat" between appellant and others, including Fields, eliminating the need to rely upon Fields' dodgy explanation of shooting in the air with someone else's gun. With this new freedom from relying on Fields, the State elected not to call him as a witness during the second trial and instead focused on the advantages created by its new found basis for criminal liability – mutual combat. Trial Tr. 822, l. 21 – 823, l. 23. The State candidly acknowledged the complete change in its legal theory of liability between the two cases. "That's not her business when my theory changed." Trial Tr. 832, ll. 10 – 11. During closing argument, the State was now able to lump Fields and appellant together, tying each to every shot fired.

> But even if you believe Dr. Kinsey that it is scientifically improbable for Tyler Givens's bullet to have killed Donovan Smalls, you still must find him guilty because it does not matter whose bullet delivered the fatal blow.
>
> . . .
>
> The fact of the matter is, Tyler Givens is responsible for all of those shots fired that night. And guess what, so is Ozante Fields. But today isn't Ozante Fields's day in court. Today is Tyler Givens's day in court. Tomorrow – not tomorrow, but Tuesday will be Ozante Fields's day in court. And if we ever are able to find the other two individuals who shot, they will have to face the same consequence as Mr. Givens.

Trial Tr. 998, l. 22 – 999, l. 21.

The United States Supreme Court has long held that attempting to answer the question of which side "benefit[ted]" from a mistrial is "nothing more than an exercise in pure speculation." United States v. Jorn, 400 U.S. 470, 483 (1971). However, in this case, there is no need to speculate

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the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." Kyles v. Whitley, 514 U.S. 419, 438 (1995).

as to which side benefited from the mistrial. The State was able to alter its theory of criminal liability, eliminate the need to rely upon the plainly unreliable testimony of Fields, and argue appellant was responsible for every bullet fired during the shooting. As in Parker, the totality of the circumstances of the original trial ending in mistrial and the actions of the State between trials to take advantage of those circumstances support a finding of goading. "Standing alone, any one of these actions might not show subjective intent on the part of the solicitor to goad the defense into seeking a mistrial. Rather, similar to what the first trial judge held, the totality of what occurred in the first trial leads to the conclusion that it was the intent of the solicitor to goad defense counsel to move for a mistrial." Id., 391 S.C. at 615, 707 S.E.2d at 803. As in Parker, "in this case, if we do not hold the solicitor intentionally caused the defense to move for a mistrial, then it would seem the only possible way to find that a solicitor intentionally goaded the defense would be for a solicitor to admit he or she took certain actions in an effort to goad the defense." Id., 391 S.C. at 613–14, 707 S.E.2d at 802.

If this Court finds the discovery violations committed by the State amounted to "manifest necessity" so as to avoid *the general application of double jeopardy discussed supra*, it should, under the unique facts presented here, hold that appellant was, in practical effect, intentionally goaded into the mistrial through prosecutorial misconduct. As such, the trial court erred in failing to dismiss the indictments as a violation of appellant's protection against double jeopardy. *See* Oregon v. Kennedy, 456 U.S. 667, 676 (1982) ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.").

II. The trial court erred in charging mutual combat as a theory of criminal liability when the State failed to provide notice of intent to rely upon mutual combat until opening Statements and then failed to introduce evidence supporting all elements of mutual combat.

A. Lack of notice.

While South Carolina has recognized the use of mutual combat as the basis for a jury charge to negate an assertion of self-defense, it has extended the doctrine to its use as a basis for criminal liability:

> 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. As each combatant aids and encourages the others to fire and continue firing the hail of bullets that results in a victim's death or injury, each may be found guilty under the "hand of one is the hand of all" theory of accomplice liability. Accordingly, we affirm the court of appeals' decision upholding Young Jr.'s convictions and sentences.

State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020).[12]

In Young, the defendants were charged with murder under the theory that they engaged in mutual combat. "Of course, mutual combat is not a stand-alone crime in South Carolina. Rather, it is a theory of criminal liability that underlies a recognized crime such as murder or manslaughter." Young, 429 S.C. at fn. 1, 838 S.E.2d at fn. 1.

