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STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 06 2019
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Thomas W. Cooper, Jr., Circuit Court Judge

On Certiorari to the South Carolina Court of Appeals
Opinion No. 5592 (Ct.App. filed August 22, 2018)
(Former Appellate Case No. 2015-000508)

The State, Respondent,

v.

Aaron Scott Young, Jr., Petitioner.

Appellate Case No. 2018-001861

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PETITIONER'S ISSUES PRESENTED

I. Did the Court of Appeals err in holding that mutual combat is alone recognized by South Carolina law as a sufficient basis for a murder conviction, holding that the evidence supported finding mutual combat, and affirming Petitioner's murder conviction on these grounds?

II. Did the Court of Appeals err in holding the trial court properly refused to give a jury charge on the end of mutual combat?

III. Did the Court of Appeals err in affirming the denial of Petitioner's motion for a directed verdict on the attempted murder charge?

(Brief of Petitioner, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES PRESENTED

I. Did the Court of Appeals err in finding the trial court properly denied the defense's motion for a directed verdict because the direct and circumstantial evidence, viewed in the light most favorable to the state, reasonably tended to prove his guilt of the offense under a mutual combat theory with transferred intent?

II. Did the Court of Appeals err in holding there was no abuse of discretion in denying Petitioner's request to charge withdrawal from mutual combat when no evidence existed to support such a charge?

III. Did the Court of Appeals err in holding there was no abuse of discretion in denying Petitioner's motion for a directed verdict on the charge of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of this offense?

RESPONDENT'S STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Petitioner, Aaron Scott Young, Jr., in October 2014 for the murder of Khalil Singleton (Indictment Number 2012-GS-07-1932) and for the attempted murder of Tyrone Robinson (Indictment Number 2014-GS-07-1940).

On February 23, 2015, Young's case was called to trial before the Honorable Thomas W. Cooper. Roberts Vaux, Esquire, represented him during the trial. Solicitor Isaac McDuffie Stone and Deputy Solicitor Sean P. Thornton represented the State. On February 25, 2015, the jury returned verdicts of guilty on both charges. (App. p. 602; Tr. p. 598). Judge Cooper sentenced Young to thirty (30) years imprisonment on the murder conviction and thirty (30) years, concurrent, on the attempted murder conviction. (App. pp. 620-21; Tr. pp. 616-17). Petitioner filed a timely notice of appeal.

On December 7, 2016, Petitioner filed a Final Brief of Appellant in the South Carolina Court of Appeals. (App. p. 645; FBOA, p. 1). Petitioner also filed his final reply brief that same day. (App. pp. 722-741). The State had previously filed its Final Brief of Respondent on November 30, 2016. (App. pp. 671- 72).

After argument on June 6, 2018, the Court of Appeals issued an unpublished opinion on August 22, 2018 and affirmed the convictions and sentence. (App. pp. 742-752). On September 6, 2018, Petitioner sought rehearing, (App. pp. 753-762), which the Court of Appeals denied on September 20, 2018, (App. p. 765). On October 18, 2018, Petitioner filed a petition for certiorari review in this Court. Respondent filed a return to the petition on November 29, 2018.

On May 9, 2019, this Court granted the petition. Petitioner filed his Brief of Petitioner on June 6, 2019. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

In the afternoon of September 1, 2012, eight-year-old Khalil Singleton was shot to death in the midst of an ongoing gun battle. One of the three men responsible for taking the child's life was Petitioner, Aaron Young, Jr. Within the course of an hour, a volatile conflict between Petitioner, his father, Aaron Young, Sr., and Tyrone Robinson traversed several different locations on Hilton Head Island, eventually ending in front of a group of children jumping on a trampoline. It was there Khalil was shot.

The Court of Appeals summarized the basic facts of the crime as follows:

> In October 2014, Young, Jr. was indicted for the murder of Khalil Singleton (Victim) and the attempted murder of Tyrone Robinson. The indictment arose out of a September 1, 2012 conflict between Young, Jr. and Robinson, which culminated in the death of Victim, a minor who was playing outside on a trampoline during the incident. The State's theory of prosecution was that Young, Jr. engaged in mutual combat with Robinson and thereby caused Victim's death. [FN 1]
>
> [FN 1] It is undisputed that Robinson fired the shot that killed Victim.
>
> Prior to trial, Young, Jr. moved to quash the murder indictment, arguing mutual combat is not a criminal offense in South Carolina. Young, Jr. further argued the doctrine of transferred intent does not apply in the context of mutual combat. The trial court deferred ruling on the motion until it could "get some sensible legal theory on one side of that issue or another which makes the transferred intent doctrine applicable in mutual combat."
>
> Jontu Singleton testified he met with Robinson on the afternoon of the incident at a house in Hilton Head. The two men decided to drive Robinson's car to the Youngs' residence. When Robinson and Singleton arrived at the house, Young, Sr. and Young, Jr. were both outside. Robinson exited his vehicle carrying a .38 caliber revolver and began yelling at Young, Jr. Young, Sr. saw the gun and immediately began to struggle with Robinson. Robinson fired the gun during the struggle, and Young, Sr. backed away; Robinson proceeded to fire one or two more shots at the ground. Robinson then returned to his vehicle and sped away; Singleton remained with the Youngs. Immediately after Robinson fled the yard, the Youngs went into their house and retrieved a semi-automatic pistol and ammunition. The Youngs and Singleton then entered Young, Sr.'s gray pickup truck and began to search for Robinson. Young, Sr. drove the truck, and Young, Jr. assembled the pistol in the passenger seat. The three men drove around their

neighborhood for approximately ten minutes, but they could not find Robinson. Singleton then exited the vehicle
and left the area.

Charlese Mitchell, Robinson's neighbor, testified she was home alone on the day of the incident and heard several rounds of gunshots around 4:00 p.m. After the gunfire stopped, Robinson came to her door "hyped up" and carrying a gun.

Robinson entered Mitchell's trailer and stated "those [people were] shooting at me." At that time, Tyrone Delaney, Mitchell's fiance, came home and spoke with Robinson for no more than ten minutes. Delaney told Robinson to leave, and shortly after Robinson left, Mitchell and Delaney heard another series of rapid gunfire. Mitchell testified that she saw Young, Sr. and a passenger she could not identify speeding down the road in a gray truck when she went outside to tell her son and stepsons to come inside the trailer. After retuning indoors with her children, Mitchell heard three final gunshots followed by screaming. Mitchell went outside to see Victim lying on the ground.

Delaney testified he observed the Youngs' gray truck speeding out of Mitchell's neighborhood at approximately 4:00 p.m. When Delaney arrived at Mitchell's trailer, Robinson explained he and the occupants of the truck had exchanged gunfire. At that point, Delaney asked Robinson to leave. Shortly after Robinson left, Delaney heard a burst of semi-automatic gunfire, and he and Mitchell brought their children inside. A few minutes later, Delaney heard three more gunshots, of a different type than the semi-automatic shots. When the gunfire ceased, Delaney heard Victim screaming for help.

The State also published Young, Jr.'s police interview to the jury. In his interview, Young, Jr. stated, "The first time we caught [Robinson] ... the [pistol] wouldn't shoot. It wouldn't shoot." Young, Jr. continued, "It didn't go down like we wanted it to. If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing [because] it was a dead[-end] road.... But the [pistol] just wouldn't go off." Later in the interview, when an investigator asked Young, Jr. who he was shooting at, he indicated Robinson was his target.

(App. pp. 742-44).

However, the record shows the even greater detail of evidence submitted to the jury which may be described as follows:

Jontu Singleton and Tyrone Robinson were socializing at a mutual friend's house on September 1, 2012. (App. pp. 358-59; R.p. 357, line 2 – p. 358, line 12). Around 4:00 p.m., Jontu decided to ride with Robinson to the store. (App. pp. 360 and 376; R.p. 359, lines 16-17; p.

375, lines 12-13). On the way, the two stopped by the house of Aaron Young, Sr., Petitioner's father, on Wild Horse Road because Jontu needed money. (App. pp. 360-61; R.p. 359, line 14 – p. 360, line 2). Both Petitioner and Young, Sr. were outside in the yard when Jontu and Robinson drove up. (App. p. 362; R.p. 361, lines 22-24). Robinson and Petitioner had animosity towards each other due to prior altercations (State's Ex. 38, Video 4). They exited the car and Jontu spoke with Young, Sr. while Robinson approached Petitioner with a .38 caliber gun in his hand. (App. p. 363; R.p. 362, lines 2-5; State's Ex. 38, Intro Video at 2:55-3:39). After seeing Robinson with a gun, Young, Sr. moved towards Robinson and tried to take the gun away but it accidently fired. (App. p. 363; R.p. 362, lines 18-22). Young, Sr. backed away as Robinson fired one or two more shots into the ground near Young Sr.'s feet. (App. pp. 363-64 and p. 379; R.p. 362, line 18 – p. 363, line 12; p. 378, lines 4-6). Robinson then got into his vehicle and drove away while Jontu stayed with Petitioner and Young, Sr. (App. pp. 364-65; R.p. 363, line 25 - p. 364, line 4). Moments after Robinson left, Petitioner and Young, Sr. went inside their house and emerged with a black bag containing a 9MM semi-automatic pistol, a thirty round magazine, and a box of ammunition. (App. pp. 365 and 412-14; R.p. 364, lines 7-10; p. 408, lines 1-2; p. 410, lines 13-16). The three men got into Young, Sr.'s grey truck and began searching for Robinson. (App. p. 368; R.p. 367, lines 5-12).

