

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Beaufort County

Honorable R. Markley Dennis, Circuit Court Judge

**RECEIVED**

**DEC 27 2019**

**S.C. SUPREME COURT**

THE STATE,

PETITIONER,

V.

JOSEPH BOWERS

RESPONDENT.

APPELLATE CASE NO 2019-001776

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RETURN TO PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR RESPONDENT

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ARGUMENT

1

    Respondent’s objection to jury charge on mutual combat was well preserved for appellate review since the mutual combat case of *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003) was discussed by the trial judge, and defense counsel specifically objected to jury instruction on mutual combat at the charge conference.....16

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    The Court of Appeals correctly reversed respondent’s conviction for ABHAN where all of respondent’s charges were intertwined and cannot be logically separated out since the unwarranted jury instruction on mutual combat superimposed an erroneous charge on the law over a correct statement of law fostering confusion for the jury. ....18

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## QUESTIONS ON ISSUES OF CERTIORARI

1.

Did the Court of Appeals reversibly err by finding Bowers's appellate challenges to the trial judge's mutual combat and voluntary manslaughter jury instructions were properly preserved for appellate review when defense counsel never presented any specific grounds to the trial judge in support of an objection to either of those charges, raised no objections after the trial judge instructed the jury on mutual combat and voluntary manslaughter as part of his jury charge, and then directly indicated to the trial judge she had no objections to the jury instructions as presented after the trial judge finished instructing the jury on the applicable law?

2.

Even if Bowers's appellate challenge to the mutual combat jury instruction was somehow properly preserved for appellate review and the trial judge erred by instructing the jury on mutual combat, did the Court of Appeals nonetheless err by reversing Bowers's assault and battery of a high and aggravated nature conviction when the mutual combat instruction could not have resulted in any actual prejudice to Bowers in regard to the specific conviction since the trial judge direction instructed the jury the doctrine of mutual combat did not apply to the charge stemming from the shooting of Green and neither mutual combat nor self-defense was factually applicable to that particular charge based on the evidence presented, which only supported a conclusion Bowers shot Green in the back as that unarmed individual merely attempted to flee?

## **COUNTERSTATEMENT OF ISSUES OF CERTIORARI**

1.

Whether respondent's objection to a jury charge on mutual combat was preserved for appellate review since the mutual combat case of State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) was discussed by the trial judge when considering charging it, and defense counsel specifically objected to the jury instruction on mutual combat at the charge conference?

2.

Whether the Court of Appeals also correctly reversed respondent's conviction for ABHAN where all of respondent's charges were intertwined from a single continuous "shoot out" at a club where this unwarranted jury instruction on mutual combat not only negated respondent's self-defense case, it also superimposed an erroneous charge over a correct statement of law which only fostered confusion for the jury?

## STATEMENT OF THE CASE

### **Procedural History**

Respondent was indicted for two counts of murder, two counts of attempted murder, and possession of a firearm during the commission of a violent crime. App. 362 – 374. His case came on for trial on September 29, 2014, before the Honorable R. Markley Dennis, Jr., and a jury. App. 5. The state dismissed one count of murder during the trial, and the other count went to the jury after the judge stated directing a verdict in this case would constitute him weighing the evidence.

On October 1, 2014, the jury found respondent guilty of voluntary manslaughter on the other count of murder. The jury found respondent guilty of assault and battery of a high and aggravated nature (ABHAN), on one count of attempted murder, and not guilty on the other count of attempted murder. The jury also found respondent guilty of possession of a firearm during the commission of a violent crime. App. 356, l. 2 – 357, l. 3.

Judge Dennis sentenced respondent to fifteen years imprisonment for voluntary manslaughter, fifteen years imprisonment for ABHAN, and five years imprisonment for possession of a weapon during the violent crime. All sentences were concurrent. App. 360, ll. 2 – 13.

The Court of Appeals reversed respondent's convictions in State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (2019). App. 456-469. The Court of Appeals denied rehearing, but highlighted State v. Johnson, 333 S.C. 62, 64 n. 1, 508 S.E.2d 29, 30 n. 1 (1998) on the opinion's preservation analysis, and modified footnote 6 of the opinion as to all charges against respondent being intertwined and the unwarranted jury instruction on mutual combat being prejudicial. App. 454-455.

