RECEIVED
Jan 04 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LARRY T. CHESTNUT,

APPELLANT

Appellate Case 2019-000533

BRIEF OF APPELLANT

STEPHEN D. GEOLY

Stephen D. Geoly
222 Phoenix Street
Greenwood, SC 29646
(864) 223-3352
geolylawfirm@yahoo.com

ATTORNEY FOR APPELLANT.

<u>TABLE OF CONTENTS</u>

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUE PRESENTED 3

STATEMENT OF THE CASE 4

STANDARD OF REVIEW 12

ARGUMENT 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Freiburger v. State, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015).................... 12

Ingle v. State, 348 S.C. 467, 470, 560 S.E.2s 401, 402 (2002)... 12

Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) 12, 13

Padilla v. Kentucky, 599 U.S. 356, 366 (2010)... 12

Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018).. 12

State v. Belcher, 385 S.C. 597, 611 S.E.2d 802, 809 (2009).. 10, 18

State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) 16

State v. Bowers, 428 S.C. 21, 34, 832 S.E.2d 623, 630 (Ct. App. 2019).......................... 18

State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983) 14

State v. Graham, 260 S.C. 449, 450-51 196 S.E.2d 495, 4495-96 (1973).......................... 15

State v. Grubbs, 353 S.C. 374, 381-82, 557 S.E.2d 493, 497 (Ct. App. 2003)............... 14

State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989).................................... 14, 15

State v. Smith, 363 S.C. 111, 609 S.E.2d 528 (Ct. App. 2005).. 14

State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011) 14, 15

State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (S.C. 2003).......................... 3,13,14,15,17,18

Strickland v. Washington, 446 U.S. 668, 688 (1984) 12

Weik v. State, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014) 12

Statement of Issue Presented

Did the Post Conviction Relief court err when it failed to grant Larry T. Chestnut a new trial because his trial counsel was ineffective in failing 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)?

STATEMENT OF THE CASE

This case arises out of an incident that occurred on May 21, 2006 at approximately 3 a.m. at the residence of Larry Chestnut in Horry County. The State indicted Larry Chestnut for murder, along with his cousin, Kendrick Chestnut. The State tried Mr. Larry Chestnut and Mr. Kendrick Chestnut before an Horry County jury and the Honorable Steven H. John from August 13-17, 2012. Nancy Livesay, Assistant Solicitor for Horry County, represented the State. Ralph W. Wilson represented Larry Chestnut at trial, and Russell Blake Long represented his co-defendant, Kendrick Chestnut. The jury acquitted both defendants of murder, but convicted Mr. Larry Chestnut of the lesser included offense of Voluntary Manslaughter and found Mr. Kendrick Chestnut not guilty. Judge Steven H. John sentenced Larry Chestnut to 20 years in prison for voluntary manslaughter. App. 1029. An appeal was filed on behalf of the Defendant, by Jeremy Thompson. This Court affirmed the conviction and sentence in *State v. Larry T. Chestnut* in Memorandum Opinion No. 2015-MO-002 heard September 24, 2014 and filed January 14, 2015. *State v. Chestnut,* S.C.S.CT. Unpublished Op. No. 2015-MO-002 (filed Jan. 14, 2015).

Mr. Chestnut filed his application for post-conviction relief ("PCR") on January 29, 2016. The State filed its return on or about February 16, 2017. The Honorable Larry B. Hyman convened an evidentiary hearing on Monday, May 21, 2018. Mr. Larry Chestnut was represented by Stephen D. Geoly of the Greenwood County Bar, Johnny Ellis James, Jr., represented the State. By written order filed on July 20, 2018, Judge Hyman denied Mr. Chestnut's PCR application. App. 1036. A motion to reconsider was timely filed and denied by Judge Hyman, an order signed February 19, 2019, and filed with the Clerk's office on February

25, 2019. App. 1059. Notice of Intent to appeal was filed in a timely manner on behalf of the Defendant.

Petition for writ of *certiorari* was granted in this matter.

STATEMENT OF FACTS

On May 21, 2016, in the early morning hours Larry Chestnut, a black man, was involved in an incident at his residence where he was attacked by a white man, Joey Hucks, who was yielding a knife. Chestnut retreated to the kitchen where he allegedly grabbed a pair of kitchen scissors and stabbed his attacker, resulting in the death of Joey Hucks. At trial the defense presented no evidence.