Young, Sr. drove the truck while Petitioner and Jontu were in the passenger seats. (App. p. 369; R.p. 368, lines 1-4). They drove down Spanish Wells Road and veered off on Oak View Road after Young, Sr. thought he saw Robinson driving down the road. (App. p. 369; R.p. 368, lines 6-9). Petitioner then pulled the contents out of his black bag and began assembling his weapon. (App. p. 369; R.p. 368, lines 13-25). Unable to find Robinson, the continued their search and headed towards Robinson's house on Allen Road off of Marshland Road. (App. p.

370; R.p. 369, lines 23-25). When they arrived, Robinson was nowhere to be found. (App. p. 371; R.p. 370, line 1). Jontu got out of the car on Allen Road to talk to his son who lived in that neighborhood but no one was home so the three men left Allen Road. (App. pp. 371-73; R.p. 370, line 2 – p. 372, line 9). They drove back to Young, Sr.'s house and Jontu exited the car while Petitioner and Young, Sr. drove off. (App. pp. 373-74; R.p. 372, line 8 – p. 373, line 21).

Minutes later, Petitioner and Young, Sr. finally tracked down Robinson on Bryant Road. (State's Ex. 38, Video 7 at 00:23-00:36). Petitioner pulled out his weapon and tried to shoot Robinson but the gun jammed. (State's Ex. 38, Video 7 at 1:10-1:17). Robinson fled and the two men decided to continue the pursuit and drive back to Robinson's home on Allen Road. (State's Ex. 38, Video 7 at 2:00-2:50).

While driving down Allen Road, Petitioner saw a group of children playing on a trampoline a short distance away from where they spotted Robinson's car. (State's Ex. 38, Video 1 at 00:10-1:00; Video 1 at 1:39-1:41). Petitioner drew his weapon and began firing bullets into Robinson's car. (State's Ex. 38, Video 2 at 00:10-00:21). Petitioner boasted that he shot the car twenty times and when he was done it looked like "swiss cheese." (State's Ex. 38, Video 3 at 00:08-00:20; Video 6 at 00:55-00:59). Petitioner got back into the truck and they began to drive away down Allen Road. (State's Ex. 38, Video 3). Within moments, Robinson fired three shots back at Petitioner and Young, Sr. as they turned onto Marshland Road. (State's Ex. 38, Video 3 at 00:45-00:55). The bullets did not hit their intended targets, but instead one found its way to eight year old Khalil. Robinson fled in his bullet-riddled car and Petitioner and Young, Sr. absconded in the other direction. (App. p. 348; R.p. 347, lines 1-6; State's Ex. 38, Video 3). Immediately, 911 dispatch began fielding reports of the incident. (State's Ex. 2). Khalil was

struck in the chest and died within minutes. (App. pp. 506 and 508; R.p. 502, lines 12-14; p. 504, lines 20-23).

One witness that called to report the crime told the 911 dispatcher that two cars were shooting at each other near Spanish Wells Road. (State's Ex. 2). She identified the two cars involved as a grey truck and a grey Lexus. (State's Ex. 2). The woman told the dispatcher that the man driving the Lexus was Tyrone Robinson. (State's Ex. 2).

Between 5:00 and 5:30 p.m. that same day, Petitioner, Young, Sr., and his girlfriend, Ebony Campbell, were pulled over by police in Young, Sr.'s grey truck. (App. pp. 392 and 399; R.p. 391, lines 1-10; p. 398, lines 13-24). While on the side of the road, Officers located spent shell casings matching a 9 MM firearm in the back of the truck. (App. p. 393; R.p. 392, lines 11-13). The two men were then taken to the police station where they were Mirandized and interviewed. (App. pp. 395-97; R.p. 394, line 15 – p. 396, line 15). Young, Sr. told officers where they could retrieve the black bag containing the gun and ammunition. (App. pp. 405-407; R.p. 401, line 24 – p. 403, line 8). Petitioner gave a statement to Investigator Albertin admitting to the shootout with Robinson, firing numerous bullets into Robinson's vehicle, and his failed attempt to kill Robinson. (App. pp. 475-97; R.p. 471-493; State's Ex. 38, Introduction Video – Video 8).

After officer's located and arrested Robinson, they processed his vehicle for evidence. (App. p. 423; R.p. 419, lines 14-24). They were able to locate numerous bullets that were lodged in Robinson's car. (App. pp. 434-35; R.p. 430, line 22 – p. 431, line 3). These bullets, along with Petitioner's weapon and shell casings, were sent off for examination. (App. p. 435; R.p. 431, lines 12-23). Agent Frank DeFreese, an expert of firearm's marks and ballistics with the South Carolina Law Enforcement Division, was able to determine that the bullets in Robinson's

car originated from Petitioner's 9 MM semi-automatic pistol. (App. pp. 470-71; R. p. 466, line 15 – p. 467, line 6).

At Petitioner's trial for the murder of Khalil, numerous witnesses testified to what they observed on September 1, 2012. Charlese Mitchell, a woman who lived in the neighborhood off Allen Road, testified that she heard three sets of gunshots around 4:00 p.m. that afternoon. (App. pp. 301-330; R.p. 300, line 23 – p. 329, line 15). After the first round of shots, she saw a grey truck driven by Young, Sr. speeding down the road. (App. p. 329; R.p. 328, lines 3-21). Robinson, a relative of Mitchell's, came to her door after she heard the first round of gun shots. (App. p. 310; R.p. 309, lines 5-17). She let him inside the house and observed a gun sticking out of his pocket. (App. pp. 310-311; R. p. 309, line 19 – p. 310, line 7). Robinson, who appeared scared, told Mitchell, "those M. F. was shooting at me." (App. p. 311; R.p. 310, lines 8-11). At that point, Mitchell's fiancé, Tyrone Delaney, came home and the two men stepped outside to talk. (App. p. 311; R.p. 310, lines 14-25). Robinson left the yard and minutes later Mitchell heard another set of rapid gunshots. (App. p. 312; R.p. 311, lines 1-13). A few minutes after the second round of shots, Mitchell heard three more shots and again observed Young, Sr. speeding down Allen Road. (App. pp. 324-26; R.p. 323, line 22 – p. 325, line 14).

Tyrone Delaney testified he was driving down Spanish Wells Road between 4:00 and 5:00 p.m. on his way home when a grey truck sped towards him and forced him to pull over to the side of the road. (App. pp. 331-33; R.p. 330, line 20 – p. 332, line 14). When he arrived home, Robinson was there and asked Delaney if he had seen a grey truck. (App. p. 334; R.p. 333, lines 1-2). Delaney told Robinson of his encounter with the grey truck. (App. p. 334; R.p. 333, lines 17-18). Robinson replied, "yeah they was shootin at me so I shoot back at them." (App. p. 334; R.p. 333, lines 18-19). Delaney testified that he heard rapid gun shots after Robinson left

their house. (App. p. 335; R.p. 334, lines 20-25). Minutes later, he heard three gunshots that seemed to have come from a different type of weapon. (App. p. 336; R. p. 335, lines 5-17).

The last witness to testify at Petitioner's trial was Dr. Lee Tormos, the forensic pathologist who performed the autopsy on Khalil. (App. p. 504; R.p. 500, lines 2-12). She observed that one bullet had entered into Khalil's chest, piercing his lungs and heart, before coming to rest in his arm. (App. pp. 506-507; R. p. 502, line 1 - p. 503, line 24). Dr. Tormos concluded that the cause of death was a gunshot wound to the left lateral chest and the manner of death was homicide. (App. p. 509; R.p. 505, lines 15-17).

The bullet was removed and turned over to the Beaufort County Sheriff's Office for analysis. Indisputably, the bullet recovered from Khalil's body was fired from Tyrone Robinson's gun. (App. pp. 282 and 572; R.p. 281, lines 11-12; p. 568, lines 22-24).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Consequently, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* "An appellate court will not reverse the trial judge's decision absent an abuse of discretion." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2008). "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).

Directed Verdict Review

In reviewing the denial of a motion for a directed verdict, the evidence is viewed in the light most favorable to the State. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). When considering a motion for directed verdict, the trial court must be concerned with "the existence or nonexistence of evidence, not its weight." *State v. Bennett*, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016). If there is any direct evidence, or if there is substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, a reviewing court must find the case was properly submitted. *State v. Brown*, 402 S.C. 119, 124,740 S.E.2d 493, 495 (2013). A court "should grant a directed verdict motion" only in cases where "the evidence merely raises a suspicion the accused is guilty." *Id.,* 402 S.C. at 124-25, 740 S.E.2d at 495.

Where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Bennett*, 415 S.C. at 237, 781 S.E.2d at 354. Circumstantial evidence is considered as a whole, not in isolation. *See State v. Frazier*, 386 S.C. 526, 532-33, 689 S.E.2d 610,613-14 (2010). A reviewing court must consider the evidence and all reasonable inferences

in the light most favorable to the State. *State v. Pearson*, 415 S.C. 463, 473, 783 S.E.2d 802, 808 (2016). The State need not, though, "present evidence sufficient to exclude *every* other hypothesis." *Id.,* 415 S.C. at 474, 783 S.E.2d at 808. (emphasis in original).

Jury Charge Issue

If there is any evidence to support a charge, the circuit court should grant the request. *State v. Brandt,* 393 S.C. 526, 549-550, 713 S.E.2d 591, 603 (2011). When a request is made for a charge that "states a sound principle of law when that principle applies to the case at hand," it is error to refuse to given the charge. *Id.*, 393 S.C. at 549-50, 713 S.E.2d at 603 (internal quotation marks omitted) (quoting *State v. Williams,* 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005)). "The purpose of a jury instruction is 'to enlighten the jury and to aid it in arriving at a correct verdict,'" consequently, "[i]t is error to give instructions which are calculated to confuse or mislead the jury." *State v. Blurton*, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002) (quoting *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury." *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989).

