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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI-COA
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge
Deadra L. Jefferson, Trial Judge

Appellate Case № 2023-001847

Jerome Campbell, # 349454,. . . . . Petitioner,

vs.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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Statement of the Issue Presented

Did the Post Conviction Relief judge err in failing to find trial counsel ineffective when he failed to object to the trial judge charging mutual combat which undercut the self defense charge in violation of the principles established in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003)?

Standard of Review

The South Carolina Supreme Court has established the Standard of Review in the appeal of a Post Conviction Relief Hearings. The Court said, "Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839 (2018)(internal citations omitted). As the trial court erred as a matter of law in finding trial counsel did not err in failing to object to the mutual combat charge, this error should be reviewed de novo.

Statement of the Case

Procedural History

Jerome Campbell was tried before a jury on January 23-27, 2012 on charges of murder and three counts of assault and battery with intent to kill. The charges arose from an incident that occurred in Charleston, SC on January 9, 2009. He was convicted of all the charges and sentenced to thirty years for murder and ten years on the three assault and battery with intent to kill charges. The judge ran the latter charges concurrent with the murder charge.

A timely Notice of Intent to Appeal was filed with the South Carolina Court of Appeals. The conviction was affirmed on August 7, 2013. A petition for rehearing was denied on October 23, 2013. Mr. Campbell did not appeal further.

Mr. Campbell filed his initial Post Conviction Relief Hearing on May 12, 2014. An Amended Petition was filed on January 12, 2017. A hearing on the Post Conviction Relief hearing was held before the Honorable William H. Seals, Jr. on January 12, 2017. By his order of January 17, 2018, Judge Seals denied the Petition. Mr. Campbell filed a Motion to Alter or Amend the Judgement on January 31, 2018. This Motion was denied by Order filed March 7, 2018. Mr. Campbell filed his Notice of Appeal on March 12, 2018. The South Carolina Court of Appeals granted the Petition for Writ of Certiorari on February 9, 2021 on the single issue of whether trial counsel was ineffective in failing to object to the trial judge charging the law of mutual combat.

The South Carolina Court of Appeals heard oral argument in this case on February 16, 2023. The Court issued its first opinion on July 17, 2023. Upon the filing of a petition for rehearing by Mr. Campbell, the original opinion was withdrawn on October 18, 2023 and a new opinion issued. The Court of Appeals denied the second petition for rehearing of Mr. Campbell on November 2, 2023.

Factual History

The events that led to the shooting arose from a marital disputed between Charise Coaxum, the sister of Jerome Campbell, and her husband, Michael Allen. Mr. Allen and his wife resided at the Plantation Apartments. Anthony German and his brother Michael German, the deceased, resided at Georgetown Apartments. Frank Haigler, the brother of Michael Allen, testified he had been to the Plantation Apartments to try and mediate the differences between Ms. Coaxum and Michael Allen. App. at 308, l 25 to 307, l 5. He testified he stayed at the Plantation apartment for about 45 minutes. App. at 310 ll 3-8.

Mr. Haigler testified he saw Mr. Campbell in front of the apartment of Ms. Coaxum, his sister-in-law, at the Plantation apartment. App. at 305, l 4-6. He later testified Mr. Campbell was not at the Plantation apartment. App. at 310, ll 19-21. After Mr. Haigler left the Plantation apartment, he, with his brother Michael Allen, went to the Georgetown apartment of Anthony and Michael German. At this apartment Mr. Haigler said he saw Mr. Campbell with a pistol. App. at 306, l 3 to 307, l 7. Mr. Haigler testified that notwithstanding messages from Mr. Campbell for Michael Allen not to return to the Plantation apartment, he, Michael Allen, Anthony German, and Michael German went to the vicinity of the apartment. According to Goolge Earth, the distance between the two apartment complexes is approximately 4 miles.[1]

Mr. Haigler testified that he told the others to wait at the store while he went to the Plantation apartment of Ms. Coaxum and Mr. Allen. App. at 312, l 24 to 313, l 14. As he approached the apartment, he saw Mr. Campbell. He stated he and Mr. Campbell had a confrontation in which he