The following is a recitation of the Statement of Facts from the Initial Brief of the Petitioner following the jury trial, followed by additional facts relating to the testimony from the Post-Conviction Relief hearing :

May 20, 2006, was the Appellant's twenty-eighth birthday. That afternoon, the Appellant's pregnant girlfriend, Christie Hucks ("Christie"), threw a party for the Appellant at the apartment complex where they lived. Following the party, the Appellant went out to further celebrate with his co-defendant Kendrick Chestnut ("Kendrick") and Christie's brother, the decedent, Joseph "Joey" Hucks. While the Appellant was gone, Christie opened a birthday card from the Appellant's daughter's mother which stated that she loved the Appellant. Upset at the card, Christie called her sister, Cynthia "Cindy" Evans ("Cindy"), who went to the apartment with her boyfriend Richard Day ("Day"). When the Appellant arrived home with Kendrick and the decedent in the early morning hours of May 21, 2006, Day, Cindy, and Christie were all present in the apartment. App. 449, l. 15-p.; App. 456, l. 2. Day, Cindy, and Christie each gave extremely different versions of the subsequent events.

Day testified that after the Appellant arrived home, the Appellant and Christie walked to the kitchen when Day heard the Appellant yell that he had lost $400.00. Day then witnessed the Appellant push Christy up against the wall with both hands around her neck. Day testified that "[w]e all tr[ied] to stop him" by intervening and that the Appellant punched the decedent, who fell to the ground. The Appellant went back into the kitchen where he was followed by Cindy, but Kendrick attempted to prevent Day from following as well. Day then got around Kendrick and witnessed the Appellant on the ground biting Cindy's leg. Day pushed the Appellant up against the counter, but the fighting did not stop. Day then could no longer see Cindy, so he ran back through the kitchen and the living room to exit the home through the front door to try to find her. The decedent, Christie, and the Appellant were left in the kitchen when Day left the apartment. Day subsequently returned to the apartment after unsuccessfully looking for Cindy and saw the decedent staggering out of the home with at least one visible stab wound. The Appellant and Kendrick then attacked the decedent, knocking him to the ground, and began kicking him. Day observed the Appellant making a stabbing motion, but he did not see the Appellant with a weapon. In Day's first statement to the police, he did not state that he observed the decedent being stabbed. App. 309, l. 16-p.; App. 320, l. 2; App. 325, l. 23-p.; App. 326, l. 20.

Cindy testified that the Appellant and Christie went to the kitchen after the Appellant arrived at the apartment. The Appellant and Christie then got into a verbal argument, which prompted Cindy and the decedent to enter the kitchen to calm the situation down. The Appellant then grabbed Christie by the throat and pushed her against the wall in the hallway. While the Appellant had Christie up against the wall, the Appellant managed to punch Cindy so hard that she fell to the floor. The Appellant pursued Cindy and continued punching her. She then threw

a shoe at the Appellant, to which the Appellant responded by biting her leg. Cindy then hit the Appellant on the head with a vase three times. After this altercation, Cindy heard the decedent say "don't touch my sisters" from the living room. Cindy snuck out of the back door, located in the kitchen, to get help, but did not find anyone, so she tried to go back in the home. As she tried to get back in the home, however, she saw the Appellant in the kitchen standing next to a drawer but did not see what, if anything, he got from the drawer. Cindy continued to try to find help outside from neighbors. When she came back to the apartment, she saw the decedent on the ground outside. Shortly thereafter, she saw Kendrick's car speeding away from the apartment. App. 389, l. 1-p.; App. 403, l. 16.

Christie testified that the Appellant entered the home and was upset that $400.00 had been stolen from him. She told the Appellant that she wanted to talk to him, so they both entered the kitchen. She showed the Appellant the card and the Appellant pushed her up against the refrigerator and told her that he loved her. She told the Appellant that he needed to leave, and the Appellant agreed to do so. The Appellant then walked back to the living room while the decedent and Cindy came into the kitchen to ask her if anything was wrong. Christie subsequently tried to walk back to the living room, but the Appellant grabbed her and pushed her up against a wall. Cindy tried to get the Appellant off of Christie, but the Appellant punched Cindy. In response, Cindy threw her shoe at the Appellant, and the Appellant attacked Cindy. Christie next saw the Appellant in the living room in an encounter with the decedent. The decedent had taken out his pocket knife and told the Appellant not to mess with his sisters. The Appellant tried to punch the decedent but the decedent swung the knife at the Appellant, cutting him. The Appellant went back to the kitchen as Christie went upstairs. Christie came back downstairs and entered the kitchen where she saw the decedent at one end of the room and the

Appellant and Kendrick at the other end of the room. Christie saw the Appellant holding a pair of scissors. Christie took the decedent out of the house through the front door, but he was attacked from behind by Kendrick, knocking the decedent to the ground. As the decedent was on the ground, Kendrick kicked him multiple times. Christie went to get help, and when she returned, the Defendant and Kendrick had left. App. 458, l. 1-p.; App. 478, l. 24.

