

|                          |   |                                  |
|--------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF GENERAL SESSIONS |
|                          | ) |                                  |
| COUNTY OF LEXINGTON      | ) |                                  |
|                          | ) | WARRANTS: 2022A4021601032;       |
|                          | ) | 2022A4021601078-85               |
| STATE OF SOUTH CAROLINA, | ) | 2022A4021601087                  |
|                          | ) | 2022A4021601089                  |
| vs.                      | ) |                                  |
|                          | ) | DEFENDANT'S MOTION TO            |
| MARQUISE ROBINSON,       | ) | SURPRESS ARUGMENT OF             |
|                          | ) | "MUTUAL COMBAT"                  |
| Defendant.               | ) |                                  |
| _____                    | ) |                                  |

COMES NOW, the Defendant, Marquise Robinson, by and through his undersigned attorney, and respectfully moves this honorable court to surpress any mention of the legal theory "mutual combat" until and unless a proper foundation is laid through the evidence.

It is the understanding and belief of the Defense that the State intends to try Mr. Robinson under the common law doctrine of "mutual combat". The basis of this doctrine is that when multiple people willingly agree to fight, they are each responsible for the natural consequences that flow from the resulting fight. The Court has recently extended this doctrine to extend to harm caused to by standers not involved in the fight. The elements of mutual combat were most recently recited in the case of *State v. Young* 429 S.C. 155, 838 S.E.2d 516 (2020).

Mutual combat requires that:

- (1) The fight arise out of a pre-existing dispute;
- (2) That the combatants be armed with deadly weapons and aware that each other is armed;
- (3) That the agreement to fight be entered into prior to the beginning of combat.

The most essential element that is assumed in all of the mutual combat cases is participation in the fight. The Court in *State v. Young*, 429 S.C. 155, 838 S.E.2d 516 (2020), *relied*

heavily on *Alston v. State*, 339 Md. 306, 662 A.2d 247 (1995) a Court of Appeals from a Maryland case in which the court emphasized, "The relevant frame of reference, however, is [ the defendant's] participation in the gun battle." (emphasis added)

In the case at hand, the Defendant did not participate in the gun battle. The State has conceded through the testimony the State elicited through their expert witness, Thomas Alvin Smith, in the trial of *State v. Amari Price* that the bullets that struck the victims were not fired by Robinson.

In that same trial, the State's own expert agreed that there was no evidence indicating that Robinson fired a shot on the day in question.

There were no shell casings found on the crime scene that matched Robinson's firearm. It was further conceded at the immunity hearing in case of *State v. Amari Smith* that Robinson. Never pointed his gun at anyone and only raised his gun to a 45° angle.

|    |                                         |
|----|-----------------------------------------|
| 21 | A. -- in the direction of Mr. Robinson. |
| 22 | Q. And Robinson is gonna stand up?      |
| 23 | A. Yes, sir.                            |
| 24 | Q. And he's got his gun out?            |
| 25 | A. Yes, his gun is in his right hand.   |

(transcript continued...)

|   |                                                             |
|---|-------------------------------------------------------------|
| 1 | Q. By his side. Now do you see his arm begin to raise,      |
| 2 | his right hand?                                             |
| 3 | A. He does. He gets it up to about maybe a 45-degree        |
| 4 | angle before him and other individuals in the mall begin to |
| 5 | react to gunfire.                                           |

In short, the evidence proffered through the State's own witnesses indicate that Robinson approached Jewayne Price and at some point, Jewayne Priace pulled a gun out of his pants. After Price pulls his gun, the Defendant pulls his own gun out of his pants. Robinson never pointed the gun at anyone nor fired a shot. When the shooting occurred, Robinson immediately hid behind a kiosk in the mall. Robinson ran out of the mall when the shooting concluded.

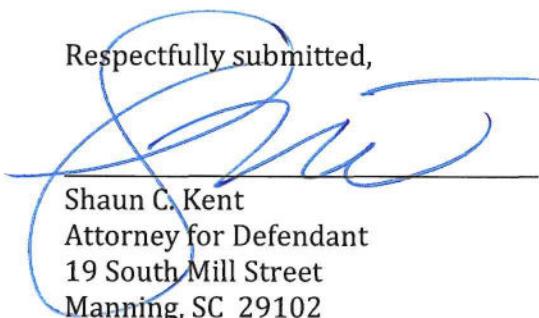
Mutual combat is not applicable to the case at hand. Simply put, Mr. Robinson did not fight. There is no evidence that will be presented to support that Mr. Robinson struck anyone, assaulted anyone, or fired a weapon. The progeny of cases in which the theory of mutual combat has been developed have all involved Defendants who were active participants in the fight itself.

Because Mr. Robinson did not engage in the fight itself, the doctrine of mutual combat is not applicable to this case.

Therefore, the State should be precluded from mentioning or arguing the doctrine of mutual combat or its elements unless evidence that the Defendant actually fought it entered. The mention of this doctrine without a proper foundation will unduly prejudice Mr. Robinson and will confuse the jury.

*(Signature Page to Follow)*

Respectfully submitted,



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November 4, 2024



429 S.C. 155  
Supreme Court of South Carolina.

The **STATE**, Respondent,  
v.  
Aaron Scott **YOUNG** Jr., Petitioner.

Appellate Case No. 2018-001861

Opinion No. 27942

Heard November 20, 2019

Filed February 5, 2020

Rehearing Denied March 12, 2020

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### Synopsis

**Background:** Defendant was convicted in the Circuit Court, Beaufort County, Thomas W. Cooper, Jr., J., of murder of an innocent bystander and attempted murder of shooter arising from defendant's gun battle with shooter. Defendant appealed. The Court of Appeals, 424 S.C. 424, 818 S.E.2d 486, affirmed. Defendant petitioned for writ of certiorari, which was granted.

**Holdings:** As matters of first impression, the Supreme Court, Kittredge, J., held that:

[1] each participant who willingly engages in **mutual combat** may be held accountable for death or injury of an innocent bystander resulting from that confrontation, and

[2] defendant was a **mutual combatant** who could be held liable under the doctrine of **mutual combat** for death of bystander.

Affirmed.

Hearn, J., filed a dissenting opinion.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection.

### West Headnotes (7)

[1] **Criminal Law** ⇌ **Mutual** or voluntary conduct

To constitute "**mutual combat**," there must be a **mutual** intent and willingness to fight, manifested by the acts and conduct of the parties and the circumstances attending and leading up to the **combat**.

4 Cases that cite this headnote

[2] **Homicide** ⇌ **Mutual combat**

**Homicide** ⇌ **Mutual** or voluntary conduct

**Mutual combat** may be the basis of either a murder or manslaughter conviction depending on the **combatant's state** of mind at the time of the killing, i.e., whether the **combatant** acted with malice aforethought.

[3] **Homicide** ⇌ **Mutual** or voluntary conduct

A **mutual combatant** may properly be found guilty of murder for the death of a friendly co-combatant at the hands of a rival **combatant**.

1 Case that cites this headnote

[4] **Criminal Law** ⇌ **Mutual** or voluntary conduct

A **combatant** may withdraw from **mutual combat** if he endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary.

2 Cases that cite this headnote

[5] **Homicide** ⇌ Aiding, abetting, or other participation in offense

If a **combatant** satisfy the requirements to withdraw from **mutual combat**, he may no longer be held liable for the actions of his former co-combatants.

1 Case that cites this headnote

- [6] **Homicide** — Aiding, abetting, or other participation in offense

Each participant who willingly engages in **mutual combat** may be held accountable for the death or injury of an innocent bystander resulting from that confrontation under the “hand of one is the hand of all” theory of accomplice liability.

1 Case that cites this headnote

- [7] **Homicide** — Aiding, abetting, or other participation in offense

Defendant was a **mutual combatant** who could be held liable under the doctrine of **mutual combat** for death of innocent bystander from gunshot fired by another **combatant**, where defendant and his father engaged in a cat-and-mouse gun battle through residential neighborhoods with the other **combatant** for over an hour.

3 Cases that cite this headnote

## ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

### Attorneys and Law Firms

F. Elliotte Quinn IV, of The Steinberg Law Firm, LLP, of Summerville, and Jennifer K. Dunlap, of Parker Poe Adams & Bernstein, LLP, of Charleston, for Petitioner.