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[1] This Court, in an appeal, has taken judicial notice of distances. "Rand McNally's Road Atlas indicates Gray, Tennessee, is about ten miles from Johnson City, Tennessee." *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004)

was struck by Mr. Campbell. He also observed two other men with shotguns. App. at 315, ll 11-15. After being struck he fled the scene and stated he heard two gun shots, presumably from the shotgun. App. at 318, ll 7-14. After he fled the scene, he heard a car speeding from the Plantation apartments and heard more gunshots. App. at 319, ll 7-11. No one was able to identify who was driving or who was shooting. As a result of the shooting, a ricochet bullet struck and killed Michael German. Mr. Campbell turned himself in to the police some two hours later. App. at 264, ll 3-6.

Argument

Did the Post Conviction Relief judge err in failing to find trial counsel ineffective when he failed to object to the trial judge charging mutual combat which undercut the self defense charge in violation of the principles established in *State v. Taylor,* 356 S.C. 227, 589 S.E.2d 1 (2003)?

History of Mutual Combat

When the doctrine of mutual combat was first introduced in South Carolina, the concept was used as a basis to reduce murder to manslaughter. "Even in cases of mutual combat, if one begins the fight with a mortal weapon, it is murder; for in all such cases the combat must have been begun on equal terms to reduce the offence to manslaughter." *State v. Hammond,* 36 S.C.L. 91, 102 (S.C. App. L. 1850). This Court has also held, "In cases of mutual combat, to mitigate a homicide to manslaughter, it is necessary that the occasion should be unpremeditated, and that at the commencement of the contest, the parties should be upon equal terms." *State v. McCants*, 28 S.C.L. 384, 385-386 (1843). While not part of the actual opinion, this Court quoted the charge given to the jury in the case. The Court stated, "But, there is no malice in manslaughter; it is a crime, committed in hot blood: for example, where the parties are engaged in mutual combat-inasmuch as it is

committed in hot blood, it is manslaughter." *State v. Smith*, 44 S.C.L. 341, 344 (S.C. App. L. 1857). This Court has also approved this charge to the jury:

> To illustrate a case of sudden heat and passion, if two parties, without any previous quarrel or animosity, meet up and get into a discussion, and that waxes warmer and warmer and they get into a fight, mutual combat, and as a result of the combat one strikes the other and he dies from the effect of it, and that was the result of that quarrel suddenly precipitated, and he dies, under those circumstances the law says, "Well, you had no right to kill him, but inasmuch as you did it in a fight, in sudden heat and passion, while the blood was coursing through your veins, inasmuch as you did it under those circumstances, it will not hold you to as strict accountability for that act as if you had gone there premeditatedly and sought it, and therefore it takes a charitable view of the act, and reduces the killing from murder to manslaughter." *State v. Driggers*, 84 S.C. 526, ___, 66 S.E. 1042, 1044 (1910).

Geogia also follows this rule. "If upon a sudden quarrel the parties fight upon the spot, or presently agree and fetch or draw their weapons and fight, and one of them is killed, such killing is but voluntary manslaughter, no matter who strikes the first blow. Being suddenly aroused by anger, and mutually intending to fight, the law of mutual combat is involved." *Johnson v. State,* 173 Ga. 734, 161 S.E. 590, 594 (1931)[2] Illinois also follows this line of reasoning. "Evidence of mutual combat or a physical struggle entered into willingly by both parties is sufficient provocation to require a voluntary manslaughter instruction." *People v. Brown*, 222 Ill. App. 3d 703, 720, 584 N.E.2d 355, 367 (1991). These cases establish the early application of mutual combat to be, not to negate self defense, as the state now uses it, but to benefit the defendant and reduce murder to manslaughter. The jury in this case was not instructed that a finding of mutual combat would reduce the crime from murder to manslaughter. Thus, Mr. Campbell did not receive the benefit from the mutual combat charge to which he was entitled, if the fact were sufficient to establish mutual

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[2] The State of Georgia, by a very wide margin, has the most cases involving mutual combat than any other state in our country.

combat..

