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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

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WILLIE M. WILLIAMS,

RESPONDENT/PETITIONER

V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

APPELLATE CASE NO 2020-000796

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the PCR judge correctly find that the trial lawyers were ineffective for failing to object to the jury instruction on mutual combat when there was no evidence of mutual combat?

2. Did the PCR judge correctly find that Williams was prejudiced by the trial lawyers' deficient performance in failing to object to the mutual combat jury instruction because the unwarranted instruction negated Williams' self-defense claim as well as his accident claim?

3. Did the PCR judge correctly grant relief on all four charges of conviction – murder, attempted murder, possession of a weapon during the commission of a violent crime, and unlawful conduct toward a child - when all four charges were affected by the unwarranted jury instruction on mutual combat?

## PETITIONER-RESPONDENT'S QUESTIONS PRESENTED

1. Did the PCR court err in finding Williams' defense attorneys were constitutionally ineffective for not objecting to the trial court's jury instruction on mutual combat when the PCR court's finding that Williams suffered prejudice was erroneously based on the assumption that Williams was entitled to a self-defense instruction and when the PCR court's findings as to this issue contradict its other findings?

2. Did the PCR court err in not restricting the grant of post-conviction relief to the murder conviction only when that is the offense tried that could have been affected by the mutual combat instruction and, in the alternative, from refusing to clarify to which convictions the grant of relief was meant to apply?

## STATEMENT OF THE CASE

In April of 2013, the Greenville County Grand jury indicted Respondent-Petitioner, Willie M. Williams, for murder, possession of a weapon during the commission of a violent crime, attempted murder and unlawful conduct toward a child, indictments #2013-GS-23-238, 239, 240. (App. pp. 680-685). On May 13, 2013, Williams proceeded to jury trial before the Honorable Deadra L. Jefferson. Richard H. Warder and W. Townes Jones, IV represented Williams at trial. Judith M. Munson prosecuted the case. The jury returned verdicts of guilty on each charge. Judge Jefferson sentenced Williams to life in prison for murder, five (5) years for the weapon charge, thirty (30) years concurrent for attempted murder, and ten (10) years concurrent for unlawful conduct toward a child. A timely notice of intent to appeal was filed and the direct appeal perfected. One of the issues raised on direct appeal was the trial judge's refusal to instruct the jury on the law of involuntary manslaughter. (App. p. 693). The South Carolina Court of Appeals affirmed the convictions and sentences, finding the issue with regard to involuntary manslaughter was not preserved for appellate review. State v. Williams, Op. No. 2016-UP-215 (S.C.Ct.App. filed May 18, 2016). (App. pp. 767-768).

On December 28, 2016, Williams filed an application for post-conviction relief [PCR]. (App. pp. 769-785). The State filed a return and partial motion to dismiss and motion for a more definite statement on September 13, 2017. (App. pp. 786-793). On May 9, 2019, Williams filed an amended application that was assigned a 2019 case number. (App. pp. 794-802). On July 30, 2019, the State moved to merge the two cases and the motion was granted by the Honorable Letitia H. Verdin on September 3, 2019. (App. pp. 803-807). On December 18, 2019, an evidentiary hearing was held before the Honorable Robin B. Stilwell. C. Rauch Wise represented Williams at the PCR hearing. Taylor Z. Smith represented the State. In a written

order signed March 31, 2020, Judge Stilwell granted relief on the one issue involving the trial lawyers failing to object to the trial judge's instruction on mutual combat. (App. pp. 897-921). The State filed a motion to alter or amend on April 17, 2020. (App. pp. 922-931). Judge Stilwell denied the motion on May 7, 2020. (App. p. 932). The State filed a timely notice of intent to appeal on May 21, 2020. Williams filed a timely notice of intent to appeal on May 22, 2020. The State filed a petition for writ of certiorari on November 18, 2020. Williams filed a petition for writ of certiorari on January 22, 2021. This return to the State's petition follows.

## ARGUMENTS

1. **The PCR judge correctly found that the trial lawyers were ineffective for failing to object to the jury instruction on mutual combat when there was no evidence of mutual combat.**

The jury found Respondent-Petitioner, Willie M. Williams, guilty of the murder of his wife, Natasha Kerns, and the attempted murder of her friend, Anthony Wilson in 2010. At trial, Williams testified that he acted in self-defense when Wilson, armed with a gun, approached him outside of the house where Kerns was living. The two men struggled over the gun and it accidentally discharged, killing Kerns.

