STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2019-000533

Larry T. Chestnut,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

Did the PCR court err when it failed to grant Larry T. Chestnut a new trial because his trial counsel failed to object to the Judge's charge that contained a mutual combat charge in the Court's self-defense charge to the jury, contrary to the holding in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (S.C. 2003)?

RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny relief where the trial court instructed the jury regarding mutual combat without objection, because Counsel articulated his reasoning that the withdrawal language of the charge was helpful to his defense strategy, because Petitioner's claim of self-defense was defeated by the evidence irrespective of the mutual combat charge, and where the jury convicted Petitioner of a mutually exclusive lesser-included offense in the form of voluntary manslaughter?

STATEMENT OF THE CASE

Larry T. Chestnut (a/k/a "Ty", hereinafter "Petitioner") is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the July 2006 term of the Horry County Grand Jury for murder (2006-GS-26-02998). Ralph J. Wilson, Sr. represented Petitioner, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On August 13, 2012, Petitioner proceeded to trial before the Honorable Steven H. John and a jury. The jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter on August 17, 2012.[1] Judge John sentenced Petitioner to imprisonment for a term of 20 years.

Petitioner filed a timely notice of appeal. While pending in the Court of Appeals, the case was certified by the Supreme Court of South Carolina for review pursuant to Rule 204(b), SCACR. The direct appeal was perfected by Jeremy A. Thompson, Esq., who raised the following issues:

1. Whether subsequent developments in the law have so undermined the foundation of State v. Huckie, 22 S.C. 298 (1885)—establishing the order of closing argument in joint trials—such that Huckie should be overruled to permit co-defendants who do not introduce evidence in a joint trial the right to the last argument even if another co-defendant does introduce evidence?

2. Whether the trial court's denial of the Appellant's motion to permit the Appellant's co-defendant to make the final closing argument to the jury if the Appellant presented evidence violated the Appellant's Fifth, Sixth, and Fourteenth Amendment constitutional rights to present a defense and to testify in his own defense?

By memorandum opinion decided January 14, 2015, the Supreme Court of South Carolina affirmed Petitioner's convictions. State v. Chestnut, Op. No. 2015-MO-002 (S.C. Sup. Ct. filed Jan. 14, 2015). The Remittitur was issued on January 30, 2015.

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[1] Petitioner's co-defendant, Kendrick Chestnut, represented by Russell B. Long, Esq., was acquitted.

Petitioner filed his application for post-conviction relief on January 29, 2016 (2016-CP-26-00652). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, due to:
    a. "Counsel's failure to properly and adequately prepare for trial prior to the case being called for trial."
        i. "While the case was pending for six years prior to the call or the case, the Applicant rarely met with and prepared for the trial with his attorney."
    b. "Counsel's failure to strike a juror who he knew to be biased against the Applicant."
        i. "Counsel sat a juror who he knew to have fired Applicant's father, and who he knew had knowledge of the matter at hand. Said juror had obvious prejudices against the Applicant, was not stricken, and eventually became foreman of the jury."
    c. "Counsel's failure to file a speedy trial motion."
        i. "A speedy trial motion was never filed during the six years this matter was pending."
    d. "Counsel's failure to make a motion for severance."
        i. "Despite the co-defendant making multiple statements against the Applicant's interest prior to trial, Counsel for the Applicant made no motion to [sever] the trial, and this failure continued to impact the trial of the case throughout the course of the proceedings. Eventually, the counsel for the Applicant admitted to the Court that this would be an issue for the Appellate Court or a PCR proceeding."
    e. "Counsel's failure to object to the Judge's instructions on the law."
        i. "Typically in a murder case counsel is given an opportunity to review the proposed charge prior to the Judge giving instructions to the jury. Counsel failed to object to the improper mutual combat charge, so the matter was not preserved for Appellate counsel. Also, trial counsel failed to object to the misstatement of law that by using a deadly weapon in his own home while being attacked with a deadly weapon, the jury could presume malice. The Assistant Solicitor trying the case actually objected to the charge."
    f. "Counsel's failure to object to the Judge's correction of his misstatement of law and/or for failing to request the corrective charge include self-defense language in a timely manner."
        i. "When the Judge made his corrected charge, trial counsel did not request that self-defense language be included in a timely [manner]. He eventually made a request after the jury had returned to deliberate, and the judge refused to bring them out again for the additional charge."

