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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case № 2018-000464

Jerome Campbell ..... Petitioner,

vs.

The State of South Carolina ..... Respondent.

REPLY TO RETURN

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Question I

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

Contrary to the position urged by the State in their return, there was not indication that the parties in this case intended to engage in mutual combat. As this Court has said "The case law does establish that there must be 'mutual intent and willingness to fight' to constitute mutual combat." *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 3 (2003). The Court in *Taylor* further said:

> As mentioned, mutual combat acts [is] a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. As such, it is only logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the *Porter*; *Graham*, and *Mathis* cases.
> *Id.* at 234, 589 S.E.2d at 4.

In the present case, the evidence as to mutual combat is not plain. By holding the evidence of mutual combat must be plain, the Court obviously meant more than just some evidence. The evidence of mutual combat referenced in the cases cited above is plain. "There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other." *State v. Mathis*, 174 S.C. 344, ___, 177 S.E. 318, 319 (1934); "As the deceased left his truck, appellant, who was in the barber shop and had observed the deceased's return, walked into the

street, placing himself in a position where an encounter with the deceased could be expected. Appellant could see the weapon in the possession of the deceased, and the deceased knew that appellant was armed." *State v. Graham*, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (1973); "In the instant case, appellant returned with a gun to Slagle's property at least twice in spite of prior verbal abuse, threats and gunshots." *State v. Porter*, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977). In the present case, nothing in the record established that Mr. Campbell knew the other party was armed, if a rusted pistol that would not fire constitutes being armed. App. at 238, ll 2-19. Without some evidence that Mr. Campbell knew the other party was armed, plain evidence of mutual combat has not been presented.

State v. Jackson, 384 S.C. 29, 681 S.E.2d 17 (Ct. App. 2009) is not support for the proposition that self defense and mutual combat are mutually exclusive. The Court first discussed *Taylor* saying, "No exception was taken to the charge on self-defense; rather, the supreme court held the mutual combat charge negated the self-defense charge and created unfair prejudice against Taylor." *Id.* at 38, 681 S.E.2d at 21. The Court then dropped a footnote to say "We do not suggest mutual combat and self-defense are mutually exclusive; rather, in *Taylor*, there was no evidence that the victim was willing to engage in mutual combat with Taylor." *Id.* at 38, 681 S.E.2d at 22, n. 5. In *Taylor,* some evidence of mutual combat existed as the court found "All witnesses agree that Angela insisted the two take the fight outside, and that they continued their struggle on the porch of the trailer and into the front yard." *Taylor*, at 230, 589 S.E.2d at 3. Thus, as the evidence as to mutual combat was not plain, it was prejudicial in *Taylor* to charge it. The same principle applies in this case.

Question II

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective in failing to properly object to the failure of the trial judge to charge the law as to the defense of others?

While defense counsel did argue for a defense of others charge, he did not object when the trial judge stated she would not charge defense of others and did not renew the objection after the charge. He therefore either waived the objection he had previously made or acquiesced in the ruling by the trial judge. Rule 20 of the South Carolina Rules of Criminal Procedure; *State v. Rios*, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.) When the trial judge asked at the end fo the jury charge if there were any objections, trial counsel simply responded "None, Your Honor." App. at 781, l 7.

The State incorrectly argues that the failure to object after the jury charge preserves the issue. If the trial judge has asked if there were any objections other than those previously discussed, then the State's argument may have some merit. But here, not only did trial counsel fail to raise an objection after the judge initially stated she would not give the defense of others charge, he in acquiesced in her charge when he raised no objection after being asked after the trial judge failed to charge defense of others. *State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Later, after charging the jury, the trial court asked if there were any objections to the charges given. Neither the State nor Rios had any objections.")

Question III

Did the Post Conviction Relief Judge err in failing to find trial counsel was ineffective for his failing to object to the trial judge charging the hand of one is the hand of all and the law of aiding and abetting when the facts did not support the charge?