The state sought certiorari and this return follows.

### **Relevant Facts – An Introduction**

The evidence in this case showed that respondent went to the club with a couple of people he knew. There was not any evidence before the jury that he went to the club with the intention of engaging in “mutual combat.” An altercation occurred between two other men that did not involve respondent, and armed individuals outside the club began shooting when one decedent fired a flare gun. The trial judge correctly did *not* instruct the jury on accomplice liability – “the hand of one is the hand of all.” App. 316, l. 16 – 344, l. 2. Respondent objected to instructing the jury on “mutual combat” and voluntary manslaughter. Mutual combat had earlier been discussed at the directed verdict stage, and the judge talked about Judge Hayes<sup>1</sup> getting reversed for charging it in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). The judge put on the record that he was instructing mutual combat over respondent’s objection. App. 281, l. 23 – 284, l. 4; app. 295, l. 3 – 297, l. 16. The issue was preserved for appellate review.

Further, there was no evidence of a tacit agreement or otherwise to engage in mutual combat in this case. The “mutual combat” instruction was extraordinarily prejudicial because it negated the jury’s ability to find respondent not guilty by reason of self-defense in what certainly appeared to be a self-defense case *if* respondent fired a gun during the chaos that ensued after the flare gun was fired. While the state’s challenge to the mutual combat instruction is purely procedural and not substantive, a review of the trial evidence for the context of the prejudice follows below.

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<sup>1</sup> The Honorable John C. Hayes, III.

## Trial Evidence

Stanley Humphries was that state's first non-law enforcement witness at trial. Stanley went by the nickname "Hump." App. 78, ll. 10 – 20.

Stanley remembered that on June 21, 2012, he was with Dante Bailey. Dante went by the nickname "Cole." That night he went with Dante Bailey and "Janey" to the Sand Dollar, and they played pool there until the Sand Dollar closed. Respondent Joey Bowers was not with them. The men then went by Dante's house to get a pack of cigarettes. "Some other people got in the van with us, and we went to the Midnight Soul Patrol [club], I believe is the name of it." Joey Bowers was one of the men who got in the green minivan with them. Respondent's nickname was "Opie." Stanley did not even know where the Midnight Soul Patrol bar was so he had to get directions. App. 79, l. 13 – 81, l. 3. Stanley was driving a green minivan at the time. App. 78, l. 15 – 79, l. 14.

Stanley had known Dante since he was about fourteen or fifteen years old, and he was thirty-seven at the time of the trial. The following occurred on direct examination of Stanley.

Q. Tell us what happened when you got to the [Soul Patrol] club.

A. We went inside. Some people got some drinks. I got a bottle of water. *Asked where the pool table was*, they said it was off in the side room. Stood around and talked for a little while, walked outside, and this whole incident started. *We never even got to shoot pool that night.*

*Q. All right. And is that why you went there?*

*A. Yes, ma'am.*

Q. And when you say this whole incident started, tell us exactly what started.

A. We were outside smoking, and this guy Krum, they call him Krum, came over there and started *some trouble*

*with Dante. And somebody said, Come on, let's go. And as we went to leave the gunshots rang out.*

Q. Do you actually get in your van?

A. Yes, ma'am.

Q. All right. Did Dante get in the van?

A. No, ma'am. He was backing us out. There was cars parked real close to us. There was a telephone pole beside us, and *he was actually directing us out. He was standing at the back passenger side of the van.*

Q. *Did Opie get in the van?*

A. *Yes, ma'am.*

Q. *Did he get out of the -- did he stay in the van?*

A. *We all got out of the van once we realize that Cole [Dante] had been shot.*

Q. All right. What did you see after Cole had been shot?

A. I actually went over there to him and pulled his shirt up, and he had a bullet hole on his right side.

Q. Did you see anyone tending to him?

A. No, ma'am. He was -- he was -- he was already dead.

App. 81, l. 4 – 82, l. 11. (emphasis added).

On direct-examination Stanley initially said that he thought Respondent Joey Bowers left with them but now maintained that he was wrong about that initial assertion. However, he acknowledged on cross-examination that Respondent Bowers was actually the person who “*called out and said, C'mon, let's go.*” App. 82, l. 14 – 84, l. 24. (emphasis added).