g. "Counsel's failure to make a motion for mistrial when the Judge made a misstatement of law to the jury during his instructions."
    i. "A bell cannot be unrung. Trial counsel should have made a motion for a mistrial when the Judge improperly instructed the jury."
h. "Counsel's failure to object to a mutual combat charge being included in the Jury instructions"
    i. "There was no evidence to support a mutual combat charge. Mutual combat effectively ruins a self defense claim."
i. "Counsel's failure to present evidence on behalf of his client when he had just announced to the court that it was necessary to properly try his case."
    i. "Trial counsel knew that [it] was imperative that he present a defense.
j. "Counsel's failure to preserve the record adequately by presenting evidence to the court regarding the matter of last argument."
    i. "Trial counsel made no proffer of evidence. Soon after this case the court proposed a rule change regarding last argument in this state."
k. "Counsel's failure to put the Applicant's interests above those of his co-defendant and in failing to properly advise the Applicant regarding his decision not to take the stand."
    i. "Same as (j) above"
l. "Counsel's failure to properly prepare and present a defense that the co-defendant was the individual that actually caused the injuries that resulted in the death of the victim for which the Applicant was on trial."
    i. "Applicant did not cause the injuries to the victim in this matter that resulted in his death, the Applicant was seriously injured and remained in critical condition for weeks fighting for his life. Someone got a pair of scissor sand stabbed the victim to death in this case. It was physically impossible for the Applicant to accomplish this in his wounded state. The co-defendant or some other individual was the killer and trial counsel did nothing to present this defense on behalf of the Applicant."

Respondent made its return on or about February 16, 2017, and an evidentiary hearing into the matter was convened on May 21, 2018, before the Honorable Larry B. Hyman, Jr. Petitioner was present at the hearing and represented by Stephen D. Geoly, Esq. Johnny E. James Jr., of the South Carolina Attorney General's Office, represented Respondent. By written order dated July 17, 2018, and filed July 20, 2018, Judge Hyman denied and dismissed the application. Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on August 10, 2018, which was denied by order filed February 25, 2019.

Petitioner thereafter filed a notice of appeal on April 1, 2019. By and through counsel Geoly, Petitioner filed a petition for writ of certiorari and the appendix on July 10, 2019. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

STATEMENT OF THE FACTS

a. Petitioner and victim Joey Hucks violently confronted one another with scissors and a knife, respectively, after Petitioner choked Christie Hucks, his girlfriend and Joey's sister, such that Joey died and Petitioner was hospitalized.

A number of people gathered on May 21, 2006, at the apartment home of Petitioner and his girlfriend Christie Hucks for Petitioner's birthday party and good, clean fun. (Appx. 301-03; Appx. 385-86; Appx. 449-50; Appx. 622-23). After a day of celebrating with a cookout and fun by the pool, Petitioner, his brother Kendrick (Mo) Chestnut, and the teenage victim Joey Hucks, all went out around 10 p.m. to celebrate further at a club.[2] (Appx. 452-53; Appx. 517, ll. 16-25; Appx. 630-31). After the boys departed and the seven-to-eight-months pregnant Christie remained home with the kids, she thumbed through some of the birthday cards brought to Petitioner at the party. (Appx. 388, ll. 14-16; Appx. 454-55; Appx. 537, ll. 6-7; Appx. 606-07). Christie opened one and, after reading it, concluded Petitioner was cheating on her; she was distraught. (Appx. 454-55; Appx. 567-72).

Christie called her younger sister, Cynthia (Cindy) Evans, in the late night, early morning hours, and Cindy came back to the house a few minutes later alongside her boyfriend Richard (Moke)[3] Day to talk things over. (Appx. 298, ll. 15-25; Appx. 304-05; Appx. 386-88; Appx. 454-55; Appx. 509-10; Appx. 572-73). The women floated the prospect of calling Joey to ask him to drop Petitioner off at his father's house, or anywhere else that night. (Appx. 511-12). Shortly after Cindy and Richard arrived, Petitioner, Kendrick, and Joey returned to the home; Joey was in good spirits but Petitioner was frustrated over the loss of $400, which he suspected

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[2] On cross-examination, Christie described Petitioner as five feet, ten inches tall and about 150 pounds, and Joey as six feet tall and around 300 pounds. (Appx. 528, ll. 9-15). The autopsy measured Joey as six feet, two inches and about 308 pounts. (Appx. 786, ll. 14-17).

[3] It is worth emphasizing again that in reviewing the transcript "Mo" and "Moke" refer to Kendrick Chestnut and Richard Day, respectively.

Kendrick stole. (Appx. 307-08; Appx. 388-90; Appx. 456-58; Appx. 512, ll. 7-10; Appx. 574-75). Petitioner met with Christie in the kitchen for a private conversation which soon became heated, and Petitioner stormed back into the living room. (Appx. 309-10; Appx. 389-90; Appx. 458-62; Appx. 575-76).