Attorney General Alan Wilson, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General Melody J. Brown, all of Columbia; and Solicitor Isaac McDuffie Stone III, of Bluffton, for Respondent.

### Opinion

ACTING CHIEF JUSTICE KITTREDGE:

**\*\*517 \*157** In the course of a gun battle between **mutual combatants**, a bullet fired at Petitioner Aaron Young Jr. (Young Jr.) missed its intended mark and killed an unintended victim; all involved in the gun battle, including Young Jr.,

were charged with murder. The heart of this case deals with the reach of the doctrines of **mutual combat** and transferred intent.

Young Jr. and his father Aaron Young Sr. (Young Sr.) willingly engaged a rival, Tyrone Robinson, in a cat-and-mouse gun battle in a residential neighborhood. The gun battle came to a tragic conclusion when Robinson shot and killed an unintended victim, an eight-year-old child who was playing in the area. The State charged all three **combatants** with the murder of the victim. Robinson's murder charge stemmed from a straightforward application of the doctrine of transferred intent. The Youngs' murder charges stemmed from an application of the doctrine of **mutual combat**,<sup>1</sup> under which each **combatant** is criminally responsible for a death caused by any of the other **combatants**, regardless of whether he fought with or against the killer-combatant.

Today, we hold **mutual combat** can properly serve as the basis for a murder charge for the death of a non-combatant under the “hand of one is the hand of all” theory of accomplice liability. When two or more individuals engage in **combat** via a reckless shootout, they collectively trigger an escalating chain reaction that creates a high risk to any human life falling within the field of fire. In that type of gunfight, *all* individuals are willing to use lethal force and display a depraved indifference to human life. More importantly, an innocent bystander would not be shot but for the willingness of all **combatants** to turn an otherwise peaceful environment, often a residential or commercial setting, into a battlefield. In a real sense, each **combatant** aids and encourages all of the other **combatants**—whether friend or foe—to create the lethal crossfire. We **\*158** therefore find the law sanctions holding Young Jr. responsible for the actions of Robinson in causing the victim's death. Both men were equally culpable. As a result, we affirm Young Jr.'s murder conviction and sentence.<sup>2</sup>

### I.

Prior to the date of the gun battle, Robinson and Young Jr. had a history of violent confrontations with one another. On the day in question, Robinson drove to the Youngs' house and began arguing with Young Jr. outside, eventually pulling out a .38 caliber revolver and moving toward Young Jr. Young Sr. was present and attempted to take Robinson's gun away. While the two struggled for possession of the weapon, the revolver discharged. Young Sr. backed away, but Robinson



fired once or twice more at the ground by **Young Sr.**'s feet. Robinson then returned to his vehicle and sped away.

This confrontation began a series of armed exchanges between the **Youngs** and Robinson across multiple residential neighborhoods over the next hour, wherein one side would catch up with the other, shoot, and flee. During the penultimate exchange, the **Youngs** were unable to locate Robinson but saw his unoccupied vehicle, so **Young Jr.** "swiss cheese[d] that car"—shooting at it \*\*518 over twenty times—despite the fact that he (**Young Jr.**) had just seen a group of children playing on a trampoline a short distance away. As the **Youngs** fled again, Robinson emerged from hiding and shot at their car three times, missing the **Youngs**, but tragically hitting the victim, who had been playing on the trampoline. Following their arrests, all three men were charged with the victim's murder.

Prior to the start of trial, **Young Jr.** moved to dismiss the murder indictment, arguing the charge was based on the theory of **mutual combat**, which was not a stand-alone theory of criminal responsibility in South Carolina, but instead a

\*159 limitation on self-defense.<sup>3</sup> The **State** acknowledged that, prior to charging **Young Jr.**, the doctrine of **mutual combat** had not been used to impose liability for the death of a non-combatant. See, e.g., *State v. Brown*, 108 S.C. 490, 499, 95 S.E. 61, 63 (1918) ("[E]very one [sic] 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 [sic] 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." (emphasis added)). The **State** argued it was a reasonable extension of the **mutual combat** doctrine to impose liability on all **combatants** for the death of an innocent bystander as well. Importantly, **Young Jr.** conceded the theory of **mutual combat** would apply to hold **Young Jr.** responsible for murder if, for example, Robinson had shot and killed **Young Sr.** instead of the victim because **Young Sr.** was a co-combatant. However, because the victim was not a **combatant**, **Young Jr.** argued he could not be found criminally responsible for the victim's murder.

The trial court denied **Young Jr.**'s motion to dismiss the indictment, noting that in **mutual combat** situations all participating parties were responsible for their fellow

**combatants'** actions resulting in injuries to other participants in the **combat**. Although the experienced trial judge recognized the facts of this case represented an extension of the existing case law, he found **Young Jr.** could be held liable for the murder of the victim based on the theories of **mutual combat** and transferred intent, agreeing with the **State's** argument that

it would be very difficult to understand how if multiple people are shooting at each other and someone in the group is killed and everyone's responsible how they would also not be responsible if an innocent third party was shot.

\*160 Comparing this **mutual combat** scenario with the "hand of one is the hand of all" doctrine, the trial judge concluded, "[I]t 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."

Ultimately, the jury convicted **Young Jr.** of murder, and the trial court sentenced him to thirty years' imprisonment. **Young Jr.** appealed, and the court of appeals affirmed. *State v. Young*, 424 S.C. 424, 818 S.E.2d 486 (Ct. App. 2018). We granted **Young Jr.**'s petition for a writ of certiorari to review the decision of the court of appeals.

## II.

**Young Jr.** argues **mutual combat** cannot be used as the grounds on which to base criminal responsibility for murder, but instead may only be used as a limitation on self-defense. We disagree.

### A.

[1] [2] "The doctrine of **mutual combat** has existed in South Carolina since at least 1843, but has fallen out of common use in recent years." *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). To constitute **mutual combat**, there must be a **mutual** intent and willingness to fight, "manifested by the acts and \*\*519 conduct of the



parties and the circumstances attending and leading up to the **combat**.” *Graham*, 260 S.C. at 450, 196 S.E.2d at 495; *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.”); *Brown*, 108 S.C. at 499, 95 S.E. at 63 (“[T]o constitute **mutual combat**, it is not necessary that there should be a positive agreement between the participating parties to enter the **combat**; it is sufficient if they [willfully] enter into the conflict, upon the impulse of the moment.”). The State is required to prove the rival **combatants** were armed for the **mutual combat** with deadly weapons and each **combatant** knew the others were armed. *Taylor*, 356 S.C. at 233–34, 589 S.E.2d at 4–5. **Mutual combat** may be the basis of either a murder or manslaughter conviction depending on the **combatant’s** state of mind at the time of the killing, i.e., whether the **combatant** acted with malice aforethought. \*161 *Id.* at 232, 589 S.E.2d at 3–4 (quoting *State v. Andrews*, 73 S.C. 257, 260, 53 S.E. 423, 424 (1906)).

[3] The majority of jurisdictions impose criminal responsibility on all **combatants** for the consequences of **mutual combat**. In line with the majority approach, South Carolina law has long recognized that criminal liability may be imposed on all **combatants** for the death of one of the participating parties because all are presumed to know and intend the consequences that naturally flow from their unlawful acts. *Brown*, 108 S.C. at 499–500, 95 S.E. at 63. In South Carolina and many other jurisdictions, the criminal liability stemming from **mutual combat** does not depend on which side(s) the **combatant** or the deceased fought. *Id.* Thus, for example, a **combatant** may properly be found guilty of murder for the death of a friendly co-**combatant** at the hands of a rival **combatant**. *See id.* In the eyes of the law, it does not matter that the **combatant** did not intend any harm to the friendly co-**combatant**. *People v. Sanchez*, 26 Cal.4th 834, 111 Cal.Rptr.2d 129, 29 P.3d 209, 223 (2001) (Kennard, J., concurring); *see also Brown*, 108 S.C. at 491–500, 95 S.E. at 61–63 (upholding the manslaughter convictions of three non-striking employees/**combatants** who participated in a fight between strikers and non-strikers that resulted in the death of a striker at the (accidental) hands of a fellow striker). Rather, the death of the friendly co-**combatant** was a harm that both in kind and degree was within the foreseeable risks the participants expected and intended to result from the **mutual combat**. *See Sanchez*, 111 Cal.Rptr.2d 129, 29 P.3d at 223 (Kennard, J., concurring); *Roy v. United States*, 871 A.2d 498, 507–09 & n.10 (D.C. 2005) (collecting cases); *Commonwealth v. Santiago*, 425 Mass. 491, 681 N.E.2d 1205, 1215 (1997) (noting death is “a natural result of a shootout”).

