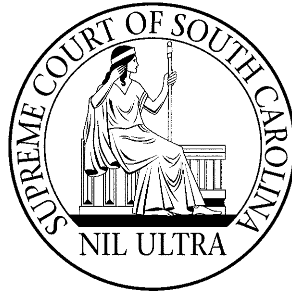


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 23**
**June 29, 2022**
**Patricia A. Howard, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

In the Matter of Anonymous Applicant for Admission to the South Carolina Bar, Applicant.

Appellate Case No. 2022-000139

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Opinion No. 28100
Heard June 7, 2022 – Filed June 29, 2022

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**PETITION FOR ADMISSION GRANTED**

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Barbara M. Seymour, Esquire, for Applicant.

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**PER CURIAM:** Applicant submitted an application for admission to the practice of law in South Carolina. Following a hearing to determine whether Applicant is qualified for admission, the Committee on Character and Fitness (Committee) issued a report and recommendation on November 15, 2021, finding Applicant possesses the requisite character and fitness to practice law. Although we accept the Committee's recommendation and grant Applicant's petition for admission, we are troubled by Applicant's lack of candor in his law school application and his subsequent misrepresentations on social media. We therefore find a one-year delay in admission is appropriate and hold that Applicant is not eligible to be admitted until November 14, 2022—one year from the issuance of the Committee's report and recommendation.

**I.**

On his law school application, Applicant responded "no" when asked if he had "ever been charged, arrested, formally accused, or convicted of a crime other than a minor parking or traffic violation." Additionally, he respondent "no" when asked

if he had "ever been subjected to disciplinary action by any of the educational institutions" he attended. Those responses were not truthful.

### *A. Minor in Possession of Alcohol*

After being admitted to law school, Applicant disclosed to the law school sometime in 2019 that he had been charged as minor in possession of alcohol. On December 21, 2020, Applicant amended his application to explain the charge. According to Applicant's explanation, during his senior year in high school, he and "many other students" from his school were involved in an "incident" that resulted in him being ticketed as being a minor in possession of alcohol (MIP).[1] Applicant explained the charge was "dismissed without any punishment or fine," but the high school required all students involved to participate in community service. Applicant informed the law school that he failed to disclose this criminal charge because he "had forgotten it happened" due to the "minimal punishment" he received. Applicant was seventeen years old at the time of the incident.

In testifying about this incident during his hearing before the Committee, Applicant reported that he was involved in underage drinking at a party when the police arrived due to noise. Applicant testified he received a ticket for MIP at that time, and he thereafter hired an attorney and was found not guilty. Nevertheless, he was required to complete community service by his high school.

### *B. Hindering Police*

In August 2020, Applicant disclosed to the law school that he had been charged with hindering police when he was sixteen years old.[2] According to Applicant, this was a "minor altercation" with an officer of a municipal police department that occurred in October 2010. Applicant stated he was attending a gathering at a home where underage drinking was taking place; however, Applicant denied drinking

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[1] *See* S.C. Code Ann. § 63-19-2450 (2010 & Supp. 2021) (providing a person under the age of twenty-one who knowingly possesses alcoholic liquors is guilty of a misdemeanor).

[2] *See* Sullivan's Island, S.C., Code § 14-3 (2021) (prohibiting any person from hindering or interfering with any officer or employee of the police department in the discharge of official duties).

alcohol when he informed the law school of this incident. Applicant stated that a concerned neighbor knew the homeowner was not in town and called the police. When the police arrived, Applicant fled because he "was worried about getting in trouble." Applicant claimed that "everyone who was at the 'party' or gathering began to run." Applicant further claimed he left the house before the police arrived at the front door of the home to question the homeowner. Applicant stated his mother picked him up, but the police found out his name and called his parents. Eventually, Applicant's parents took him to the police station where he received a ticket for hindering police. Applicant stated he was ordered to perform sixty hours of community service and the ticket was expunged.

The police report provided a much different account of what occurred. According to that report, an officer saw a car turn into the driveway of the residence. The officer was familiar with the residence because the owner had informed the officer of problems with underage parties at her home and asked the officer to check on the home if cars were present while hers was not. Not seeing the owner's car at the residence, the officer stopped to speak with the occupants of the car. The officer found four people in the car, all of whom had been drinking. As the officer administered field sobriety tests to one individual, Applicant ran away. One of the other individuals provided the police with Applicant's name. The police called Applicant's parents, who agreed to take Applicant to the police station, where he received a ticket for hindering police.

During the hearing before the Committee, Applicant's recollection of what occurred more closely resembled the police report than what he previously reported to the law school or in his application for bar admission. Applicant testified that the police arrived as the car in which he was a passenger pulled up to the house. The police officer approached the vehicle and began asking questions about why Applicant and his companions were there. Applicant testified he "was terrified of getting in trouble" because he was being recruited to play football after high school. Applicant testified he ran and called his mother, who picked him up and took him home. Later, the police called Applicant's mother, who took Applicant to the police station where he received a ticket for hindering police. In contrast to what he reported to the law school, Applicant admitted to the Committee that he had been drinking at the time of the incident.

*C. Careless Driving*

In December 2020, Applicant amended his law school application to reveal he received a uniform traffic ticket for careless operation of a vehicle in May 2012. Applicant told the law school he had "NO CLUE" where the ticket was from, despite a "vague" recollection of having received a warning, and that he intended to dispute the ticket.

On his bar application, Applicant stated the May 2012 citation was related to his failure to stop at a stop sign. Applicant further explained he appeared in municipal court, where he was found guilty and paid a $120 fine.

At the hearing, Applicant informed the Committee that he believed he failed to stop for a stop sign or rolled through a stop sign in his neighborhood, but he did not have a firm recollection of the events giving rise to the ticket. Applicant explained he disclosed the ticket after he obtained his driving record in the course of completing his bar admission application and remembered the ticket.

