The Supreme Court of South Carolina

Re: Amendments to Rule 45, South Carolina Rules of Civil Procedure

Appellate Case No. 2019-001492

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 45 of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 30, 2020

Rule 45, South Carolina Rules of Civil Procedure, is amended to delete the last sentence of paragraph (b)(1) and add new paragraph (a)(4), which provides:

> **(4)** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a copy of the subpoena must be served on each party in the manner prescribed by Rule 5(b) at least ten days before the time specified for compliance.

Paragraph (e) of Rule 45, South Carolina Rules of Civil Procedure, is amended to provide:

> **(e) Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend a deposition, permit an inspection, or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A); or if served without an adequate time to respond; or if service is made upon an individual under Rule 4(d)(1) and the individual did not receive or acknowledge the subpoena.

The following Note is added to Rule 45, South Carolina Rules of Civil Procedure:

Note to 2020 Amendment:

The amendment incorporates a version of the 2013 amendment to the Federal Rule by transferring the last sentence in paragraph (b)(1) to new paragraph (a)(4) and amending the sentence to require the issuing party serve a copy of the subpoena on each party before it is served on the person to whom it is directed. The language has also been modified, consistent with the corresponding Federal Rule and prior amendments to the South Carolina Rules of Civil Procedure involving electronic discovery, to include a reference to electronically stored information.

Paragraph (e) has been amended to delete the specific reference to former paragraph (b)(1)—now paragraph (a)(4)—with regard to an

adequate time to respond. This provision controls the time to serve a subpoena on each party, and not the time to serve the subpoena on the person to whom the subpoena is directed.

The Supreme Court of South Carolina

Re: Amendments to Rule 221, South Carolina Appellate Court Rules

Appellate Case No. 2019-001828

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the last sentence of Rule 221(a), South Carolina Appellate Court Rules, is amended to provide:

> "No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR, or declining to entertain a matter under Rule 245, SCACR."

The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

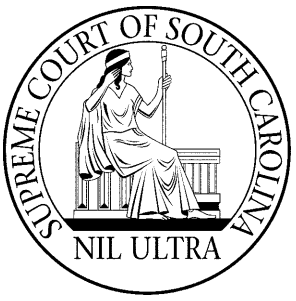
s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 30, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6
February 5, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2020-UP-031-State v. Alqi Dhimo

2020-UP-032-Devante Antonio Grant v. The State

2020-UP-033-Mykel Johnson v. State of South Carolina

2020-UP-034-William A. Brazell v. Judith D. Haley

2020-UP-035-SCDSS v. Michael D. Lollis
(Filed February 3, 2020)

PETITIONS FOR REHEARING

5691-Eugene Walpole v. Charleston County	Pending
5692-Samuel Tomlinson v. Jenna Melton	Pending
5694-State v. Rickey Henley	Pending
5697-State Farm v. Beverly Goyeneche	Pending
5698- Gunjit Singh v. Simran Singh	Pending
5699-PCS Nitrogen, Inc. v. Continental Casualty Co.	Pending
5700-Gene Schwiers v. SCDHEC	Pending
5702-State v. Edward P. Bonilla	Pending
5703-David Lemon v. Mt. Pleasant Waterworks	Pending