"To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt,* 393 S.C. at 550, 713 S.E.2d at 603 (quoting *State v. Mattison,* 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Brandt,* 393 S.C. at 549, 713 S.E2d at 603 (quoting *State v. Adkins,* 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct.App.2003)). "A jury charge which is substantially correct and covers the law does not require reversal." *Id.* (citing *State v. Foust,* 325 S.C. 12, 479 S.E.2d 50 (1996)).

ARGUMENT

I.

The Court of Appeals did not err in finding the trial court properly denied the defense's motion for a directed verdict because the direct and circumstantial evidence, viewed in the light most favorable to the state, reasonably tended to prove his guilt of the offense under a mutual combat theory along with transferred intent.

The Court of Appeals properly found the established doctrine of mutual combat, along with transferred intent, correctly applied to this ongoing gun battle and the death of an innocent young bystander. Petitioner submits, though, the Court of Appeals erred in three ways: 1) in recognizing mutual combat; 2) in applying it factually; and 3) if applicable factually, failing to recognize evidence of withdrawal from the combat. (Brief of Petitioner at 7). However, the Court properly rejected Petitioner's position that mutual combat is "not recognized by South Carolina law and not supported by the evidence at trial...." (See App. p. 651, FBOA, p. 7). It resolved:

> Although we acknowledge the doctrine of mutual combat has "fallen out of common use in recent years," we find South Carolina law still recognizes mutual combat as a basis for a murder charge. *See Taylor*, 356 S.C. at 231, 589 S.E.2d at 3. Our supreme court has repeatedly recognized mutual combat as a basis for a murder charge. *See Andrews,* 73 S.C. at 260, 53 S.E. at 424 (upholding jury instructions stating "where two persons mutually engage in combat, and one kills another, and at the time of the killing it be maliciously done, it is murder; if it be done in sudden heat and passion upon sufficient provocation without premeditation or malice, it would be manslaughter."); *Mathis*, 174 S.C. at 348-49, 177 S.E.2q at 319 (holding a murder charge was proper where evidence showed the defendant and the deceased engaged in mutual combat). Specifically, in *Brown*, our supreme court upheld a trial court's ruling that multiple defendants involved in mutual combat could be charged with murder for the death of a participating party. 108 S.C. at 499, 95 S.E.2d at 63. Based on the foregoing, we find the trial court did not err in finding mutual combat a viable theory of prosecution for the murder charge.

(App. pp. 756-47). In short, the Court of Appeals acknowledged and applied long standing precedent from this Court to the facts presented in the case before it. There is no error to correct.

Petitioner additionally argues error in applying transferred intent to the instant facts. (See Petition, pp. 8-9; see also App. pp. 753-56, petition for rehearing to the Court of Appeals). He suggests that use of the doctrine in these facts "expand[s] the criminal liability of one actor to include the results of another person's actions." (Brief of Petitioner at 9; Petition, p. 9). In support of his argument, Petitioner submits "other jurisdictions around the United States recognize the fact that two parties engaged in mutual combat is not alone sufficient to establish murder...," (Brief of Petitioner at 9; Petition, p. 8), and complains, "...at the time Robinson fired the fatal shots, Petitioner did not see Robinson, did not even know Robinson was in the area, and could not have foreseen that Robinson was hiding and waiting to ambush him in the vicinity of the children." (Brief of Petitioner at 10; Petition, p. 9). Petitioner's argument fails to acknowledge the malice aforethought in the very act of engaging in continuing gun battle in a residential area. The Court of Appeals correctly reasoned:

> We find the trial court did not err in applying the doctrine of transferred intent to Young, Jr.'s case. It is undisputed Robinson fired the final three shots at the Youngs as they fled his neighborhood for the final time; one of those three shots fatally struck Victim. Because Robinson fired at Young, Jr. with the intent to kill, this intent transferred to Victim. Thus, Robinson was criminally responsible for Victim's death under the doctrine of transferred intent. *See e.g., State v. Horne*, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984) ("If there was malice in [the actor's] heart . . . it matters not whether he killed his intended victim or a third person through mistake. . . . [T]he actor's intent to kill his intended victim is said to be transferred to his actual victim."). Furthermore, under the theory of mutual combat, all combatants are deemed "equally responsible for the natural consequences" of their actions during combat, and all may be held equally guilty of murder when a combatant dies, regardless of which combatant fired the fatal shot. *See Brown,* 108 S.C. at 499, 95 S.E.2d at 63. Therefore, despite the fact that Victim was a bystander rather than a combatant, we find Young, Jr. could still be found guilty for Victim's death as a "natural consequence" of the combat with Robinson. This is especially true under the instant facts because Young, Jr. admitted to police that he knew children were bystanders during the combat; specifically, Young, Jr. stated, "I saw the [children playing on the] trampoline and all. . . . In order to rid up the road, you [have to] pass by the children." The Youngs chased Robinson into his neighborhood while firing shots, including shots from the semi-automatic weapon Young, Jr. retrieved and assembled for use

> in the pursuit. Robinson fired his shots at the Youngs as they fled when Young, Jr.'s weapon jammed - after Young. Jr.'s rapid firing of some twenty shots to "swiss cheese" Robinson's car. Accordingly, we find the trial court did not err in allowing the State to proceed under the theory of mutual combat even where Young, Jr. did not fire the shot that killed Victim, a bystander.

(App. pp. 747-48).

Respondent submits that the jury was instructed on the law of murder and they found that the State had met its burden of proof in establishing the elements of murder. The judge explained, "Murder is defined in our law as the killing of any person with malice aforethought either express or implied." (App. p. 571; R. p. 567). The judge then defined the terms "malice" and "aforethought." (App. pp. 571-72; R. pp. 567-68). Furthermore, he instructed the jury, "the state is required to prove malice beyond a reasonable doubt." (App. p. 572; R. p. 568). Thereafter, the judge explained to the jury that the murder charge rested, in part, on evidence of mutual combat. (App. pp. 572-73; R. pp. 568-69). Therefore, the jury was well aware that not only must mutual combat be proven, but the elements of murder, as well. The trial judge also properly charged the law of transferred intent. (App. pp. 574-75; R. pp. 570-71). This Court has apparently not specifically addressed the law on mutual combat in the factual circumstance presented here (*i.e.,* the death of an innocent bystander in mutual combat scenarios).[1] Nevertheless, it is only logical that transferred intent would apply in such a situation.

Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim: "If there was malice in appellant's heart, he was guilty of the crime charged, it

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[1] The Court of Appeals has at least twice been presented this scenario – in the instant case, and also in a Richland County murder conviction affirmed in April 2013. *State v. Boone*, No. 2013-UP-155, 2013 WL 8507863, at *1 (S.C. Ct. App. Apr. 17, 2013). Respondent noted in the return that Aaron Young Sr.'s appeal was then pending in the Court of Appeals with a similar issue. Appellate Case no. 2016-000873. (Return p. 10 n. 1). It has now been decided in an unpublished opinion that cites to the Court of Appeals decision in this case. *See State v. Young, Sr.,* Unpublished Opinion No. 2019-UP-233 (S.C.Ct.App. filed June 26, 2019). The Westlaw cite for the unpublished opinion is 2019 WL 2616762 (S.C.Ct. App. June 26, 2019).

matters not whether he killed his intended victim or a third person through mistake." *State v. Heyward,* 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941). Thus, transferred intent allows for holding a defendant liable for the harm caused to an innocent bystander. *See, e.g., State v. Fennell,* 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) (a person who, acting with malice, unleashes a deadly force should anticipate that the law will require him to answer fully for injury to intended or unintended victims). The California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting, *People v. Sanchez*, 29 P.3d 209 (Cal. 2001). In referencing the concurring opinion's analysis of transferred intent via footnote, the majority opinion reflects:

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

29 P.3d at 220 n. 9 (quoting concurring opinion, 29 P.3d at pp. 223-224). The Court concluded each of the rival gang members could be guilty of murder. 29 P.3d at 220. ("Although it could not be determined who fired the fatal bullet, since sufficient evidence established that defendant and Gonzalez premeditated the murder of one another, and that the unlawful conduct of each was a substantial concurrent, and hence proximate, cause of [... the...] death, both could be convicted of the first degree murder ... by operation of the doctrine of transferred intent."). *See also State of Iowa v. Spates*, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engage in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); *Roy v. United States*, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) ("While the evidence was unclear as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun

battle where it was clearly foreseeable that others would be endangered."); *Reyes v. State,* 783 So. 2d 1129, 1133 (Fla. Dist. Ct. App. 2001) ("... each participant in a mutually-agreed-to-gun battle in a public place may be held accountable for any death or injury to an innocent person which results from that confrontation"); *Alston v. State*, 662 A.2d 247, 254 (Md. 1995) ("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare.").

Therefore, under the law of South Carolina, consistent with holdings in other states faced with similar circumstances, if both parties contributed to the mutual combat (which by definition they must), then both parties are actors in the gunfire and both parties are culpable for the resulting injury. This Court should reject Petitioner's argument South Carolina should not allow a murder conviction to rest upon the legal theories of mutual combat and transferred intent for fear that any time an individual fought with an opponent, the individual would be criminally responsible for the harm caused by his opponent's conduct. (See Brief of Petitioner at 10; Petition 9). That is the precise reason it can be and should be used for a murder conviction. Much like accomplice liability,[2] both parties should be held equally accountable for the consequences that result from creating a zone of danger. Mutual combatants' activities are comparable to those of aiders and abettors because they encouraged each other to engage in an urban conflict. *See Reyes,* 783 So.2d at 1133-1134.

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[2] "Under the 'hand of one is the hand of all' theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." *State v. Gibson*, 390 S.C. 347, 701 S.E.2d 766, 769 (Ct. App. 2010) (quoting *State v. Thompson,* 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (internal quotations and citations)).