Christie walked towards the living room where Petitioner saw her, returned to her, pushed her against the wall in the hallway leading into the living room, and choked her. (Appx. 310-11; Appx. 390-94; Appx. 462-64; Appx. 576-77). Cindy, Richard, and Joey immediately moved to intervene and de-escalate, but instead the confrontation worsened. (Appx. 311-12; Appx. 391-94; Appx. 411-12). Petitioner punched Cindy repeatedly and also struck Joey, who fell against the steps. (Appx. 312-13; Appx. 394-95; Appx. 406-08; Appx. 466-67). Joey bemoaned the pain in his head from falling against the steps as Petitioner ran into the kitchen; Richard attempted to follow, but Kendrick tried to stop him. (Appx. 313-14; Appx. 468, ll. 1-5).

Petitioner and Cindy fought in the kitchen. Cindy threw a shoe at Petitioner as he charged her. Petitioner bit Cindy's leg while she yanked his dreadlocks and beat him over the head with a vase or "a glass monkey." (Appx. 396-99; Appx. 408, ll. 11-20; Appx. 410-12). Richard pushed his way around Kendrick, where he found Petitioner biting Cindy. (Appx. 314, ll. 9-11; Appx. 468, ll. 10-17; Appx. 483-85). Richard forced Petitioner against the counter and ordered everybody to stop, and for a moment they did. Richard disengaged to follow and check on Cindy after she fled out of the front door under the subsequent loud exchange of warnings and threats among Petitioner, Kendrick, and Joey. (Appx. 314-15; Appx. 399-402; Appx. 412, ll. 8-14).

The soft, preppy, and usually pacifist Joey, "scared to death", and armed with "a little, teeny pocket knife," ordered Petitioner to leave his sisters alone, to which Petitioner replied "or

what?" (Appx. 468-69; Appx. 515-21; Appx. 533, ll. 9-15; Appx. 578-83; Appx. 623, ll. 11-15; Appx. 627-28; Appx. 630-34). Petitioner swung at Joey, who managed to cut Petitioner as he fell and hit the floor. (Appx. 469-71; Appx. 519-20; Appx. 529-30; Appx. 583-84). Christie vanished upstairs with two children who had been sleeping on the couches in the living room, and who were woken by the commotion. (Appx. 470-71; Appx. 523-24; Appx. 530-31; Appx. 623-24). Petitioner returned to the kitchen and opened a drawer next to the stove. (Appx. 413, ll. 1-9). While Christie was upstairs, Petitioner, Kendrick, and Joey were apparently alone in the kitchen.

Christie returned from securing the children and saw Petitioner, Kendrick, and Joey in the kitchen. Joey's hands were on the dishwasher and blood marked his horrified face. Kendrick stood by the refrigerator, unarmed and uninjured. Petitioner stood in a corner near the stove, armed with kitchen shears. All were still. (Appx. 471-75; Appx. 518-19; Appx. 544-45). Christie retrieved Joey and he silently followed her outside as his face continued to bleed, though she did not realize the scope of his injuries at the time. (Appx. 474-76; Appx. 485-86; Appx. 488-89; Appx. 545, ll. 15-19). Richard briefly saw and spoke to Joey at this time, but somehow became separated from him. (Appx. 315-16).

As Christie and Joey rounded the bushes along the front, beyond a gate, Kendrick caught up with them and punched Joey "dead in the center of his head and he just went down." (Appx. 476-77; Appx. 486, ll. 8-14; Appx. 545, ll. 19-23). Joey did not get up again. (Appx. 480, ll. 3-5). Christie fell with him, and there could only remember the white Nike Air Force One sneakers, "but they were kicking, and kicking, and kicking," and she begged them to stop hurting Joey. (Appx. 477, ll. 2-9; Appx. 486, ll. 14-18; Appx. 546-48). When Richard again turned to

Joey, he saw "[Petitioner] and [Kendrick] standing there kicking them and stabbing[4] him or whatever[;]" Richard attempted to get back to Joey when Kendrick threatened to kill them and motioned as though to draw a gun from his pocket. (Appx. 315-16; Appx. 318-20). Christie heard Kendrick indicate he was going to get a gun, followed by the sight of Richard's blue Suburban and Cindy out by the highway. (Appx. 477, ll. 10-23; Appx. 486-87). Christie, unharmed, told Cindy to get help, and began yelling the names of neighbors seeking help, but nobody answered. (Appx. 477-78; Appx. 487, ll. 2-5; Appx. 514, ll. 10-12). Christie stayed with Joey. (Appx. 551, ll. 5-10).

Because she lost her cell phone during the fight, Cindy and Richard had tried to get help by knocking on neighboring apartment doors to no avail, and then waived down a car passing by along the highway, who called 911. (Appx. 276-81; Appx. 315, ll. 3-14; Appx. 402-03; Appx. 467, ll. 1-2). Cindy returned to a blood-drenched Joey lying on the ground, and cradled his head as he gurgled blood. (Appx. 403, ll. 4-12; Appx. 479-80; Appx. 489-90). The Chestnuts fled and first responders arrived very shortly thereafter. (Appx. 403-04; Appx. 490, ll. 17-19).

