THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

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Statement of Issue on Appeal

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)?

Question 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)?

Issue Preservation

In this case the Post Conviction relief judge dismissed the mutual combat issue in a summary manner. The court simply stated, "Here, there was some evidence presented that Applicant engaged in a mutual willingness to fight throughout the day of the incident. Therefore, the trial court's instruction on mutual combat was supported by the evidence presented at trial and any objection would not have been successful." App. at 1098. In summarily dismissing the mutual combat argument, the trial court cited no facts to support the alleged mutual willingness to fight. The Post Conviction relief court did not discuss *State v. Taylor* 356 S.C. 227, 589 S.E.2d 1 (2003). As the lower court dismissed the mutual combat argument, this Court is entitled to presume the lower court knew the law and considered all the elements of mutual combat. "We presume that trial courts know and follow the applicable law." *Thurman v. State*, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). As this court can presume the lower court knew the law, this court can presume the lower court considered the elements of mutual combat. Thus, all issues as to the requirements of mutual combat are preserved for review.

In discussing the fact that mutual combat was traditionally used to reduce murder to manslaughter, the Petitioner is not urging that the case be reversed because manslaughter was not charged. This issue is discussed to simply show one of the reason the mutual combat was not

applicable in this case. When the purpose of the law is not served in the case, the charge to the jury should not be given.

This Court has said, "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). At a minimum in this case, the issue of whether the mutual combat doctrine applies to this case was presented to the post conviction relief judge and ruled upon.

Mutual Combat Not Established

The Return filed by the Respondent raises and ignores an important question. When in South Carolina did the law of mutual combat change? As noted by the Respondent and stated in the opening petition, mutual combat, as originally understood, was to mitigate murder to manslaughter. Manslaughter was the verdict in *State v. Graham,* 260 S.C. 449, 196 S.E.2d (1973). Mutual combat was originally used to help a defendant, which it did in *Graham.* Thus, if the state concedes mutual combat has been proven, then the state has conceded murder has not been proven.

The Respondent suggests that while mutual combat may have started off as reducing murder to manslaughter, that today mutual combat is used to refute self defense. Br. of Resp. at 10. The Respondent has failed, however, to cite any case where any appellate court in South Carolina has changed the law as to mutual combat. In the opening Petition Mr. Campbell shows that historically mutual combat in South Carolina was used to reduce murder to manslaughter. If any court in South Carolina has changed the law as to mutual combat, the State should be able to show the case that changed the law. They cite no such case.

The State appears to ignore the requirement that mutual combat must be based upon

sudden passion. The reason is the state puts forth the facts in a manner that shows the alleged gunfight in this case was long planned and premeditated. Under those circumstances, the alleged gunfight was not mutual combat. Numerous other states hold that a premeditated intent to engage in a gun battle is not mutual combat. *See, e.g. State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 795 (1981)(Thus a killing committed during the course of a quarrel or scuffle may yet constitute first degree murder provided the defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent.); *Commonwealth v. Webster*, 59 Mass. 295, 308 (1850), abrogated on other grounds by *Commonwealth. v. Russell*, 470 Mass. 464, 23 N.E.3d 867 (2015)(The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offence of murder.)

Mutual combat appears to have arisen from the days when many people carried firearms on a regular basis. In those days, two armed people engaging in an argument could easily have resulted in both using their weapons. Mutual combat did not arise out of the scene from western folklore where an armed individual threatens another to meet him at noon the next day on Main Street. Under those circumstances, the survivor would and should be convicted of murder. The

intent to kill was premeditate and did not arise in sudden heat or passion.

The Return also fails to discuss the concept that each side must know the other side to be armed to invoke mutual combat. "Additionally, each party must know the other is armed with a deadly weapon." *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). In *Graham,* the facts stated by the court showed that both sides knew the other was armed before the shots were fired. "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). The State has pointed to no facts that establish that Jerome Campbell knew the other side was or would be armed. Without mutual knowledge of the other side being armed, there is no mutual combat. More is required than proving that both sides were in fact armed. The State must prove each knew the other to be armed before the shooting occurred. The record in this case established that Frank Haigler, Michael Allen, Anthony German and Michael German knew Mr. Campbell was armed. The State has failed to establish any proof that Mr. Campbell knew any of the four people were armed. In fact, the record establishes Mr. Campbell was not expecting the four to return to the Georgetown Apartments as he had told them to stay away from there. App. at 305, ll 19-21. Thus, without knowledge by Mr. Campbell that at least one person on the other side would be armed, there can be no mutual combat.

CONCLUSION

Fore the foregoing reasons and for the reason set forth in the Petition for Writ of Certiorari, this Court should grant the Petition for Writ of Certiorari to address the issues raised as to the meaning and proof of mutual combat reverse the conviction of Jerome Campbell and remand the case for a new trial.

February 22nd, 2024

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