*D. Fraternity Prank*

Shortly before the Committee hearing, Applicant amended his bar application to disclose that he had participated in a fraternity prank as an undergraduate. "As part of a tradition, [he] and the other sophomore members of the fraternity took bikes from a dormitory and rode them back to the fraternity house as a prank." They were caught, and the entire fraternity was reprimanded. Additionally, the fraternity was required to complete community service. Applicant's undergraduate institution had no record of the incident when Applicant made a request to the university for information about it.

*E. Applicant's Testimony Before the Committee*

During the hearing before the Committee, Applicant testified he did not inform the law school about his arrests for MIP and hindering police because he "was under the impression they were off [his] record and they were expunged." Applicant admitted this was a mistake on his part because the law school application

unambiguously required disclosure of expunged offenses.[3] Applicant also acknowledged that the law school gave him numerous reminders "about the importance of disclosures," and he realized he needed to disclose those two offenses. However, Applicant testified he "made the decision to disclose just the MIP and not the hindering police because [he] was certain as to what exactly the MIP was and [he] needed to get a little bit more information on the hindering police." Applicant acknowledged this was "not a good excuse" and that he should have disclosed both at the same time. Applicant claimed he was "very nervous" and "embarrassed" as well.

At the hearing, Applicant apologized for his failure to disclose these incidents to the law school when he applied. He stated he deeply regretted this failure and considered it an "inexcusable mistake." Applicant assured the Committee that he took full responsibility for his mistakes and intended to learn from them.

In considering Applicant's character and fitness to practice law, the Committee noted the relatively minor nature of Applicant's infractions, most of which occurred about a decade ago while Applicant was young. However, the Committee also acknowledged Applicant's failure to disclose these infractions in his law school application was both more recent and more troubling. The Committee noted Applicant accepted full responsibility for his prior misconduct and appeared genuine in his regret for failing to disclose the matters. Additionally, the Committee found Applicant's disclosure—albeit late in the process—of the fraternity prank as an undergraduate student demonstrated "a sincere attempt to be completely candid with the Committee regarding his past misdeeds." In considering the totality of the information available, the Committee ultimately concluded Applicant possesses the requisite character and fitness to practice law.

*F. LinkedIn Profile*

Following the hearing before the Committee, an additional matter involving dishonesty came to light. During Applicant's third year of law school, he worked as a law clerk with a local law firm. In January of that year, Applicant accepted an offer to become an associate attorney with the firm pending his admission to the

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[3] Specifically, Applicant acknowledged the law school application directed disclosure of all instances "including instances that have been expunged by order of the court, including juvenile offenses."

bar. While awaiting the results of the bar examination, Applicant began working for the firm as a law clerk. In October 2021, this Court notified Applicant he achieved a passing score on the bar examination but remained ineligible to be admitted because the Committee had not yet completed its investigation. Upon receiving the Court's letter, Applicant updated his publicly-available LinkedIn profile to reflect that he was employed as an associate attorney at the law firm. Applicant has never been admitted to practice law in this jurisdiction or any other.[4]

"South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys." *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706 (2005). "The goal of the prohibition against the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representations." *Id*., 365 S.C. at 139, 616 S.E.2d at 707 (citation omitted). This Court's regulation of the practice of law "is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law." *Boone v. Quicken Loans, Inc*., 420 S.C. 452, 459-60, 803 S.E.2d 707, 711 (2017).

When questioned by this Court about his decision to hold himself out as an attorney untruthfully, Applicant explained he was proud to learn he had passed the bar examination, and in that excitement, he changed his LinkedIn profile to reflect his achievement. Applicant admitted that, at the time he updated his profile, he was employed as a law clerk, that he was neither an associate nor an attorney, and that his representation on LinkedIn was false. Applicant acknowledged that his actions jeopardized not only his own prospects for bar admission, but also risked the law firm's reputation and could have misled members of the public.[5]

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[4] Notwithstanding his false representations online, there is no evidence any member of the public ever solicited legal services from Applicant or that Applicant ever engaged in the unauthorized practice of law. *See* S.C. Code Ann. § 40-5-310 (2011 & Supp. 2021) (providing a person who engages in the unauthorized practice of law in this state is guilty of a felony and subject to a $5,000 fine and five years in prison). To the extent any member of the public had been misled, the outcome of this matter would almost certainly be different.

[5] Applicant submitted affidavits from the chief operating officer and the current and former managing members of the law firm, all of which described Applicant's role with and work for the firm. Based on these affidavits and Applicant's sworn

In maintaining the content of his LinkedIn profile, Applicant was, at all times, responsible for all the information incorporated in his profile, including ensuring all content was accurate and truthful.[6] Applicant's actions in holding himself out as an attorney without having been admitted to practice law raises serious questions about whether Applicant possesses the requisite honesty, trustworthiness, and fitness to practice law. *See* Rule 402(c)(2), SCACR (establishing an applicant must be "of good moral character" to be eligible for admission to practice law). When considered alongside Applicant's history of non- and half-disclosures on his law school application, this most recent instance of misleading conduct is particularly troubling.

**II.**

An applicant who provides false or misleading information in a bar application or related attachments, such as an applicant's law school application, is subject to any action this Court deems appropriate under the circumstances. Rule 402(e), SCACR (defining "false or misleading information" as including "the knowing omission of material information by an applicant"). "This may include, but is not limited to, finding the applicant in contempt, finding the applicant unfit for admission, prohibiting the applicant from using the results of the examination for admission, and/or preventing the applicant from reapplying for admission for up to five (5) years." *Id*.

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testimony to this Court, we conclude Applicant has consistently received appropriate supervision by the firm's attorneys. *See* Rule 5.3, RPC, Rule 407, SCACR (requiring supervisory attorneys to take reasonable measures to ensure that non-lawyers in the firm act in a way that is compatible with the Rules of Professional Conduct).