As the Chestnuts departed, Petitioner called his daughter down from upstairs, and Cindy's son, afraid of being alone, went with her. (Appx. 624, ll. 4-23). Petitioner, Kendrick, and the two children loaded into Kendrick's car, while Kendrick angrily repeated profanities and declared "I'm going to go kill them[.]" (Appx. 625, ll. 14-24). Petitioner was mostly silent and focused on his injuries. (Appx. 626, ll. 1-11).

Joey was cut and stabbed ten times in the face, chest, arm, hands, thigh, and back, and died at the hospital. (Appx. 544, ll. 10-17; Appx. 765-70). Dr. Cnythia Schandl, who conducted

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[4] On the night of the incident, Richard denied personally seeing the stabbing. (Appx. 325-26).

the autopsy, concluded that "wound number five," a stab wound to the left chest which plunged four inches through the pericardial sack and into the heart, caused Joey's death. (Appx. 772-73). The autopsy additionally revealed an enlarged heart, liver, mild coronary artery disease, and a blood-alcohol level of 0.141. (Appx. 775, ll. 1-15; Appx. 777-78). Dr. Schandl could not clearly conclude whether the stab wounds were caused by the scissors or the knife provided alongside Joey's body. (Appx. 776-77).

b. Counsel argued strenuously for self-defense based on Petitioner's retreat into the kitchen during the fight, and did not object to the trial court's charge on mutual combat and withdrawal therefrom.

Prior to closing arguments, the parties and the trial court discussed the verdict form and the instructions to be given to the jury. (Appx. 889-900). Judge John explained his intention to charge the jury on self-defense and include "you have to be without fault, the issue about mutual combat, imminent danger," and so forth. (Appx. 898, ll. 12-13). Counsel renewed his objections to the trial court's declination to charge the jury on the Castle Doctrine and S.C. Code Ann. § 16-11-440. (Appx. 899-900).

Counsel presented the second closing argument, sandwiched between the State and Kendrick Chestnut. "It's not about who your family is, and who you are related to. It's not about what color you are, or how big you are, or how short you are. It's about the truth." (Appx. 955, ll. 7-10). After a few more preliminary remarks, Counsel zeroed in on the central point of his defense:

> One of the issues that the Solicitor raised to you is, well, you know, in this case there is no self-defense because Larry Chestnut didn't have a right to defend himself. How absurd can that possibly be? Can you think of anything more absurd than to say that a man does not have a right to defend himself when he is confronted with a three hundred and eight pound man who has a knife in his hand and is standing between him and the door.

(Appx. 955-56). Counsel argued that during the moment of peace Richard achieved, when all emerged from the kitchen, the first fight was over and Petitioner was attempting to peaceably leave with his child until Joey pulled his knife. (Appx. 956-57). Counsel narrowed attention to Petitioner's retreat to the kitchen:

> Christie says he got cut in that altercation with Joey and his knife. Then if Joey is finished and he's trying to leave, and Joey is finished and Joey is trying to leave, why does Joey end up in the kitchen with this knife/ Joey has to – after he cuts Ty, after he cuts Larry Chestnut, he then proceeds – because, remember, now, the scissors are allegedly in the kitchen. The scissors are allegedly in the kitchen, which means what, that Larry Chestnut is leaving, if he's backing up away from this knife to go try to find something to protect himself, and Joey pursues him. He follows him in the kitchen with this knife.
>
> Self-defense? How far you gotta run? He goes to the kitchen because he can't get out the door because he's standing there, the three hundred and eight pound man with a knife, between him and the door and his daughter. He can't go out the door. He's already cut.

(Appx. 957-58). Counsel condemned Christie and law enforcement for doing nothing to help Petitioner, despite his injuries, and described Christie as "aggressive" from her testimony. (Appx. 958-60). Counsel also challenged Christie's placement of the first altercation between her and Petitioner, emphasizing that in her original statement in 2006, she had placed the first assault by Petitioner in the kitchen and out of Cindy's sight. (Appx. 961, ll. 6-20). Counsel further challenged whether Petitioner had choked Christie at all, and noted she suffered no bruises. (Appx. 962, ll. 5-10).

Counsel returned to the moment of Petitioner's confrontation with Joey, again noted Petitioner was cut first, and then described Petitioner's retreat in the context of forthcoming jury instructions:

> Now, this is [Petitioner's] home, too. Whether you like the relationship that they had or don't like the relationship they had don't really matter. He was living there with her. That's the arrangement that they had. He was home, and when you're home, you don't have a duty to retreat.

> His Honor is going to tell you you don't have to retreat if you're going – if it's going to cause you to be in more danger, you don't have to retreat, but he did, even after he was cut, because if Joey wanted to get away after he cut him, all Joey had to do was go out the front door, but what did he do? He goes in the kitchen.