In discussing the issue of mutual combat, the early decisions used the phrase "sudden heat or passion" or "committed in hot blood." Thus, under these case, if two people agree to meet at a certain time and engage in a duel, this would not be mutual combat, even though a duel is commonly understood as a classic example of mutual combat. Geogia also requires that for mutual combat to apply, the events leading up to the combat must be sudden. "Mutual combat exists where there is a fight with dangerous or deadly weapons, and when both parties are at fault and are mutually willing to fight because of a sudden quarrel." *Joyner v. State*, 208 Ga. 435, 439, 67 S.E.2d 221, 225 (1951). The legal lesson learned from these cases is that in a mutual combat case, the provocation has to be sudden, similar to the provocation that normally reduces murder to manslaughter. If the agreement to fight with deadly weapons is planned, then the alleged mutual combat does not reduce the murder to manslaughter. Against this historical background, the facts of this case must be analyzed.

The Erroneous Application of Mutual Combat to the Present Case

Lack of Suddenness or Heat of Passion

The first error in applying the doctrine of mutual combat is that under the facts as stated by the Court of Appeals, to which the Petitioner takes exception to some, the events leading up to the shooting did not occur suddenly or under heat of passion as is required by the doctrine of mutual combat. The Court of Appeals found, correctly, that Mr. Campbell had a confrontation with Frank Heigler, Anthony German and Michael Allen. The record shows that after this confrontation Mr. Campbell told the three not to go to the Plantation Apartment where he would be. After some deliberation, the three men decide to go to the Plantation Apartments after being told not to go there. This decision was made several hours after the confrontation at the Georgetown Apartments. This

was not done in suddenness nor heat of passion. Anthony German intentionally armed himself. None of these actions show "sudden heat and passion" as required by *Driggers.* As the acts did not arise out of sudden heat and passion, mutual combat did not apply.

The Court of Appeals attempted to equate this case to *State v. Graham,* 260 S.C. 449, 196 S.E.2d (1973). The Court of Appeals failed to consider that the defendant in *Graham* achieved the result to which a mutual combat charge was designed to achieve. Mr. Graham was convicted of manslaughter, the lesser included when an act is done in mutual combat. That is not true in this case

Jerome Campbell Lacked Knowledge the Other Side was Armed nor did he have a Willingness to Fight

The Court of Appeals further erred in failing to recognize that the doctrine of mutual combat requires that each side know the other side is armed. As this Court held, "In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that each party knew the other was armed." *State v. Taylor*, 356 S.C. 227, 234, 589 S.E.2d 1, 5 (2003). 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." *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 519 (2020) Thus, the State is required to prove a willingness to fight and that each party knows the other to be armed. Without either, mutual combat has not been proven. Simply proving after the fact that both parties were armed does not supply the required knowledge. If this were true, a mutual combat charge would be proper anytime deadly weapons were used by both parties.

The record in this case does not established a willingness to fight as to both parties as was clearly shown in the *Graham* case. The Court of Appeals acknowledged that Mr. Campbell told Michael Allen not to come to the Plantation Apartments, the residence of his niece. *Campbell v.*

State, 441 S.C. 361, 364, 893 S.E.2d 492, 493 (Ct. App. 2023), reh'g denied (Oct. 18, 2023), reh'g denied (Nov. 2, 2023). This action does not indicate a willingness to fight. Nothing in the record establishes a willingness by both sides to fight. The opinion cites no facts from which Mr. Campbell had any reason to believe the four men would in fact come to the Plantation Apartment where Mr. Campbell was located. He never encouraged them to come. No evidence suggests he knew they would be armed even if for some reason he should have anticipated they would come to the Plantation Apartment.

Likewise, the record establishes that the four men did not go to the Plantation apartment seeking a fight. Frank Haigler testified he went to the Plantation Apartment seeking to keep the matter from escalating. He stated, "I didn't want nothing to escalate that was already -- I didn't want the fire to start burning again that had been out, been put out." App. at 313, ll 8-11. At the encounter between Mr. Campbell and Mr. Haigler at the Plantation Apartments, Mr. Haigler said, "Yo, just call your mom and your sister. This thing has been alleviated." App. at 315, ll 6-7. This does not even suggest a willingness to fight on the part of both parties.