5704-Frederick Robert Chappell v. State	Pending
5705-Chris Katina McCord v. Laurens Cty. Health Care System	Pending
5706-State v. Jamie Lee Simpson	Pending
5707-Pickens County v. SCDHEC	Pending
5710-Russell Carter v. Bruce Bryant	Pending
5711-Carla D. Garrison v. Target Corporation	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart (2)	Pending
2019-UP-389-Branch Banking v. Cindy Hunt	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending
2019-UP-401-Stow Away Storage, LLC v. George W. Sisson (2)	Pending
2019-UP-412-Jacquelin Bennett v. Estate of James King	Pending
2019-UP-415-David Deen v. Deborah Deen	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2019-UP-419-Grange Mutual v. 20/20 Auto Glass	Pending
2020-UP-001-State v. Guadalupe G. Morales	Pending
2020-UP-003-State v. Shane Washington	Pending
2020-UP-004-Emory J. Infinger and Assoc. v. N. Charleston Com. Ctr.	Pending
2020-UP-012-State v. Kenneth S. Collins	Pending
2020-UP-013-Sharon Brown v. Cherokee Cty. School District	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5614-Charleston Electrical Services, Inc. v. Wanda Rahall	Pending
5633-William Loflin v. BMP Development, LP	Pending
5636-Win Myat v. Tuomey Regional Medical Center	Pending
5639-Hugh Dereede v. Courtney Feeley-Karp	Pending
5641-Robert Palmer v. State et al.	Pending
5643-Ashley Reeves v. SC Municipal Insurance	Pending
5653-Nationwide v. Shamin Walls	Pending
5659-State v. Fabian Lamichael R. Green	Pending
5660-Otis Nero v. SCDOT	Pending
5661-Palmetto Construction Group, LLC v. Restoration Specialists, LLC	Pending
5663-State v. Ahshaad Mykiel Owens	Pending
5669-Jeffrey Kennedy v. Richland School Dt. Two	Pending
5671-SC Lottery Commission v. George Glassmeyer	Pending
5676-H. Marshall Hoyler v. State of South Carolina	Dismissed 01/29/20
5681-Richard Ralph v. Paul D. McLaughlin	Pending
5683-State v. Ontario Stefon Patrick Makins	Pending
5684-Lucille Ray v. City of Rock Hill	Pending
5685-Nationwide Insurance v. Kristina Knight	Pending
5686-Cortland J. Eggleston v. United Parcel Service, Inc.	Pending
2018-UP-432-Thomas Torrence v. SC Department of Corrections	Pending

2019-UP-133-State v. George Holmes	Pending
2019-UP-169-State v. Jermaine Antonio Hodge	Pending
2019-UP-172-Robert Gillman v. Beth Gillman	Pending
2019-UP-178-Arthur Eleazer v. Leslie Hughey	Pending
2019-UP-209-State v. Terrance Stewart	Pending
2019-UP-214-State v. Jose Reyes Reyes	Pending
2019-UP-219-Adele Pope v. Alan Wilson (James Brown Legacy Trust)	Pending
2019-UP-233-State v. Aaron Young Sr.	Pending
2019-UP-266-Lynne Van House v. Colleton County	Pending
2019-UP-270-Deep Keel, LLC v. Atlantic Private Equity Group, LLC	Pending
2019-UP-272-State v. John M. Ghent, Jr.	Pending
2019-UP-284-The Bank of New York Mellon v. Cathy Lanier	Pending
2019-UP-293-Thayer Arredondo v. SNH SE Ashley River Tenant	Pending
2019-UP-295-State v. Anthony M. Enriquez	Pending
2019-UP-305-Billy Herndon v. G&G Logging	Pending
2019-UP-308-Edward Kelly v. Allen McCombs	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Aaron Scott Young Jr., Petitioner.

Appellate Case No. 2018-001861

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27942
Heard November 20, 2019 – Filed February 5, 2020

AFFIRMED

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.

ACTING CHIEF JUSTICE KITTREDGE: 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,[1] 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 therefore find the law sanctions

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[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.

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.[2]

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 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

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[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.

stand-alone theory of criminal responsibility in South Carolina, but instead a limitation on self-defense.[3] 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.

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[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))).

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.

"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 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. *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)).

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*, 29 P.3d 209, 223 (Cal. 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*, 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*, 681 N.E.2d 1205, 1215 (Mass. 1997) (noting death is "a natural result of a shootout").

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. *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).

