THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge
Deadra I . Jefferson, Trial Judge

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

Jerome Campbell, # 349454, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

REPLY BRIEF OF PETITIONER

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 6188

Attorney for Petitioner

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Argument

Question

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)?

In the States's brief they make numerous references to threats against Jerome Campbell and a willingness to fight by one or more of the group that went to the Plantation Apartments, but they completely fail to show any willingness on the part of Jerome Campbell to engage in mutual combat. The South Carolina Supreme Court in *State v. Taylor,* 356, S.C. 227, 589 S.E.2d 1 (2003) specifically held, "Texas and Colorado adhere to the rule than an 'antecedent agreement to fight' must exist for the court to charge mutual combat." *Id.* at 232, 589 S.E.2d at 4. The Court then stated, "We believe the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas are warranted." *Id.* The mere fact that both parties may have been armed, did not like each other, or had even made threats against each other even combined, does not rise to the level of mutual combat.[1] These facts do not establish an antecedent agreement to fight.

While there may have been some evidence through the treats that the associates of the

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[1] In at least two states, a defendant requests a mutual combat charge to reduce the charge from murder to manslaughter. "Evidence of mutual combat or a physical struggle entered into willingly by both parties is sufficient provocation to require a voluntary manslaughter instruction. *People v. Brown*, 222 Ill. App. 3d 703, 720, 584 N.E.2d 355, 367 (1991); "A finding that a defendant was engaged in mutual combat at the time the victim was killed may authorize the jury to find the defendant guilty of voluntary manslaughter and not malice murder." *Moore v. State*, 307 Ga. 290, 295, 835 S.E.2d 610, 617 (2019)(internal citations omitted)

victim in this case were willing to engage in mutual combat, there is no evidence that Mr. Campbell had any desire to engage in mutual combat. A mere statement, even if considered a threat, saying "I know where you live at now." (Rec. on App. at 418, l 3) is hardly an agreement to engage in mutual combat. In the same conversation, Mr. Campbell is disavowed any intent to engage in mutual combat when he told Mr. Allen, "You better not come home, I will be there soon." Rec. on App. at 418, l 10. This comment cannot be stretched into an intent on Mr. Campbell's part to engage in mutual combat. Telling someone to stay away is the exact opposite of mutual combat.

The question as to whether mutual combat and self-defense are mutually exclusive is still unresolved. The footnote comment in *State v. Jackson*, 384 S.C. 29, 38, 681 S.E.2d 1, 21 n.5 (2009) is simply dicta. As mutual combat strikes such a dagger into the heart of self-defense, I should be given with self-defense only under the most unusual facts. It should be given only is those cases when the evidence, on at least one side, clearly establishes a factual scenario form which a jury could conclude the existence of mutual combat. This case is not such a case.

The evidence in the light most favorable to Mr. Campbell is that is automobile was fired upon as he was leaving the scene. This is not in keeping with any fact sufficient to invoke the doctrine of mutual combat. When two people are shooting at each other, a lay jury may well perceive that as mutual combat. It does not meet the legal definition, as the California Appellate Court stated, "As used in the present context, the phrase 'mutual combat' is not only ambiguous but a misnomer. The mutuality triggering the doctrine inheres not in the combat but in the preexisting intent to engage in it. Old but intact caselaw confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one

pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities. *People v. Ross*, 155 Cal. App. 4th 1033, 1045, 66 Cal. Rptr. 3d 438, 447 (2007). In this case, no real definition was "mutual combat" was given. The phrase was defined as "there must be a mutual intent and willingness to fight." Rec. on App. at 759. A lay jury, with no further definition, could easily conclude that when guns are being fired by both sides, there is "a mutual intent and willingness to fight." The jury could have used this concept to avoid the more difficult question - who fired first?

The giving of a mutual combat charge in this case is prejudicial to Mr. Campbell and was therefore improper.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this Court should reverse the determination that trial counsel was not ineffective, reverse the decision of the Post Conviction Relief judge and order a new trial.

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C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Jerome Campbell