(Appx. 963-64). Counsel then set out the inconsistencies in the testimony of what happened outside, and contended that Richard's testimony that Petitioner stabbed Joey on the ground outside was false. (Appx. 964-66). Counsel then *again* returned to self-defense and Petitioner's withdrawal after being cut by Joey:

> Larry Chestnut was not at fault in bringing on this difficulty, and even if you believe, which I can't – even if you believe that he started whatever happened with Cindy and not – I'm sorry, Christie, and not Christie herself, that he started, it was over and done with when he started to leave, when he started to walk out to leave to go get his daughter, and Joey confronts him with a knife.
>
> Whatever had happened was over. It was done with, and he's leaving. Joey wasn't going to have it. He wasn't going to have it, but, you know, the most telling thing, and I think I said this to you earlier, the most telling thing, the most telling thing is, is that when Ty gets cut, he's got no weapon. Nobody disputes that. Nobody disputes that and nobody in this trial that I can remember ever says that he saw a weapon with Ty other than Christie, but be that as it may, after Ty got cut, he goes away from Joey because he's in the kitchen.
>
> He didn't – there's not one bit of testimony that he grabbed Joey by the arm and dragged Joey all the way into the kitchen while Joey is holding that knife so that he can fight with him some more. No, no, no, no, no. Joey comes in the kitchen. When his sister, Christie, comes back, he's still in the kitchen. When his sister, Christie, comes back, he's still in the kitchen with the knife, standing at one end – Larry is standing here, and then Mo is further down at the end of the other counter.

(Appx. 966-67). Counsel again noted the State's failure to test blood swabs from the kitchen, then moved on to address the imminent danger Petitioner faced, *once again* emphasizing Petitioner retreated from the imminent danger into the kitchen, and Joey followed him. (Appx. 968-69). After touching on the non-locking knife Joey used, and the indeterminate source of the various wounds Joey suffered, Counsel concluded his argument asserting Petitioner was "not guilty of anything except trying to stay alive, and he has right to do that." (Appx. 971, ll. 13-15).

Kendrick Chestnut's attorney, Russell Blake Long, Esq., enjoyed the last "last word" and echoed Counsel's version of events and his emphasis on Petitioner's retreat after getting stabbed, stating in no uncertain terms he agreed "with Mr. Wilson a hundred percent." (Appx. 973-75). While emphasizing that Kendrick "hadn't laid a hand on a soul[,]" Long argued Joey pursued Petitioner into the kitchen after stabbing him and rather than end the fight and seek help for Petitioner, he held onto the knife and kept fighting. (Appx. 975-76). Long noted that Joey still had the knife on his person when he went outside, and that the knife was recovered near his body. (Appx. 976, ll. 15-20).

The trial court charged the jury on murder and voluntary manslaughter.[5] (Appx. 992-95). The trial court instructed the jury that both defendants raised self-defense, and explained it was "a complete defense, and if established, you must find the defendant not guilty. The State has the burden of disproving self-defense beyond a reasonable doubt." (Appx. 997, ll. 17-24). The trial court folded a charge on mutual combat into its instructions on the first element of self-defense:

> The following elements are required to establish self-defense. One, without fault. The defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.
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> Mutual combat. If the defendant voluntarily participated in mutual combat for the purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, *if before the killing is committed the defendant*

[5] The trial court erroneously charged the jury regarding the inference of malice from the use of a deadly weapon, and upon prompting from the State, who enjoyed the first opportunity to state its objections to the jury charge, the Court cured erroneous charge. (Appx. 993, ll. 8-13; Appx. 1007-10). In fact, the trial court erred in the cure to Petitioner's substantial benefit, instructing the jury that "[m]alice cannot be inferred by the use of a deadly weapon." (Appx. 1010, ll. 5-6). The trial court declined to reinstruct the jury on malice absent a specific request from the jury to do so. (Appx. 1010, ll. 14-16).

withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault in bringing on the difficulty.

For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

(Appx. 998, ll. 4-24) (emphasis added). The trial court instructed the jury that "[i]f the defendant was on his own premises, the defendant had no duty to retreat before acting in self-defense. The defendant had no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase." (Appx. 1000, ll. 12-16).

c. Counsel explained at the PCR evidentiary hearing that the withdrawal language of the mutual combat charge was beneficial to his client, and that it emphasized the key facts he argued in Petitioner's defense.