Frank Heigler did not know Anthony German had a firearm until they were on the way to the Plantation Apartments. He stated, "I didn't realize – I didn't know Anthony had the gun until we was on the way back to my brother's house." Rec. on at 337, ll 4-6. Michael Allen also did not know Anthony had a firearm. He testified:

> Q. (By Mr. Voight) Did you know Anthony had a weapon?
> A. (By Mr. Allen) No, I didn't.
> Rec. on App. at 430, 11-13.

The record does not establish that any of the four men went to the Plantation Apartment to engage in mutual combat. Only one brought a firearm. Rec. on App. at 464, ll-16-23. If such had

been the intent of Mr German, logic would dictate that he would have mentioned he had a firearm or one of the other people would have testified they told him to bring a firearm.

In *Graham* the defendant was armed. The victim in the case knew the defendant was armed. The defendant knew the victim was armed. Knowing that the victim was armed, the defendant elected to take his firearm with him from the barber shop into a public street to confront the armed victim. *Graham* is a classic case of mutual combat. The court in *Graham* said, "Under the circumstances the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing . . . ." *Id.* at 451, 196 S.E2ed at 496. Under the facts of *Graham,* the "apparent willingness" came from the fact that each knew the other was armed and each took an affirmative action to invoke an encounter. In this case, the record is totally devoid of any basis for Mr. Campbell to know the other party had a firearm. Knowledge by Mr. Campbell that the other side had a firearm cannot be inferred. Nor does the record establish any intent on the part of Mr. Campbell to have a confrontation at the Plantation Apartments. In fact, the record shows Mr. Campbell had told the four men to stay away from Plantation Apartments in order to avoid a confrontation. As this Court has said, "Moreover, it is essential that the agreement to fight be 'entered into prior to the beginning of combat, also described as an antecedent agreement to fight.'" *State v. Bowers*, 428 S.C. 21, 32, 832 S.E.2d 623, 629 (Ct. App. 2019), aff'd, 436 S.C. 640, 875 S.E.2d 608 (2022). No such antecedent agreement to fight has been shown in this case.

As noted above, in this case there is no such affirmative knowledge of the possession of a deadly weapon by each party. Nor does evidence exist of an "apparent willingness of each party to engage in an armed encounter." In *Graham,* the evidence was clear and unequivocal that each party

knew the other to be armed at the time of the encounter. The same cannot be said of the facts in this case. As there is no direct testimony that each party knew the other was armed, the Court of Appeals, contrary to the clear holding in *Graham*, has impermissibly inferred the fact that both parties knew the other was armed with no substantial evidence to support the fact. The facts in *Graham* establish that each party knowing the other to be armed was objectively proven. In *Graham,* the knowledge was not inferred from ambiguous testimony. If such an inference is permissible simply because a firearm is later found on both parties, then mutual combat could be charged in any case where both sides are armed. This is not the law in South Carolina. As mutual combat eliminates self defense, the fact that both parties knew the other to be armed should not be left to a weak inference. This fact must be objectively proven.

Georgia, which uses mutual combat to reduce murder to manslaughter, requires that the mutual intent to fight must be affirmatively shown. "In order to reduce the homicide from murder to voluntary manslaughter, as relates to the doctrine of mutual combat, it should affirmatively appear that at the time of the homicide both parties were in position and manifested intention to fight. Mere threats on the part of one party at the time of a fatal shot by the other will not suffice." *Cornelious v. State*, 193 Ga. 25, 28–29, 17 S.E.2d 156, 158 (1941). The Court of Appeal erred in holding the evidence established mutual combat. This Court further erred in relying upon *Carreker v. State*, 273 Ga. 371, 541 S.E.2d 364 (2001). In affirming the case, the Geogia court cited *Sinkfield v. State*, 266 Ga. 726, 727, 470 S.E.2d 649, 651 (1996) which held, "Moreover, we note that a charge on mutual combat enables a jury to find a criminal defendant guilty of voluntary manslaughter in lieu of murder. Hence, the mutual combat charge could only have benefitted Sinkfield, and we reject this enumeration as meritless." A charge that benefits a defendant will not be held to be reversible error.