[6] This includes correcting, deleting, or disclaiming any false or misleading entries or endorsements made by third parties relating to an applicant or lawyer's practice of law. *Cf.* Rule 7.1, RPC, Rule 407, SCACR (prohibiting false, misleading, or deceptive communications about a lawyer or a lawyer's services); *In re Anonymous*, 386 S.C. 133, 687 S.E.2d 41 (2009) (applying lawyer advertising rules to law firm website content).

At the hearing before the Committee, Applicant admitted the law school application unambiguously required disclosure of the MIP incident, the hindering police incident, and the careless and negligent driving incident. Applicant acknowledged the law school reminded him of the importance of accurate and complete disclosures, that he realized the need to disclose these incidents, and that he failed to do so. In light of these admissions, we find Applicant's failure to disclose these incidents on his law school application was false and misleading as contemplated by Rule 402(e), SCACR. Additionally, at the hearing before this Court, Applicant acknowledged that his conduct in misrepresenting his position with the law firm on LinkedIn was false and misleading. We turn now to the issue of what outcome is appropriate in light of Applicant's sustained pattern of false and misleading conduct.

A lawyer is not simply a representative of clients; he or she is also an officer of the legal system and has special responsibility for the quality of justice. Pmbl. at [1], RPC, Rule 407, SCACR. "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." *Id*. at [5]. "A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts[,] and others with respect to the professional duties owed to them." App. B at (5), Pt. IV, SCACR. To protect the public and the system of justice, this Court takes seriously its duty to evaluate the character and fitness of applicants for admission to the practice of law. S.C. Const. art. V, § 4 (providing this Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted).

In recent years, this Court has been presented with a growing number of bar applicants who omit from their law school applications information that is plainly required to be disclosed. Despite warnings in law school of the consequences of nondisclosure, too many applicants never amend, or never fully amend, their law school applications to include all relevant matters. Predictably, the issue of nondisclosure often resurfaces at the time an applicant submits a petition for admission to practice law. Often, the undisclosed conduct itself would not necessarily have disqualified an applicant from admission to law school, but false and misleading nondisclosures most certainly impact this Court's evaluation of an applicant's character and fitness to practice law. When applicants are confronted about incidents they failed to disclose on their law school applications, this Court

and the Committee receive a familiar refrain of unpersuasive excuses.[7] Although this Court imposes repercussions for these nondisclosures in individual cases, bar admissions matters are nonpublic, and this Court's decisions in those matters are not published. Accordingly, too many potential applicants continue to interpret application instructions and early warnings in law school of the consequences of nondisclosure as empty threats.

Additionally, social media has increased in prevalence such that it now affects nearly every aspect of modern life, including the practice of law. Indeed, the most recent technology report published by the American Bar Association indicates that, nationally, up to 96% of law firms and 81% of individual attorneys use social media for professional purposes. Allison C. Shields Johs, 2021 Websites & Marketing, ABA TECHREPORT (Nov. 17, 2021), https://www.americanbar.org/groups/law_practice/publications/techreport/2021/webmarketing/. Of the attorneys who maintain individual social media profiles for professional purposes, 90% of those attorneys use LinkedIn specifically. *Id*. Accordingly, it is imperative that bar applicants and attorneys alike remain keenly aware of their ethical obligations relating to social media content, particularly as it relates to ensuring no information or communication is false, fraudulent, or misleading in any way.

In light of the concerning increase in nondisclosures this Court has seen in recent years and the growing prevalence of social media, today we take the unusual step of publishing our decision in this case while allowing Applicant to remain anonymous. Our goal in doing so is to warn potential law students, law schools, and bar applicants of the serious consequences of nondisclosure and to encourage law school applicants to completely and fully disclose all required information at the time their applications are first submitted. Now that applicants will have the benefit of this published decision, we caution that future nondisclosures and misleading statements will not be viewed with any degree of leniency and may result in this Court's outright denial of admission to practice law.

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[7] These excuses range from "I forgot," to "I couldn't find any records," to "I thought I didn't have to disclose it because it was sealed/expunged," to inappropriately expansive interpretations of "minor parking or traffic violations."

## III.

Although we acknowledge that most of Applicant's interactions with law enforcement were relatively minor and occurred many years ago when Applicant was a teenager, we cannot overlook the fact that Applicant knowingly failed to timely and fully disclose required information on his law school application, and that this series of nondisclosures occurred within the past four years. Additionally, within the past year, Applicant affirmatively misrepresented his licensure status on his LinkedIn profile. This most recent incident represents a troubling continuation of Applicant's pattern of untruthfulness.

Nevertheless, during the hearing before this Court, Applicant admitted his misconduct, took full responsibility for his failures, and appeared genuinely contrite. Additionally, Applicant submitted affidavits from various members of his employing law firm, all of whom remain steadfast in their endorsements of Applicant and commitments to provide him continuing support and mentorship.

Accordingly, we grant Applicant's petition for admission but find he is not eligible to be admitted to the practice of law before November 14, 2022—one year from the issuance of the Committee's report and recommendation. Applicant is reminded that until such time that he has been admitted to the practice of law, he is under a continuing obligation to keep his bar application current and must update responses whenever there is an addition or change to information previously filed with the Clerk. *See* Rule 402(d)(5), SCACR.

**PETITION FOR ADMISSION GRANTED.**

**BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur. JAMES, J., not participating.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Petitioner,

v.

Joseph Bowers, Respondent.