[4] [5] However, the existence of **mutual combat** is not wholly dispositive of criminal liability. A **combatant** may withdraw from **mutual combat** if he “endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary.” *Graham*, 260 S.C. at 451, 196 S.E.2d at 496 (citation omitted). Should a **combatant** satisfy the requirements to withdraw from **mutual combat**, he may no longer be held liable for the actions of his former co-**combatants**. \*162 *Cf. id.* (explaining that although a **mutual combatant** ordinarily may not validly claim self-defense, if he withdraws from the **mutual combat**, his right to self-defense is restored); *State v. Hendrix*, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (citing 40 C.J.S. *Homicide* §§ 121, 133 (1944)) (explaining that withdrawing from the conflict restores a defendant’s right to self-defense).

## B.

No appellate court in South Carolina, however, has addressed the import of the **mutual combat** doctrine on the death of an innocent bystander. Jurisdictions that have considered a factual scenario analogous to the present case are nearly unanimous in finding **mutual combat** may serve as the basis for criminal liability for all **combatants** charged with murder or manslaughter, regardless of who fired the fatal shot. A number of jurisdictions reached this result under an aiding and abetting theory similar to South Carolina’s “hand of one is the hand of all” doctrine. *See, e.g., State v. Spates*, 779 N.W.2d 770, 777–79 (Iowa 2010) (collecting cases and adopting this approach).

\*\*520 For example, in *Alston v. State*, the Court of Appeals of Maryland affirmed a second-degree murder conviction of a participant in a gun battle, despite proof that the innocent bystander was shot and killed by a member of the rival group. 339 Md. 306, 662 A.2d 247, 247–48 (Md. 1995), *aff’d* 101 Md.App. 47, 643 A.2d 468 (Md. Ct. Spec. App. 1994). In rejecting the defendant’s argument that he did not aid and abet his rival in killing the bystander, the court explained the “argument rests heavily on [the defendant] disassociating himself from the [rival group’s actions] and from the particular shot that killed [the bystander]. The relevant frame of reference, however, is [the defendant’s] participation in the gun battle.” *Id.* at 252 (emphasis added). The court found significant the fact that both groups “were armed and prepared to do battle whenever and wherever their forces encountered one another” and “opened fire, returned



fire, and continued to fire in mindless disregard of the lives of the people on the street and in the surrounding houses.” *Id.* Likewise, the court determined the firefight demonstrated each participant was willing to use lethal force and exhibited the malice necessary to \*163 support a second-degree murder conviction. *Id.* The court concluded that “all of the participants, driven by an unwritten code of macho honor, tacitly agreed that there would be **mutual combat**. ... *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.*” *Id.* at 254 (emphasis added).

Similarly, in *People v. Russell*, the Court of Appeals of New York upheld a defendant's second-degree murder conviction even though the **State** was unable to establish which of the three **combatants** fired the shot that fatally wounded an innocent bystander. 91 N.Y.2d 280, 670 N.Y.S.2d 166, 693 N.E.2d 193, 194 (1998). The court explained the **State** “was not required to prove which defendant fired the fatal shot when the evidence was sufficient to establish that each defendant acted with the mental culpability required for the commission of depraved[-]indifference murder, and each defendant ‘intentionally aided’ the defendant who fired the fatal shot.” *Id.*, 670 N.Y.S.2d 166, 693 N.E.2d at 195 (emphasis added). The court rejected the **co-combatants**’ arguments that, as adversaries in a gun battle, they did not “share[ ] the ‘community of purpose’ necessary for accomplice liability,” explaining that each of their respective actions made the gun battle possible, as there would not have been a firefight at all had they not been shooting at one another. *Id.*, 670 N.Y.S.2d 166, 693 N.E.2d at 195–96 (discussing *People v. Abbott*, 84 A.D.2d 11, 445 N.Y.S.2d 344, 347 (1981),<sup>4</sup> and citing, *inter alia*, *People v. Fabian*, 154 Misc.2d 957, 586 N.Y.S.2d 468, 471 (Sup. Ct. 1992) (“Although [the] defendants were trying to injure, if not kill each other, at the very same time they acted in concert to create an explosive condition which resulted inevitably in [the victims’ death and injuries.]”). The court therefore held the evidence was \*164 sufficient for the jury to find all three **co-combatants** acted with the mental culpability required for depraved-indifference murder, and the three men “intentionally aided and encouraged each other to create the lethal crossfire that caused the death of [the victim].” *Id.*, 670 N.Y.S.2d 166, 693 N.E.2d at 196 (emphasis added).

[6] We find the aiding and abetting approach outlined in *Alston* and *Russell* dovetails with our “hand of one is the hand of all” doctrine. See, e.g., *State v. Harry*, 420 S.C.

290, 299, 803 S.E.2d 272, 276–77 (2017) (explaining that under the “hand of one is the hand of all” doctrine, one who joins with another to accomplish an illegal purpose—whether by *encouraging or aiding and abetting*—is guilty as a principal). We agree with those jurisdictions that have concluded **co-combatants** \*\*521 who aid and incite one another to engage in the fight that leads to the death or injury of an innocent bystander are equally criminally liable.<sup>5</sup> As a result, we extend our **mutual combat** jurisprudence to permit finding all **mutual combatants** criminally liable in situations where an innocent bystander is killed by one of the **combatants**.<sup>6</sup> *Cf. Roy*, 871 A.2d at 507 (“We think it \*165 important to note 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. While urban gun battles years ago involved revolvers or clipped pistols of limited fire power, they have now escalated to the use of automatic and semiautomatic weapons. The results are pocket wars with no rules of engagement resulting in a highly increased risk to noncombatants. It is this increased risk to innocent bystanders which justifies the application of proximate cause liability to those participants who willfully choose to engage in these battles.”).

### C.

[7] As applied here, the **Youngs** and Robinson were clearly engaged in **mutual combat**.<sup>7</sup> In a real sense, although they were adversaries, the **Youngs** and Robinson jointly incited one another to continue the cat-and-mouse gun battle that resulted in the victim's death. While Robinson may have been the man who pulled the trigger and formally killed the victim, he would not have fired that shot had it not been for the “aid” and “encouragement” of the **Youngs**. To myopically narrow the focus only to Robinson's actions misses the point.

We therefore find the deadly homicidal force here was not the single bullet that struck and killed the victim, but rather a collective fusillade that spanned several neighborhoods over the course of one hour. See *Alston*, 643 A.2d at 469; see also *Roy*, 871 A.2d at 507 n.10 (“[C]ourts have determined that the combined hail of bullets that result from such a battle are jointly responsible for the fatal injury, such that a determination of which defendant's bullet ‘actually’ caused the death is \*166 unnecessary.”). The **Youngs** and Robinson voluntarily and jointly created a battlefield



that encompassed any number of innocent and unwilling bystanders—including **young** children like the victim. See *Russell*, 670 N.Y.S.2d 166, 693 N.E.2d at 195. Given the **Youngs** and Robinson's collective actions in carrying out the gun battle, it is reasonable for the law of **mutual combat** to serve as the foundation of a murder charge—to hold each one responsible for both his own actions and the actions of the others. *Id.* Because we \*\*522 find the deadly force used in this case was the result of collective action, we hold the responsibility for the victim's death was collective as well. Accordingly, we hold **Young Jr.** was properly charged with the victim's murder under the theory of **mutual combat**.

### III.

Today, we extend our jurisprudence and hold that each participant who willingly engages in **mutual combat** may be held accountable for the death or injury of an innocent bystander resulting from that confrontation. As each **combatant** aids and encourages the others to fire and continue firing the hail of bullets that results in a victim's death or injury, each may be found guilty under the “hand of one is the hand of all” theory of accomplice liability. Accordingly, we affirm the court of appeals' decision upholding **Young Jr.**'s convictions and sentences.<sup>8</sup>

#### AFFIRMED.

JAMES, FEW, JJ., and Acting Justice Aphrodite K. Konduros, concur.