Counsel testified at the evidentiary hearing that he knew mutual combat was going to be charged. (Appx. 39, ll. 8-11). Counsel explained his belief that mutual combat was an appropriate charge given the facts of the case, as both persons were willing to engage in combat and ultimately both persons were armed. (Appx. 40-41). Counsel then explained the interplay between self-defense, mutual combat, and withdrawal:

> If in the situation Mr. Chestnut abandons his mutual combat, let's say that he decides he doesn't want to fight Joey anymore and he walks away from the fight. And then Joey comes and follows him in the kitchen and then he arms himself with the scissors in order to protect himself, now you've got self-defense. Totally and separate away from the first issue of whether or not it was mutual combat because – and because he left the fight, he goes into a separate room to get away from the fight and while he's in that separate room, he is followed by Mr. Chestnut – by Mr. Hucks who then – who is still armed with a knife, supposedly, and he then picks up the shears and defends himself against Mr. Hucks. So, in that case, yes.

(Appx. 41, ll. 8-22). Counsel testified his belief that an instantaneous fight could justify an instruction on mutual combat "[i]f both parties, if both parties are willing to fight and if both parties are equally yoked in terms of the fight[.]" (Appx. 49, ll. 9-17). Counsel and PCR

counsel, alongside an actively engaged PCR court, argued over the propriety of mutual combat for much of the direct examination.

On cross-examination, Counsel explained his overarching strategy at trial was to establish self-defense. (Appx. 59-60). Counsel acknowledged the mutual combat charge given at trial, and agreed that the portion of the charge regarding withdrawal comported with the defense strategy he employed at trial. (Appx. 63-64). The PCR court interceded and observed "that's not a typical mutual combat charge[,]" to which Counsel noted it was not the full charge. (Appx. 64, ll. 4-6). After a detour to discuss the charge given and the charge at issue in State v. Taylor,[6] Counsel acknowledged his theory of the case was that Petitioner withdrew from the engagement with Joey, that Joey pursued Petitioner into the kitchen, and only then did Petitioner arm himself and engage in combat; thus, Counsel wanted to emphasize the withdrawal and the instruction given by the trial court emphasized withdrawal. (Appx. 66-67). Counsel also explained his client did not testify in order to avoid prompting Kendrick to testify, as Long warned he would put his client on the stand if they lost the final argument. (Appx. 68-72).

On redirect examination, Counsel further noted that the last thing he wanted to do was draw unnecessary attention to the mutual combat portion of the charge, but rather emphasize the validity of the self-defense, and that he felt the charge was appropriate. (Appx. 74-75).

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[6] 356 S.C. 227, 589 S.E.2d 1 (2003).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL ARTICULATED HIS STRATEGIC REASONING THAT THE LANGUAGE IN THE "MUTUAL COMBAT" CHARGE EMPHASIZING WITHDRAWAL WAS BENEFICIAL TO HIS CLIENT, BECAUSE PETITIONER'S SELF-DEFENSE STRATEGY WAS FATALLY DEFEATED BY THE FACTS IN THE RECORD REGARDLESS OF THE "MUTUAL COMBAT" CHARGE, AND BECAUSE THE JURY COULD NOT HAVE RELIED UPON THE "MUTUAL COMBAT" CHARGE IN CONVICTING PETITIONER OF VOLUNTARY MANSLAUGHTER

The PCR Court properly found Petitioner could not establish he was prejudiced by the trial court's charge on mutual combat where, given the particular facts, circumstances, and strategy employed in this case, Counsel validly reasoned that the strong "withdrawal" language in the charge was more beneficial than the charge was harmful, and where the jury could not have relied upon the mutual combat charge in reaching a verdict for voluntary manslaughter, but could have only reasonably concluded Petitioner was guilty of murder had he met all of the requirements of mutual combat.

"The law to be charged to the jury is to be determined by the evidence at trial." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002).

To establish self-defense in South Carolina, four elements must be present:

(1) The defendant was without fault in bringing on the difficulty;

(2) The defendant actually believed he was in imminent danger of losing his life or sustaining serious bodily injury;

(3) A reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and

(4) The defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did.

State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 27 (Ct. App. 2006). "If the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict and communicates that decision to his adversary." Id., 370 S.C. at 161, 634 S.E.2d at 27 (citing State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)).

In order for the record to support a charge on the doctrine of mutual combat, there must be evidence to show "a mutual intent and willingness to fight." Jackson v. State, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) (citing State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)). "Mutual intent is manifested by the acts and conduct of the parties and circumstances attending and leading up to the combat." Id.; but see State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003) (one month prior to Jackson, adopting requirement from other jurisdictions that an "antecedent agreement to fight" must exist to validly instruct a jury on mutual combat). "Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault.'" Jackson, 355 S.C. at 571, 586 S.E.2d at 563.

a. Counsel's self-defense strategy centered and relied upon the jury concluding that Petitioner withdrew from the conflict when he retreated to the kitchen, such that he was thereafter entitled to defend himself, so Counsel's reasoning that the "withdrawal" language in the mutual combat charge was ultimately beneficial was a reasonable and valid trial strategy.