However, unlike the indictment in Young, which provided clear notice of the State's intent to rely upon offensive mutual combat as its theory of criminal liability, the indictment here was silent as to mutual combat, containing only the assertion that "on or about April 14, 2019, with

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[12] As argued *infra*, the application of Young to crimes committed before its decision would violate due process under the prohibition on *ex post facto* application of substantive changes in the law. The *ex post facto* nature of applying Young to this case was addressed clearly only during post-trial as a motion for a new trial. A partial explanation for trial counsel's surprise regarding the use of mutual combat stems directly from the lack of pre-trial notice.

malice aforethought, the defendant, Tyler Jamal Givens did kill one Donovan Smalls by means of shooting the victim in the head. The victim did die as a proximate result thereof." R. * Indictment 2019-1481.[13]

As counsel for appellant noted, since the State failed to provide notice of its reliance on mutual combat until opening statements, no objection had been lodged regarding the sufficiency of the indictment.

> And now, am I going to be found ineffective because after his opening, I no longer have the opportunity to say that it's a defective indictment because I didn't know that that's what he was facing. And now I'm setting myself up for PCR.

Tr. 832, ll. 2 – 7.

Counsel for appellant emphasized the lack of notice regarding the use of mutual combat in objecting to the trial court's decision to charge mutual combat.

> I need to juxtapose this case from *Young*. I intend to do that in several ways. The first way is, Your Honor, in *Young*, the Court cited that the indictments -- the indictments alleged mutual combat. The indictments did. And that is key, because, let me tell you why, Your Honor. Four-and-a-half years, for four-and-a-half years, their theory, because of whatever investigation it was -- and I can't stand to hear myself so I'm going to move this -- but their theory for four-and-a-half years was that, We saw Tyler Givens and that's who's shooting and who did it.
>
> Your Honor, at some point, when I come in and say, You guys got problems because the science doesn't match up, all of a sudden -- all of sudden, now their theory becomes -- because they can't prove that he fired the fatal shot and they can't prove that his bullet hit Miss Saddler that now, all of a sudden, it becomes mutual combat. And, Your Honor, that is dangerous.

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[13] The indictment at issue in Young contained language regarding murder, including the malice aforethought requirement. The indictment in Young can be viewed in Appendix page 205 contained in the South Carolina Appellate Case Management System for State v. Young, Appellate Case No. 2018-001861(2020). https://ctrack.sccourts.org/public/caseView.do?csIID=68570.

Tr. 822, l. 21 – 823, l. 16.

In South Carolina, "[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993). A "conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts *under a different theory* than that alleged." Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (emphasis added) (*quoting* Thomason v. State, 892 S.W.2d 8, 11 (Tex.Crim.App.1994)). In Bailey, our Supreme Court held that an indictment charging "physical injuries resulting in Victim's death" required the State to produce evidence of such "physical injuries" rather than relying on "neglect" to support a conviction. Bailey, 392 S.C. at 435–36, 709 S.E.2d at 678.

The State argued that the indictment was not required to expand on the basic murder language to include mutual combat, equating the concept to an indictment on a principal basis but establishing accomplice liability at trial. Tr. 844, ll. 9 – 17.

> MR. HINDS: And others, but inclusive of him. And I think we're allowed to argue that to the jury. I think it's very applicable, and I don't think -- we are allowed to change our theory based on, number 1, new case law, and, number 2, as our case develops. That's, frankly, not her business if and when we change our theory.

Tr. 846, ll. 18 – 24.

The trial court erred in agreeing with the State. Here, the lack of notice regarding the reliance on mutual combat prevented that theory of liability from being charged to the jury. The trial court committed reversible error in charging mutual combat regardless of the evidence presented during trial.