HEARN, J., dissenting in a separate opinion.

#### JUSTICE HEARN:

\*167 I respectfully dissent. While I agree with the majority to affirm the conviction for attempted murder, I disagree with extending the doctrine of **mutual combat** to hold Aaron **Young Jr.** responsible for the murder of the bystander victim. Specifically, I find the lapse of time between when the gun shots were fired at Robinson's car and when the fatal shots occurred prevents the extension of the **mutual combat** doctrine under our “hand of one is the hand of all” theory. Moreover, even if the doctrine applied here, the trial court erred in failing to charge the jury on the end of **mutual combat**.

In extending the doctrine of **mutual combat**, the majority relies on several cases from other jurisdictions, all of which are factually and materially distinct from this case. Every case cited by the majority involves individuals or groups on opposite sides who engaged in a gun battle where both sides *contemporaneously* opened fire on one another. There, the gunfire was characterized as the “combined hail of bullets,” “shower of bullets,” “lethal crossfire,” and “gang-style gun play” in which both parties participated and induced the other to engage in a battle that proximately caused the death of an innocent bystander. Here, the majority portrays the events of \*168 this case as a continuous, ongoing gun battle in which the parties' collective action resulted in a bystander's death. However, unlike the cases on which the majority relies, there is no evidence to support that a simultaneous exchange of bullets occurred and caused the victim's death. Rather, a considerable amount of time passed between **Young Jr.**'s attack on Robinson's empty car \*\*523 and Robinson's retaliatory shooting which killed the victim. Indeed, a neighbor testified at trial that approximately ten minutes elapsed between these two events. Even the trial court's reasoning for charging **mutual combat** contemplated only the scenario where “multiple people are shooting at each other.” Moreover, at oral argument, counsel for both parties acknowledged that a concrete lapse of time in which the “warfare” had subsided would prevent the **State** from charging a defendant with murder under a **mutual combat** theory. While it may be sound public policy to extend the doctrine under circumstances analogous to those in the cases cited, and I would be inclined to do so in the proper case, I disagree with the application of the doctrine under the facts presented here.

Even if the **mutual combat** charge was appropriate, the trial court erred in failing to instruct the jury on the end of **mutual combat**. The majority declines to reach this issue because it believes **Young Jr.** conceded at trial that he would have been guilty of murder through **mutual combat** if Robinson had shot and killed **Young Sr.** instead of the victim. However, in my view, this interpretation misstates the record. To gain a better understanding of the **mutual combat** doctrine and its application in the bystander context, the trial judge posed a hypothetical to **Young Jr.**, stating “if the **Youngs** and Mr. Robinson are out there shooting at each other, that if either one of them got shot and killed, that everybody would be guilty under **mutual combat**.” **Young Jr.** agreed, stating “there's no question but the fact that if Aaron Sr. had gotten shot, then everybody would be responsible, but that's not what happened.” I understand his response to the judge's



hypothetical to be in the context expressed in *State v. Brown*, providing for criminal liability through **mutual combat** when another **combatant** is killed, and in the cases cited by the majority, where both \*169 parties are shooting at each other simultaneously and a bystander is killed. I do not believe there was any concession under these facts, where the **Youngs** clearly were not engaged in a shootout with Robinson at the time he fired the fatal shots.

In addition to relying on defense counsel's ostensible concession, the majority seems to imply that the charge was wholly unnecessary as a matter of law because there was no indication of withdrawal. As the majority notes, the trial court believed the facts evidenced a "temporary retreat" rather than a withdrawal ending the **combat**. While this may have been the case, and the jury could have agreed, the fact remains that if there was any evidence to support withdrawal, the trial judge should have given the charge. *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011) ("If there is any evidence

to warrant a jury instruction, a trial court must, upon request, give the instruction."); *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) ("If there is any evidence to support a charge, the trial judge should grant the request."); *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence."). At a minimum, the **Youngs'** conduct of driving away constituted some evidence of their withdrawal such that a charge on this issue was warranted. Therefore, I would affirm the conviction for attempted murder and reverse on the murder conviction and jury charge issues.

#### All Citations

429 S.C. 155, 838 S.E.2d 516

#### Footnotes

- 1 To be clear, the **Youngs** were charged with murder, not **mutual combat**. Of course, **mutual combat** is not a stand-alone crime in South Carolina. Rather, it is a theory of criminal liability that underlies a recognized crime such as murder or manslaughter. As we will explain later, the **mutual combat** doctrine is most commonly used to negate self-defense, but may also be used as a basis to sustain a murder or manslaughter conviction.
- 2 **Young Jr.** also appeals his conviction for the attempted murder of Robinson. At one point in the **combat**, **Young Jr.** had his gun pointed at Robinson. When **Young Jr.** pulled the trigger, the gun jammed and did not fire. This action resulted in a charge of attempted murder. We affirm the conviction for attempted murder pursuant to Rule 220(b), SCACR, as any argument that **Young Jr.** did not attempt to kill Robinson is manifestly without merit.
- 3 See, e.g., *Jackson v. State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("**Mutual combat** bars a claim of self-defense because it negates the element of 'not being at fault.'" (citing *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495–96 (1973))).
- 4 In *Abbott*, the court held a defendant/drag racer equally complicit in the death of a bystander killed by the defendant's rival racer because the defendant's "conduct made the race possible." 445 N.Y.S.2d at 347. In particular, the court found that the defendant "accepted [his rival racer's] challenge and shared in the venture. Without [the defendant's] aid[, the rival racer] could not have engaged in the high-speed race which culminated in the tragedy. The accident was 'the culmination of a continuum of events' in which both [racers] participated." *Id.* (citation omitted).
- 5 See, e.g., *Reyes v. State*, 783 So.2d 1129, 1132–33 (Fla. Dist. Ct. App. 2001); *March v. State*, 458 So.2d 308, 309 (Fla. Dist. Ct. App. 1984) (per curiam); *Spates*, 779 N.W.2d at 779–80 (discussing with approval *State v. Brown*, 589 N.W.2d 69, 74–75 (Iowa Ct. App. 1998), overruled on other grounds by *State v. Reeves*,



636 N.W.2d 22 (Iowa 2001)); *State v. Garza*, 259 Kan. 826, 916 P.2d 9, 15 (1996); *Alston*, 662 A.2d at 252–54; *Santiago*, 681 N.E.2d at 1215; *Russell*, 670 N.Y.S.2d 166, 693 N.E.2d at 195–96.

- 6 Other jurisdictions have reached a similar result by finding the **mutual combat** was the proximate cause of the innocent bystander's death, rather than by applying an aiding and abetting theory. *See Spates*, 779 N.W.2d at 777 (collecting cases). In doing so, the courts held the defendant criminally responsible as a principal on the basis of his own conduct. *See, e.g., Sanchez*, 111 Cal.Rptr.2d 129, 29 P.3d at 217–20 (collecting cases); *id.*, 111 Cal.Rptr.2d 129, 29 P.3d at 223 (Kennard, J., concurring); *Roy*, 871 A.2d at 507–08 & n.10 (collecting cases); *Brown*, 589 N.W.2d at 74–75; *Phillips v. Commonwealth*, 17 S.W.3d 870, 875 (Ky. 2000); *cf. Commonwealth v. Gaynor*, 538 Pa. 258, 648 A.2d 295, 297, 299 (1994) (reaching the same result under a **state** statute dealing with **mutual combat** and transferred intent). We view the proximate cause theory of liability and the “hand of one is the hand of all” theory of liability as overlapping theories, tightly intertwined with one another. *See, e.g., Santiago*, 681 N.E.2d at 1215 (noting that a defendant may be the proximate cause of a bystander's death because death is the natural result of a shootout, and because “the shootout could not occur without participation from both sides”); *People v. Daniels*, 172 Mich.App. 374, 431 N.W.2d 846, 851 (1988).
- 7 **Young Jr.** moved for a directed verdict on the murder charge by claiming there was no evidence he and Robinson were engaged in **mutual combat**. The trial court denied the motion for a directed verdict, finding the evidence showed the shootout was the culmination of a running argument between the **Youngs** and Robinson. We agree. Any argument that there was no evidence of **mutual combat** is manifestly specious, as the evidence of **mutual combat** was overwhelming.
- 8 As a final matter, at trial, **Young Jr.** asked the trial court to instruct the jury on the end of **mutual combat**, claiming that by fleeing after “swiss cheesing” Robinson's car, he had ended the fight. The trial court refused to give such an instruction, **stating** that the **Youngs'** flight at that point was more akin to a temporary retreat than an unequivocal cessation of the gun battle, which the law requires. Pointing to the fact that the fight spanned several neighborhoods, the trial court found it “unlikely that the shooting of the car and then leaving is a signal that [the **Youngs**] have chosen at that point in time to fold their tents and move away and that the battle is over and truce has been declared.” *See Graham*, 260 S.C. at 451, 196 S.E.2d at 496 (explaining that in order to withdraw from **mutual combat**, the defendant must—before the homicide is committed—“withdraw[ ] and endeavor[ ] in good faith to decline further conflict, and, either by word or act, *make[ ] that fact known to his adversary*” (emphasis added) (citation omitted)). In support of the trial court's observation, we note that **Young Jr.** admitted to police that after Robinson fired the shots at the **Youngs'** fleeing truck following the “swiss-cheesing” of Robinson's car, he yelled at his father to turn the truck around and return to the gun battle. There is no indication that the **Youngs'** retreat after “swiss-cheesing” Robinson's car was any different than any of their previous—and, more importantly, *temporary*—retreats. Significantly, **Young Jr.** made no attempt to communicate to Robinson that *this* retreat was a complete withdrawal from the ongoing gun battle.