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. 662 A.2d 247, 247–48 (Md. 1995), *aff'g* 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 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. 693 N.E.2d 193, 194 (N.Y. 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.* 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.* at 195–96 (discussing *People v. Abbott*, 445 N.Y.S.2d 344, 347 (App. Div. 1981),[4] and citing, *inter alia*, *People v. Fabian*, 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 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.* at 196 (emphasis added).

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 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.[5] As a result, we

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[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);

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.[6] *Cf. Roy*, 871 A.2d at 507 ("We think it 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.").

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*, 916 P.2d 9, 15 (Kan. 1996); *Alston*, 662 A.2d at 252–54; *Santiago*, 681 N.E.2d at 1215; *Russell*, 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*, 29 P.3d at 217–20 (collecting cases); *id.* 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*, 648 A.2d 295, 297, 299 (Pa. 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*, 431 N.W.2d 846, 851 (Mich. Ct. App. 1988).

C.

As applied here, the Youngs and Robinson were clearly engaged in mutual combat.[7] 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 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*, 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 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.

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[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.

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.[8]

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[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

AFFIRMED.

JAMES, FEW, JJ., and Acting Justice Aphrodite K. Konduros, concur.
HEARN, J., dissenting in a separate opinion.

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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.

JUSTICE HEARN: 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 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 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 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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Terry Edward McCall, Appellant.

Appellate Case No. 2015-001097

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 27943
Heard May 30, 2019 – Filed February 5, 2020

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

JUSTICE HEARN: In this appeal from a felony DUI conviction, Appellant Terry McCall contends the warrantless collection of his blood and urine at the direction of law enforcement pursuant to Section 56-5-2946 of the South Carolina Code (2018) violates the Fourth Amendment. We affirm because exigent circumstances existed to support the admission of his blood and urine test results.

FACTUAL BACKGROUND

On the evening of March 4, 2012, in Greenville, McCall's Ford Explorer crossed a center turn lane and veered into oncoming traffic. He struck Robert Suddeth's Chevrolet pickup truck head on as Suddeth and his daughter were returning home from her volleyball practice. The collision left McCall and Suddeth injured, and both had to be extricated from their vehicles by the "jaws of life." Suddeth's daughter suffered only minor physical injuries, but Suddeth's injuries were life-threatening. Fortunately, a firefighter was driving nearby, and after narrowly avoiding the crash, he stopped to help. To reach Suddeth, he climbed into the bed of the pickup truck and entered the cab through the back window where he immediately realized that Suddeth was near death. Law enforcement, emergency personnel, and even the coroner arrived shortly thereafter, as it was uncertain whether Suddeth would survive.

Trooper David McAlhany and Sergeant Wes Hiatt of the South Carolina Highway Patrol were two of the many law enforcement personnel at the scene. Hiatt quickly noticed empty beer cans inside the Ford Explorer. Believing that alcohol may have played a role in the collision, Hiatt questioned McCall while he was strapped onto a stretcher in the back of an ambulance. McCall denied drinking any alcohol and said his brakes had failed. Although McCall's breath did not smell of alcohol, Hiatt believed he was impaired because McCall's eyes were "glassy and his pupils were dilated." Hiatt also informed McAlhany of his suspicion that McCall was under the influence of a substance other than alcohol.

In addition to McAlhany and Hiatt, approximately eight other officers assisted at the scene, most of them primarily responsible for traffic control on this heavily traveled road during evening rush hour. The Major Accident Investigation Team also arrived and began investigating the accident.