Appellate Case No. 2019-001776

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Beaufort County
R. Markley Dennis Jr., Circuit Court Judge

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Opinion No. 28101
Heard December 9, 2020 – Filed June 29, 2022

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**AFFIRMED**

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Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; Solicitor Isaac McDuffie Stone III, of Bluffton, all for Petitioner.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

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**JUSTICE FEW:** Joseph Bowers was involved in a shootout in which multiple people fired their guns. Four people were shot, and two of them died. A jury convicted Bowers of voluntary manslaughter, assault and battery of a high and aggravated nature (ABHAN), and possession of a firearm during the commission of a violent crime. The court of appeals reversed the convictions because the trial court should not have charged the doctrine of mutual combat to the jury. *State v. Bowers*, 428 S.C. 21, 34, 39, 832 S.E.2d 623, 630, 633 (2019). We granted the State's petition for a writ of certiorari to address a narrow point: the State's contention the erroneous jury charge did not prejudice Bowers as to the ABHAN conviction. We affirm the court of appeals.

## I. Facts and Procedural History

The facts and circumstances of this chaotic shootout are explained in detail in the opinion of the court of appeals. 428 S.C. at 25-28, 832 S.E.2d at 625-27. In essence, at least ten people shot at each other and at innocent bystanders in the parking lot of Midnight Soul Patrol on St. Helena Island in Beaufort County in the early morning hours of June 21, 2012. Approximately 75 people were present at the club when Michael Morgan began the shootout by firing a flare gun. When the shooting ended, four people had been shot, including Richard Green. Two of them later died, including Michael Morgan.

The State charged Bowers with two counts of murder, two counts of attempted murder, and possession of a firearm during the commission of a violent crime. At trial, Bowers claimed he acted in self-defense. In an off-the-record conference, the State requested the trial court charge the jury on the doctrine of mutual combat to negate the self-defense claim. Over Bowers' objection, the trial court agreed to give the mutual combat instruction. Before giving the instruction to the jury, the trial court stated to the attorneys, "[mutual combat] only applies . . . to the murder as to Michael [Morgan] . . . ." The trial court then explained the doctrine of mutual combat to the jury and stated, "This law provides that if a defendant voluntarily participated in mutual combat . . . , the killing of a victim would not be self-defense." The trial court did not explain to the jury whether or how a finding that Bowers engaged in mutual combat with Michael Morgan would affect his claim that he acted in self-defense in shooting other victims.

During its deliberations, the jury asked a question, "Does a determination of mutual combat require a finding of culpability in each of the charges?" After an off-the-

record discussion with the attorneys, the trial court stated, "I'll recharge mutual combat . . . and then tell them, as a matter of law . . . , I don't think mutual combat can apply to the indictments for attempted murder." The trial court then answered the question by repeating to the jury its original instruction on mutual combat and stating, "There can only be one mutual combat defense in the indictments, that is the indictment with respect to Michael Morgan, because there are -- I find as a matter of law there is no evidence to support the other victims being armed at any point." The trial court continued its answer, "You would still, as to the other victims, since there's no mutual combat, you would have to consider whether or not the State has disproved self-defense . . . because mutual combat would not be there to negate [self-defense] as to those particular indictments."

The jury convicted Bowers of the lesser-included offenses of voluntary manslaughter for killing Michael Morgan and ABHAN for shooting Green.[1] The jury also convicted Bowers of possession of a firearm during the commission of a violent crime.

The court of appeals reversed, 428 S.C. at 25, 832 S.E.2d at 625, finding there was no evidence to support the trial court charging the jury on the doctrine of mutual combat, 428 S.C. at 34, 832 S.E.2d at 630.[2] The State filed a petition for a writ of certiorari. The State does not challenge the court of appeals' analysis of the evidence or its ruling that the doctrine of mutual combat is not applicable. Rather, the State challenges whether the court of appeals' ruling on that issue requires reversal of the ABHAN conviction. We hold it does.

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[1] The State withdrew one of the murder indictments during trial, and the jury found Bowers not guilty on one of the attempted murder indictments.

[2] The court of appeals found "evidence of one or more elements of mutual combat is entirely lacking." 428 S.C. at 34, 832 S.E.2d at 630. Specifically, the court of appeals found "there was no evidence of an antecedent agreement to fight or pre-existing ill-will between [Bowers] and Michael Morgan," *id.*, and "there was no evidence that Michael Morgan had reason to believe [Bowers] was armed with a deadly weapon before the shooting started," 428 S.C. at 36, 832 S.E.2d at 631. For both findings, the court of appeals relied on *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003), in which this Court placed limitations on the application of the doctrine of mutual combat. 356 S.C. at 233-34, 589 S.E.2d at 4.

## II. Analysis

The State makes two arguments to support its contention the erroneous jury charge did not prejudice Bowers as to the ABHAN conviction. First, the State argues the trial court's initial jury instruction explaining mutual combat "could not have had any impact on [the attempted murder] charge based on the specific evidence presented." In other words, the State argues the jury would not have thought in the first place to apply the doctrine of mutual combat—based on the trial court's initial explanation—to the attempted murder charge involving Green. Second, the State contends the trial court's answer to the jury's question "corrected" any misunderstanding the jury may have had as to whether the doctrine of mutual combat could apply to the attempted murder charge involving Green.

### A. The Law of Prejudice

To reverse a criminal conviction on the basis of an erroneous jury instruction, we must find the error was a prejudicial error. *See State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (stating "the charge must be prejudicial to the appellant to warrant a new trial" (citing *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013))). Prejudicial error in a jury instruction is an error that contributed to the jury verdict. *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). The question we address here is not whether the error was harmless beyond a reasonable doubt because of overwhelming evidence of guilt. *See State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018) ("If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed."). Rather, the question here is whether the erroneous jury charge affected the jury's deliberations on the charge involving Green and, thus, contributed to the ABHAN verdict. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (stating, "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (internal quotation marks omitted) (quoting *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993))).[3]

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[3] *See generally State v. Chavis*, 412 S.C. 101, 110 n.7, 771 S.E.2d 336, 340 n.7 (2015) (discussing "the 'contributing to the verdict' standard and the 'overwhelming evidence' standard" for determining if error is reversible); 412 S.C. at 115 n.14, 771

If we have any reasonable doubt as to whether the erroneous charge contributed to the verdict, we must affirm the reversal of the conviction. *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475.