In 2007, Williams and Kerns became romantically involved and they had a daughter that same year. (App. p. 484, line 6 – p. 485, lines 1-23). The couple married in 2009, when Williams was home from Iraq where he was working. (App. p. 492, lines 12-15). In February of 2010, Williams resigned from his job in Iraq because of the stress of the working environment and he moved in with Kerns and their daughter and her son. (App. p. 494, line 1 – p. 495, lines 1-13). At the time of the shooting in July of 2010, however, Williams and Kerns had separated. (App. p. 510, lines 2-4). Kerns was living with the children in the home she had shared with Williams in Greenville County. Williams was living in his home in Gray Court.

On the night of the shooting Williams went to some clubs in Greenville. (App. pp. 520-525). Williams testified that he left the last club between 4:15 and 4:30 AM. (App. p. 526, lines 6-8). Williams was supposed to pick up his daughter in a few hours. (App. p. 524, lines 2-6). Williams testified that he called Kerns' cell phone and the house phone but she did not answer. (App. p. 526, lines 10-14). Williams testified at trial, "So, instead of driving 50 miles back to Gray Court, I had my key to the place. So I said I was going to ride over there." (App. p. 526, lines 15-17).

When Williams got to Kerns' house he saw a parked unfamiliar SUV with North Carolina plates. (App. p. 526, lines 21 – 25). He did not see Kerns' car. (App. p. 526, lines 21 – 25). He parked behind the SUV and went to the front door. (App. p. 527, line 25 – p. 530, lines 1- 2). The storm door was locked and he was unable to use his key. (App. p. 529, lines 13-17). He knocked on the door for three to five minutes. (App. p. 529, lines 20-21). As Williams turned to leave, he heard a noise and then saw a man approaching him with a weapon. (App. p.530, lines 12-14). Williams testified that the man pointed a gun at Williams, Williams reacted in self-defense, the two men struggled over the gun and the gun went off. (App. p. 535, line 21 – p. 536, lines 1-25). As they continued to wrestle over the gun, both men fell through the front window and the struggle continued inside the house. (App. p. 537, lines 1-25). Williams described another struggle over the gun and said, "And then that's when the gun went off, pow, pow, pow." (App. p. 539, lines 4 – 14). The man he was struggling with went to the floor and did not move. (App. p. 539, lines 15 – 20). Williams then saw Kerns on the floor and "blood everywhere." (App. p. 540, lines 6 – 13). Williams rushed over to Kerns and checked for a pulse but found none. (App. p. 540, lines 6-10). Williams began crying, panicked and left the scene. (App. p. 540, lines 6 – 25).

The man who Williams struggled with, Anthony Wilson, testified at trial. Wilson testified that on the night of the shooting he was asleep in bed with Kerns and her daughter when he was awakened by dogs barking and some banging. (App. p. 288, line 12 – p. 289, 290, lines 1-15). According to Wilson, when he awakened Kerns she immediately hopped up, grabbed her weapon and ran toward the front. (App. p. 290, lines 11 – 19). Wilson testified that he took the daughter to the son's room. (App. p. 291, lines 1 – 3). Wilson testified he heard Kerns talking and heard her "say something about get away from my property, get away from my house." (App. p. 291, lines 18 – 25). Wilson then testified that he saw the "silhouette of a human being come down the hallway"

that he knew was not Kerns. (App. p. 292, lines 11 – 22). According to Wilson he heard gunshots and believed the first shot hit him and knocked him unconscious. (App. p. 295, lines 2 – 11). The EMT who testified at trial said that Wilson "had a superficial laceration noted to the right side of his head." (App. p. 174, lines 15 – 20). Wilson testified that he never left the house but regained consciousness and checked on Kerns when the police arrived. (App. p. 296, lines 6 – p. 297, lines 1-15). The parties stipulated, however, that Wilson's bloody handprint was found on the trunk of a car parked outside behind Kerns' house. (State's Exhibit #59). The trial judge instructed the jury on the law of self-defense and accident. (App. pp. 644, line 1 - 648, lines 1-8).

In explaining the elements of self-defense to the jury the trial judge explained that the defendant must be without fault in bringing on the difficulty. (App. p. 644, lines 14-16). The trial judge then instructed the jury:

> If the Defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self-defense. This is true if even during the combat the Defendant feared death or serious bodily injury. However, if before the killing is committed, the Defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes the 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.

(App. p. 644, line 24 – p. 645, lines 1-13). There was no objection to the instruction. (App. p. 658, lines 18-21).