Here, Petitioner and Robinson encouraged each other to engage in a lethal gun battle that resulted in the death of an innocent child. Even though Robinson fired the bullet that killed Khalil, it is just as probable that one of Petitioner's bullets could have injured or killed an innocent bystander who was merely caught in the crossfire. The proximate cause was the battle. Therefore, not to hold Petitioner accountable for the death of Khalil would be an injustice. Petitioner, though, moved to quash the indictment and later for a direct verdict based upon the State's use of mutual combat in this context. These were properly denied.

The indictment read that Petitioner was engaged in mutual combat with Tyrone Robinson and thereby caused the death of Khalil Singleton. (App. p. 213; R. p. 212, lines 9-18). Citing numerous South Carolina cases[3], the State asserted that mutual combat was a valid legal theory in South Carolina. (App. pp. 222; R. p. 221, lines 12-23). The State conceded mutual combat was a bar to a self-defense claim, but explained that the theory was not limited to that one purpose. (App. p. 223; R. p. 222, lines 1-10). The State argued *State v. Brown* used mutual combat to convict multiple defendants for the death of one of the combatants[4]. (App. p. 221; R.p. 220, lines 14-16). Finally, the State argued that transferred intent would be applicable to Petitioner's case since an innocent bystander was killed, instead of a combatant. (App. p. 223; R. p.. 222, line 24-p. 223, line 12). The judge considered the relationship between mutual combat and self-defense. (App. p. 268; R. p. 267, lines 8-11). He noted: "Mutual combat has its most significant application in the law in that it denies anybody who is involved in mutual combat the defense of self-defense because none of them can claim to be without fault in bringing about the

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[3] The State cited the following case law: *State v. Brown*, 108 S.C. 490, 95 S.E. 61 (1918); *State v. Taylor*, 356 S.C. 227 (2003); *State v. Graham,* 260 S.C. 449, 196 S.E.2d 495 (1973); *State v. Andrews*, 73 S.C. 257, 53 S.E. 423 (1906).

[4] *Brown*, 108 S.C. 490, 95 S.E. 61.

incident." (App. p. 268; R. p. 267, lines 8-11). Citing to *State v. Brown,*[5] the judge recited the current law on mutual combat.[6] (App. p. 268; R. p. 267, lines 12-22). He explained:

> Here an innocent person, not a combatant, was killed. The question is whether the law relieves the mutual combatants of the responsibility of that. The responsibility of which had been of their's if they had killed an equally guilty party involved, are they now not responsible because an innocent party was involved. And I hold that they would be responsible.

(App. pp. 269-70; R.p. 268, line 19 – p. 269, line 1). He reiterated that "it is not the identity of the victim that controls, it is the intent, the state of mind which led to the mutual combat in the first place and the consequences that followed from that." (App. p. 270; R. p. 269, lines 2-5). The judge then denied the motion to quash the indictment. (App. p. 270; R. p. 269, lines 6-7).

Then, at the close of the State's case, Petitioner made a motion for a directed verdict on both charges. (App. p. 511; R.p. 507, lines 24-25). Particularly to the murder charge, Petitioner argued that no evidence was presented of a mutual combat between Petitioner and Robinson. (App. p. 516; R.p. 512, lines 2-3). The State asserted in response:. "Both are armed..., they both know each other is armed..., Young chases Robinson through two neighborhoods and in fact into Allen Road twice and a result of that Khalil Singleton is dead. I think that is exactly the

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5 *Brown*, 108 S.C. 490, 95 S.E. 61.

6 Specifically, in reciting the law on mutual combat, the judge stated:

> "Everyone is presumed to know the consequences of his act and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used and death results to one of the participating parties, everyone engaged in such combat is equally guilty. Regardless of whether he used the deadly weapon or not and regardless of whether he was on one side or the other makes no difference. And where all are participating in the mutual combat all are equally guilty for the natural consequences."

(App. p. 268; R. p. 267, lines 12-22).

language that *Brown*[7] uses when they describe and define mutual combat." (App. p. 518; R.p. 514, lines 17-23). In denying the motion, the judge correctly stated that he was not concerned with the weight of the evidence but only its existence. (App. p. 520; R. p. 516, lines 8-9). The judge explained evidence of mutual combat came from Petitioner's own statements. (App. p. 521; R.p. 517, lines 5-14). He denied the motion in light of the evidence. (App. pp. 521-522; R. p. 517, line 15- p. 518, line 8). He later charged the jury on mutual combat. (App. pp. 572-75; R.p. 568, line 24 – p. 571, line 12). The case law and record support the trial court did not err.

A. Mutual combat is a valid legal theory under South Carolina law to form the basis of a murder charge.

The doctrine of mutual combat has existed in South Carolina law since 1843. *State v. Taylor*, 356 S.C. 227, 231, 589 S.C. 227, 3 (2003). This Court in *Taylor* acknowledged the doctrine had "fallen out of common use in recent years" but still found it to be binding law. *Id.* The escalating urban warfare in present-day society has resurrected the need for the doctrine of mutual combat. Here, the State took the long-standing and viable theory of mutual combat and applied it to modern day facts. Petitioner argues that the doctrine of mutual combat can only be used for the sole purpose of barring a plea of self-defense. (See Brief of Petitioner at 8). This is an incorrect limitation of the law on mutual combat. Although mutual combat is commonly analyzed when a claim of self-defense is raised,[8] that is not its only application.

Numerous South Carolina cases have used the theory of mutual combat to hold a defendant guilty of murder. "Where two persons mutually engage in combat, and one kills the other, and at the time of the killing it be maliciously done, it is murder. If, on the other hand, it be

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7 *Brown*, 108 S.C. 490, 95 S.E. 61.

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

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

The 1918 case of *State v. Brown* utilized the doctrine of mutual combat to hold multiple defendants accountable for the death of one of the combatants. 108 S.C. 490, 95 S.E. 61. Much like the facts of Petitioner's case, all of the defendants were held responsible for the death of the victim even though only one of them had inflicted the fatal injury. In *Brown*, many employees at a local mill began to strike and picket after the mill organized a labor union. *Id.*, 95 S.E. at 62. One morning, a fight erupted between current employees and strikers. *Id.* One of the men involved in the melee pulled out a knife and killed David Freize, another participant in the fight. *Id.* Two of the strikers and three of the employees were indicted for the murder of the Freize. *Id.* On appeal, the defendant's alleged that it was improper to charge the law of mutual combat. *Id.* at 61. This Court affirmed the convictions and held, "... everyone is presumed to know the consequences of his act, and if one voluntarily enters a mutual combat where deadly weapons are used, knowing that they are being used, and death results to one of the participating parties, every one engaged in such combat is equally guilty, regardless of whether he used a deadly

weapon or not. And regardless of whether he was on one side or the other makes no difference, and where all are participating in the mutual combat, all are equally responsible for the natural consequences." *Id.* at 63.

In order for the doctrine of mutual combat to be asserted and an instruction on the law given to the jury, multiple factors must be shown including there must be evidence of a "mutual intent and willingness to fight." *Jackson v. State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) (quoting *Graham*, 260 S.C. at 450, 196 S.E.2d at 495). One looks to the "acts and conduct of the parties and circumstances attending and leading up to the combat" to determine mutual intent. *Id.* Also, there must be an antecedent agreement to fight. *Taylor,* 356 S.C. at 234, 589 S.E.2d at 4. This agreement can be shown by evidence of "ill-will between the parties," threats, and an "apparent willingness of each to engage in an armed encounter with the other" *Id.* Additionally, the parties must be armed and know the other to be armed. *Id.* These factors fit into the question of murder which was before the jury in this case.

Here, the jury found that the State met its burden of proof in establishing the elements of murder. The judge explained, "Murder is defined in our law as the killing of any person with malice aforethought either express or implied." (App. p. 571; R .p. 567, lines 5-12). The judge then defined the terms "malice" and "aforethought." (App. pp. 571-72; R. p. 567, line 13 – p. 568, line 17). Furthermore, he instructed the jury, "the state is required to prove malice beyond a reasonable doubt." (App. p. 572; R.p. 568, lines 19-21). The elements of murder were correctly charged. Thereafter, the judge explained to the jury that the murder charge rested on the theory of mutual combat. (App. pp. 572-73; R.p. 568, line 24 – p. 569, line 1). Therefore, the jury was well aware that not only must mutual combat be proven, but the elements of murder as well.

The trial judge also properly charged within the instruction on criminal intent the law of transferred intent. (App. pp. 573-75; R. p. 569, line 24 – p. 571, line 12). Again, the jury was given the proper law to resolve the case.

Respondent agrees the law on mutual combat in South Carolina has yet to address the scenario where an innocent bystander is killed instead of a combatant in a published case. Nevertheless, it is only logical that transferred intent would apply in such a situation. Transferred intent applies to cases where an innocent bystander is killed, rather than the intended victim. South Carolina recognizes that "if there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake." *State v. Heyward,* 197 S.C. 371, 377, 15 S.E.2d 669, 672 (1941). Thus, transferred intent holds the defendant liable for the harm caused to an innocent bystander. *See, e.g., State v. Fennell*, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.").

As noted above, the California Supreme Court upheld a murder conviction based on the theories of mutual combat and transferred intent in a similar setting. In *People v. Sanchez*, 26 Cal. 4th 834, 29 P.3d 209 (2001), the majority opinion underscored that "...'it does not matter whether defendant himself fired the fatal shot or instead induced or provoked another to do so; in either situation, defendant's culpable mental state is determined as if the person harmed were the person defendant meant to harm.'" 29 P.3d at 220 (quoting concurring opinion).

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

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

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

For these same reasons, transferred intent was properly applied to Petitioner's case. As the trial judge stated, if Young, Sr. had been killed, then there would be no question that both Petitioner and Robinson would be responsible for his death under mutual combat. Since an innocent bystander was killed rather than one of the combatants, the doctrine of transferred intent was properly utilized to transfer Petitioner's and Robinson's criminal intent to the unintended victim. Hence, there was no error in charging the jury on the law of transferred intent.