This theme of both sides being mutually armed was used by the State in their closing argument. As the State argued, "If they did, and if we all bring guns to the gun fight, none of us get to say self defense. All right? That's what mutual combat says and it's clear from his actions that he did." App. at 735, ll 12-15. The fact should be noted that this is not a correct statement of the law as to mutual combat. Even if both sides are armed, a defendant may invoke self defense. Both sides being armed is only one requirement for mutual combat. The State must prove a mutual willingness to fight. This argument by the State is based, at least in part, upon the jury charge where the Court stated, "In addition it must be shown that both parties were armed with a deadly weapon." App. at 763, ll 23-24. The ambiguous charge, with the comment by the solicitor, easily mislead the jury and permitted a conviction on an improper basis. With out the improper mutual combat charge, the state could not have made this argument.

The exhibits show that the convenience store was across the street from an entrance to the Plantation Apartments. The most logical exit from the apartments is to drive toward the store. The testimony established that Mr. Campbell's Impala took a right turn out of the apartments and sped away. Anthony German stated, "[Y]ou could see a white Impala coming and then it made a right turn onto Carriage Lane coming from Plantation Apartments . . . ." App. at 466, ll 12-14. Simply pulling out of an apartment complex and making a required turn is not evidence of a willingness to engage in mutual combat. In fact, leaving the scene of a confrontation is actually strong evidence of a desire not to engage in any type of altercation including mutual combat. No testimony exists that establishes affirmatively or by inference that Mr. Campbell knew the other men would be at the

convenience store.[3]

If Mr. Campbell had a desire to engage in mutual combat, he simply would have waited where he was. He would not have left. The record offers no evidence that Mr. Campbell knew three other people would be at the convenience store. He was not, therefore, going toward trouble, but away from it. To the extent the Court of Appeals used the claim that Mr. Campbell was going toward the convenience store to establish that he had a willingness to fight, such use was improper and not supported by the evidence.

The Court of Appeals correctly stated in the opinion the long established principle that each party in mutual combat must know the other is armed to make mutual combat applicable. *Campbell* at 366, 893 S.E.2d at 494. *See, also,* "Appellant could see the weapon in the possession of the deceased, and the deceased knew that appellant was armed." *Graham*, at 451, 196 S.E.2d at 496; "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." *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 519 (2020). What the Court of Appeals has not done is demonstrate that Mr. Campbell knew that any of the four individuals were armed. The Court of Appeals correctly noted that during the contact at the Georgetown Apartments, the four individuals there were not armed. *Campbell*, at 369, 893 S.E.2d at 496. The opinion does not explain how Mr. Campbell obtained the knowledge that any of the four individuals were armed when they came to the Plantation Apartments. Without this knowledge by Mr. Campbell, a mutual combat charge is not proper.

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[3] The record is also devoid of any evidence that Mr. Campbell fired a weapon, other than the weapon was fired from his automobile. For this reason, the lower court charged the law as to accomplice liability. App. at 760, l 16 to 762, l 4. *See, State v. Washington,* 431 S.C. 394, 848 S.E.2d 779 (2020).

The Court of Appeals improperly concluded, "The facts in the present case created an inference of mutual combat that necessitated a corresponding charge to be submitted to the jury." *Campbell* at 18. The Court of Appeals failed to state what facts permitted the jury to infer Mr. Campbell knew the other side was armed. Under such an analysis, the jury would be permitted to find mutual combat even when one side was not armed simply because they inferred it or believe one party could infer the other side was armed even when they were not. Simply because both sides are armed does not support such an inference.