In the amended application for post-conviction relief Williams alleged that, "Trial counsel was ineffective in failing to object to the jury charge as to mutual combat when no evidence was presented to support such a charge." (App. p. 796). In the amended application Williams explained, "The trial judge instructed the jury as part of her self-defense instruction, the law of

mutual combat. Tr. at 644, l 24 to 645, l4. The South Carolina Supreme Court in *State v. Taylor* 356 S.C. 227, 589 S.E.2d 1 (2003) held such a charge should not be given in connection with self-defense, especially when no facts support the allegation." (App. p. 797). During the PCR hearing both trial counsel admitted that they were not familiar with the Taylor case. (App. p. 857, line 15 – p. 858, lines 1-14; p. 877, lines 5-16).

In the portion of the order granting relief the PCR judge wrote, "Applicant's attorneys were constitutionally ineffective for failing to object to the jury instruction on mutual combat when no evidence was presented at trial that would have supported such an instruction." (App. p. 912). The PCR judge additionally wrote:

> The law of South Carolina is clear that mutual combat should generally not be charged in connection with self -defense. *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003). In *Taylor* the Court found that:
>
> > Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the petitioner's ability to claim self-defense, and prejudiced him by transferring the State's burden to disprove self-defense onto the Petitioner, forcing him to prove self-defense. *Id.* at 235.
>
> The same is true in the case at bar. The mutual combat charge had the impact of negating the self-defense charge, and Mr. Williams was in fact prejudiced thereby.
>
> Further, both trial counsel testified at the Post Conviction Relief hearing that they were not familiar with the holding in *Taylor*. This case was tried on May 13-14, 2013. *Taylor* had been the law of our state for over 10 years. A reasonable criminal defense attorney should have been knowledgeable concerning the application of *Taylor*. In additional, even if trial counsel were not familiar with *Taylor*, the evidence in this case does not support mutual combat. Giving due deference to the credibility issues, the evidence does not indicate that Mr. Wilson and Mr. Williams intended to engage in mutual combat. The evidence did not support mutual combat, and trial counsel should have objected to such a charge. Under this charge, the jury was unable to fairly consider the Defendant's claim of self-defense.
>
> The Applicant has, therefore, met his burden of proof with respect to the Mutual Combat charge.

(App. pp. 912-913). The PCR judge correctly found that the trial lawyers were ineffective in failing to object to the jury instruction on mutual combat when there was no evidence presented to support such a charge.

In challenging the grant of relief by the PCR judge the State as Petitioner-Respondent argues that Williams was not entitled to an instruction on the law of self-defense as to the murder of Kerns because "transferred self-defense," as mentioned in State v. Porter , 269 S.C. 618, 239 S.E.2d 641 (1977), is not recognized as a legal theory under South Carolina law. (Petition for Writ of Certiorari of the State as Petitioner-Respondent, pp. 10-12). First, as addressed below with regard to the second Strickland prong, prejudice, Williams did not rely on self-defense alone but a combination of self-defense and accident. Williams testified that he acted in self-defense when Wilson approached him with a gun, they struggled over the gun and the gun accidently discharged, presumably fatally striking Kerns. The judge properly charged the jury with the law of self-defense as well as accident. The unwarranted mutual combat charge negated both the self-defense claim as well as the accident claim. The finding of deficient performance was not based on a theory of "transferred self-defense" but rather a combination of self-defense and accident under the facts of this case. Second, although the deficient performance found was not based on "transferred self-defense," the PCR judge's refusal to find trial counsel ineffective for a failing to request a jury instruction on transferred intent as it relates to self-defense is raised in Williams' petition for writ of certiorari.

The standard of review in PCR cases depends on the specific issue before the court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The appellate court will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. the appellate court reviews questions of law de novo, with no deference to trial courts. Id. at 180-

81, 810 S.E.2d at 839. A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. There is evidence in the record to support the PCR judge's finding that, under the first prong of the Strickland test, the trial lawyers' performance in failing to object to the mutual combat jury instruction fell below an objective standard of reasonableness.

In State v. Taylor, 356 S.C. 227, 231–32, 589 S.E.2d 1, 3 (2003), the South Carolina Supreme Court wrote:

> 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 case law does establish that there must be "mutual intent and willingness to fight" to constitute mutual combat. 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 the circumstances attending and leading up to the combat." Id. Whether or not mutual combat exists is significant because "the plea of self-defense is not available to one who kills another in mutual combat." Id. (citing State v. Jones, 113 S.C. 134, 101 S.E. 647

> (1919)). In order to claim self-defense, the defendant "must be without fault in bringing on the difficulty." State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Because mutual combat requires mutual intent and willingness to fight, if a defendant is found to have been involved in mutual combat, the "no fault" element of self-defense cannot be established.