Additionally, Petitioner argues that the State must present evidence of some doctrine that would allow for one defendant to be responsible for another defendant's actions. Petitioner's examples of such doctrines are conspiracy, accomplice liability, and felony murder. (See Brief of Petitioner at 8). However, much like the above theories, mutual combat is a recognized doctrine in which a defendant can be held accountable for the actions of another defendant. *See Brown*, 95 S.E. at 63 ("[E]very one engaged in such combat is equally guilty, regardless of whether he used a deadly weapon or not.); *see also Taylor*, 356 S.C. at 235, 589 S.E.2d at 5 ("The mutual combat doctrine is triggered *when both parties contribute* to the resulting fight.") (emphasis added).

To further counter Petitioner's argument, Respondent submits a listing of other states' case law on mutual combat with relation to other theories of culpability is beneficial. *See State of Iowa v. Spates*, 779 N.W.2d 770, 779 (Iowa 2010) ("Our cases support a conclusion that the acts of a defendant engage in mutual combat can be the proximate cause of injury to an innocent bystander that directly results from the act of another combatant."); *Roy v. United States*, 871 A.2d 498, 509 (D.C. 2005), *cert. denied*, 547 U.S. 1162 (2006) ("While the evidence was unclear

as to whether Roy's or Settles' bullet was responsible for the fatal shot, such a determination is unnecessary if both men prepared for and undertook to participate in the gun battle where it was clearly foreseeable that others would be endangered."); *Alston v. State*, 662 A.2d 247, 254 (Md. 1995) ("Though the groups were adversaries at one level of analysis, at the level of analysis relevant to depraved heart murder, each group aided, abetted, and encouraged the other to engage in urban warfare."). *See also Reyes v. State*, 783 So.2d 1129, 1133 -1134 (Fla.App. 3 Dist. 2001) (noting *Alston* and adopting logic citing other jurisdictions with similar holdings). The logic of these cases are instructive.

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

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

779 N.W.2d at 780.

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

personally to the fatal bullet.[9] The appeals court, considering proximate cause, rejected Brown's assertion finding:

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

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

A Maryland Court of Appeals considered similar circumstances in regard to a conviction for a "depraved murder"[10] conviction, and reasoned as follows:

> The "bottom line" is that when a group, or two groups, of hoodlums deliberately engage in a gang-war style of shoot-out in a crowded urban area, they collectively trigger an escalating chain reaction creating a high risk to human life. When instead of taking their gunslinging vendetta to an uninhabited island or some remote spot in the desert, they arrogantly indulge in their homicidal insanity in the middle of a crowded block of residences, each participant in such collective madness displays a

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

[10] Again, though we have no such offense, this charge appears similar to the "second degree murder" charge in Iowa, and omits only an otherwise required deliberation or premeditation element of first degree. *See Owens v. State*, 906 A.2d 989, 1026 (Md. App. 2006)(describing one way of proving second degree murder as "what has become known as depraved heart murder--a killing resulting from ' the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.'"). It is not, however, limited to unintentional acts, but apparently professed unintentional results. *Robinson v. State*, 307 Md. 738, 745-746, 517 A.2d 94, 98 (Md. 1986). The inclusion of the "depraved heart" and "reckless and wanton" aspect, however, places the charge on similar footing with our requirement of malice. *State v. Wilds*, 355 S.C. 269, 276-277, 584 S.E.2d 138, 142 (Ct.App. 2003) ("Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life').

> wanton and depraved indifference to any human life that might randomly fall within their overlapping and deadly enfilades. Should death to one of the innocent bystanders or homeowners ensue, each participant in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.

Alston v. State, 643 A.2d 468, 469 (Md. App.1994).

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

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

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

Finally, Petitioner argues that South Carolina should not allow for a murder conviction to rest upon the legal theories of mutual combat and transferred intent because, if the legal theory was accepted, any time an individual fought with an opponent, the individual would be criminally responsible for the harm caused by his opponent's conduct. (See Brief of Petitioner at 9). Again, Respondent submits that is the precise reason it can be and should be used for a murder conviction. Much like accomplice liability,[11] both parties should be held equally accountable for the consequences that result from creating a zone of danger. Mutual combatants' activities are comparable to those of aiders and abettors because they encouraged each other to engage in an urban conflict. *Reyes,* 783 So.2d at 1133-1134. Here, Petitioner and Robinson encouraged each other to engage in a lethal gun battle that resulted in the death of an innocent child. Even though Robinson fired the bullet that killed Khalil, it is just as probable that one of Petitioner's bullets could have injured or killed an innocent bystander who was merely caught in the crossfire of the havoc the two men created. Therefore, not to hold Petitioner accountable for the death of Khalil would be an injustice, for this case and future cases.

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

There must be a "mutual intent and willingness to fight" to constitute mutual combat. *Taylor.* 589 S.E.2d at 3. However, the required mutual intent can be inferred from the parties' acts and conduct, and the circumstances of the combat. *Id.* In finding that evidence of mutual combat existed to submit the issue to the jury, the Court in *Graham* held:

> "There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point. Under these circumstances, the apparent willingness of each to engage in an

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11 "...one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Gibson*, 701 S.E.2d at 769.

> armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing, and required that the issue be submitted to the jury for determination."

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

Here, the State presented direct and substantial circumstantial evidence that Petitioner and Robinson mutually intended to fight. The evidence showed Robinson approached Petitioner with a .38 caliber gun in his hand. (App. p. 363; R.p. 362, lines 2-5; State's Ex. 38, Intro Video at 2:55-3:39). Young, Sr. tried to take the gun away but it accidently fired. (App. p. 363; R.p. 362, lines 18-22). Young, Sr. backed away as Robinson fired another shot into the ground. (App. p. 363; R.p. 362, lines 18-22). Robinson then got into his vehicle and drove away. (App. pp. 364-65; R.p. 363, line 25 - p. 364, line 4). Seconds after Robinson left, Petitioner and Young, Sr. retrieved a black bag containing a 9MM semi-automatic pistol, a thirty round magazine, and a box of ammunition. (App. pp. 365, 412 and 414; R .p. 364, lines 7-10; p. 408, lines 1-2; p. 410, lines 13-16). In Young Sr.'s grey truck, Petitioner and Young, Sr. began searching for Robinson. (App. p. 368; R.p. 367, lines 5-12). After one failed attempt at locating Robinson, Petitioner and Young, Sr. finally tracked him down on Bryant Road. (State's Ex. 38, Video 7 at 00:23-00:36). Petitioner pulled his weapon out and tried to shoot Robinson but the gun jammed. (State's Ex. 38, Video 7 at 1:10-1:17). Robinson fled and the two men decided to continue the pursuit and drive back to Robinson's home on Allen Road. (State's Ex. 38, Video 7 at 2:00-2:50). After spotting Robinson's vehicle, Petitioner began firing bullets into the car. (State's Ex. 38, Video 2 at 00:10-00:21). Petitioner boasted that he shot the car "**twenty damn times**" and when he was done it looked like "**swiss cheese**". (State's Ex. 38, Video 3 at 00:08-00:20; Video 6 at 00:55-00:59). Petitioner got back into the truck and began to drive away when Robinson fired three shots at Petitioner and Young, Sr. (State's Ex. 38, Video 3 at 00:45-00:55). Further, Delaney testified Robinson approached him during the conflict and told him "yeah they was shootin at me

so I shoot back at them." (App. p. 334; R.p. 333, lines 18-19). A woman who called 911 dispatch reported that a grey truck and Robinson were shooting at each other. (State's Ex. 2). Petitioner and Robinson's actions and conduct that afternoon indisputably prove the required mutual intent and willingness to fight for mutual combat. This intent is further demonstrated by Petitioner's own admission to participating in a gun battle with Robinson. (State's Ex. 38, Intro Video - Video 8).

The State also presented direct evidence of Petitioner and Robinson's animosity towards each other. Petitioner, in a conversation with Investigator Albertin, discussed his relationship with Robinson:

> **Man, Tyrone tried to kill me in the gardens a couple of days ago, man...I don't like that dude, man.**
>
> ...
>
> **He crazy. Something wrong with that boy. He think he the shit or something. I don't know. He thinks he got power around here. Cause people scared...I'm little? But I'm not scared of you big dude...Ever since I knocked him out that one time he don't like me. Me and him got in a fight, I knocked his ass out right there. I swear to God. Ask everybody. I knocked that bitch clean out.**

(State's Ex. 38, Video 4).

This colloquy, coupled with the chain of events on September 1, 2012, clearly shows Petitioner and Robinson had ill-will towards each other. And each knew the other was armed.