The police recovered a pair of scissors and a pocket knife from the scene. App. 660, [1]l. 6-20. SLED ran DNA tests on the blood found on both items, and found that there were mixtures of two individuals' blood on each item. App. 712, l. 1-5. Neither the Appellant nor the decedent could be excluded from the blood found on the knife. App. 712, l. 5-7. The decedent was the major contributor to the blood found on the scissors while the Appellant's was the minor contributor. App. 712, l. 13-p.; 713, l. 2. The blade of the scissors measured 3.6 inches in length and the blade of the knife measured 2.3 inches in length. App. 788, l. 11-18.

The decedent suffered ten sharp force injuries. Eight of these injuries were 1.4 inches deep or less, but two injuries--one to the decedent's chest that punctured his heart and one to the decedent's left back--were at least four inches deep. The injury to the decedent's chest was fatal. He also had a blood alcohol content of .141 percent and a marijuana metabolite in his system. App. 764, l. 24-p.; App. 773, l. 4; App. 777, l. 22-p; App. 779, l. 5.

While there was no direct testimony regarding the Appellant's injuries, Christie testified that she was aware that the Appellant was taken to the hospital due to his wounds from the altercation with the decedent and that Appellant Chestnut was hospitalized "for a while." App. 524, l. 8-24. During the sentencing proceeding, the Appellant explained that he had suffered

---

[1] Cindy's daughter and the Appellant's daughter were spending the night at the apartment and were in the living room asleep when the incident began. Christie testified that she took them upstairs as the altercation between the Appellant and the decedent began. App. 469 l. 8-p.; App. 471, l. 4.

three stab wounds, one of which was life threatening, as it collapsed one of his lungs. He was hospitalized for approximately three weeks as a result of his injuries. App. 1024, l. 17-25.

At the Post Conviction Relief evidentiary hearing Mr. Larry Chestnut testified to what happened in the early morning hours of May 21, 2006 for the first time. At the time of the incident, it was the wee morning hours after Larry's 28th birthday. It was the first time Larry had ever been arrested. On the night of the incident, when Larry returned to the residence he was ambushed by accusations, he testified at the hearing that when he entered Christie said:

> "Oh, you cheating on me, I want you to get your property and leave. So, I was trying to explain to her, like, listen, we just had a great day, birthday party, all this, you know finish off a good night. So, she was like, I want you to leave. So, I'm like okay, well, I'm gonna grab my daughter, which was Tynesha at the time, from another previous relationship. And she grabbed me, she like, no, I don't want you to leave. So, I grabbed her by the arm, I'm like, listen, like, I love you, man, I'm not cheating on you, like, just relax. So, at that time we was standing in the kitchen. So, Joey came and was standing like in the living room. And if you look at the forensics, where all the blood splatter happened, he stabbed me in the living room, because first he said the N-word, like, didn't I tell you don't raise your voice at my sister, which I was shocked but found out later through the toxicology that he was two times over the DUI limit." App.84, l. 1-19.

The testimony was that they had all been drinking together in celebration of Larry's 28th birthday before this incident happened. Petitioner and the decedent had never had an argument

before. They had never fought before. They were like best friends. App. 78, l. 3-5. Larry told his defense counsel, Ralph Wilson, that his co-defendant and cousin, Kendrick "Mo" Chestnut, had been the one that killed Hucks. App. 85, l. 19-23. And continued explaining what happened the night of the incident:

> "So, once we was in the living room and he was like N-word, didn't I tell you never -- don't yell at my sister. So, I looked down and he had a knife in his hand. So, I'm like, man what you gonna do with a knife? Like, you gonna cut me? Because we best friends, so I'm like, really. And when I said that, he swung. When he swung, I swung. I didn't even know I was cut until I seen my shirt turning red. So, then I ran to the kitchen ---" App. 85, l. 24 -25; App. 86, l. 1-7.