To determine whether the erroneous jury charge contributed to the verdict here, we must attempt to determine how the jury understood the initial jury instruction and the trial court's answer to the jury's question. As the State argues in its brief, "the appropriate test involves determining what a reasonable juror would have understood the charge to mean." *See Sheppard v. State*, 357 S.C. 646, 664, 594 S.E.2d 462, 472 (2004) (stating "the test is what a reasonable juror would have understood the charge as meaning"), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 503 n.3, 832 S.E.2d 575, 583 n.3 (2019); *State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) (same). Specifically, we must determine whether the jury would have interpreted the trial court's instruction on mutual combat—as originally given or as "corrected" by the trial court's answer to the jury's question—to mean that Bowers' mutual combat with Michael Morgan did not foreclose his claim of self-defense as to the charge involving Green.

### B. The Role of the Doctrine of Mutual Combat

We begin our analysis with a brief summary of the doctrine of mutual combat. Mutual combat relates primarily to the law of self-defense. *See State v. Young*, 429 S.C. 155, 157 n.1, 838 S.E.2d 516, 517 n.1 (2020) (explaining "the mutual combat doctrine is most commonly used to negate self-defense"). This Court has explained self-defense by referring to four elements. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (listing the four elements that must be present for self-defense); *State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999) (same); *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (same); *State v. Ross*, 75 S.C. 533, 544, 55 S.E. 977, 981 (1906) (affirming a jury charge in which the four elements were explained). The doctrine of mutual combat relates to the first element, *Taylor*, 356 S.C. at 232, 589 S.E.2d at 3, which "we have traditionally described as, 'The defendant [must be] without fault in bringing on the difficulty,'" *State v. Williams*, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019) (quoting *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101).

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S.E.2d at 343 n.14 (Hearn, J., dissenting) (same, arguing the two standards are different, citing cases).

Under the doctrine of mutual combat, if Bowers had engaged in mutual combat with Michael Morgan before they arrived at Midnight Soul Patrol, then Bowers would be deemed to be at fault in bringing on the difficulty, even though Bowers might not have started the shootout. *See Taylor*, 356 S.C. at 232, 589 S.E.2d at 3 (explaining "if a defendant is found to have been involved in mutual combat, the 'no fault' element of self-defense cannot be established"); 356 S.C. at 234, 589 S.E.2d at 4 (explaining "mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the 'no fault' finding necessary to establish self-defense"); 356 S.C. at 234, 589 S.E.2d at 5 (requiring "pre-existing ill-will or dispute"); *see also State v. Graham*, 260 S.C. 449, 452, 196 S.E.2d 495, 496 (1973) (finding "the apparent willingness of each to engage in an armed encounter with the other" made the doctrine of mutual combat applicable). Thus, mutual combat is not a defense. Rather, the doctrine of mutual combat—if it applies—negates the defense of self-defense.

### C. The Applicability of the Doctrine of Mutual Combat in a Multi-Person Shootout

In *Taylor*, *Graham*, and most other cases in which this Court considered the applicability of the doctrine of mutual combat in the context of self-defense, the dispute began as a one-on-one encounter between the defendant and the eventual victim, and the "difficulty" resumed later between the same two combatants.[4] In those cases, it was not necessary for the Court to consider the extent to which a

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[4] *See, e.g.*, *Jackson v. State*, 355 S.C. 568, 572, 586 S.E.2d 562, 564 (2003) (stating the same two participants in the initial fight resumed the alleged "difficulty"); *State v. Mathis*, 174 S.C. 344, 348, 177 S.E. 318, 319 (1934) ("[T]he 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."); *State v. Lee*, 85 S.C. 101, 104-06, 67 S.E. 141, 142 (1910) (finding "there was bad blood between" the defendant and the deceased, the two anticipated further conflict, and the deceased was eventually killed by the defendant); *but see State v. Porter*, 269 S.C. 618, 621-23, 239 S.E.2d 641, 642-43 (1977) (holding "the law [of] . . . mutual combat obviated a plea of self-defense" when the defendant engaged "in an exchange of gunfire in which [a third person] was severely wounded").

combatant bore responsibility for the death or injury of a person not involved in the original dispute.[5]

In this case, at least ten people participated in the same shootout. If Bowers and Michael Morgan had a previous dispute, mutually agreed to fight at a later time, and otherwise satisfied the limitations on the doctrine of mutual combat set forth in *Taylor*, and if the resumption of their conflict played a role in starting the shootout in which Bowers shot Green, then under the same theory that led us to apply the doctrine in *Graham* and *Young*, the doctrine would make Bowers responsible for the injury to Green. In other words, even though there had been no prior difficulty between Bowers and Green, and even if Green threatened Bowers with death or serious bodily injury, Bowers' "mutual combat" with Michael Morgan would render Bowers "at fault" in bringing on the shootout in which he shot Green. Under those circumstances, the doctrine of mutual combat "negates self-defense." That is, Bowers' mutual combat with anyone would preclude Bowers from self-defense as to any victim killed or injured during the shootout, including Green.

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[5] In *Young*—outside the context of self-defense—we addressed the responsibility one combatant bears when another combatant kills an innocent bystander. We held,

> 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 . . . into a battlefield. . . . [E]ach combatant aids and encourages all of the other combatants—whether friend or foe—to create the lethal crossfire. We therefore find the law sanctions holding [one combatant] responsible for the actions of [another combatant] in causing the victim's death. Both men were equally culpable.