We nevertheless need not reach the challenge of **Young Jr.** that the trial court's failure to instruct the jury on the end of **mutual combat** was reversible error. This is because of **Young Jr.**'s concession at trial that he would have been guilty of murder via the **mutual combat** doctrine had Robinson shot and killed **Young Sr.** instead of the victim. In so conceding, **Young Jr.** tacitly admitted the **mutual combat** was ongoing at the time of the victim's death. That concession removed any basis on which to instruct the jury on the end of **mutual combat**.

## Alston v. State

339 Md. 306 (Md. 1995) · 662 A.2d 247  
Decided Jul 25, 1995

No. 105, September Term, 1994.

July 25, 1995.

Appeal from the Circuit Court, Baltimore City,

307 Roger W. Brown, J., \*307

Victoria S. Lansburgh, Asst. Public Defender,  
(Stephen E. Harris, Public Defender, both on  
brief), Baltimore, for petitioner.

J. Joseph Curran, Jr., Atty. Gen., (Annabelle L.  
Lisic, Asst. Atty. Gen., both on brief), Baltimore,  
for respondent.

Argued before ELDRIDGE, RODOWSKY,  
CHASANOW, KARWACKI, BELL and RAKER,  
JJ., and JOHN F. McAULIFFE, Judge (retired)  
Specially Assigned.

RODOWSKY, Judge.

The petitioner, David L. Alston (Alston), was  
convicted by a jury in the Circuit Court for  
Baltimore City of, *inter alia*, second degree  
murder that had been submitted on the depraved  
heart theory. The Court of Special Appeals  
affirmed. *Alston v. State*, 101 Md. App. 47, 643  
A.2d 468 (1994). Alston petitioned this Court to  
review "[w]hether the evidence was insufficient to  
sustain the charge of second degree murder where  
the victim was killed by a shot that was fired by a  
man against whom the petitioner was engaged in a  
gun battle." We granted the writ of certiorari, and  
we shall affirm.

Depraved heart murder was described by this  
Court in *Robinson v. State*, 307 Md. 738, 517 A.2d  
94 (1986), as follows:

"A depraved heart murder is often  
described as a wanton and wilful killing.  
The term "depraved heart" means  
something more than conduct amounting  
to a high or unreasonable risk to human  
life. The perpetrator must [or reasonably  
should] realize the risk his behavior has  
created to the extent that his conduct may  
be termed wilful. Moreover, the conduct  
must contain an element of viciousness or  
contemptuous disregard for the value of  
human life which conduct characterizes  
that behavior as wanton."

"R. Gilbert and C. Moylan, *Maryland  
Criminal Law: Practice and Procedure* §  
1.6-3 (1983). The critical feature of  
'depraved heart' murder is that the act in  
question be committed 'under  
circumstances manifesting extreme \*308  
indifference to the value of human life.' 2  
*Wharton's Criminal Law* § 143 at 197  
(14th ed. 1979). The terms 'recklessness'  
or 'indifference,' often used to define the  
crime, do not preclude an act of intentional  
injury. They refer to 'recklessness' or  
'indifference' to the ultimate consequence  
of the act — death — not to the act that  
produces that result."

*Robinson*, 307 Md. at 745, 517 A.2d at 98.



The murder victim, Adrian Edmonds, age fifteen, was shot and killed on the night of July 14, 1992.<sup>1</sup> Ms. Edmonds, her eighteen month old baby, and two of her friends happened to be at a street corner in Baltimore City when two bands of teenaged males engaged in a gun battle at about 11:00 p.m. Alston was a member of one of the bands that we shall call the "Alston" group.

<sup>1</sup> The indictment spells Ms. Edmonds's first name as "Adrian." The autopsy report spells it "Adrienne." We shall use the spelling from the indictment.

In its opening statement, the State conceded that Ms. Edmonds had been killed by a nine millimeter bullet from a weapon fired by a youth known only as "BO." BO was a member of the group at which the Alston group was shooting. BO and another member of this group, "D Nice," were referred to in the neighborhood as "New York boys." Consequently, we shall call the second hand of gun battle participants the "New York" group.

In this Court Alston does not contend that the evidence of his conduct is insufficient to convict for depraved heart murder because it lacks the requisite degree of wantonness. Alston's point is that BO is the acknowledged shooter and that his act of shooting is the sole legal cause of Ms. Edmonds's death. Further, Alston argues that as a matter of law no member of the Alston group could have been aiding and abetting BO whose object was to shoot members of the Alston group.

The Court of Special Appeals, speaking through Judge Moylan, rejected these contentions and

309 explained: \*309

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

"In terms of the *actus reus* of this particular depraved-heart murder, the deadly homicidal force was not *a bullet*. Such an analytic approach would commit us to the trivializing foolishness of seeking to establish the trajectory and provenance of each of forty or fifty bullets fired in the course of a single wild exchange. The deadly homicidal force, rather, was a collective hail of bullets, a collective fusillade, with no further parsing required. Which bullet came from which gun is inconsequential. One does not anguish over which member of the firing squad killed the prisoner."

101 Md. App. at 49, 643 A.2d at 469.

The identity of the participants, a description of the setting, and a statement of the events preceding the gun battle are necessary to understanding the conviction in this case. The two groups of participants, some of whom were not

identified by their full names, were comprised of the following persons (parenthetical numerals indicate age as of July 14, 1992):

The Alston Group The New York Group

David L. "Diesel" Alston (17) Gregory Alexander Hall (19) Thomas "Junior" Conyers (18) "D Nice" or "Nice" Micah Mays, known as Micah "BO" (17) Rennie Cooper Boiseau, known as "Cooper" (17) Thomas "Porky" Kent (17)

310 \*310

Hall and the members of the Alston group were arrested and indicted. BO and D Nice were not apprehended by the time of trial.

The gun battle took place in and near the intersection of Presstman and Division Streets in Baltimore City. Witnesses placed both groups of participants, prior to the gun battle, in the rectangular area formed by Presstman St. on the north, Division St. on the east, Robert St. on the south, and Brunt St. on the west.<sup>2</sup> Within that rectangle there are three alleys. One runs behind the houses on the north side of Robert St. from Brunt to Division (the Southern Alley). A second runs behind the houses on the south side of Presstman St. from Brunt to Division (the Northern Alley). The third alley connects the Northern and Southern Alleys and runs behind the properties that face on Division and Brunt Sts. (the Central Alley).

<sup>2</sup> Attached to this opinion is a copy of the Baltimore City block plat encompassing the area bounded by Presstman, Division, Robert, and Brunt Streets.

The neighborhood is densely populated. There are a dozen three-story rowhouses, *i.e.*, houses with party walls, on each side of Presstman St. between Division and Brunt Sts. Those on the south side bear odd numbers beginning at Division St. with 553 and those on the north side bear even numbers beginning at Division St. with 550. The houses on both sides of that block of Presstman St. have no

lawns or porches. The building line meets the sidewalk. Basements of the buildings project one-half story above ground level. Access between the front doors and the sidewalk is by traditional Baltimore City "marble" steps.