The State presented direct and circumstantial evidence that Petitioner was armed with a 9MM semi-automatic pistol. During Petitioner's interview with Investigator Albertin, Petitioner admitted to using his 9MM handgun to shoot Robinson's car. According to Petitioner, **"Boy, I swiss cheese that car...I swear I did."** (State's Ex. 38, Video 3 at 00:20). Petitioner bragged, **"I mean shit, I shot the car a good, what, twenty damn times."** (State's Ex. 38, Video 6 at 00:55). Additionally, Petitioner admitted he attempted to shoot Robinson with the gun but it

jammed. **"The first time we caught his ass, but the shit wouldn't shoot...It Wouldn't shoot...No, it wouldn't shoot"** (State's Ex. 38, Video 7 at 00:25). The State presented circumstantial evidence that Petitioner was armed through Jontu's testimony. According to Jontu, Petitioner pulled a gun out of a black bag and began assembling the weapon while they were searching for Robinson. (App. pp. 365-69; R.pp. 364-68). Agent DeFreese's testimony corroborated Jontu's testimony and Petitioner's admission in determining that the bullets in Robinson's car originated from Petitioner's 9 MM semi-automatic pistol. (App. pp. 470-71; R.p. 466, line 15 – p. 467, line 6). Also, the State introduced direct evidence that Petitioner knew Robinson was armed with a weapon. During Petitioner's interview, he discussed knowing what type of gun Robinson used during the conflict:

> **"Cause at the end of the day, Y'all still don't got T's shit...T's shit is a revolver, man. That's the most important gun. Fuck a automatic and a hand gun is nothing 'cause it automatically drop shells. But nigga if he got a revolver, how the fuck y'all gonna get his gun casings? ...You know how many people done got hit with a nine millimeter and ain't die, but bitch you get hit with a 38 your ass is dead."**

(State's Ex. 38, Intro Video at 2:55-3:39)

Furthermore, the State produced circumstantial evidence that Petitioner knew Robinson was armed. Jontu testified that Robinson approached Petitioner with a gun in his hand off Wild Horse Road. (App. p. 363; R.p. 362, lines 2-22). Robinson then fired the gun twice in front of Petitioner. (App. p. 363; R. p. 362, lines 2-22). Additionally, the State presented direct evidence Petitioner knew Khalil and the other children were playing outside. During Petitioner's interview, he admitted multiple times to engaging in a gun fight with children present:

> **"We came down the road. There was children outside playing already..."** (State's Ex. 38, Video 1 at 00:11-00:28); **"The little children was the ones who saw us 'cause they was pointing at us...they was pointing at us...I saw the trampoline and all, that's the crazy thing about it"** (State's Ex. 38, Video 1 at 1:10-1:16); **"In order to ride up the road, you gotta pass by the children"** (State's Ex. 38, Video 1 at 1:39-1:41).

While discussing seeing the children, Petitioner stated, "**We got there and all hell broke loose**" (State's Ex. 38, Video 1 at 00:34-00:37). This evidence clearly demonstrated that Petitioner was aware that innocent bystanders were in the vicinity. But this fact did not stop Petitioner from continuing the conflict with Robinson. Accordingly, it is reasonable to presume Petitioner knew the natural consequences of his actions could lead to Khalil's death.

In conclusion, overwhelming direct and circumstantial evidence was presented to the jury tending to prove Petitioner was engaged in mutual combat with Robinson. The State introduced evidence Petitioner and Robinson had a mutual intent to fight, they had ill-will between each other, and both came to the fight armed and knew the other to be armed. The elements of mutual combat have clearly been established. Thus, the trial court did not abuse his discretion in denying Petitioner's motion for directed verdict on the murder charge, and the Court of Appeals properly affirmed.

C. Petitioner did not request a directed verdict on the basis of a withdrawal from mutual combat, so that portion of the issue is not preserved for review. However, the record shows the argument is without merit.

The trial record shows this particular portion of the issue is not preserved for review. Petitioner only discussed the end of mutual combat when he requested a jury instruction on the law after he had already argued his motion for a directed verdict. Even so, this argument is easily dispatched as there was no evidence that Petitioner withdrew from the conflict.

In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. *State v. Kennerly*, 503 S.E.2d 214, 221 (S.C. App. 1998), *aff'd*, 524 S.E.2d 837 (S.C. 1999). A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below. *See State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). Here,

Petitioner did not argue that the mutual combat ended when he made a motion for a directed verdict. The trial judge only had the opportunity to consider this issue when Petitioner asked for a jury charge on the law of withdrawal. Therefore, Petitioner is barred from asserting and relying on this point in his appeal.

Regardless, Petitioner would not be entitled to relief even if he raised this issue at trial. In order to bring mutual combat to an end, one of the combatants must withdraw from the conflict in good faith and make that fact known to his adversary. *Graham*, 260 S.C. at 451, 196 S.E.2d at 495–96. Here, there was no evidence presented at trial that would allow for the jury or the judge to deduce that Petitioner withdrew from the conflict. This matter is discussed in much greater detail in Issue II. Petitioner's action of driving away after firing multiple bullets into Robinson's car must be taken in context with entire conflict. The chain of events that unfolded on September 1, 2012, included numerous instances of Petitioner and Robinson driving to and away from multiple locations. Petitioner's other comings and goings were not viewed as withdrawals because they were simply in furtherance of his pursuit of Robinson. This instance should not be viewed as any different. Also, Petitioner's recorded statements that were published to the jury directly show he did not intend to withdraw. When Petitioner was discussing his driving away after firing shots into Robinson's car, he stated, "**the dude knew we were gonna come back for him**". (State's Ex. 38, Video 1 at 1:10). Also, Petitioner stated he told his father "**man, turn around**" after he heard Robinson's gun shots. (State's Ex. 38, Video 3 at 00:45). Both of these statements undoubtedly show Petitioner's intent was not to withdraw but to continue fighting. Thus, Petitioner's own words completely contradict his assertion that he withdrew from the conflict. Again, though this particular portion of the issue is not preserved, but the record shows it is without merit.

II.

The Court of Appeals did not err in finding no abuse of discretion in denying Petitioner's request to charge withdrawal from mutual combat when no evidence existed to support such a charge.

Petitioner submits, as he did in his petition for rehearing to the Court of Appeals, that the Court of Appeals utilized an incorrect standard in reviewing the denial of a request to charge. (Brief of Petitioner at 16; Petition, p. 13; see also App. pp. 758-59 (petition for rehearing to the Court of Appeals)). He also submits the evidence of Petitioner's leaving the scene when Robinson fired is "some evidence" that the combat had ended. (Petition, p. 14). Neither argument prevails on this record.

The Court of Appeals noted the correct passage from this Court's opinion in *State v. Graham* which properly guides the analysis, and emphasized the following passage which appears in bold italics below:

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

State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 495–96 (1973);
(emphasis added in Court of Appeals opinion). (See App. p. 749).

The Court of Appeals then recounted the ongoing gun battle, including the driving through two different neighborhoods. (App. p. 750). While Petitioner argues that leaving a neighborhood and no return fire at that time may be "some evidence" of withdrawal, (see Brief of Petitioner at 18; Petition p. 14), it is hardly so where the battle has spanned locations and there were volleys in different areas. Moreover, as the Court of Appeals also noted, there was no

evidence that an intent to withdraw was communicated "either by word or act." (App. p. 454; App. p. 450). Rather,

> ...no evidence showed Young, Jr. and Robinson communicated verbally at any point in the conflict after the initial encounter in the Youngs' yard. Moreover, because we find the combat did not end when Young, Jr. fled the scene after shooting Robinson's unoccupied vehicle, we similarly find Young, Jr.'s act of fleeing before Robinson fired the fatal shots did not make known to Robinson any intent to withdraw.

(App. p. 750).

The evidence of chase does not allow Petitioner's offered argument to show some support evidence of intent to withdraw. Even so, assuming for the sake argument that Petitioner intended to withdraw, neither his words nor actions communicated this intent to Robinson. This Court in *Graham* explained that a withdrawal must be "communicated to the victim by word or act." 260 S.C. at 451, 196 S.E.2d at 496. Petitioner did not attempt to verbally communicate a desire to end the conflict with Robinson. Moreover, the act of driving down the road would not have been reasonably interpreted by Robinson that Petitioner intended to cease fighting. As stated above, the conflict included multiple instances of driving to and from different locations.

Because the law to be charged is driven by the facts adduced at trial, there was no necessity of a charge on withdrawal from the mutual combat. *See, e.g., State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008) ("The law to be charged to the jury is determined by the evidence presented at trial."). This Court has explained that the failure to give a charge supported by the evidence is an error of law; thus, the failure to give a charge warranted by the evidence constitutes an abuse of discretion. *See State v. Commander*, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011) (affirming the Court of Appeals conclusion "the trial court acted within its discretion in refusing to charge the jury on accident" where there was no "basis of an accident charge under the facts."). Though specifically regarding a manslaughter charge, the following

passage from this Court's precedent well-illustrates the logic of the matter and aptly addresses Petitioner's argument on the correctness of the legal conclusion:

> A court may eliminate the offense of manslaughter where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter. *State v. Burriss,* 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999). An appellate court will not reverse the trial judge's decision absent an abuse of discretion. *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). 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. *Id.* 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. *Id.* at 390, 529 S.E.2d at 539. 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)

Whether there was a factual basis warranting the charge is was exactly what the Court of Appeals considered in ruling on the issue. Thus, the Court of Appeals correctly followed this Court's precedent, and properly focused on the evidence presented in relationship to the requested charge. The Court of Appeals did not err in reviewing the trial judge's consideration of the charge in light of the evidence presented at trial.

A. The trial judge did not abuse his discretion in denying Petitioner's request to charge withdrawal from mutual combat because no evidence existed to support such a charge.

After Petitioner's directed verdict motion was denied, Petitioner then requested a jury instruction on the ending of mutual combat. The judge found there was no evidence of a withdrawal that would warrant such an instruction. (App. pp. 523-25). He ruled correctly.

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

known to his adversary." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Thus, two elements must be satisfied in order to successfully withdraw from mutual combat. Here, neither of these elements have been met.

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

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

Additionally, the Kentucky Court of Appeals in *Hellard v. Commonwealth* rejected the defendant's assertion that he withdrew from the combat in good faith. *Hellard v. Commonwealth*,

84 S.W. 329, 329 (Ky. 1905). The court held, "A retreat is not necessarily an abandonment. It may be only the falling back on a better position, or for strategic reasons, with intention to continue the battle when the advantage warranted it." *Id.* Also, the Supreme Court of Louisiana, in *State v Kellogg,* analyzed the reinstatement of a claim of self-defense if the defendant withdrew from the combat in good faith. *State v. Kellogg*, 29 So. 285 (La. 1901). The court stated that self-defense could not be asserted under the basis of withdrawal if the conduct was "a mere momentary cessation of hostilities, with no bona fide, clearly expressed intention to withdraw from the conflict." *Id.* at 291.