429 S.C. at 157-58, 838 S.E.2d at 517.

The trial court explained precisely this in its initial jury instruction, stating, "This law provides that if a defendant voluntarily participated in mutual combat . . . , the killing of a victim would not be self-defense." The trial court gave no indication the effect of Bowers' mutual combat with Michael Morgan was limited to the charge in which Morgan was the victim. Rather, under the initial charge, if Bowers' mutual combat with Morgan led to the shootout, then Bowers was at fault in bringing on the difficulty and was not entitled to self-defense in shooting anyone during the shootout, including Green.

Turning then to the jury's question, "Does a determination of mutual combat require a finding of culpability in each of the charges?," the parties and the trial court appear to have interpreted the question as asking whether prior mutual combat with Michael Morgan precluded Bowers' self-defense claim as to Green. Assuming that is what the jury asked, the answer should have been, "Yes, a determination of mutual combat means the State has proven Bowers is at fault in bringing on the shootout, and the State has disproved one of the elements of self-defense. This determination requires a finding that Bowers is not entitled to self-defense for any of the charges."

Therefore, the trial court's answer to the jury's question was not correct under the law. First, the trial court told the jury mutual combat was a "defense," which it is not. More importantly, as we explained in *Taylor*, *Graham*, and other opinions, the law of mutual combat—when it applies—provides the defendant is at fault and, thus, not entitled to self-defense when a fight later occurs with his mutual combatant. As we explained in this opinion, when the prior dispute leads to a multi-person shootout, the participants in the prior dispute are at fault not only as to their mutual combatant, but also in bringing on the entire shootout. Our explanation follows from *Young*. *See supra* note 5. In this case, if mutual combat between Bowers and Michael Morgan led to this shootout, then Bowers was not entitled to self-defense for his use of force against anyone, including Green.

### III. Prejudice

This brings us to the State's argument that the mutual combat instruction did not prejudice Bowers as to the ABHAN conviction. Our standard for decision is "whether the erroneous charge contributed to the verdict." *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). As stated in Subsection II.A, we must consider what impact the trial

court's initial instruction on mutual combat and its answer to the jury's question likely had on the jury's consideration of Bowers' self-defense claim as to Green.

The trial court initially instructed the jury that if Bowers "voluntarily participated in mutual combat," he was not entitled to self-defense. While the evidence does not support the instruction, the jury apparently concluded Bowers did engage in mutual combat with someone, presumably Michael Morgan. The court said nothing about whether Bowers' mutual combat with Michael Morgan affected his self-defense claim as to other victims. As we explained, the law provides that it does. On this point, the law makes practical sense. If Bowers was "at fault" in bringing on the shootout because of his prior mutual combat with Michael Morgan, then his fault intuitively extended to Green. A jury is smart enough to figure that out. Accepting the State's invitation to "determin[e] what a reasonable juror would have understood the charge to mean," we find the initial jury charge likely led the jury to believe Bowers' mutual combat with Michael Morgan precluded his self-defense claim as to Green.

The question then becomes whether the trial court's answer to the jury's question "corrected" the error. First, as we explained, the trial court's answer was not correct. We find it difficult to accept the notion that an incorrect answer "corrects" anything. Second, the answer did not correct the error because it did not clearly inform the jury that self-defense was still available to Bowers as to the attempted murder charge involving Green. The trial court began its answer stating "there is no evidence to support [Green] being armed at any point." Under the limitations on mutual combat—which the trial court already explained to the jury—the consequence of Green not being armed is that Bowers' prior interactions with Green could not be considered mutual combat. The trial court simply followed up on this thought in the next sentence, explaining that Bowers' prior interaction with Green cannot relieve the State's burden of disproving self-defense. The trial court's answer gave no indication that Bowers' mutual combat with Michael Morgan could not be used to foreclose self-defense as to Green.

The trial court did state in its answer, "You would still, as to the other victims, since there's no mutual combat, you would have to consider whether or not the State has disproved self-defense . . . because mutual combat would not be there to negate [self-defense] as to those particular indictments." The dissent places great significance on this statement, but we think the statement may be understood in two different ways. The dissent assumes the jury understood it to mean that even if

Bowers engaged in mutual combat with Michael Morgan he could still claim self-defense as to Green. We think it equally likely the jury understood the trial court to mean only that the jury could not find mutual combat based on Bowers' interactions with Green because there was no evidence Green was armed. There is nothing in this statement—or in the entire answer to the jury's question—that specifically informed the jury it could not apply Bowers' prior mutual combat with Michael Morgan to find self-defense did not apply as to Bowers' use of deadly force against Green.

As we have previously held, "When an incorrect charge is given, the court must withdraw it; '[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice.'" *State v. Robinson*, 306 S.C. 399, 401, 412 S.E.2d 411, 413 (1991) (citations omitted). *Robinson* was not intended to impose a hard and fast rule. Rather, the purpose of *Robinson* is to ensure the jury understands that the incorrect charge is not applicable and the "superimposed" correct charge must control its decision. The point of *Robinson*—which we reaffirm today—is the trial court must inform the jury the first charge was incorrect, or the charge "fosters confusion and prejudice." 306 S.C. at 401, 412 S.E.2d at 413. It is too much to ask of a lay jury to determine on its own which of a trial court's conflicting statements of law are correct, and which are incorrect.[6] In this case, the trial court responded to the jury's question by "superimposing" an *incorrect* statement of law over the already improper mutual combat instruction. We are concerned this did not cure, and likely exacerbated, the confusion the jury was already experiencing.

In addition, at trial, the State never once suggested to the jury it disproved self-defense as to the attempted murder charge involving Green on any basis other than the doctrine of mutual combat. The closest it came to doing so was in closing argument when the assistant solicitor rhetorically asked, "Was it a retaliatory

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[6] In *Robinson*, the trial court initially charged the jury incorrectly regarding mere presence. *Id.* Although the trial court correctly charged the law in the remainder of the same instruction, this Court held the error warranted reversal because the trial court "never retracted the incorrect statement." *Id.* Here, the trial court did not retract or refute its initial instruction on the doctrine of mutual combat, likely leaving members of the jury under the impression the initial charge still applied. It makes no difference that in *Robinson* the incorrect and later correct statements were made in the same charge.

gunshot?," and then answered her own question, "Maybe, but it was mutual combat." The State put no emphasis on disproving any element of self-defense as to Bowers shooting Green except by using the doctrine of mutual combat.