The night of July 14, 1992 was a hot, humid, Tuesday night. A number of the witnesses described themselves and others sitting on the front steps of various houses before the gun battle. Indeed, the jurors, based on their common experience, could have concluded that in rowhouse neighborhoods in Baltimore City it is not uncommon for residents to sit on the front \*311 steps or in lawn chairs on the sidewalks on midsummer nights until 11:00 p.m. or later.

Prior to the events hereinafter described, there had not been any serious altercation between the Alston and New York groups. On Sunday, July 12, 1992, a friend of the Alston group, Renardo "Nardo" Foster, while standing on a street corner, had been shot at, but not hit, by one or more of a group of youths from another neighborhood to the east. It seems that one of the latter group resented the attention which Nardo was paying to a young lady, or, as Nardo perceived it, vice versa. BO was present at that shooting, but did not intervene on behalf of Nardo. Hall, a witness for the State, testified that, following the Sunday shooting, members of the Alston group were angry with BO. Following an incident that occurred on Monday, July 13, the description of which was excluded under a defense motion in limine, Hall began carrying a .32 caliber revolver because he did not know what was going to happen.

The events of the night of July 14, in overview, are that, after a peace overture by the New York group failed, the Alston group assembled and armed themselves in the vicinity of Robert and Brunt Sts., whence they hastened on foot to the northwest corner of Presstman and Division Sts. There, from behind the cover of a large motor vehicle, they opened fire on the New York group who, proceeding on foot northbound on Division



St., had almost reached its intersection with Presstman. The murder victim, Ms. Edmonds, was one of four persons seated on the outside front steps of the building at 553 Presstman St., the corner building in the southwest quadrant of the intersection. They were fully within the field of fire commanded from the position of the Alston group on the other side of Presstman St.

On the night of the murder Phyllis Avery, then approximately nineteen years old, was residing with six other persons at her grandmother's house, 556 Robert St., on the north side thereof, between Brunt and Division Sts. She was sitting on the front outside steps talking to Alton "Baldy" Alston, the <sup>312</sup> brother of the petitioner. D Nice approached, walking westerly along Robert St. from Division, calling out, "Diesel." Two youths (inferentially, Hall and BO) were standing at the intersection of Division and Robert Sts., waiting for D Nice. Baldy identified himself as Diesel's brother and said that D Nice should talk to him, Baldy. Ms. Avery testified, "D Nice told Baldy, '[T]ell your brother we would like to quash this before anybody else gets hurt.'" After Baldy answered, D Nice said, "Well, I guess this means more people getting hurt." D Nice then walked back to Division St. and "went around the corner" with the other two young men. After the conversation Baldy "got up and went down Brunt St."

As Ms. Avery remained seated in front of 556 Robert St., the Alston group and others began to assemble in front of the house "next to" 556 Robert St. Cooper came from Brunt St. with a shotgun in his hand and carrying a bag. Nardo and Porky rode up on a "bike." When they got off the "bike" Porky and Cooper started checking their guns. Porky's weapon was approximately six inches in length. Nardo was giving bullets from a bag to Cooper. At some point a black car with a sun roof arrived, driven by someone whom Ms. Avery could not identify. "Rock" got out of the car. At that point the group consisted of Cooper, Micah, Porky, Nardo, and Rock. Then the group

left. Rock and the driver rode in the car around the corner of Brunt St., and the others went around the corner on foot. Ms. Avery estimated that the shooting started approximately twenty minutes after the Baldy/D Nice conversation had ended.

Mrs. Addie Smith and her husband reside at 1911 Brunt St. On the night in question, from within her house, she heard a car park on Brunt St. Looking out, she saw a group of approximately five teenagers. Junior was the only one of them whom she could identify by name. One of the other teenagers was carrying a bag. The shape of the bag indicated to Mrs. Smith that it contained a gun or guns. The group went through the alley behind Mrs. Smith's house (the Central Alley). Mrs. Smith telephoned the police and reported what she had seen. Almost immediately after she hung up <sup>313</sup> the telephone gunfire erupted. There were, "gun shots everywhere. Just lots and lots of gun shots."

Tracy Braxton, then age twenty or twenty-one, was seated on the steps at 553 Presstman St. with Ms. Edmonds, who was feeding her infant son, Eric, and with Takisha Carolina, then fifteen or sixteen years old. Ms. Braxton lived at 561 Presstman, five houses from the Division St. corner, and Ms. Carolina lived in the 2100 block of Division St., north of Bloom St., the next street north of Presstman. They had been seated on the steps for approximately one-half hour when Ms. Braxton saw Alston with Porky, Micah, and Cooper. They were running at a jogging pace eastwardly on the north sidewalk of Presstman St. toward Division. They stopped behind a vehicle, identified as a Chevy Blazer, parallel parked, facing westerly, at the north curb of Presstman St. in front of the numbers 552 and 554. Alston was carrying a "real big gun." It was long and black, with an attachment.<sup>3</sup>

<sup>3</sup> When the members of the Alston group were arrested *en masse* two days later, the police recovered two weapons, one of which was a .22 caliber Charter Arms

semi-automatic rifle, Model AR-7 Explorer, together with its detachable magazine capable of holding approximately thirty rounds.

Within seconds after the Alston group got to the Blazer, they began shooting. Their shots were the first shots that Ms. Braxton heard. At that point she and her companions began running for her house at 561 Presstman. The shooting continued while they ran westerly on the south sidewalk of Presstman St., while they were trying to get into the house, and after they were in the house.

In the house Ms. Edmonds handed her child to Ms. Carolina and collapsed. Ms. Edmonds had been shot completely through the left arm and chest by a nine millimeter bullet that was recovered under her body. Young Eric had been wounded in the right arm.

Takisha Carolina confirmed that Alston and Cooper, with two others, were shooting from  
314 behind the truck. \*314

Hall testified that immediately prior to the shooting he, BO, and D Nice were walking northerly on Division St. toward Presstman. Hall was carrying a .32 caliber revolver, BO had a nine millimeter semi-automatic weapon, and D Nice had a small handgun. Hall was in the lead. As soon as he reached Presstman St., the Alston group started shooting. Hall identified Alston as one of the persons shooting at him. Hall ducked behind a car. BO and D Nice ran into Presstman St. and were shooting. Hall ran across Division St. and easterly on Presstman St., shooting as he ran. He fired six rounds, without aiming at anything in particular. BO and D Nice were standing in the middle of Presstman St. firing their weapons while the Alston group was running westbound on Presstman St.

Hall said that after the shooting stopped D Nice was "hyper and pumped up." He stood on the corner "yelling, hopping around like he just had did something that was outstanding."

That same night Corinthin Carolina, a friend of Ms. Edmonds, was seated on the steps at 2106 Division St. with another friend. Based on information that she received from a person who had been walking northbound on Division St., Corinthin Carolina began walking south on Division toward Presstman. She reached the northwest corner of Bloom and Division Sts. when shooting started. She heard "a lot" of shots and saw sparks or gun barrel flashes at Division and Presstman. She ran back to her house and did not venture to Presstman St. until the police had arrived.

Sharlene Braxton, a resident of 561 Presstman St., had been shopping on Pennsylvania Avenue, the street parallel to, and a short block west of Brunt St. With her were her two children, her little brother, and her pregnant girlfriend. As they were walking home on the south side of Presstman St. in the block east of Brunt, the gunfire erupted. She saw "sparks" spraying from the northwest corner of Presstman and Division Sts. There were more than five people there. Two of those persons, standing on the curb side of the Blazer, were firing long guns, braced on the hood of the vehicle.

315 Another man in \*315 the group would rise up from behind the Blazer, shoot, and then duck down again. Ms. Braxton identified the semi-automatic .22 rifle seized by the police as identical to one of the long guns that she saw being fired that night from behind the Blazer.

In their investigation of the crime scene, the police observed the following physical facts. There were two bullet holes in the driver's side of the Chevy Blazer. On the sidewalk behind the Blazer were two live cartridges and one cartridge casing. There was a bullet trajectory mark on the left front of an automobile parallel parked on the north side of Presstman St. in front of No. 560. There was a bullet hole in the rear of a van parked on the north side in front of 564 Presstman St. There was a bullet fragment in the wall of the building at that address. In the bed of Division St., from the midline of Presstman St. south, there were eight



cartridges cases, six of which were clustered south of the Presstman St. building line of the building on the southwest corner, but at points from which there was a line of direct sight to the Blazer.