Stanley said he did not have a gun that night, Dante Bailey did not have a gun that night, and to the best of his knowledge Respondent Joey Bowers did not have a gun that night. Stanley

confirmed that they were attempting to leave in the van, and that someone shot and killed Dante. Stanley did not know where the shots came from before Dante dropped to the ground, dead. Stanley obviously feared for his life at the time. Stanley also acknowledged that respondent, who was near him, was also under fire. They both wanted to get away to save their lives. App. 84. l. 25 – 86, l. 15.

There was evidence that respondent Joseph Bowers, “Opie,” and Stanley Humphries, “Hump,” were the only two white young men at the club that night. Joe Pope remembered seeing respondent, Stanley, “Mike G., and “Corleon” when he arrived at the club, but he admitted “It happened so fast.” App. 87, l. 4 – 88, l. 23.

Pope acknowledged that Lucas Morgan was the only person he saw with a gun at the club that night. Lucas Morgan was also the only person he saw shooting his gun. Pope acknowledged that Irvin Smalls got into an argument with Lucas Morgan and that Lucas Morgan crouched down by a propane tank. Morgan then began firing his weapon. App. 97, l. 11 – 98, l. 11. (Lucas Morgan was acquitted in a separate trial held about two weeks before respondent’s trial. This Court can also take judicial notice of the fact that the South Carolina Incarcerated Inmate Locator website does not list Lucas Morgan as being incarcerated). App. 8, l. 19 – 9, l. 24. The following occurred during the cross-examination of Pope:

Q. Isn't it true, Mr. Pope, that you never saw Joseph Bowers with a gun, right?

A. No, ma'am.

Q. Okay. And you never saw Joseph Bowers in an argument with anybody that night, right?

A. I don't -- I don't think I know to about.

Q. Okay. Well, that's helpful. Thank you. And isn't it true, Mr. Pope, that you called 911?

A. Yes, ma'am.

Q. *And you told 911, Hey, look, Lucas Morgan's out here shooting this place up, right?*

A. *Yes, ma'am.*

Q. Okay. And you told them, Richard Green's been hit, right?

A. Yes, ma'am.

Q. Okay. *And you said, Michael Morgan's [the decedent] been hit, too?*

A. *Yes, ma'am.*

Q. *Right. And did you see Michael get shot?*

A. *No, ma'am.*

Q. Did not. And you didn't see Robert Goodwine get shot, correct?

A. No, ma'am.

Q. Do you know when Michael Morgan got shot? Was it while Lucas was firing? Do you have any idea?

A. Well, when them guys came running through the parking lot, Mikey was standing over Richard with a flare gun, holding it like this, and he didn't see them guys coming.

Q. *Right. Michael had a flare gun, right?*

A. *Yes, ma'am.*

Q. *You saw that flare gun in his hand?*

A. *Yes.*

App. 98, l. 15 – 99, l. 23. (emphasis added).

Pope said all of the four or five men he remembered running across the parking lot shooting toward Michael were black men -- meaning respondent was not one of those men. App. 100, ll. 1 – 17.

Robert Goodwine was one of the men shot at the club that night, and the subject of one of the “attempted murder” indictments. Goodwine testified he was shot by Lucas Morgan. He remembered Morgan “shot at me from the front, but he hit me from the back.” Goodwine testified he was running at the time because Morgan was shooting at him. App. 104, l. 25 – 105, l. 19.

Goodwine confirmed the only two people he saw shooting that night were Lucas Morgan and Dante Bailey, “Cole.” As already seen, Dante Bailey was shot and killed that evening.

Goodwine remembered he got in the van with “Hump,” and “Hump,” who was Stanley Humphries, took him to the hospital. Goodwine said he had seen respondent earlier that evening at the club, but he did not remember respondent being with them when he was driven to the hospital. App. 105, l. 22 – 106, l. 23.

On cross-examination, Goodwine confirmed that he was around Dante Bailey and Joey Chaplin while at the club. App. 107, l. 14 – 108, l. 8. Goodwine acknowledged that Chaplin was black.