In State v. Bowers, 428 S.C. 21, 32, 832 S.E.2d 623, 629 (Ct. App. 2019), cert. granted (May 22, 2020), the South Carolina Court of Appeals, discussing mutual combat wrote:

> The antiquated doctrine was limited in its application by our supreme court in State v. Taylor. In Taylor, our supreme court required that the fight arise out of a pre-existing dispute and that the combatants be armed with deadly weapons. 356 S.C. at 233–34, 589 S.E.2d at 4. Additionally, each party must know the other is armed with a deadly weapon. Id. at 234, 589 S.E.2d at 5. 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. 40 C.J.S. *Homicide* § 206; *accord* Taylor, 356 S.C. at 233, 589 S.E.2d at 4.

In the present case there was no evidence presented of a mutual intent and willingness to fight. There was no evidence presented that Williams and Wilson had a pre-existing dispute or prior agreement to fight. There was no evidence presented that both Williams and Wilson were armed. Williams testified that Wilson approached him outside of the home, armed with a gun, Williams acted in self-defense, struggled with Wilson over the gun when it accidently discharged. Wilson, testified that Williams was inside the house, armed with a gun, when he started shooting at him. (App. pp. 294-295). As the courts found in Taylor and Bowers, the PCR judge correctly found there was no evidence presented of mutual combat. As a result of this factual finding, there is evidence in the record to support the PCR judge's finding that trial counsel was ineffective in failing to object to the unwarranted mutual combat jury instruction. This Court should defer to that factual finding, find resulting prejudice and deny the petition for writ of certiorari.

**2. The PCR judge correctly found that Williams was prejudiced by the trial lawyers' deficient performance in failing to object to the mutual combat jury instruction because the unwarranted instruction negated Williams' self-defense claim as well as his accident claim.**

In the portion of the order granting relief the PCR judge wrote:

The PCR judge additionally wrote:

> The law of South Carolina is clear that mutual combat should generally not be charged in connection with self -defense. *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003). In *Taylor* the Court found that:
>
> > Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the petitioner's ability to claim self-defense, and prejudiced him by transferring the State's burden to disprove self-defense onto the Petitioner, forcing him to prove self-defense. *Id.* at 235.
>
> The same is true in the case at bar. The mutual combat charge had the impact of negating the self-defense charge, and Mr. Williams was in fact prejudiced thereby.
>
> Further, both trial counsel testified at the Post Conviction Relief hearing that they were not familiar with the holding in *Taylor*. This case was tried on May 13-14, 2013. *Taylor* had been the law of our state for over 10 years. A reasonable criminal defense attorney should have been knowledgeable concerning the application of *Taylor*. In additional, even if trial counsel were not familiar with *Taylor*, the evidence in this case does not support mutual combat. Giving due deference to the credibility issues, the evidence does not indicate that Mr. Wilson and Mr. Williams intended to engage in mutual combat. The evidence did not support mutual combat, and trial counsel should have objected to such a charge. Under this charge, the jury was unable to fairly consider the Defendant's claim of self-defense.
>
> The Applicant has, therefore, met his burden of proof with respect to the Mutual Combat charge.

(App. pp. 912-913). The PCR judge correctly found that the trial lawyers were ineffective in failing to object to the jury instruction on mutual combat when there was no evidence presented to

support such a charge **and** the PCR judge correctly found that Williams was prejudiced by the deficient performance.

The State as Petitioner-Respondent argues that Williams failed to show prejudice because his main defense at trial was accident and not self-defense. (Petition for Writ of Certiorari of the State as Petitioner-Respondent, pp. 13-15). At trial Williams raised both self-defense and the defense of accident. The judge properly instructed the jury on the law of self-defense and the defense of accident because there was evidence of both. (App. pp. 644-648). "While it is true accident and self-defense 'are often mutually exclusive,' a trial court should charge both when there is evidence in the record to support both charges. See Williams, 400 S.C. at 317, 733 S.E.2d at 610." State v. White, 425 S.C. 304, 312, 821 S.E.2d 523, 528 (Ct. App. 2018). In instructing on the defense of accident the judge told the jury:

> The Defendant has, also, raised the defense of accident. An act may be excluded on the ground of accident if it was shown that the act was unintentional, that the defendant was acting lawfully and that reasonable care was used by the Defendant in the handling of the weapon. For example, if a person is lawfully armed in self-defense and the gun accidentally discharges, the defense of accident would apply. The burden is on the State to prove beyond a reasonable doubt that the act was not an accident, but was caused by the negligence or carelessness on the part of the Defendant in the handling of a dangerous instrumentality.