Larry continued his explanation of what occurred that morning "... I don't know where the scissors came from, I didn't never grab the scissors, but I know after all the tussling and tussling, Mo got Joey off of me, like, yo you're bleeding, let's get you to the hospital." App. 87, l. 8-11. Larry spent almost 4 weeks in the hospital before being released. App. 78, l. 24. Then he was transported to the county jail. App. 79, l. 14. Notwithstanding the aforementioned, the decedent's sister, Christie Hucks, hired Ralph Wilson to represent Larry. App. 77, l. 16-21. His trial started over 6 years later in August of 2012. During that time period he met with his attorney, Ralph Wilson, two or three times. App.80, l. 6-10.

During the Court's charge to the jury in this matter the Court instructed the jury that malice could be inferred from the use of a deadly weapon. After the jury retired to the jury room, without objection from defense counsel, the Assistant Solicitor informed the Court that the charge was improper. *State v Belcher* was decided more than two years earlier 385 S.C. 597,

611, S.E. 2d 802, 809 (2009) holding that a jury charge that "malice may be inferred by the use of a deadly weapon is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." The Court brought the jury out and gave a curative instruction. However, the Court also included a mutual combat charge into its self-defense charge to the jury. A. No objection was made from any quarter, despite the fact that there had been no evidence presented during the trial to suggest mutual combat. The defense counsel argued a strategy of self-defense, a tactic that is nullified by mutual combat, yet when mutual combat was charged there was no objection from trial counsel to an improper charge that was not supported by the evidence and was fatal to his espoused strategy and defense.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 446 U.S 668, 688 (1984). "The first prong constitution deficiency is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 599 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C 214, 236, 761 S.E.2d 757, 768 (2014). The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error has on the outcome of the trial." *Smalls v. State*, 422 S.C 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case))."In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the

strength of the government's case ...," and "we must consider the totality of the evidence before the jury.")) "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of providing prejudice." *Id.* There are occasions where our Court has decided that certain errors committed by trial counsel are ipso facto prejudicial, in essence automatically satisfying the second prong of Strickland when they occur. One such instance is when a judge charges mutual combat in a self-defense case. *State v Taylor* "Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

ARGUMENT

Question

Did the Post Conviction Relief court err when it failed to grant Larry T. Chestnut a new trial because his trial counsel was ineffective in failing 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)?

The portion of the Court's order addressing the Petitioner's claim of ineffective assistance of counsel for failure to object to the erroneous jury instruction involving a Mutual Combat charge within the trial court's self-defense jury instruction begins with the following:

> "Applicant alleges Counsel was ineffective in failing to object to the trial court's instructions to the jury on the doctrine 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) (citing *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989)). 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, 557 S.E.2d 493, 497 (Ct. App. 2003) (citing *State v. Davis*, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983)). "If the defendant is engaged in mutual combat, self-defense is unavailable unless the

> defendant withdraws from the conflict before the killing occurs." *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 2 (2003) (citing by footnote *State v. Graham*, 260 S.C 449, 450-51, 196 S.E.2d 495, 495-96 (1973)). The doctrine of mutual combat is applicable only where there is a pre-existing dispute, an antecedent agreement to fight, and where both parties are equally armed with deadly weapons. *Id.*, 356 S.C at 223, 589 S.E.2d at 4."

Then the Court totally ignored the law it had just cited. At the evidentiary hearing PCR counsel for the Petitioner and the Court had an exchange as to mutual combat that resulted in the Court stating the following:

> "THE COURT: I get it. I don't think there was any evidence in this record indicating true mutual combat. I don't think it's there. I agree with you for once and for all, it's there. Okay?
>
> MR. GEOLY: Yes, sir." App. 99, l. 18-22.

Contrary to the PCR findings, the order stated: "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) (citing *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). It bears repeating. Not only was the Trial Court's instruction a violation of the holding in *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 2 (2003) (citing by footnote *State v. Graham*, 260 S.C 449, 450-51, 196 S.E.2d 495, 495-96 (1973)), in this instance it violated the holding in *State v. Smith*, 391 S.C. 408, 413, 706 S.E.2d 12, 14 (2011) (citing *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989), as well. Here, as the PCR court noted, there was no evidence of mutual combat. It is improper to confuse the jury with a self-defense charge that includes a mutual combat charge, when there is no evidence of mutual combat. Additionally, this court noted in the Blurton case, "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).