Richard Green was the victim of the other attempted murder charge. App. 108, l. 14 – 109, l. 23. Green confirmed he was at the Midnight Soul Patrol club on the evening of June 21, 2012. He remembered “hanging out” for a while at the club before he went to the owner’s house nearby. “That’s when I heard the first gunshot, so I moved. I walked off a little bit, and that’s when I felt I got shot, with a second one.” App. 110, ll. L – 5. Green did not know who shot

him. Green was paralyzed as a result of the shot, and he was in a wheelchair. App. 110, ll. 9 – 10.

Alvin Wilson was also at the club that night. He estimated there were about seventy-five people at the club – it was a busy night. Wilson did not know respondent, but he confirmed he only saw two white people at the club. App. 113, l. 10 – 115, l. 16.

Wilson was in the DJ booth in the club, and he played music. Wilson said he “shut the music down” because “an altercation was going on, like I said, I said, the party is over.” App. 116, ll. 8 – 25.

Wilson did not see anyone shooting but he saw his cousins, Michael Morgan and Richard Green, “laying on the ground outside.” App. 117, ll. 5 – 25. Lucas Morgan was also related to Wilson. App. 118, l. 24 – 119, l. 1. Wilson, nonetheless, admitted that he saw Lucas Morgan with a gun that evening. App. 124, ll. 13 – 15.

Magnum Smalls was a regular at the Midnight Soul Patrol club. On the night of the shooting he remembered shaking hands with Dante Bailey. Smalls recalled about fifteen minutes later that Dante Bailey and a man named Arthur were “having words.” App. 125, l. 6 – 126, l. 25. Another man, “D Grant,” got in-between the two men, and “was pretty much walking away from everybody else, like diffusing the problem . . . after that guns [were] flashed . . . like I said, they walked away pretty much from like everybody else, and they were talking – D Grant was talking to both of them. And then the flare gun went off, after the flare gun went off, all chaos broke loose. Everybody pretty much started shooting.” Smalls confirmed that decedent Michael Morgan was unfortunately the person who fired the flare gun. App. 127, l. 1 – 128, l. 22. (emphasis added).

Smalls said when the shooting ended, he saw Dante Bailey, Michael Morgan, and Richard Green on the ground. As seen, Dante Bailey and Michael Morgan were killed, and Richard Green was badly wounded. App. 130, ll. 2 – 8.

Smalls saw Respondent Joey Bowers standing near his friend Dante, and he maintained respondent picked up Dante's semi-automatic handgun while they were attempting to get Dante inside of the vehicle. App. 130, l. 10 – 131, l. 16. Smalls then gave contradictory statements, saying he saw respondent earlier with a gun, but he admitted at a prior deposition that he said he never saw respondent shoot a gun that evening. App. 131, l. 12 – 135, l. 7.

On cross-examination, defense counsel pointed out the different statements given by Smalls. Smalls admitted he did not see respondent with a gun that night, and that he only saw respondent pick up Dante's gun when they were helping him into the vehicle after Donte had been shot. Smalls repeated he did *not* see respondent shoot the gun however. App. 136, l. 14 – 138, l. 1.

The following occurred on cross-examination of Smalls:

Q. But you've also -- but, you know, *you actually saw the first shot go off, and that was Mikey Morgan, right?*

A. *Right.*

Q. *Okay. And that was him firing his flare gun?*

A. *Yes.*

Q. So, that's one shot right there?

A. *Right.*

Q. And then you saw Lewis Melvin Johnson, Dolla, shooting out the side door of the club, right?

A. *Yes.*

Q. Okay. So that's two. And they're not firing at the same time, right?

A. Right.

Q. Okay. *So, it's the flare gun, and then Dolla, and then Lucas firing, correct?*

A. *Correct.*

Q. Okay. And then I think also you would say that you saw *Arthur Chaplin firing his gun across the parking lot, right?*

A. *Correct.*

Q. Okay. *Would it also be fair to say that you saw Joseph Bowers trying to assist Cole while Cole was on the ground and had been shot?*