"When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 494, 456, 710 S.E.2d 60, 64 (2011) (citing Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)) (emphasis omitted). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the

time they were made." Id. (quoting Strickland, 466 U.S. at 689). Accordingly, the Court "must be wary of second-guessing trial counsel's tactics." Id., 392 S.C. at 457, 710 S.E.2d at 64.

As reflected in the trial transcript and set forth at the evidentiary hearing, Counsel's theory of the case was that Petitioner acted in self-defense. The facts established at trial firmly eliminated the possibility of self-defense where the conflict was initiated by Petitioner's initial confrontation with and choking of Christie. Thus, in order to sustain a self-defense strategy, Counsel and Petitioner proceeded by arguing that the initial fight was concluded and Petitioner re-established his right to self-defense when he retreated into the kitchen. In that strategic context, it was absolutely vital to Petitioner and Counsel to emphasize his rights upon withdrawal as many times as possible.

Counsel certainly did so in the course of his closing argument, repeatedly returning to facts to show there was no dispute that Joey cut Petitioner, and then Petitioner retreated into the kitchen, where he ultimately armed himself with kitchen shears. By permitting the mutual combat language, Counsel ensured the jury would hear language establishing that Petitioner could re-establish his right to self-defense by withdrawing from the combat. Counsel was reasonable in prioritizing the benefit of the withdrawal language to his client over the potential harm the mutual combat charge could bring.

Petitioner condemns the lower court's denial of relief as reliant upon "tortured logic" (Petition for Writ of Ceritorari at 12), but relies on his own erroneous read of Taylor in arguments below and now before this Court. Petitioner argues for *per se* (or "*ipso facto*") prejudice from decision to not object to a mutual combat charge. (Petition for Writ of Certiorari at 9-10). There is no South Carolina authority to support Petitioner's argument. The portion of Taylor insisted upon by Petitioner did not abrogate Strickland, as his interpretation would

effectively provide, but rather was merely reviewing the findings of the Georgia Court of Appeals in cases which pre-date Strickland. Taylor, 356 S.C. at 233, 589 S.E.2d at 4 (discussing Grant v. State, 170 S.E.2d 55, 56 (Ga. Ct. App. 1969)). Attorneys still have the right to discretion in determining if they wish to enter colorable objections to jury charges given, and there is no jury charge for which an attorney can be *per se* deficient for keeping instead of tossing.

Regarding both the reasonableness of Counsel's strategic decision and prejudice under Strickland, it is difficult to discern how the mutual combat charge could have actually harmed Petitioner given the particular facts and circumstances of this case. Though mutual combat can defeat self-defense, both "mutual combat" *and* the State's argument that Petitioner brought about the conflict so as to foreclose self-defense would have, if believed by the jury, been defeated by the same facts and argument to establish Petitioner withdrew from the conflict with Joey. Thus, the dispositive question for the jury in determining Petitioner's guilt was undisturbed by the inclusion of mutual combat instructions: did Petitioner withdraw from the fight or did he only run to the kitchen to arm himself and continue it? The lower court certainly did not "ignore the law it had just cited" (Petition for Writ of Certiorari at 11) in concluding that Counsel's decision was reasonable and that there was no prejudice from the giving of the charge.

Because Counsel articulated valid strategic reasoning, and because even if invalid there could be no prejudice to Petitioner from the giving of the mutual combat charge, the petition for writ of certiorari should be denied.

b. There is no evidence in the record to show Petitioner communicated his decision to withdraw from combat to anybody present, such that his claim of self-defense would have failed with or without the mutual combat charge.

As noted above, "[i]f the defendant provokes or initiates the assault, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict

and communicates that decision to his adversary." Santiago, 370 S.C. at 161, 634 S.E.2d at 27. The same right to self-defense upon withdrawal and communication thereof applies whether the confrontation is purely the result of the defendant's actions of the product of an antecedent agreement to fight.

In the present case, evidence was very strong to show Petitioner initiated the conflict when he came home and put his hands on Christie—multiple witnesses testified to exactly that, and there is no other evidence to establish how the fight initiated. Though Counsel endeavored to discredit the eyewitnesses who established as much, his only realistic option of defense was to carve out a withdrawal from one of the lulls in the fight. Unfortunately for Counsel, there was no evidence to show that any withdrawal from the conflict was ever articulated by Petitioner to anybody else present, let alone Joey. To the contrary, Cindy testified the only things she heard were Kendrick declaring he'd retrieve a gun to kill somebody, and Joey demanding the Chestnuts leave his sisters alone. Furthermore, there was some testimony that the Chestnuts followed Joey outside and there stabbed him, such that the jury could have inferred the fatal blow was struck after Joey himself withdrew and left the building.