In order to claim self-defense one must be without fault in bringing on the difficulty. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). As the courts found in Taylor and Bowers, the PCR judge correctly found that the unwarranted mutual combat charge negated the self-defense claim as to the no fault requirement. The charge acted as a limitation on Williams' ability to claim self-defense and prejudiced him by transferring the State's burden to disprove self-defense onto Williams. The present case has the added element of an accident defense. An accident defense requires the element of acting lawfully. The unwarranted mutual combat charge

negated the accident defense as to the acting lawfully element because the self-defense claim was negated. The unwarranted mutual combat charge acted as a limitation on Williams' ability to claim an accident defense by transferring the State's burden to disprove accident onto Williams. With the self-defense claim negated by the unwarranted mutual combat charge, the accident defense was also negated and the jury could not find that the shootings were accidental. As with the proper self-defense charge, the proper accident charge does not cure the prejudice. Williams met his burden in showing prejudice resulting from the failure to object to the unwarranted mutual combat instruction.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. There is evidence in the record to support the PCR judge's finding that, under the second prong of the Strickland test, the trial lawyers' performance in failing to object to the

mutual combat jury instruction resulted in prejudice. The unwarranted charge negated both the self-defense claim and the defense of accident. There is a reasonable probability that, but for trial counsel's failure to object to the unwarranted mutual combat charge, the result of the proceeding would have been different. Williams demonstrated both deficient performance and prejudice. This Court should deny the petition for writ of certiorari.

**3. The PCR judge correctly granted relief on all four charges of conviction – murder, attempted murder, possession of a weapon during the commission of a violent crime, and unlawful conduct toward a child - when all four charges were affected by the unwarranted jury instruction on mutual combat.**

The order granting relief in part and denying relief in part contains seven different allegations of ineffective assistance of counsel. (App. p. 900). The PCR judge granted relief on the one issue involving the failure to object to the unwarranted mutual combat charge. (App. pp. 912-913). In the conclusion to the order the PCR judge wrote, "Based on all the foregoing, this Court finds Applicant has established constitutional violations or deprivations that require this Court to grant his application for post-conviction relief. Therefore, this application is granted." (App. p. 921). The order then states that, "The conviction of Willie M. Williams is overturned and a new trial granted . . ." (App. p. 921). The State filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. (App. pp. 922-929). The State argued that Williams failed to demonstrate prejudice from the failure to object to the unwarranted mutual combat instruction. (App. pp. 924-927). Alternatively, the State argued that relief should only be granted to the murder charge. (App. pp. 922-924). The judge properly denied the motion to alter or amend. (App. p. 932).

The State, as Petitioner-Respondent, argues that relief should only be granted as to the murder charge because the specific language of the unwarranted mutual combat instruction is limited to "the killing" and makes no reference to an attempted killing. (Petition for Writ of Certiorari of the State as Petitioner-Respondent, pp. 16). With regard to mutual combat, the trial judge told the jury:

> If the Defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self-defense. This is true even during the combat the Defendant feared death or serious bodily injury. However, if before the killing is committed, the Defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes the 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.

(App. p. 644, line 24 – p. 645, lines 1-13). While the language of the charge references "the killing of the victim" rather than the attempted killing, self-defense and the defense of accident are equally applicable to both murder and attempted murder. Williams testified that he was acting in self-defense when he struggled with Wilson over the gun and the gun accidentally discharged resulting in the fatal shooting of Kerns and the non-fatal shooting of Wilson. The unwarranted mutual combat charge negated the self-defense and defense of accident claims as to both the murder charge involving Kerns and the attempted murder charge involving Wilson. Relief must be granted on both the murder and the attempted murder charges. If Williams acted properly in self-defense and shot accidentally then he would not be guilty of possession of a weapon during the commission of a violent crime and he would not be guilty of unlawful conduct toward a child. All four charges were affected by the unwarranted mutual combat charge. Relief was properly granted to all four charges.

## CONCLUSION

Based on the above arguments, this Court should deny the State's petition for writ of certiorari, affirm the PCR judge's grant of relief as to all four charges and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR
RESPONDENT/PETITIONER

This 3rd day of February, 2021.