B. The State failed to establish all of the required elements of mutual combat.

In addition, the State failed to meet its burden of production on all the essential elements of mutual combat, specifically a pre-existing dispute or ill will. The basis for the requirement of a pre-existing dispute has been addressed by our Supreme Court in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). The Taylor court found that "[a]lthough South Carolina has not explicitly required that the fight arise out of a pre-existing dispute, other States have made this prerequisite to mutual combat explicit. Texas and Colorado adhere to the rule that an 'antecedent agreement to fight' must exist for the court to charge mutual combat." Taylor, 356 S.C. at 233, 589 S.E.2d at 4. The Supreme Court reasoned it was "logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the *Porter*; *Graham*, and *Mathis* cases." Taylor, 356 S.C. at 234, 589 S.E.2d at 4.

The Supreme Court in Taylor then reviewed the evidence presented at trial to determine if mutual combat was applicable:

> There is no evidence, and the State does not contend, that there was any pre-existing ill-will or dispute between Kevin and the Petitioner, and there is no evidence that Kevin was willing to engage in an armed encounter with Petitioner. In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that each party knew the other was armed. Here, there is no indication that Kevin knew Petitioner was armed with a knife, and there was no pre-existing ill-will between the parties. Under these circumstances, there is insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury.

Taylor, 356 S.C. at 234, 589 S.E.2d at 5.

This requirement of prior ill-will was also addressed in State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022). Our Supreme Court in Bowers noted:

> If Bowers and Michael Morgan *had a previous dispute, mutually agreed to fight at a later time, and otherwise satisfied the limitations on the doctrine of mutual combat* set forth in *Taylor,* and if the

> resumption of their conflict played a role in starting the shootout in which Bowers shot Green, then under the same theory that led us to apply the doctrine in *Graham* and *Young*, the doctrine would make Bowers responsible for the injury to Green.

Bowers, 436 S.C. at 649, 875 S.E.2d at 612-13 (emphasis added).

The required element of pre-existing ill-will is a common theme seen in South Carolina caselaw on mutual combat: State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (finding the prior argument over livestock accompanied by threatening gunshots supported a finding of mutual combat); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) (noting parties had quarreled prior to the day of the killing and had made threats against each other before the fatal encounter); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("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.").

As was the case in Taylor, here there is a complete lack of evidence of any pre-existing ill-will between the parties involved. The State produced no evidence that any of the shooters (those that were identified) knew each other, interacted with each other, or had prior dealings with each other. In his recorded interview, appellant acknowledged knowing and being friends with Donovan Smalls. Appellant indicated he didn't know anyone who was shooting.

However, this expansive view of mutual combat, which effectively eliminates any need to show prior hostility or disagreement between the parties involved, has already been reviewed and rejected by our Supreme Court in State v. Taylor:

> As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the 'no fault' finding necessary to establish self-defense. As such, it is only logical that the *evidence of agreement to fight be plain*, like the evidence of mutual combat present in the *Porter*; *Graham*, and *Mathis* cases.

Taylor, 356 S.C. at 234, 589 S.E.2d at 4 (emphasis added). As noted, Porter, Graham, and Mathis all contained evidence of an ongoing dispute or prior ill-will between the parties involved.

Here, the trial court, the solicitor and counsel for appellant debated at length over the elements of offensive use of mutual combat. Counsel for appellant pointed out the lack of evidence supporting both a mutual agreement to engage in combat and prior difficulties or ill will between the parties. Tr. 842, ll. 10 – 21; 843, l. 10 – 844, l. 6; 847, ll. 5 – 21.

Ultimately, the trial court elected to charge mutual combat.

> THE COURT: I keep going back to the beginning of it where, again, it is basically a policy argument. They note here: "When two or more individuals engage to combat via a reckless shootout, they collectively trigger an escalating chain reaction that creates a high risk to any human life falling within the field of fire."
>
> And they go on over to mutual combat and say what constitutes mutual combat in the context of this conviction.
>
> So right or wrong, based on *Young*, I'm going to charge it.

Tr. 865, ll. 5 – 16.