Here, there was certainly no evidence presented at trial that indicated Petitioner withdrew or desired to withdraw from the conflict in good faith. Petitioner's act of driving away moments after firing multiple bullets into Robinson's car was not a desire to end the fighting. Petitioner's actions were not a withdrawal or a retreat, but a continuation of the hunt for Robinson. His act of driving away must be viewed in relation to the whole incident. The entire conflict revolved around Petitioner and Robinson chasing after each other. Petitioner traveled down numerous roads and made many stops in his search for Robinson. These other comings and goings were not withdrawals but rather mere continuations of Petitioner's pursuit of Robinson. Petitioner's act of driving down the road after shooting Robinson's vehicle should not be viewed as any different.

Additionally, Petitioner's statements introduced at trial further support that he did not withdraw in good faith. During the interview with law enforcement, Petitioner disclosed that after hearing Robinson shoot at Young, Sr.'s truck, he told his father, **"man turn around".** (State's Ex. 38, Video 3 at 00:45). Also, when discussing driving away after shooting Robinson's car, Petitioner told investigators, **"The dude knew we were gonna come back for him. He already knew. I know he knew. Cause he know me. I don't play like that."** (State's Ex. 38,

Video 1 at 1:10). Petitioner's admissions that he intended to return to the fight directly refute any intent to withdraw.

Assuming Petitioner intended to withdraw, which the evidence suggests otherwise, neither his words nor actions communicated this intent to Robinson. The Court in *Graham* explained that a withdrawal must be "communicated to the victim by word or act." 260 S.C. at 451, 196 S.E.2d at 496. Petitioner did not attempt to verbally communicate a desire to end the conflict with Robinson. Moreover, Petitioner's act of driving down the road would not have been reasonably interpreted by Robinson that Petitioner intended to cease fighting. As stated above, the conflict included multiple instances of driving to and from different locations that did not amount to a withdrawal. It would be unreasonable to assume Robinson viewed this instance as anything different. Therefore, since Petitioner did not withdraw from the conflict in good faith or inform Robinson of an intended withdrawal, a jury instruction on the ending of mutual combat would be improper. The trial judge did not err in declining to give the charge in these circumstances; however, if any error did occur, such error would be harmless in light of the remainder of the charge and specifically the carefully crafted charge on mutual combat.

Yet, a review of the record undoubtedly shows the requested charge was not warranted. Therefore, there was no error by the trial judge, and the Court of Appeals properly affirmed. Petitioner's argument to the contrary should be rejected.

III.

The Court of Appeals did not err in finding no abuse of discretion in denying Petitioner's motion for a directed verdict on the charge of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of this offense.

Petitioner argues there is "*no* circumstantial evidence, much less substantial circumstantial evidence that Petitioner shot at or attempted to shoot Robinson," as he similarly argued in his petition for rehearing. (Brief of Petitioner, Petition, p. 17) (emphasis in original); (see also App. p. 760, petition for rehearing in the Court of Appeals). The Court of Appeals properly and reasonably rejected Petitioner's argument there was no evidence of criminal intent toward Robinson. The Court reasoned:

> Here, Singleton testified after Robinson first fired his revolver at the ground near the Youngs, the Youngs went into their house and retrieved a semi-automatic pistol. Thereafter, Singleton and the Youngs drove around their neighborhood searching for Robinson, and Young, Jr. assembled the pistol during the search. Mitchell testified Robinson came to her door and excitedly told her the Youngs were shooting at him. Delaney also testified Robinson told him about an exchange of gun fire with the Youngs. Moreover, the State published Young, Jr.'s police interview to the jury. In the interview, Young, Jr. explained, "The first time we caught [Robinson] ... the [pistol] wouldn't shoot. It wouldn't shoot." Young, Jr. continued, "It didn't go down like we wanted it to. If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing [because] it was a dead[-end] road.... But the [pistol] just wouldn't go off." Young, Jr. also clarified Robinson was his intended target. Viewing this evidence in the light most favorable to the State, we find there was substantial circumstantial evidence tending to prove Young, Jr. attempted to murder Robinson.

(App. p. 748-49).

The record supports the Court of Appeals' decision.

Attempted murder is defined as "a person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied." S.C. Code Ann. § 16-3-29. Respondent submits that ample substantial circumstantial and direct evidence was presented at trial showing Petitioner intended to and attempted to kill Robinson with malice aforethought.

Witness Testimony

- Jontu Singleton testified Petitioner retrieved the gun, assembled the gun, and looked for Robinson (App. pp. 365-69; R.p. 364-68)

- Robinson's statement to Mitchell "those M.F. was shooting at me" (App. p 311; R.p. 310)

- Robinson's statement to Delaney "yeah they was shootin at me so I shoot back at them" after Robinson asked Delaney if he had seen a grey truck (App. p. 334; R.p. 333)

- The 911 recording from a witness stating there was a shootout between a grey Lexus, driven by Robinson, and a grey truck[12] (State's Ex. 2).

Petitioner's Admissions in Recorded Statements

- "Should've never moved my ass from Ridgeland. Could've killed any n**** I wanted to and nobody'd ever fucking find out" (State's Ex. 38, Intro Video at 4:01)

- Talking about driving away after shooting Robinson's car: "The dude knew we were gonna come back for him. He already knew. I know he knew. Cause he know me. I don't play like that" (State's Ex. 38, Video 1 at 1:10)

- "Boy, I swiss cheese that car...I swear I did" (State's Ex. 38, Video 3 at 00:20)

- After Robinson shot at them in the truck, indicated to Young, Sr., "man turn around" (State's Ex. 38, Video 3 at 00:45)

- "I mean shit, I shot the car a good, what, twenty damn times" (State's Ex. 38, Video 6 at 00:55)

- "The first time we caught his ass, but the shit wouldn't shoot...It Wouldn't shoot...No, it wouldn't shoot" (State's Ex. 38, Video 7 at 00:25)

- "It didn't go down like we wanted it to...If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing, 'cause it was a dead road, nobody would've knew nothing...But the gun just wouldn't go off" (State's Ex. 38, Video 7 at 2:11).

Petitioner was the person who tried to kill Robinson; he admitted to being the person that attempted to shoot Robinson but the gun jammed. (State's Ex. 38, Video 7). He admitted to

[12] The caller referred to the car as a "grey Lexus," however, the caller positively identifies the driver of the car (actually a green Acura) as Tyrone Robinson.

being the person who shot Robinson's car to the point it looked like "swiss cheese." (State's Ex. 38, Video 3 at 00:20). Also, witness testimony corroborates the statements that he was the shooter, in particular, Jontu Singleton's testimony that Petitioner was assembling a gun while chasing after Robinson in Young, Sr.'s truck. (App. pp. 368-69; R. pp. 367-68). Additionally, Charlese Mitchell testified seeing Young, Sr. speeding down the road where Robinson's car was shot. (App. p. 329; R. p. 328; see also App. pp. 301- 313; R. pp. 300-312).

Respondent submits that the State presented direct and substantial circumstantial evidence of Petitioner's guilt at trial. The standard is well-established:

> When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the state. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.

State v. Weston, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006)

The State met this requirement in its presentation of the evidence. Therefore, the trial judge did not abuse his discretion in denying Petitioner's motion for a directed verdict on the attempted murder charge. The Court of Appeals proper affirmed and did not err in reviewing the trial judge's consideration of the charge in light of the evidence presented at trial.

A. The trial judge did not abuse his discretion in denying Petitioner's motion for a directed verdict on the charge of attempted murder because the direct and circumstantial evidence, viewed in the light most favorable to the State, reasonably tended to prove his guilt of this offense.

After the State rested its case, Petitioner moved for a directed verdict on the murder and attempted murder charges. With regard to the attempted murder charge, Petitioner argued that there was no evidence presented that showed Petitioner attempted to kill Tyrone Robinson.

Specifically, Petitioner argued the State offered no evidence that Petitioner pointed a gun at Robinson. (App. p. 512; R.p. 508, lines 10-13). Furthermore, Petitioner alleged it was never confirmed that Robinson was referring to Petitioner when he stated "those M.F. was shooting at me." (App. p. 512; R.p. 508, lines 16-20). The State responded that there was in fact at least three pieces of evidence presented during trial proving Petitioner's attempted murder of Robinson. (App. p. 518; R.p. 514, lines 9-11). These three pieces of evidence were: (1) Robinson's statement to Mitchell, "those M.F. was shooting at me", (2) Robinson's statement to Delaney, "yeah they was shootin at me so I shoot back at them" after asking about a grey truck, and (3) the 911 call reporting a shootout between a grey Lexus driven by Robinson and grey truck.(App. pp. 517-18;R.p.513,line 20–p.514, line 11). The State further argued that Petitioner's admission to attempting to kill Robinson but failing because the gun jammed was an important indication that Petitioner intended to kill Robinson. (App. p. 518; R.p. 514, lines12-15).

Correctly reviewing the evidence in the light most favorable to the State, the trial judge held that there was substantial circumstantial and direct evidence introduced at trial. Specifically, the court emphasized "that the attempted murder of Mr. Robinson is borne out by [Petitioner's] own statement." (App. p. 521; R.p. 517, lines 18-19). Accordingly, the trial judge denied Petitioner's motion for a directed verdict on attempted murder.

Petitioner's argument fails in that the evidence must be viewed in the light most favorable to the State. Contrary to Petitioner's assertion, there is ample direct and circumstantial evidence supporting the trial judge's denial of Petitioner's directed verdict motion on the attempted murder charge, and his ruling should be affirmed.

Attempted murder is defined as "a person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied." S.C. Code Ann. § 16-3-29.