For these reasons, we find the erroneous mutual combat instruction prejudiced Bowers as to the ABHAN conviction.

## IV. Conclusion

We affirm the court of appeals' decision to reverse the ABHAN conviction based on the erroneous jury instruction on the doctrine of mutual combat.

**AFFIRMED.**

**JAMES, J., concurs. BEATTY, C.J., concurring in result only. KITTREDGE, J., dissenting in a separate opinion in which Acting Justice Thomas E. Huff, concurs.**

**JUSTICE KITTREDGE:** I respectfully dissent. Distilled to its essence, the question before the Court is whether the jury understood that the State was required to disprove Respondent Joseph Bowers acted in self-defense with respect to the charges involving victim Richard Green.[7] The answer, unequivocally, is yes. The trial court told the jury (1) self-defense applied to the charges involving Green, and (2) the State had to disprove self-defense beyond a reasonable doubt with respect to the charges involving Green. That is the end of the analysis.

On appeal, Respondent contended it was error to charge the law of mutual combat as to *any* of the charges against him. The State conceded the error, acknowledging the inapplicability of mutual combat to any aspect of the case. As a result, the intricacies of mutual combat are no longer at issue before the Court. Focusing only on the issue on which this Court granted the petition for a writ of certiorari, I would reverse the court of appeals and reinstate the jury verdict involving Respondent's actions towards Green.

**I.**

The majority's academic discussion of the law of mutual combat is irrelevant, for it is not the issue on which this Court granted the State's petition for a writ of certiorari and is not necessary to a resolution of this case. In fact, the law of this case requires us to find that mutual combat should not have been charged. *See Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (explaining an unappealed ruling, whether right or wrong, is the law of the case (quoting *Atl. Coast Builders & Contractors, L.L.C. v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). We granted a writ of certiorari to review *only* whether the court of appeals erred in reversing Respondent's ABHAN conviction involving Green based on the trial court's erroneous mutual combat instruction, when the trial court directly and subsequently instructed the jury that mutual combat did not apply to the shooting of Green. For reasons I will explain, I am confident the supplemental jury instruction corrected the error in the initial jury charge.

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[7] Specifically, as to the charges against Respondent involving his actions toward Green, Respondent was convicted of assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. I will refer to these charges collectively as either the charges involving Green or, for ease of reference, merely the ABHAN charge involving Green.

**II.**

With respect to the question actually before the Court, I certainly accept the State's and Respondent's agreement that it was error to charge the jury on mutual combat as it related to Respondent's murder charge involving another victim, Michael Morgan. As noted, error in charging mutual combat is the law of this case. The initial jury instruction apparently created confusion as to the availability of self-defense concerning Respondent's actions towards the other victims, including Green. After beginning its deliberations, the jury asked for clarification as to mutual combat, inquiring whether "a determination of mutual combat require[d] culpability in each of the charges."

The trial court informed counsel that it would recharge the jury and clarify that mutual combat was limited to the murder indictment concerning Morgan. The trial court did so via a supplemental instruction, explaining to the jury that "[t]here can only be one mutual combat defense in the indictments, that is the indictment with respect to Michael Morgan because . . . I find as a matter of law there is no evidence to support the other victims being armed at any point." Significantly, the trial court then instructed the jury that "as to the other victims, since there's no mutual combat, you would have to consider whether or not the State has disproved self-defense . . . because mutual combat would not be there to negate [self-defense] as to those particular indictments."

**A.**

I initially note Respondent did not object to this supplemental jury charge, despite the invitation from the trial court to state "[a]ny exceptions or additions." As a result, it is unassailable that Respondent has failed to preserve any possible objection to the supplemental charge. *See* Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction . . . out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. *Failure to object in accordance with this rule shall constitute a waiver of objection*." (emphasis added)); *Lowry v. State*, 376 S.C. 499, 503–04 & n.1, 657 S.E.2d 760, 762 & n.1 (2008) (noting the failure to object to a supplemental jury charge results in any objections being unpreserved for appellate review); *Pinckney v. Pettijohn Builders, Inc.*, 289 S.C. 405, 407, 346 S.E.2d 533,

534 (Ct. App. 1986) (holding that when counsel states at trial that he has no objection to a specific aspect of a jury charge, he may not argue on appeal that the jury charge was erroneous); *cf.* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). I therefore believe the proper result is to reverse the court of appeals' decision and reinstate the jury's guilty verdict as to the charges involving Green.

**B.**

Regardless, I would reverse the court of appeals and reinstate the convictions involving Green on the merits as well. In my judgment, the recharging of the jury removed any error in the original instruction by making it clear that self-defense was available to all charges related "to the other victims," which included the charges involving Green. I fully acknowledge our law recognizes that correct legal instructions overlaid or "superimposed" alongside improper instructions during the jury charge generally constitute reversible error. In this regard, the majority relies on *State v. Robinson* to support its conclusion. 306 S.C. 399, 412 S.E.2d 411 (1991). In *Robinson*, the trial court *in the same charge* gave correct and incorrect instructions on the law of "mere presence." *Id.* at 401, 412 S.E.2d at 413. This Court found the error reversible, concluding that "merely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." *Id.* (internal alteration marks omitted) (citation omitted). I find *Robinson* easily distinguished from this case.