Further explaining his decision, the trial court noted his interpretation that prior difficulties or ill will was not a required element under Young.

> THE COURT: Also, we went around and around yesterday, spirited debate with regards to the mutual combat. I read and I had not read in full, because you cited it a bunch yesterday, the *Bowers* case with regard to the prior difficulties. What I found interesting in *Bowers* was footnote 5 where it appears Justice Few is saying this mutual combat is a completely different animal. He says in *Young*, "Outside the context of the self-defense, we address the responsibility of combatant there when another combatant kills an innocent bystander," and goes into the engaging in reckless conduct and all that stuff we talked about yesterday.
>
> So I think that footnote is further indication that the Supreme Court intended this to be treated differently.

> For the record, I understand your position and you don't agree with that, and I get it. You're being an advocate. It's no problem. It doesn't hurt my feelings at all.

Tr. 905, l. 1 – 21.

Since the State presented no evidence of prior difficulty or ill will between appellant and either the vicitms or other shooters, an essential element of mutual combat was missing. The trial court erred in charging the jury on mutual combat due to this error of proof. As that was the main focus of the State's theory of criminal liability, charging the jury on mutual combat was prejudicial requiring reversal of appellant's convictions.

III. The trial court erred in refusing appellant's request to charge self-defense when evidence in the record supported the fact that defendant fired his weapon in response to being fired upon as he was seeking to find and aid his friend.

A. The charge was requested.

During the charge conference, counsel for appellant requested self-defense. Tr. 866, ll. 1 – 6. The State did not contest the charge, requesting only acknowledgement that mutual combat would negate self-defense. Tr. 866, l. 23 – 867, l. 4.

Ultimately, the trial court decided not to charge self-defense.

> THE COURT: And I wanted to put on the record too because you did request a self-defense or defense of others, and I put it in there initially and I started thinking about it, if we are to believe his statement, which that's the only evidence we have of that, it would seem ironic to have a defense of others or a self-defense charge for the person he alleged shot. So that was my reasoning there.

Tr. 904, ll. 16 – 24.

B. Discussion.

A self-defense charge is required when the evidence presented at trial raises an inference that:

> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

The trial court erred as a matter of law in denying self-defense based on the identity of the victim. This appears to be a variance on the provocation must come from the victim concept outlined in cases asserting voluntary manslaughter. *See* State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) ("[T]he applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina."). "The transferability of intent in a self-defense claim has not been recognized in South Carolina, *and Respondent does not ask this Court to recognize it now*." Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 131 (2014) (emphasis added). To the extent this is still unsettled law in South Carolina, the present case provides this Court the opportunity to clarify that, when a bullet is fired in self-defense, the shooter lacks a criminal intent behind the shot thus negating criminal liability regardless of the identity of the person struck by said shot. This Court should acknowledge the logical foundation of the concept of transferred intent and apply that to self-defense claim like that asserted here.

North Carolina courts apply this concept.

> According to the doctrine of transferred intent, a defendant "is guilty or innocent exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused." *State v. Dalton*, 178 N.C. 779, 781, 101 S.E. 548, 549 (1919) (citation omitted). In the self-defense context specifically, we have stated that [i]f the killing of the person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing of a bystander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable. *Id.* at 782, 101 S.E. at 549 (citation omitted).

State v. Greenfield, 375 N.C. 434, 441, 847 S.E.2d 749, 755 (N.C. 2020). The logic of Greenfield should have been applied below. Here, the trial court erroneously refused the charge based upon the identity of the person shot and not the intent on the person who fired the round.

C. Evidence presented during trial supported the charge.

Here, there was no dispute that appellant did not "start" the shooting. Moreover, he claimed to only fire his weapon in response to shots being fired in his direction from the area where shots were clearly fired. While the action of arming himself, then returning to the direction of those shots was evidence the jury could have used to negate this element (fault), appellant's explanation for returning to the area (searching for his friend who had been fleeing by his side) would not have equated to "coming to the difficulty." Nothing appellant did leading up to the firing of his weapon may be construed as criminal. He was entitled to arm himself in self-defense. "[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Appellant testified that he saw figures shooting in his direction and fired his weapon in response. State's Ex. 21 (08:06:40 – 08:10:00).