## I

There is no merit to Alston's contention that his conduct cannot be the actual cause of Ms. Edmonds's death. In *Jackson v. State*, 286 Md. 430, 408 A.2d 711 (1979), we sustained the felony murder convictions of two robbers who had taken the robbery victims as hostages in an effort to escape by automobile. At a roadblock a police officer, armed with a shotgun, leapt on the hood of the car. One of the robbers waved a handgun through an open window of a car. In an effort to strike the weapon from the robber's hand, the officer swung the shotgun over the roof of the car. In that process it discharged, killing one of the hostages. We said that the acts of the robbers themselves "produced the intervening cause" of the hostage's death, "and the result is not to be considered remote and was foreseeable." *Id.* at 442, 408 A.2d at 718. See also *People v. Kibbe*, 35 N.Y.2d 407, 362 N.Y.S.2d 848, 321 N.E.2d 773 (1974) (affirming conviction for depraved heart

316 murder of robbers who left highly intoxicated \*316 robbery victim on the shoulder of an unlighted rural road at night in near zero weather, without shoes, stripped of outer clothing, and approximately one-half mile from the nearest shelter. Conduct held to be cause of death when victim, while sitting in roadbed of highway, was struck and killed by a car).

Precedent for the causation element of Alston's conviction for depraved heart murder is also found in drag racing cases in which the gross negligence of racer A is the immediate cause of the death of T, an innocent bystander, and racer B, the operator of a different vehicle in the race, is convicted of manslaughter of T. See *Goldring v. State*, 103 Md. App. 728, 654 A.2d 939 (1995); *Pineta v. State*, 98 Md. App. 614, 634 A.2d 982 (1993).

## II

Alston further argues that, because BO is admittedly the principal in the first degree to the murder of Ms. Edmonds, and because Alston was not aiding and abetting BO, Alston cannot be a principal in the second degree to that murder. The argument rests heavily on Alston's disassociating himself from the New York group, from BO, and from the particular shot that killed Ms. Edmonds. The relevant frame of reference, however, is Alston's participation in the gun battle. Both the Alston group and the New York group were armed and prepared to do battle whenever and wherever their forces encountered one another. When their forces did meet at Presstman and Division Sts., they opened fire, returned fire, and continued to fire in mindless disregard of the lives of the people on the street and in the surrounding houses. Each participant, prior to the actual combat, was willing to use lethal force when the opposing groups met. Each participant manifested depraved heart malice toward non-combatants when the two groups met and sought to kill each other as they previously had determined to do. There would have been no mutual combat, and no murder of an innocent person, but for the willingness of both groups to turn an urban setting into a battleground. In this

317 sense each participant is present, aiding \*317 and abetting each other participant, whether friend or foe, in the depraved conduct.

*People v. Daniels*, 172 Mich. App. 374, 431 N.W.2d 846 (1988), is on point. The setting of the depraved heart murder was a residential street in Detroit during the early hours of a July evening. The defendant went to the home of his cousin, Steven Clark, to collect a debt. They began fighting, and Steven's brother, Gary, joined in. Gary obtained a gun, fired it once into the ground, and struck the defendant in the head with the gun, ending that phase of the events. The defendant then damaged a car parked in front of the Clark house. Steven then damaged the defendant's car. The defendant returned to his car and, while driving it in the direction of the Clark house, Gary fired several shots at the car. Twenty minutes later

the defendant drove by the Clark house and fired several shots at it. Gary left the house through the back door, went to the side of the house and returned the gunfire. One of Gary's shots struck and killed a neighbor, Berry, who was washing his car outside of his own house.

The case was tried non-jury. The trial court reasoned that the defendant, the adversary of the principal in the first degree, would have been guilty of depraved heart murder but for the antecedent provocation. A judgment of guilty of manslaughter, entered by the trial court, was sustained on appeal as voluntary manslaughter. The appellate court approved the following analysis by the trial judge:

"The trial court found that defendant was the driver of the blue car and that Gary Clark fired the shot that resulted in Berry's death, but that defendant and Gary Clark were equally culpable for holding their shoot-out on the residential street where it was likely that other people could be shot and killed. The trial court also found that the shoot-out was mutually agreed to by defendant and Gary Clark and that defendant, at a minimum, intended to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result of his act. Although the court found this intent sufficient to make the killing murder in the second degree, the court \*318 entered a verdict of voluntary manslaughter because the court was not satisfied that the prosecution proved that the mitigating circumstance of provocation did not exist in light of the evidence of the beating defendant underwent and the shots fired during his first encounter with the Clarks."

431 N.W.2d at 848.

The same reasoning was employed in *March v. Florida*, 458 So.2d 308 (Fla.App. 1984). The shoot-out in that case was the culmination of a "turf" dispute between drug traffickers in which a bystander was killed. Two participants were on one side of the shoot-out, using handguns, and a third participant was on the other side, firing a rifle. All were charged with murder in the second degree and convicted of manslaughter. The two handgun wielders contended that the evidence was insufficient to convict them of manslaughter because the victim was killed by the rifle wielding participant. The Florida court responded:

"There is no merit to this contention. Because all three parties were engaged in the same felonious activity (the shootout) their participation in the episode would have been sufficient to support a finding that they were aiders and abettors to second degree murder, so the evidence was sufficient to support the conviction of the lesser offense of manslaughter."

*Id.* at 309.

In his brief Alston places heavy emphasis on *Campbell v. State*, 293 Md. 438, 444 A.2d 1034 (1982). The holding of *Campbell* resolves an aspect of the law of felony murder. The issue was whether under "Maryland's so-called 'felony-murder' statute, the killing of a co-felon during an armed robbery, by either a police officer attempting to apprehend him, or by a victim resisting the armed robbery, constitutes murder in the first degree on the part of the surviving felon." *Id.* at 439, 444 A.2d at 1035. Finding persuasive a line of cases that applied an "agency" theory in lieu of a "proximate cause" theory, we answered the issue in the negative. There is no inconsistency 319 \*319 between the holding of *Campbell* and our holding in the matter before us.

One of the agency theory cases relied upon in *Campbell* was *People v. Washington*, 62 Cal.2d 777, 44 Cal.Rptr. 442, 402 P.2d 130 (1965). See *Campbell*, 293 Md. at 443, 446, 450, 444 A.2d at



1037, 1039, 1041. In *Washington*, Chief Justice Traynor, speaking for the Supreme Court of California, placed the agency theory limitation on felony murder in perspective, saying:

"[W]hen the defendant . . . intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective.

"Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, 'the defendant for a base, anti-social motive and with wanton disregard of human life, does an act that involves a high degree of probability that it will result in death'. . . , and it is unnecessary to imply malice by invoking the felony-murder doctrine. To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another."

44 Cal.Rptr. at 445-46, 402 P.2d at 133-34 (footnote and citations omitted).

In the instant matter the evidence would support a finding that the Alston group initiated the shoot-out. The Alston group rejected a peace overture, ran to intercept the New York group, and shot first. We need not rest our decision on that ground, however, because the facts here demonstrate the tacit agreement of each group to participate in the gun battle.

At oral argument in this Court, Alston cited *Commonwealth v. Gaynor*, 538 Pa. 258, 648 A.2d 295 (1994), in answer to a question from the bench suggesting that the instant matter presented concert of action between the two groups to engage in a "rumble." In *Gaynor* two youthful

320 males had argued \*320 violently outside of a video store in Philadelphia. Each left the scene, armed

himself, and returned. They fired shots at one another across the length of the store. A bystander was killed by a shot fired by Gaynor's adversary. The trial court convicted Gaynor of murder in the first degree, reasoning that "[e]ngaging in 'mutual combat' with intent to kill 'provides the malice necessary for murder.'" 648 A.2d at 297. The Supreme Court of Pennsylvania sustained the conviction under a Pennsylvania statute dealing with transferred intent.

With respect to the trial court's theory of first degree murder, the Supreme Court of Pennsylvania said:

"We agree that on these facts the two actors were neither accomplices to each other nor co-conspirators in any acceptable sense.[5] Plainly they were enemies in an adversarial relationship. Shared intent, therefore, was impossible on these facts."