We are not confronted with a correct statement of law being combined with or "superimposed" alongside an incorrect charge in the same jury instruction. Here, during the course of its deliberations, an astute jury presented a targeted question that went to heart of the disputed issue—did the law of mutual combat apply to all charges? The original jury instruction was confusing and incomplete. However, unlike in *Robinson*, the trial court removed any error and prejudice by issuing a standalone, supplemental jury instruction informing the jury of the correct law concerning the victim Green—that the law of mutual combat did not apply and, therefore, the State must disprove self-defense. *See, e.g.*, *United States v. Velez*, 652 F.2d 258, 262 (2d Cir. 1981) (explaining that an error in a jury charge may be cured by a subsequent, correct supplemental instruction); *Flanagan v. State*, 533 So. 2d 637, 645 (Ala. Crim. App. 1987) (same); *Morris v. Christopher*, 258 A.2d 172, 175 (Md. 1969) (same); *People v. Strong*, 683 N.Y.S.2d 275, 275 (App. Div. 1998) (same); *State v. Foss*, 134 A. 636, 637 (Vt. 1926) (same).

**C.**

We are told by the majority that the "trial court's answer gave no indication that [Respondent] Bowers'[s] mutual combat with Michael Morgan could not be used to foreclose self-defense as to Green." That statement is patently contrary to the actual jury instruction.

The supplemental instruction made it clear that mutual combat only applied to the charge involving Morgan, and significantly, the State was required to disprove self-defense as to the other charges, including the ABHAN charge involving Green. The majority states that "the trial court's answer was not correct." I disagree, for the supplemental instruction was a *correct* statement of the law in response to the specific question posed by the jury—because there was no mutual combat in connection with the charges involving Green, Respondent's claim of self-defense was proper, and the State had the burden to disprove self-defense. I respectfully disagree with the majority's efforts to disavow the supplemental instruction based on its speculation—without any shred of proof—that the jury intuitively chose to ignore the supplemental instruction. *See State v. Washington*, 431 S.C. 394, 410, 848 S.E.2d 779, 788 (2020) ("[J]urors are presumed to follow the law as instructed to them." (quoting *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999))). Moreover, I reject the suggestion that members of the jury could have been under the impression the initial charge still applied. Accepting the premise that the original instruction was erroneous, I am firmly convinced the trial court's clear supplemental instruction—the State had to disprove self-defense as to the charges involving Green—refuted and removed the error in the original charge, even absent the court failing to "formally" withdraw the original instruction.[8] *Cf. Bollenbach v. United States*, 326 U.S. 607, 612 (1946) ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word."); *McKnight v. State*, 378 S.C. 33, 48–49, 661 S.E.2d 354, 362 (2008) (explaining that supplemental instructions "attain[] a special significance in the minds of the jurors"); *Lowry*, 376 S.C. at 507, 657 S.E.2d at 764 ("The fact that the [erroneous] charge occurred in a supplemental instruction is also relevant. . . . [T]he improper charge . . . was the last thing the jurors heard before beginning deliberations and [] its brevity was likely received by the jurors with

[8] In fact, the clear majority rule from other jurisdictions is exactly contrary to the majority's conclusion here, in that most jurisdictions (if not all) find that a correct supplemental instruction cures any error in an incorrect initial instruction.

heightened alertness rather than the normal attentiveness which may well flag from time to time during the lengthy initial charge." (quoting *Arroyo v. Jones*, 685 F.2d 35 (2d Cir. 1982)) (internal quotation marks omitted) (citing *Bollenbach*, 326 U.S. at 612)).

**D.**

Perhaps the most problematic aspect of the majority opinion is that it is based on a hypothetical view of the facts. Specifically, the majority finds the trial court erred because its supplemental instruction "gave no indication that *[Respondent's] mutual combat with Michael Morgan* could not be used to foreclose self-defense as to Green." (Emphasis added). Of course, the parties and the court of appeals (and I) all agree there was no evidence of mutual combat, nor did the Court grant a petition for a writ of certiorari to consider the mutual combat issue. The majority nonetheless marches forward and concludes, hypothetically-speaking, that *if* the facts had been different, *then* mutual combat would have applied to the charges involving Green, stating "*[i]f* [Respondent] and [] Morgan . . . satisfied the limitations on the doctrine of mutual combat . . . , *then* . . . the doctrine would make [Respondent] responsible for the injury to Green." (Emphasis added). As a result, the majority holds mutual combat negated (or should have negated) Respondent's claim of self-defense against Green.

Even assuming that the majority's conclusion is correct and the supplemental jury instruction incorrectly required the State to disprove self-defense, the majority reaches the wrong result because any possible error heightened the State's burden of proof, thereby inuring to Respondent's benefit. *See, e.g.*, *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (explaining an erroneous jury charge "must be *prejudicial* to the [defendant] to warrant a new trial" (emphasis added)). Specifically, if—as the majority claims—mutual combat negated Respondent's self-defense claim related to Green, then the State had only to prove Respondent's guilt, and did *not* need to disprove the elements of self-defense. The "erroneous" jury instruction placed an additional burden on the State, with the trial court informing the jury, "[S]ince there's no mutual combat, you would have to consider whether or not the State has disproved self-defense . . . ." Thus, under the majority's formulation of the "erroneous" jury instruction, the State needed to not only prove Respondent's guilt, but also disprove the elements of self-defense—a heightened burden compared to what would otherwise be required under the majority's ultimate analysis.

Accordingly, even assuming the majority is correct in every respect as to its hypothetical view of the facts and applicability of mutual combat to the charges involving Green, Respondent benefitted from any possible error and, therefore, has failed to prove prejudice. *See id.* (stating erroneous jury charges only warrant a new trial when they are prejudicial to the defendant).

### III.

There can be no serious challenge to the narrow issue currently before the Court—self-defense was a valid defense, which the State had to disprove beyond a reasonable doubt. The jury was clearly and correctly informed of that fact in the supplemental charge. Under these circumstances, I would reverse the court of appeals and reinstate the convictions involving Green.

**Acting Justice Thomas E. Huff, concurs.**