While the no other probable means of avoiding the danger element was problematic due to appellant's returning towards the location of the gunshots, he did provide a reasonable justification

for his actions: he was searching for his friend who had been fleeing beside him in response to the initial shots. State's Ex. 21 (07:58:00 – 07:59:00). As such, it was a jury question as to whether his actions in returning to the area in search of his companion were reasonable such that, in the moment he was fired upon from down the street, he had no other probable means of avoiding the danger than to act as he did.

D. Prejudice

The trial court's failure to charge self-defense was prejudicial, especially in light of the State's reliance on mutual combat as its theory of criminal liability. Historically, mutual combat acts to negate self-defense. *See* State v. Taylor, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003) ("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."). Typically, they are interconnected with factual issues within the province of the jury to resolve: was there a "mutual willingness to fight" and prior "ill will" or was an alleged combatant actually forced to fire in self-defense in response to aggression. Here, appellant asserted his discharge was in response to being fired upon. There was no evidence of prior hostility or ill-will between appellant and the other shooters (or the victims). Charging mutual combat, thereby marrying appellant to the fatal round fired by one of the alleged combatants without the concordant ability of the jury to weigh the application of self-defense was prejudicial, requiring reversal. "Through *Burkhart* and the line of cases preceding it, this Court has placed great emphasis on the importance of a defendant's right to assert self-defense when there is 'any evidence' to support it, and has taken pains to make sure the burden to disprove self-defense remains on the State." State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003).

IV. The trial court erred in failing to exercise discretion in sentencing appellant, who was eighteen years old at the time of the offense, to life in prison.

Post trial, counsel for appellant requested that the trial court reconsider its sentence of life without parole. R. * Post-Trial Motion. In refusing the motion, trial counsel indicated the basis for the decision was a policy that treated all similarly situated defendants the same, regardless of the evidence presented at trial and potential mitigating factors, such as youth and lack of prior record.

"It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge that sentences all defendants, regardless of the facts or circumstances surrounding the crime and the existence of mitigating factors to the same sentence would in fact be an avoidance of discretion as cautioned in Smith.

Here, the appropriate remedy would be a remand for the trial court to avoid "the mere recital of the discretionary decision" and State "on what basis the discretion was exercised" as outlined in Smith. Id., 276 S.C. at 498, 280 S.E.2d at 202.

V. Since the mutual combat charge and resulting conviction were prohibited as violation of due process under the *ex post facto* clause of the United States and South Carolina Constitutions, the trial court abused its discretion in failing to grant appellant's request for a new trial.

Post trial, counsel for appellant sought a new trial on the ground that the charge to the jury allowing conviction under the theory of mutual combat violated the *ex post facto* clause of the United States and South Carolina Constitutions. R. * Post-Trial Motion. "The Constitution prohibits both federal and state governments from enacting any '*ex post facto* Law.'" Peugh v.

United States, 569 U.S. 530, 538 (2013) (*citing* Art. I, § 9, cl. 3; Art. I, § 10). As our Supreme Court has acknowledged, *ex post facto* prevents retroactive application of any "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 offence, in order to convict the offender." State v. Stahlnecker, 386 S.C. 609, 618, 690 S.E.2d 565, 570 (2010).

Here, the application of the doctrine of mutual combat does in fact alter the nature of evidence required for a conviction. Prior to February 5, 2020, "[n]o appellate court in South Carolina, however, has addressed the import of the mutual combat doctrine on the death of an innocent bystander." State v. Young, 429 S.C. 155, 162, 838 S.E.2d 516, 519 (2020). The legal liability, under the doctrine of mutual combat, for an innocent bystander struck by a bullet fired by someone associated with the mutual combat attaching to all combatants created a new legal theory of liability, altering the evidence required for a conviction. "As a result, *we extend* our mutual combat jurisprudence to permit finding all mutual combatants criminally liable in situations where an innocent bystander is killed by one of the combatants." Young, 429 S.C. at 164, 838 S.E.2d at 521.