A. *Yes.*

Q. Now, you, I guess, would also agree with me that you saw people with guns that night, at that Midnight Soul Patrol?

A. (Nods in the affirmative.)

Q. *And the people that you saw were Arthur Chaplin?*

A. *Yes.*

Q. *Also known as Krum?*

A. *Correct.*

Q. *Okay. Dante Bailey?*

A. *Yes.*

Q. *Also known as Cole?*

A. *Yes.*

Q. *And these are the two gentlemen that you say were in a little verbal altercation over something?*

A. *Yes.*

Q. How about, didn't you see Derrick Grant with a gun that night?

A. Yes, I did.

Q. And is that the man you say kind of separated those two?

A. Yes.

Q. And you saw Terry Thornton with a gun that night, T Dog?

A. Yes.

Q. And, of course, you -- we established that you saw Lucas Morgan with a gun?

A. Correct.

Q. And you saw Mikey with a gun?

A. Correct.

Q. And you saw Dolla, Lucas Melvin Johnson, with a gun?

A. Correct.

Q. And you also saw Stanley Humphries, the other white fellow, with a gun, didn't you?

A. Yes.

App. 137, l. 7 – 139, l. 15. (emphasis added).

Investigator Jeremiah Fraser testified that he talked to Michael Morgan, who “was in obvious pain,” after being shot, and Lucas Morgan. Fraser said he took respondent into custody the same day. App. 189, l. 1 – 192, l. 18.

Investigator Fraser testified respondent told him he was pulling Dante Bailey, “Cole,” back into the van, that Cole “wouldn’t listen to him,” and that “Cole stepped out from behind the van and he was shot. That was pretty much the extent of it.” App. 194, l. 13 – 195, l. 11.

On cross-examination, Investigator Fraser admitted that he told respondent five times “look, Joe, just tell me you picked up the gun. If you picked up the gun, you did it in self-defense.” Fraser acknowledged that respondent nonetheless told him he did not have a gun, and that he did not shoot anyone. App. 201, l. 21 – 202, l. 10.

The state also introduced a phone call made by respondent from the jail in which he said “I ain’t killed the boy. I only shot the boy.” When moving for a directed verdict, defense counsel said this statement was in “essence a denial of killing anyone, and at best an admission that, to his own internal belief, that he may have shot someone.” App. 207, l. 24 – 210, l. 6. App. 275, l. 9 – 277, l. 5. The judge said the jail call now raised a jury question, and that he could not end the trial by directing a verdict given that jail call. App. 277, l. 6 – 279, l. 20; 281, ll. 1 – 10.

### **Mutual Combat Instruction**

The judge told defense counsel that he, in addition to charging self-defense, had been reading about the legal concept of “mutual combat”. App. 281, l. 23 – 284, l. 4. The judge observed that he was concerned about that charge because he had read one case where Judge John Hayes had been reversed “for submitting” a mutual combat instruction. That case was State v. Taylor, 356 S.C. 227, 589 S.E. 2d 1 (2003). App. 283, l. 25 – 284, l. 4.

At the charge conference, defense counsel objected to the judge instructing the jury on “mutual combat.” App. 295, l. 3 – 296, l. 15. In addition to objecting to the “mutual combat” instruction, defense counsel also told the judge that she objected to him charging voluntary manslaughter over her objection. App. 295, l. 3 – 297, l. 16.

Following the charge conference, the solicitor told the judge that the state was dismissing the murder indictment against respondent involving Dante Bailey, who went with respondent to

the club that night, and who there was evidence respondent was trying to keep out of danger's way at the time Dante was shot and killed. App. 297, l. 21 – 298, l. 23.

### **Instructions on the Law**

The judge, over objection, charged the jury on the lesser-included offense of voluntary manslaughter. App. 329, l. 18 – 331, l. 19. As to “mutual combat” the judge charged the jury:

Now, I want to discuss with you a part of the theory that you'll have to consider, and it's known as mutual combat. And this law provides that *if a Defendant voluntarily participated in mutual combat for the purpose other than protection, the killing of a victim would not be self-defense. This is true even if during the combat the Defendant feared death or serious bodily injury.*

However, if before the killing is committed the Defendant withdraws and tried in good faith to avoid further conflict, and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.

For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the combat.

In addition, it must be shown by that -- be shown that both parties were armed with a deadly weapon.

App. 333, l. 15 – 334, l. 8. (emphasis added).

The judge also charged the jury on self-defense. App. 334, l. 9 – 337, l. 9. The judge reminded the jury as to self-defense that if the jury found “mutual combat,” he told the jurors “*Then self-defense goes out the window, so to speak. Not available.*” App. 340, ll. 13 – 23. (emphasis added).