The ambulance arrived at the hospital approximately thirty minutes after emergency officials first reached the accident. However, McAlhany—the primary investigator—remained at the scene, interviewing several witnesses as part of his investigation. Approximately two hours after the crash, McAlhany drove to the hospital to interview McCall and found him lying on a stretcher in the hallway of the critical care unit. McCall again contended his brakes failed because there were no calipers on the wheels to hold the brake pads in place, essentially meaning the

truck lacked functional brakes. According to McAlhany, McCall seemed to be impaired, as he appeared "sleepy" and would "open his eyes real wide" when answering questions. McAlhany arrested McCall for felony DUI resulting in great bodily injury at 8:13 p.m.—two hours and twenty-three minutes after the crash. McAlhany informed McCall of his implied consent rights, reading him a form that stated in part:

- You are under arrest for Felony Driving Under the Influence (Felony DUI), Section 56-5-2945, South Carolina Code of Laws 1976, as amended, or a law enforcement officer has probable cause to believe that you have violated this section.
- The officer has directed that samples be taken for alcohol and/or drug testing.
- The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
- Pursuant to Section 56-5-2946, you must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs.
- The resistance, obstruction, or opposition to testing pursuant to Section 56-5-2946 is evidence admissible at trial.

According to McAlhany, McCall agreed to a blood and urine test and signed the implied consent form while lying on the stretcher. Further, the nurse administering the tests noted that she would never collect a person's blood if he resisted, and that McCall at no point objected to the tests. However, McCall disputes that he signed the form. Ultimately, the nurse collected McCall's urine sample at 8:45 p.m. and retrieved a blood sample at 9:05 p.m.—three hours and fifteen minutes after the accident. The blood sample tested positive for methamphetamine and benzodiazepines, including Lorazepam and Klonopin, and the urine sample confirmed these results.

Before trial, McCall moved to suppress the blood and urine test results, arguing that law enforcement violated his Fourth Amendment rights by directing blood and urine tests without a warrant. McCall asserted section 56-5-2946 is unconstitutional because it establishes a per se exception to the warrant requirement. Conversely, the State contended the section satisfies the consent exception to the warrant requirement. Alternatively, the State argued that even if section 56-5-2946 is unconstitutional, McCall expressly consented to the tests, and furthermore,

exigent circumstances justified the warrantless search. The trial court denied the motion to suppress, finding exigent circumstances existed and that section 56-5-2946 by itself established consent.

Thereafter, on the morning of the second day of trial, McCall informed the trial court that he had a "conflict" with his attorney, and as a result, it would be best if the court relieved counsel. McCall further sought a continuance to allow him time to hire another lawyer, which the court denied. The court also asked McCall whether he understood the dangers and risks of proceeding pro se, to which he responded affirmatively. After finding that McCall's motions were a dilatory tactic for the purpose of delay, the court relieved his attorney, appointed standby counsel, and required McCall to proceed pro se. At the conclusion of the three-day trial, the jury found McCall guilty, and the court sentenced him to fifteen years' imprisonment. McCall appealed to the court of appeals, and this case was transferred pursuant to Rule 203(d)(1)(A)(ii) and 204(a), SCACR.

ISSUE

Did the warrantless blood and urine tests pursuant to Section 56-5-2946 of the South Carolina Code (2018) violate McCall's Fourth Amendment right to be free from unreasonable searches?[1]

DISCUSSION

We begin with the core protections afforded by the Fourth Amendment—that individuals be free from unreasonable searches and seizures by their government. U.S. Const. amend. IV. It is well-settled that drawing blood from an

[1] McCall also asserts the trial court denied McCall's Sixth Amendment right to counsel after relieving his attorney during the trial and refusing to grant him a continuance. We affirm this issue pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Morris*, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (noting that an appellate court will not reverse the denial of a continuance absent an abuse of discretion); *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.") (citing *State v. Lytchfield,* 230 S.C. 405, 95 S.E.2d 857 (1957)); *Wroten v. State*, 301 S.C. 293, 294–95, 391 S.E.2d 575, 576 (1990) (holding that an appellate court looks to the record as a whole to determine whether the defendant was sufficiently apprised of the dangers of proceeding pro se).

individual is a search within the purview of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (noting that blood tests "plainly constitute searches of 'persons'"). A warrantless search is per se unreasonable unless a recognized exception applies, which the State has the burden to prove. *State v. Gamble,* 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013); *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). Stated differently, a search without a warrant is reasonable "only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014).