The Court uses tortured logic to reach the decision to deny the Petitioner's Post Conviction Relief claim. The Court's first expressed reason is that trial counsel articulated a valid strategic reason for not objecting to the mutual combat charge. That somehow to allow the mutual combat to come in was beneficial because "... the withdrawal portion of the mutual combat instruction was helpful, while precarious, is valid considering the totality of the circumstances." App. 1052, l. 2-3. The problem with that is two fold; there was no evidence of mutual combat, and mutual combat is fatal to a claim of self-defense. In the instant case, the testimony was uncontradicted that the parties had never had prior difficulties and the PCR Court's order appears not to have considered that the record establishes that the parties had never planned to meet and fight. Also, the decedent was armed with a knife while the Petitioner retreated to the kitchen, where at best, he armed himself with a pair of kitchen scissors.

The Court's second and third enunciated reasons for denying the claim are equally perplexing. They are expressed in their entirety below:

"Second, the Court finds that even if Counsel should have objected to the mutual combat instruction, the jury's return of a verdict of guilt for voluntary manslaughter, rather than murder, indicates an affirmative finding against mutual combat and obviates and prejudice that could have followed from the erroneous instruction, In order to find mutual combat, the jury would have had to have found antecedent mutual willingness to fight. Antecedent willingness is mutually exclusive with the "sudden heat of passion" required for a voluntary manslaughter conviction.

Third, the Court finds that notwithstanding the prior two points, any error from instructing the jury on mutual combat was harmless. As noted above, the crux of Applicant's defense was his effort to withdraw from the confrontation with Victim, only for the Victim to pursue him into the kitchen. The mutual combat instruction contained language making clear that where a defendant withdraws and tries in good faith to avoid further conflict, he may yet still be without fault in bringing on the difficulty. As such, the instruction did not muddy or confuse the central question before the jury--did Applicant withdraw from the confrontation of did go to the kitchen seeking a weapon? Despite inquiries for additional instructions, the jury never expressed any confusion regarding the law of self-defense or mutual combat. The verdict is clear and consistent with the evidence." App. 1052-1053.

As to the Court's "second" reason for denying this specific claim, it is beyond confounding especially when taking into account the Court's comments at the evidentiary hearing. "THE COURT: A mutual combat is not a defense. Mutual combat is a bar to a defense. So how could being found guilty of voluntary manslaughter suggest that the Court rejected self-- how does that work?" App. 104, l. 6-9. The Court's initial inclination expressed at the evidentiary hearing was the proper one.

As noted above herein, the Court's third and final reason for not granting Petitioner's claim to ineffective assistance of counsel on this ground was that any "... error from instructing the jury on mutual combat was harmless". . This Court has decided that this is impossible. *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 2 (2003) instructs that failure to object to such a charge is *ipso facto* prejudicial. Citing with approval two Georgia cases this Court said, "Significantly, the court found that commingling charges on mutual combat and justification was 'ipso facto harmful' because 'it placed upon the defendant a heavier burden than required for

self-defense'... "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." *Id* at 233,589, S.E.2d. at 4.(internal citation omitted). Also in *Bowers,* the court found the mere charge as to mutual combat was prejudicial because in negated self-defense. *State v. Bowers*, 428 S.C. 21,34, 832 S.E.2d 623, 630 (Ct. App. 2019)

Here a black man was attacked in his own home by a knife yielding 308lb white man. Larry Chestnut retreated to his kitchen to get away. He allegedly armed himself with a pair of kitchen scissors. Retreating from an armed attacker to arm oneself with a pair of kitchen scissors is not mutual combat. The parties had no plan to fight. The decedent and Petitioner were not equally armed at all at the beginning of their encounter. The trial counsel never objected to the mutual combat charge which was fatal to his stated strategy of self-defense. Additionally, neither defense counsel ever objected to the charge that malice could be inferred by the use of a deadly weapon. The Solicitor made this objection. Despite the fact that *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009) had been decided almost 3 years prior to the trial, both trial counsel had no objection. App. 1007, l. 15-19 and 1008, l. 2-3. To take the position that allowing a mutual combat charge was somehow strategic in a self-defense case is malpractice. While Belcher had only been the law of the land in South Carolina since 2009, -approximately 3 years prior to this trial, *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 2 (2003) had been the law in South Carolina for nearly a decade, and trial counsel seems to have been unaware of its ramifications.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Post Conviction Relief Judge and grant Mr. Chestnut a new trial.

Respectfully Submitted,

By

Stephen D. Geoly
S.C. Bar Number 9674
Geoly Law Firm
222 Phoenix Street
Greenwood, SC 29646
(864) 223-3352
(864) 223-3400 (fax)
Email: geolylawfirm@yahoo.com