Absent some evidence to show Petitioner articulated his intent to withdraw, he could not establish withdrawal and the renewed right to self-defense under the law, regardless of whether mutual combat was charged. Even if Counsel was deficient in failing to object to the mutual combat charge, Petitioner cannot show prejudice because he had no chance of prevailing upon self-defense even if mutual combat was not charged. Petitioner's only argument[7] against this

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[7] Petitioner implicates another argument throughout the course of the petition for writ of certiorari through the repeated emphasis that Petitioner is black whereas Joey was white. See, e.g. Petition for Writ of Certiorari at 2 (". . . Larry Chestnut, a black man, was involved in an incident at his residence where he was attacked by a white man, Joey Hucks, . . .") and at 14

reasoning is the same erroneous reading of Taylor as addressed in the prior section. As such, the petition for writ of certiorari should be denied.

c. Voluntary manslaughter and mutual combat are mutually exclusive legal concepts, as the antecedent agreement to fight required in a mutual combat charge is tantamount to malice, such that the jury could have only reached its conclusion without reliance upon the doctrine of mutual combat.

"Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005). "Fighting is sufficient legal provocation to warrant giving a voluntary manslaughter charge." State v. Grubbs, 353 S.C. 374, 381-82, 577 S.E.2d 493, 497 (Ct. App. 2003) (citing State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983)).

Given voluntary manslaughter is only appropriate given "the sudden heat of passion," it cannot be reconciled with the requirement of an "antecedent agreement to fight" for a finding that the defendant and victim engaged in mutual combat. Contra Taylor, 356 S.C. at 232, 589 S.E.2d at 3-4 (citing State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906)). As noted in the Order of Dismissal, "[t]he antecedent agreement to mutual combat with deadly weapons is tantamount to malice aforethought, not the sudden heat of passion." (Appx. 1052, n. 4); see, e.g. Ward v. Commonwealth, 116 S.W. 786, 788 (Ky. Ct. App. 1909) ("A duel has none of the elements of sudden heat and passion."); State v. Romero, 801 P.2d 681, 683 (N.M. Ct. App. 1990) (citing Ward); Baker v. Supreme Lodge K.P., 60 So. 333, 334 (Miss. 1913) ("A duel, as the term is ordinarily understood, and as used in this policy, 'is the fighting together of two persons by previous concert with deadly weapons to settle some antecedent quarrel,' and has none of the elements of sudden heat and passion."). Put another way, anybody who has the presence of mind

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("Here a black man was attacked in his own home by a knife yielding [sic] 308lb white man."). There is *absolutely no evidence in the record* to establish any racial motivations to the fight between Petitioner and Joey.

communicate with another person so as to establish the mutual desire to fight, and condition violent confrontation upon that mutual intent (explicitly or implicitly), remains restrained and gripped by some reason, however misguided, and cannot be said to have lost his or her good sense to "the sudden heat of passion" as is required for a conviction for voluntary manslaughter. Any person who so duels does so with cold malice and absolute disregard for life, and is guilty of murder.

Here, the jury did not convict Petitioner of murder, but of the lesser-included offense of voluntary manslaughter. The jury could have not found the "mutual intent and willingness to fight" as required to establish mutual combat and still find (1) Petitioner lacked malice or (2) Petitioner was acting in the sudden heat of passion. The jury must have rejected self-defense on some other ground—namely that the combat was never mutual but entirely instigated by Petitioner choking Christie. Thus, the mutual combat charge was of no consequence, Petitioner cannot establish prejudice, and the petition for writ of certiorari should be denied.

d. Petitioner's arguments regarding the erroneous Belcher charge are irrelevant and unpreserved.

Despite raising only a single issue regarding the mutual combat charge, Petitioner repeatedly takes issue with the trial court's erroneous charge regarding the inference of malice from the use of a deadly weapon, which was then-prohibited by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and now by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR; see also Rule 243(e)(1), SCACR (requiring questions presented). Though the issue was raised to and ruled upon by the PCR court, Petitioner does not identify Counsel's lack of objection to the bad Belcher charge as an issue on appeal, so the issue is not preserved and it is not relevant to the issue raised.

In any event, the State caught the error and advised the Court regarding it, prompting an over-correction by the trial court to Petitioner's benefit, which potentially contributed to his acquittal for murder.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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6 Nov., 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2019-000533

LARRY T. CHESTNUT

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by courier two (2) copies addressed to:

Stephen D. Geoly
Geoly Law Firm
222 Pheonix Street
Greenwood, South Carolina 29646

This 6th day of November, 2019

EVA COOK
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
NOV 06 2019
S.C. SUPREME COURT

November 6, 2019

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Larry T. Chestnut, #352116 v. State of South Carolina**
Appellate Case No. 2019-000533
Lower Court Case No. 2016-CP-26-0652

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/ec
Enclosures

cc: Stephen D. Geoly, Esquire