Prior to Young, the State would have been required to establish appellant fired the fatal shot (acted as a principal) or acted in concert with another who fired the fatal shot (acted as an accomplice). This approach was adopted by the State in appellant's original trial, allowing defenses such as the lack of evidence that appellant fired the fatal shot and third-party guilt since there was no evidence appellant was connected in any way to the other shooters. Young specifically expands the scope of accomplice liability to capture, under an expansion of the hand of one hand of all embedded in accomplice liability, to capture those who were not acting in concert but as opponents. Thus, "a combatant may properly be found guilty of murder for the death of a

friendly co-combatant at the hands of a rival combatant. See id. In the eyes of the law, it does not matter that the combatant did not intend any harm to the friendly co-combatant." Young, 429 S.C. at 161, 838 S.E.2d at 519.

This extension of the concept of mutual combat to encompass liability for "innocent bystanders" for all participants in the alleged combat does in fact alter the proof required to convict appellant in this case. The jury was provided evidence that appellant did not fire the fatal bullet that struck and killed Donovan Smalls. The same logic would apply to the bullet that wounded Ajulae Saddler. There were other shots fired by persons unconnected to appellant in any way other than through the "mutual combat" doctrine. There was no evidence presented that connected appellant with any of the other identified shooters. The sole basis for liability would have been as a principal actor (appellant fired the fatal bullet) or through mutual combat. Thus, the "legal rules of evidence, and receives less, or different, testimony, than the law required *at the time of the commission of the offence*, in order to convict the offender" offends the prohibition on *ex post facto* application of the law. Stahlnecker, 386 S.C. at 618, 690 S.E.2d at 570 (emphasis added).

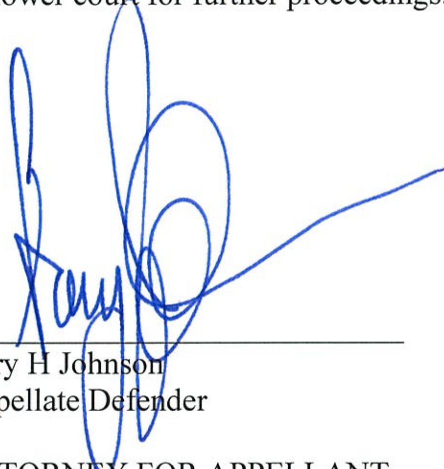
While this issue could have been raised sooner by trial counsel, it was brought before the trial court as a post-trial motion seeking a new trial on the basis the underlying conviction could not withstand an *ex post facto* challenge. Ideally, an argument on this ground would have been brought to the trial court's attention as soon as the State shifted to mutual combat in its opening statement. "Nevertheless, an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances." State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012). Bonner provides guidance here. The appeal raised a Constitutional issue that was apparent (a life without parole sentence of a minor for burglary). Here, the application of mutual combat to

an offense that pre-dates State v. Young, 429 S.C. 155, 838 S.E.2d 516 (2020) is equally apparent. Appellant has already been subject to two trials for the 2019 charges. Delaying addressing the *ex post facto* nature of applying mutual combat in this setting would not further judicial economy.

"An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). Here, the trial court's refusal to grant a new trial, based upon the improper *ex post facto* application of State v. Young as the basis of criminal liability, was an error of law requiring reversal. If, as argued before the trial court and here, State v. Young adopted a new basis for criminal liability through the use of mutual combat for the death of an innocent bystander, then appellant is entitled to a new trial free of the unfair taint of mutual combat.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's ruling and dismiss the indictments against appellant under the double jeopardy protections afforded by the United States and South Carolina Constitutions. In the alternative, the Court should reverse appellant's convictions and sentence and remand the matter to the lower court for further proceedings.



Gary H Johnson
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2026.