## ARGUMENT

1.

Respondent's objection to jury charge on mutual combat was well preserved for appellate review since the mutual combat case of *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003) was discussed by the trial judge, and defense counsel specifically objected to jury instruction on mutual combat at the charge conference.

As seen above, defense counsel objected to instructing the jury on "mutual combat," and voluntary manslaughter. Mutual combat had earlier been discussed at the directed verdict stage, and the judge talked about Judge [John] Hayes getting reversed for charging it in *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003). The judge instructed the jury on both over respondent's objection. App. 281, l. 23 – 284, l. 4; app. 295, l. 3 – 297, l. 16.

The judge specifically noted the defense's objection to him charging the jury on mutual combat, and counsel also objected to his charge on voluntary manslaughter. Once her objections and position were placed on the record as to the jury instructions with the judge at the charge conference, she was not obligated to continue to object. *State v. Johnson*, 333 S.C. 62, 65, n. 1, 508 S.E.2d 29, 31, n. 1.

The Court of Appeals correctly held that "once a party objects to a jury charge and, after opportunity for discussion, is denied on the record, no further action is necessary in order to preserve the issue for appeal." *State v. Johnson*, 333 S.C. 62, 64, n. 1, 508 S.E.2d 29, 30 n. 1 (1998). App. 460. The Court further observed, quoting this Court, "instead of being hypertechnical, we approach preservation with a practical eye." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). App. 460. The Court of Appeals correctly found it

was apparent from the record “[t]hat the trial judge and the state understood appellant was objecting because he thought there was no evidence to support the charge.” App. 462.

The Court of Appeals correctly found the objection to the mutual combat jury instruction was preserved and cited State v. Taylor as an example of a case where the facts did not justify a jury instruction on mutual combat. App. 463 – 464. On the merits, the court found that the charge on mutual combat was improper and that respondent was prejudiced. App. 465 – 469. Certiorari should be denied on the state’s error preservation ground.

2.

The Court of Appeals correctly reversed respondent's conviction for ABHAN where all of respondent's charges were intertwined and cannot be logically separated out since the unwarranted jury instruction on mutual combat superimposed an erroneous charge on the law over a correct statement of law fostering confusion for the jury.

The Court of Appeals correctly found that all of the charges against respondent were intertwined and that the reversal would apply to all of respondent's convictions, including the ABHAN conviction. App. 469, n. 6. The state contends the judge's mutual combat instruction did not taint the ABHAN conviction. However, this record shows even the trial judge knew he could not adequately separate out mutual combat from the other charge -- seemingly without giving a charge on the facts -- when he recharged the jurors:

THE COURT: The question which is Court's Exhibit 6, does a determination of mutual combat require a finding of culpability in each of the charges?

The day may come where we will be able to really answer that charge in detail. There is a provision in our Constitution that prohibits the Court from charging on the facts. And when we get into answering specific questions we are getting close to charging on the facts. And the Federal court they are permitted to do that, but we are not since it is a provision of our state Constitution. So, it's not that I don't want to specifically address it, but I'll address it in this fashion: I'll remind you of the charge by reading the mutual combat charge. And I'm going to preface what I'm saying. Remember, the State has the burden of proof here. They have the burden of proving all elements of the mutual combat. They have the burden of disproving self-defense . . .

For mutual combat there must be a mutual intent and a willingness to fight. This intent may be shown by the acts and conduct of the parties and circumstances surrounding the conduct. In addition, it must be shown that both parties were armed with a deadly weapon. That being said, that creates an answer as a matter of law without addressing specifics. And that is, there can only be one mutual combat defense in the indictments. That is the

indictment with respect to Michael Morgan because there are – I find as a matter of law there is no evidence to support the other victims being armed at any point.

But you would still, as to the other victims, since there's no mutual combat, you would have to consider whether or not the State has disproved self defense because that would apply as to those particular persons because mutual combat would not be there to negate that consideration as to those particular indictments. As to the remaining indictment, obviously, as I indicated to you, the weapons charge is dependent upon your findings of some of the other charges. So, I think that I have addressed that to the extent that I'm permitted to address by law.