The only evidence the State urges to contend that the trial counsel was not ineffective in failing to object to the aiding and abetting charge is an ambiguous statement made before the car left the scene. In that statement Mr. Campbell allegedly said "Go get that, go get that." App. at 313, l 11. The comment has no reference to shooting and to assume it references an instruction to shoot is speculation at best. If this is all the State can find to support an aiding and abetting charge, then the record in this case is woefully inadequate to sustain an aiding and abetting charge to the jury. The Post Conviction Relief judge erred in failing to find trial counsel was ineffective in failing to object to such a charge.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the Petition for Writ of Certiorari and Order that Jerome Campbell be given a new trial.

December 27, 2018

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CERTIORARI TO CHARLESTON COUNTY
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William H. Seals, Jr., Circuit Court Judge

Appellate Case № 2018-000464
Lower Case No. 2014-CP-10-3019

Jerome Campbell, # 349454, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

AFFIDAVIT OF SERVICE

Personally appeared before me Sandy Traynham, who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Applicant in the above entitled case. That on December 27, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Reply To Return in the above case addressed to Samuel Leonard Key, SC Attorney General Office, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

Sworn to and Subscribed
before me this 27 day
of December 2018

Notary Public for South Carolina
My Commission Expires: 12/3/2019

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December 27, 2018

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Jerome Campbell vs. State of South Carolina, Appellate Case No. 2018-000464

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Reply to Return together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

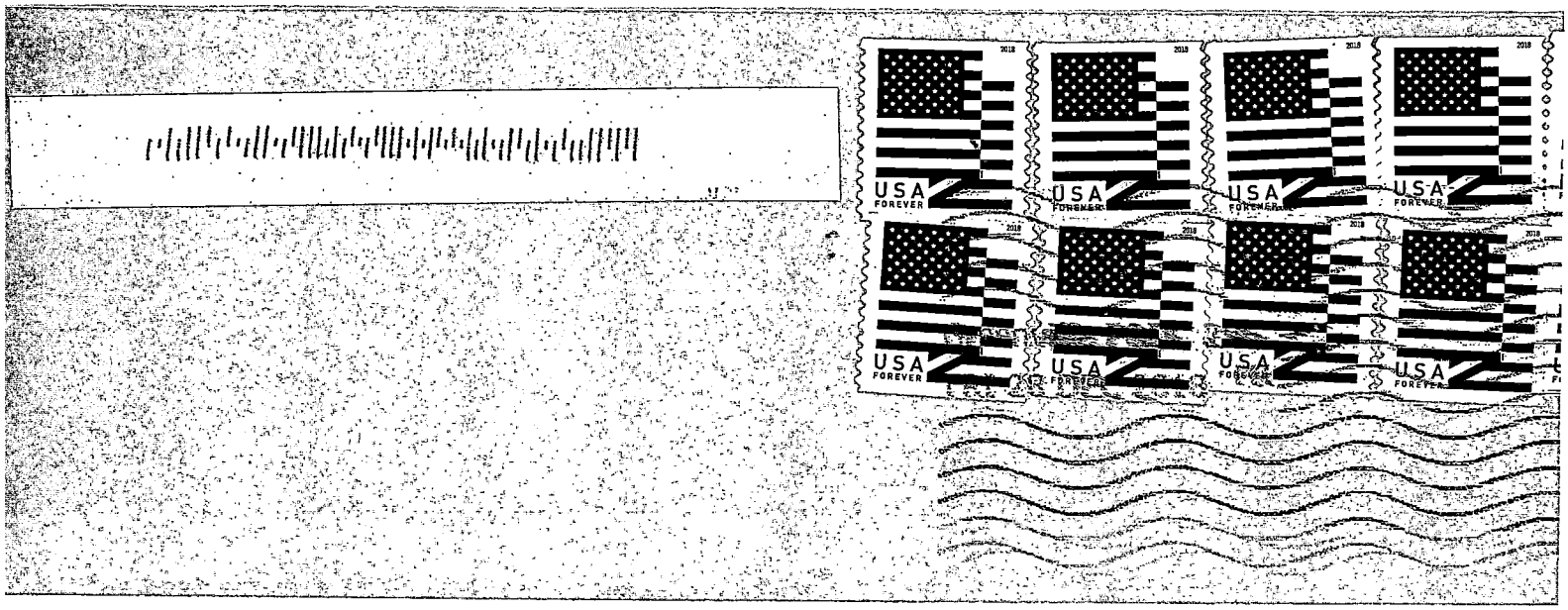
With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Samuel Leonard Key



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