In the last decade, the United States Supreme Court has issued three opinions concerning the constitutionality of warrantless testing following a suspected DUI. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding whether the warrantless blood testing of a suspected drunk driver qualifies as an exigent circumstance involves a "case-by-case analysis under the totality of the circumstances"); *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016) (holding a warrantless breath test, but not a blood test, is valid as a lawful search incident to arrest); *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525, 2530–32 (2019) (adopting a general rule that law enforcement may obtain a blood test without a warrant from an unconscious motorist under the exigent circumstances exception). Each case focused on a different exception to the warrant requirement, including the exigent circumstances exception invoked today.

This well-recognized exception to the warrant requirement may be invoked "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *McNeely*, 569 U.S. at 148–49 (citing *Kentucky v. King,* 563 U.S. 452, 460 (2011)). Generally, whether exigency exists is also determined by the totality of the circumstances. *Id.* While the exception may apply in numerous settings, *see id.* at 148–49, in the context of a suspected impaired driver, the rationale derives in part from the destruction of evidence—that evidence of impaired driving would dissipate in the bloodstream during the time needed to procure a warrant. Two Supreme Court cases guide our exigency discussion: *Schmerber* and *McNeely*.

In *Schmerber*, the Supreme Court held the specific facts therein permitted the warrantless blood draw over the defendant's objection because the police officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Schmerber*, 384 U.S. at 770. Those "specific facts" involved a serious car accident where Schmerber lost control of his vehicle and

struck a tree, injuring a passenger and himself. Upon arriving, a police officer smelled alcohol on the defendant's breath and noticed his eyes were "bloodshot, watery, sort of a glassy appearance." *Id.* at 769. Both occupants were transported to the hospital, followed by the officer approximately two hours later. *Id.* There, the officer directed a physician to take a blood sample despite Schmerber's refusal to consent to the test. *Id.* at 758–59.

After being convicted, Schmerber argued that the admission of the blood test results violated his Fourth Amendment rights because he refused to consent. The Supreme Court acknowledged that "[s]earch warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* at 757. After noting that alcohol in the blood begins to dissipate shortly after consumption ends, the Supreme Court held the blood test—in that specific case—did not violate the Fourth Amendment because: 1) time had elapsed to take the defendant to the hospital for treatment, 2) time was spent investigating the accident, and 3) there was no time to secure a warrant from a magistrate. *Id.* at 770–71.

Nearly fifty years later, the Supreme Court revisited the exigency exception involving a drunk driver. In *McNeely*, a police officer stopped the defendant's truck at approximately 2:00 a.m. after observing it exceed the speed limit and cross the center line several times. 569 U.S. at 145. The driver displayed common signs of impairment—alcohol on his breath, bloodshot eyes, and slurred speech. *Id.* The driver admitted he had consumed "a couple of beers" at a bar earlier, and he failed a field sobriety test. The officer requested an onsite portable breath test, but the driver refused. Thereafter, the officer arrested the individual and headed toward the police station to conduct a breath test, but after the defendant indicated he would refuse, the officer drove to the hospital to obtain a blood sample. At the hospital, the officer informed him of the implied consent statute, but the defendant refused to provide a blood sample. *Id.* at 146. The lab technician obtained a blood sample at the officer's direction, which occurred nearly thirty minutes after the traffic stop. *Id.*

The Supreme Court rejected the State of Missouri's argument that the natural dissipation of alcohol in the blood created a per se exigent circumstance, thereby declining to establish a bright-line rule that drawing blood for evidentiary purposes without a warrant is constitutional. *Id.* at 152. Instead, the Supreme Court held that whether exigent circumstances permit warrantless blood testing is determined on a case-by-case basis under the totality of the circumstances. *Id.* at 156.