App. 351, l. 13 – 352, l. 5; app. 353, l. 4 – 354, l. 1. (emphasis added).

The state's claim, certiorari petition at 18, that “[t]he trial judge expressly explained to the jury the mutual combat charge was only applicable to the charge stemming from the fatal shooting of Morgan and *not to the charge related to the shooting of Green,*” very much turns a blind eye to the improper mutual combat instruction causing confusion, and prejudice. In fact, the judge further admitted to the lawyers after this instruction that he did not think he could adequately answer the jury's inquiry or prevent the confusion: “[I] appreciate you trying to help me work that answer out. We have that constraint and I would love to do it, we could all fashion a charge if that Constitutional provision wasn't there, but it's there. And we try to honor it. But I appreciate your attention. We will be at ease.” App. 354, ll. 17-22. (emphasis added). The jury then found appellant guilty of ABHAN on one count of attempted murder and not guilty on the other, and guilty of voluntary manslaughter on the murder count. App. 353, l. 3 – 354, l. 3.

The indictment for attempted murder as to Richard Green, resulting in the ABHAN conviction, alleged: “That in Beaufort County on or about June 21, 2012, *while engaged in an ongoing gun battle*, an inherently dangerous felony, with malice aforethought, Joseph Bowers *did attempt to kill and murder Richard Green by means of shooting*, in violation of Section 16-3-

10 of the South Carolina Code of Laws (1976) as amended.” See Indictment App. 363; Jury verdict 356. (emphasis added). The attempted murder indictment for Robert Goodwine also alleged Goodwine was shot during an “ongoing gun battle.” App. 371.

This ongoing gun battle was what the solicitor erroneously urged justified the unwarranted “mutual combat” instruction. The jury found respondent not guilty on this attempted murder count against Goodwine and guilty as to Green. App. 356.

Further, respondent was found guilty of voluntary manslaughter in the shooting death of Michael Morgan even though there was no evidence of a heat of passion upon a sufficient legal provocation. See Brief on this issue in the Court of Appeals. App. 398-399; and indictment. App. 365. The Court of Appeals did not reach this voluntary manslaughter conviction issue given its reversal on the “mutual combat” instruction, which negated respondent’s defense of self-defense.

While shots were undisputedly fired or exchanged that June 21, 2012 night, the inconsistent jury verdicts tend to support the logical conclusion that the unwarranted “mutual combat” jury instruction confused the jury.<sup>2</sup> A fair reading of the jury charge and the limited recharge including self-defense and “mutual combat” supports this conclusion. See App. 329, l. 15 - 350, l. 7.

The purpose of a trial judge’s jury instructions is “to enlighten the jury and aid it in arriving at a correct verdict.” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). “Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion.” State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986).

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<sup>2</sup> Respondent fully understands that “inconsistent jury verdicts” is not a basis for relief, and that is not his point. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

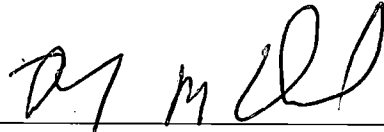
This case involves a shooting, which turned into a shootout free for all which involved various people apparently shooting and others scattering. As the Court of Appeals correctly found, the judge's erroneous charging of mutual combat in this case, where all the charges from this continuous chaotic free-form shootout were intertwined, likely confused the jury. See State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury."). Court of Appeals opinion, App. 469, n. 6.

The jury was not engaged in solving a math problem. The Court of Appeals correctly included the ABHAN conviction in its reversal, and order of a new trial for respondent, given the confusion and prejudice the unwarranted jury instructions caused. See State v. Robinson, 306 S.C. 399, 412 S.E.2d 411, 413 (1991), *citing* State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986).

Certiorari should be denied.

**CONCLUSION**

By reason of the foregoing arguments, certiorari should be denied.

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2019.

**RECEIVED**

**DEC 27 2019**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Beaufort County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

PETITIONER,

V.

JOSEPH BOWERS

RESPONDENT.

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

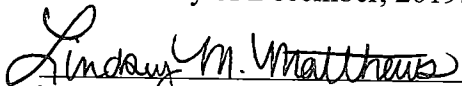
The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joseph Bowers, #361626, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 27th day of December, 2019.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me  
this 27th day of December, 2019.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 22, 2024.