As this Court has noted, mutual combat is inconsistent with self defense. "As a general rule, the plea of self-defense is not available to one who kills another in mutual combat." *State v. Graham*, at 450, 196 S.E.2d at 495. What happened in this case was. with the charge of mutual combat, the State was able to take the focus off the issue of who fired first. The issue of self defense in this case depended on who fired first. The trial judge admitted there was a serious factual question as to who shot first. She observed, "There's no one that, at least of independent when we talk about the expert because they weren't there, to say who shot when, who shot first." App. at 672, 18-22. The trial judge clearly stated who shot first was a clear factual dispute. When the trial judge then charges the law as to mutual combat, the key issue of who shot first became a much less important issue. The jury had an easier time simply finding mutual combat aided by the State's argument ""If they did, and if we all bring guns to the gun fight, none of us get to say self defense. All right? That's what mutual combat says and it's clear from his actions that he did." App. at 735, ll 12-14

Reason for Granting the Petition for Writ of Certiorari

The South Carolina Court of Appeals appears to have ruled that a jury can infer both parties knew the other was armed from the simple fact that after the shooting both sides were armed with

a deadly weapon. No case makes this holding in South Carolina. Nor does the fact that each side had a weapon mean there was mutual combat. As the Supreme Court of Appeals for Virginia has said, "To be mutual it must have been voluntarily and mutually entered into. If this were not so, every fight would be a mutual combat, without regard to the manner in which it began. Mutual combat would be its synonym and have no special meaning. One who is assaulted may and usually does defend himself, but the ensuing struggle cannot be accurately described as mutual combat." *Harper v. Commonwealth*, 165, Va. 816, 820, 183 S.E. 171, 173 (1936). Unless the error of the Court of Appeal is corrected, any case where both sides use deadly weapons will be a case involving mutual combat.

In *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003) this Court said, "The doctrine of mutual combat has existed in South Carolina since at least 1843, but has fallen out of common use in recent years." The reason mutual combat has fallen out of use since 1843 is the fact that today, citizens generally are not armed. Therefore the probability today of two citizens having a disagreement and suddenly drawing weapons on each other is substantially less than in 1843. The Georgia Supreme Court in 1846 declared a law banning citizens from possessing firearms to be unconstitutional. "The conclusion at which the court arrived was, that an act to prevent persons from wearing even concealed weapons is unconstitutional and void." *Nunn v. State*, 1 Ga. 243, 248 (1846). With prohibitions against possessing firearms being generally disfavored, mutual combat situation were more likely to arise. Research indicates that South Carolina did not outlaw the possession of a pistol until 1880. *See*, 1880 S.C. Acts 448, § 1, as codified in S.C. Rev. Stat. (1894). § 129 (2472.).

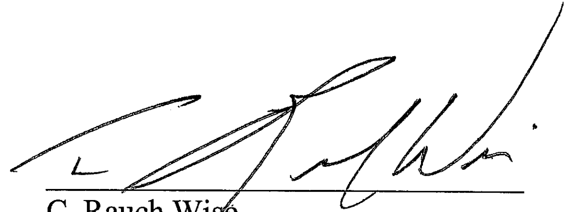
This Court should take this opportunity to grant the petition for writ of certiorari and abolish

the doctrine of mutual combat. Today the doctrine serves no real purpose except to confuse a jury as to the law of self defense. This Court has not adopted the doctrine of imperfect self defense. "Heretofore, South Carolina has not expressly adopted the doctrine of imperfect self-defense." *State v. Sams*, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014). Imperfect self defense has been defined as "Under the 'imperfect self-defense' doctrine, the crime is reduced from murder to voluntary manslaughter where a defendant had a genuine but unreasonable fear of imminent peril from the victim and killed the victim or where the slayer, although acting in self-defense, was not himself or herself free from blame." 40 C.J.S. *Homicide* § 114. This defense would achieve the same purpose as the mutual combat doctrine without confusing the jury as to self defense. If such a doctrine had been applied in this case, the jury would not have been confused as to the importance of who fired the first shot.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari, reverse the decision of the Court of Appeals and hold the trial counsel was ineffective when he failed to object to the jury charge as to mutual combat.

December 27, 2023



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