Respondent submits that substantial circumstantial and direct evidence was presented at trial showing Petitioner intended to and attempted to kill Robinson with malice aforethought. The following are the key pieces of direct and circumstantial evidence from the trial record:

Witness Testimony

- Jontu's testimony about Petitioner retrieving a gun and looking for Robinson (App. p. 365; R.p. 364, lines 7-10; p. 367, lines 5-8)
- Jontu's testimony about Petitioner assembling the gun while looking for Robinson (App. p. 369; R.p. 368, lines 13-25)
- Robinson's statement to Mitchell "those M.F. was shooting at me" (App. p. 311; R.p. 310, lines 8-11)
- Robinson's statement to Delaney "yeah they was shootin at me so I shoot back at them" after Robinson asked Delaney if he had seen a grey truck (App. p. 334; R.p. 333, lines 1-19)
- The 911 recording from a witness stating there was a shootout between a grey Lexus, driven by Robinson, and a grey truck[13] (State's Ex. 2)

Petitioner's Admissions

- Petitioner's statement **"Should've never moved my ass from Ridgeland. Could've killed any nigga I wanted to and nobody'd ever fucking find out"** (State's Ex. 38, Intro Video at 4:01)
- Petitioner's statement when he was talking about driving away after shooting Robinson's car: **"The dude knew we were gonna come back for him. He already knew. I know he knew. Cause he know me. I don't play like that"** (State's Ex. 38, Video 1 at 1:10)
- Petitioner's statement **"Boy, I swiss cheese that car...I swear I did"** (State's Ex. 38, Video 3 at 00:20)
- Petitioner's statement to Young, Sr. after Robinson shot at them in the truck, **"man turn around"** (State's Ex. 38, Video 3 at 00:45)

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[13] Petitioner argues in his brief that the caller referred to the car as a "grey Lexus", but that Robinson was driving a green Acura on the incident date. Respondent submits that this argument is meritless because the caller positively identifies the driver of the car as Tyrone Robinson. Therefore, the color of the car is insignificant.

- Petitioner's statement **"I mean shit, I shot the car a good, what, twenty damn times"** (State's Ex. 38, Video 6 at 00:55)

- Petitioner's statement **"The first time we caught his ass, but the shit wouldn't shoot...It Wouldn't shoot...No, it wouldn't shoot"** (State's Ex. 38, Video 7 at 00:25)

- Petitioner's statement **"It didn't go down like we wanted it to...If it wouldn't went down like that, we wouldn't even be here and nobody would know nothing, 'cause it was a dead road, nobody would've knew nothing...But the gun just wouldn't go off"** (State's Ex. 38, Video 7 at 2:11)

- Investigator Albertine's question "So what were you shooting at then?" and Petitioner's response "**Him**" (State's Ex. 38, Video 7 at 1:10).

The chain of events evidences that the Petitioner clearly intended and attempted to kill Tyrone Robinson with malice aforethought. Petitioner's intent was unmistakably illustrated by eyewitness testimony about Petitioner obsessively chasing Robinson down numerous roads in Hilton Head while armed with a semi-automatic weapon. Moreover, Petitioner's admission that he attempted to kill Robinson but the gun was inoperative further supports his guilt. Even though Petitioner does not specifically state he pointed the gun at Robinson, he admitted he was shooting at "**him**". (State's Ex. 38, Video 7 at 1:10). This admission constitutes direct evidence of the Petitioner's involvement in the crime, "immediately" establishing his intent to murder Robinson. If Petitioner's statements were not persuasive enough, Robinson's statements about Petitioner shooting at him surely aided the jury in their determination of Petitioner's guilt beyond a reasonable doubt. Although Petitioner argues that Robinson's statements could have meant someone besides Petitioner was shooting at him, the statements must be taken in the context of the events that afternoon. This was a question for the jury to decide and the only reasonable inference was that Robinson was referring to Petitioner in his statements. Accordingly, the State did indeed present substantial direct and circumstantial evidence, when viewed in the light most favorable to the State, proving Petitioner's guilt of the attempted murder of Robinson.

Petitioner compares his case to the following cases: *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011); *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011); and *State v. Hepburn*, 409 S.C. 416, 753 S.E.2d 402 (2013). His reliance on these cases is misplaced. In each of those cases, this Court found that a directed verdict was warranted based on the evidence presented by the State at trial. However, the instant case is distinguishable from all of those cases. *Accord State v. Bratschi*, 413 S.C. 97, 106-14, 775 S.E.2d 39, 44-48 (Ct. App. 2015).

The Court in *Bostick* and *Odems* held a directed verdict was proper because the State had failed to present evidence placing the defendant at the scene of the crime. *Bostick*, 392 S.C. at 141, 708 S.E.2d at 778; *Odems*, 395 S.C. at 592, 720 S.E.2d at 53. Here, there is no question Petitioner was present at the crime. Not only do multiple witnesses place him at the scene, he places himself there by his own admission. Therefore, both of these cases cited by Petitioner are inapplicable to the case at hand.

Also, Petitioner's contention that his case is comparable to *Hepburn* is erroneous. The Court in *Hepburn* held that the State failed to present substantial circumstantial evidence that the defendant killed the victim, and thereby a directed verdict was warranted. *Hepburn,* 406 S.C. at 440, 753 S.E.2d at 415. The Court emphasized that while the State presented substantial evidence the defendant was at the scene, it failed to present evidence tending to prove that this defendant, rather than the codefendant, inflicted the harm on the victim. *Id.* Thus, unlike this case, the underlying issue was **"who"** committed the crime. Here, there is no question about "who" attempted to kill Robinson. Undoubtedly, it is known that Petitioner was the person who tried to kill Robinson due to his own confessions. Petitioner admitted to being the person that attempted to shoot Robinson but the gun jammed. (State's Ex. 38, Video 7). Petitioner admitted to being the person who shot Robinson's car to the point it looked like "swiss cheese." (State's

Ex. 38, Video 3 at 00:20). Also, witness testimony corroborates Petitioner's own statements that he was the shooter. Jontu testified Petitioner was assembling a gun while chasing after Robinson in Young, Sr.'s truck. (App. p. 369; R.p. 368, lines 13-25). Mitchell testified seeing Young, Sr. speeding down the road where Robinson's car was shot. (App. p. 329; R.p. 328, lines 3-21). Since the identity of the person who committed the crime is not at issue in this case, *Hepburn* is not appropriate for comparison.

Respondent submits that the evidence presented in this case is akin to evidence presented by the State in *State v. Lane*, where the South Carolina Supreme Court reversed the Court of Appeal's reversal of the trial judge's denial of the defendant's motion for a directed verdict. *State v. Lane*, 765 S.E.2d 557, 557 (S.C. 2014). In reversing the Court of Appeals decision, the Court held "in viewing the evidence in the light most favorable to the State, which we are constrained to do, the State presented substantial circumstantial evidence of Respondent's guilt." *Id.* In that case, the State presented evidence of the following: eyewitness testimony observing a red Mitsubishi parked in the victim's driveway on the afternoon of the burglary, a piece of paper found in victim's driveway after the burglary that was later identified as belonging to the defendant, officer testimony that they observed a red Mitsubishi in the driveway when they went to interview the defendant at his girlfriend's house, and defendant's admission to driving a red Mitsubishi on the day of the burglary and ownership of the piece of paper. *Id.*

Here, the State presented evidence regarding Petitioner's ill-will towards Robinson, Petitioner and Robinson's confrontation earlier in the day, Petitioner's actions in retrieving and assembling a weapon, Petitioner hunting down Robinson in a grey truck, eyewitness testimony placing Young, Sr.'s grey truck near the scene, officers testimony that they pulled over Petitioner in Young, Sr.'s grey truck shortly after the shooting, eyewitness testimony about a shootout

between a grey truck and grey Lexus shooting at each other near the scene, Petitioner's own admission of his chasing down Robinson while riding in his father's grey truck, and Petitioner's admission of his intent, and attempt, to shoot Robinson. (See App. pp. 489-90; R.pp. 287-506; State's Ex. 38, Intro Video to Video 8; State's Ex. 2). Indeed, there was exceedingly more evidence presented in this case than in *Lane* to withstand a directed verdict motion.

Respondent submits that the State presented substantial circumstantial evidence in the instant case of the same caliber, if not more, as the evidence presented in *Lane*, and Respondent asks the Court to find, just as the Court did in *Lane*, that "the aforementioned evidence was sufficient to withstand Respondent's motion for a directed verdict." *Id.*

The State presented direct and substantial circumstantial evidence of Petitioner's guilt at trial. Therefore, the trial judge did not abuse his discretion in denying Petitioner's motion for directed verdict on the attempted murder charge, and the Court of Appeals properly affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals ruling affirming the judgment, conviction, and sentence of the trial court should likewise be affirmed.

Respectfully submitted,

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August 6, 2019.

[14] Present counsel for Respondent acknowledge the contributions of former Assistant Attorney General Margaret G. Boykin. Though no longer with the officer, Ms. Boykin prepared the Respondent's brief in this matter in the South Carolina Court of Appeals. Thus, her work carries over and is acknowledged here.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions
Thomas W. Cooper, Jr., Circuit Court Judge

On Certiorari to the South Carolina Court of Appeals
Opinion No. 5592 (Ct.App. filed August 22, 2018)
(Former Appellate Case No. 2015-000508)

The State, Respondent,

v.

Aaron Scott Young, Jr., Petitioner.

Appellate Case No. 2018-001861

CERTIFICATE OF SERVICE

I, Melody J. Brown, certify that I have served the Brief of Respondent on Petitioner by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to his attorneys of record:

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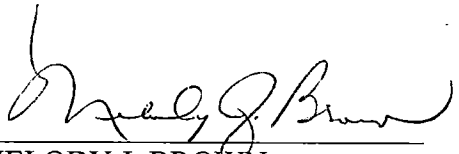
I further certify that all parties required by Rule to be served have been served.

This 6th day of August, 2019.



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