*Id.* at 298. In its footnote five the court found "troubling" the trial court's characterization of the shoot-out as a duel, pointing out that "[a]t common law, such combat with deadly weapons was usually carried out by pre-arrangement and in conformity with agreed or prescribed rules." *Id.* at 298 n. 5.

In the instant matter, it is true that the antagonists did not proceed pursuant to a written code of honor. Compare W. Schwartz, et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. Legal Studies 321, 321-25 (1984). Nor is there any evidence of an expressly articulated agreement for mutual combat. Nevertheless, the Baltimore City jury in this case had sufficient evidence from which it could find that all of the participants, driven by an unwritten code of macho honor, tacitly agreed that there would be mutual combat. The conclusion is supported by the evidence that the trouble began on Sunday, that following the events of Monday, Hall found it necessary to go about armed, that D Nice fatalistically observed that more people would be hurt, and that the Alston group used the vicinity of

Robert and Brunt Sts. as a staging area for the  
321 impending battle. Though the groups were \*321  
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.

For these reasons, we affirm.

*JUDGMENT OF THE COURT OF SPECIAL  
APPEALS AFFIRMED. COSTS TO BE PAID BY  
THE PETITIONER.*

323  \*323



1 Q. You didn't.

2 A. It happened so fast.

3 Q. Well, correct. But you remember you said you even let  
4 him walk up on you a little bit, catch up on you?

5 A. Yes, sir.

6 Q. That was your decision, correct?

7 A. Yes, sir.

8 Q. You let him get nearer to you, a guy that you said's a  
9 threat, you let him get close, correct?

10 A. Yeah, if I -- if I was out of range, I would have back  
11 shot.

12 Q. We'll never know, but we're talking about what you  
13 did. So as he gets closer he still doesn't have a gun out,  
14 correct?

15 A. But I seen a gun.

16 Q. At his waist. He never points that gun at you?

17 A. His hand's on it though.

18 Q. He never points that gun at you, right?

19 A. Yes, sir.

20 Q. Okay. And then you decide I'm pointing a gun, I'm  
21 firing, right?

22 A. Yes, sir.

23 Q. Okay.

24 (State's Exhibit Number 3 playing.)

25 Q. We're now looking at State's Exhibit 3. This is,

1 MR. HUBBARD: Right here.

2 THE COURT: Thank you.

3 MR. HUBBARD: In blue.

4 THE COURT: Oh, for him. Thank you.

5 All right.

6 BY MR. HUBBARD:

7 Q. All right. Now you're reaching for yours right there,  
8 correct?

9 A. Yes, sir.

10 Q. So you were reaching for yours before he ever pointed  
11 a gun at you, correct?

12 A. I probably started reaching when he came towards me.

13 Q. Okay. So now it's not that he's reaching for his,  
14 so I reached for mine. That's what you told law  
15 enforcement --

16 A. Yes, sir.

17 Q. -- correct?

18 A. Yes, sir.

19 Q. That's not what we're seeing, is it?

20 A. No, sir.

21 Q. No, it's not. So just hours after you got taken into  
22 custody to talk about what happened here, you said he was  
23 reaching for his, I reached for mine. He upped on me, I  
24 pointed at him. Right?

25 A. Yes, sir.



1 Q. All right. His arms are down, you're going for a gun.

2 Let's --

3 Go ahead, Sully.

4 (State's Exhibit Number 18 playing.)

5 Q. And now you've got your gun out, correct?

6 A. Yeah, I do. I think so.

7 Q. Can you see?

8 Stop it.

9 You are now pointing through the kiosk. Do you see  
10 that?

11 A. Yes, sir.

12 Q. So you have your gun out, your arm up, correct?

13 A. Yes, sir.

14 Q. And we're gonna see a little bit of blue through that  
15 kiosk and through that window. Who is that?

16 A. Marquise Robinson.

17 Q. Okay.

18 Go ahead, Sully.

19 (State's Exhibit Number 18 playing.)

20 And now you are moving to the kiosk and to  
21 Mr. Robinson, correct?

22 A. Yes, sir.

23 Q. And we see you right here with a fully extended arm  
24 in this window on the left side of this video; isn't that  
25 correct?

1 A. Yes, sir.

2 Q. Your arm is out, correct?

3 A. Yes, sir. That's -- I think so.

4 Q. We're gonna take a little closer look and Mr. Robinson  
5 does not have his arm up, does he?

6 A. No, sir.

7 Q. No, sir.

8 Go ahead, Sully.

9 (State's Exhibit Number 18 playing.)

10 Now you see your arm out, correct?

11 A. Yes, sir.

12 Q. Correct. And where are Mr. Robinson's hands?

13 A. On his waistline.

14 Q. On his waistline. So you upped him, correct?

15 A. Yes, sir.

16 Q. When you told law enforcement he upped his gun on you  
17 and so you upped on him, that wasn't correct, was it?

18 A. No, sir.

19 Q. You actually got your gun out first, right?

20 A. Yes, sir.

21 Q. But now you will see him pulling a gun here, won't  
22 you?

23 A. Yes, sir.

24 Q. All right. Let's watch Mr. Robinson.

25 A. You really can't see it. It look like he already got



1 it in his hand.

2 Q. All right. He does right here, I'm gonna agree with  
3 you, but this arm of yours is gonna fade off, and we'll go  
4 to another video, okay?

5 A. Uh-huh.

6 Q. But let's just watch this through with Mr. Robinson.

7 (State's Exhibit Number 5 playing.)

8 Q. He's got a gun in his hand now, right?

9 A. Yes, sir.

10 Q. Is it up or down?

11 A. It's down.

12 Q. Okay. He's about to come up and what happens?

13 A. That's when I shot him.

14 Q. Okay. Freeze. He's still got it down and you shoot.  
15 You shoot.

16 A. Yes, sir.

17 Q. Huh?

18 A. Yes, sir.

19 Q. So he didn't shoot at you first, you shot at him,  
20 right?

21 A. Yes, sir.

22 Q. He didn't have his gun up on you first, you had yours  
23 up first, right?

24 A. Yes, sir.

25 Q. That's very different from what you told law

1 (State's Exhibit Number 124 playing.)

2 So we see Mr. -- Mr. Price. He's now pointing and do  
3 you see Mr. Robinson coming around?

4 A. Correct. That's him right there on the --

5 Q. Okay. Now right here -- freeze just a minute, Sully,  
6 if you would.

7 Do we see Price looking through the Trendsetter window  
8 on the left-hand side of this video with his arm extended  
9 towards Mr. Robinson?

10 A. Yes.

11 Q. And Mr. Robinson's on the far side of the kiosk, which  
12 is on the Windsor side of the kiosk, coming around the  
13 corner?

14 A. Yes, sir.

15 Q. Okay. Go ahead.

16 (State's Exhibit Number 124 playing.)

17 And then Mr. Price moves out of frame?

18 A. Yes, sir. And as he's moving out, you can see he  
19 still has his gun up pointed --

20 Q. Okay.

21 A. -- in the direction of Mr. Robinson.

22 Q. And Robinson is gonna stand up?

23 A. Yes, sir.

24 Q. And he's got his gun out?

25 A. Yes, his gun is in his right hand.

1 Q. By his side. Now do you see his arm begin to raise,  
2 his right hand?

3 A. He does. He gets it up to about maybe a 45-degree  
4 angle before him and other individuals in the mall begin to  
5 react to gunfire.

6 Q. Where we have it frozen right now on this video clip,  
7 do you see him hunched now?

8 A. Yes, sir.

9 Q. Do you see other reaction of people in this video?

10 A. Yes.

11 Q. What, as an expert, do you believe's happened at that  
12 point?

13 A. I believe this is when we get the first gunfire from  
14 -- from Price in the direction of -- of Robinson.

15 Q. And to be clear, looking at this video, Price is now  
16 off screen, so he has moved away from Robinson basically  
17 towards the Edge store?

18 A. Yes, sir.

19 Q. Moving towards the food court?

20 A. Yes, sir.

21 Q. And Robinson's on the far side of this Kiosk and is  
22 now ducking down?

23 A. Yes, sir.

24 (State's Exhibit Number 124 playing.)

25 Q. Okay. Now right here who are we seeing? Looking in