We agree with the trial court that exigent circumstances existed, and accordingly, we affirm McCall's conviction. As the court correctly noted, approximately ten police officers responded to a serious accident requiring extensive investigation. At least three officers were diverted to other calls shortly after arriving, as evening rush hour traffic proved particularly busy. While McCall argues that officers had ample time to obtain a warrant, McAlhany rightfully secured the scene and thoroughly investigated the accident before arriving at the hospital two hours later. We also do not believe obtaining a warrant was practical, as McAlhany testified it likely would have taken at least ninety minutes to obtain one after 5 p.m. While *McNeely* makes it clear that the natural dissipation of drugs cannot by itself qualify as an exigency, the seriousness of the accident places this case much higher on the "exigency spectrum." *Mitchell*, 139 S.Ct. at 2533 (noting the car accident in *Schmerber* "heightened" the "degree of urgency common to all drunk-driving cases," thereby placing it higher on the "exigency spectrum"). Finally, unlike the trilogy of cases decided by the Supreme Court, officers quickly believed that McCall was impaired by a substance other than alcohol. While alcohol has a relatively steady dissipation rate, other substances dissipate much faster.[2] Without immediately knowing the substance's identity, officers could not possibly know how long it would remain in McCall's blood, thus increasing the urgency. We recognize any one fact alone may not support exigency; however, we find the trial court thoroughly analyzed the totality of the circumstances, especially given our deferential standard of review. *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (applying a deferential standard of review of a motion to suppress based on Fourth Amendment grounds). Accordingly, we affirm McCall's conviction. Because we affirm based on exigent circumstances, we need not reach the question concerning whether a warrantless blood draw pursuant to section 56-5-2946 is constitutional.[3]

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[2] A SLED toxicologist testified that the body metabolizes some drugs rapidly, such as cocaine and THC in marijuana, while alcohol dissipates at a steadier rate.

[3] While we leave this question for another day, we do note numerous courts have cast doubt on the constitutionality of similar implied consent statutes. *See Williams v. State*, 771 S.E.2d 373, 377 (Ga. 2015) ("[M]ere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant."); *State v. Moore*, 318 P.3d 1133, 1137 (Or. 2013), *opinion adhered to as modified on reconsideration*, 322 P.3d 486 (2014) ("Rather, for

CONCLUSION

We affirm McCall's conviction because exigent circumstances justified the warrantless blood draw.

AFFIRMED.

KITTREDGE, JAMES and FEW, JJ., concur. BEATTY, C.J., concurring in result only.

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purposes of this opinion, we assume without deciding that it would be unconstitutional to "deem" defendant to have consented when he drove."); *State v. Yong Shik Won*, 372 P.3d 1065, 1080 (Haw. 2015) ("[I]n order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given."); *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017) ("In recent years, a multitude of courts in our sister states have interpreted their respective—and similar—implied consent provisions and have concluded that the legislative proclamation that motorists are deemed to have consented to chemical tests is insufficient to establish the voluntariness of consent that is necessary to serve as an exception to the warrant requirement."); *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014) (holding Nevada's implied consent statute that permitted law enforcement to use force to obtain a sample and did not give the individual the right to withdraw consent could not be considered voluntary consent under the consent exception); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) ("[I]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent."); *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (holding the Fourth Amendment requires consent to be voluntary and independent of an implied consent statute); *State v. Modlin*, 867 N.W.2d 609, 621 (Neb. 2015) (holding actual voluntary consent is required for a warrantless blood test to be reasonable and the proper inquiry is the totality of the circumstances, "one of which is the implied consent statute"); *but see People v. Eubanks*, ___ N.E.3d ___, 2019 IL 123525 (Ill. 2019) (holding a statute that authorizes a compelled blood draw when an accident has resulted in death or serious bodily injury is not facially unconstitutional, but may be unconstitutional as applied in unusual cases, in light of the general rule adopted in *Mitchell* that exigent circumstances normally would exist).