

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge  
\_\_\_\_\_

Opinion No. 2014-UP-332 (S.C. Ct. App. filed 9/17/2014)

11-GS-42-1933  
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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY ROGERS,

PETITIONER

APPELLATE CASE NO. 2014-002518  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 23, 2014.

QUESTION PRESENTED

Whether the Court of Appeals erred by ruling the trial court correctly denied petitioner's Motion to Dismiss pursuant to S.C. Code §16-11-450 where the evidence showed petitioner had repeatedly demanded that the decedent leave petitioner's mobile home and where, instead of leaving petitioner's home, the decedent attacked petitioner with a knife which ultimately resulted in a struggle over the knife and injuries to petitioner and a fatal wound to the decedent?

## STATEMENT OF THE CASE

### **Procedural History**

Petitioner was indicted by the Spartanburg County grand jury for the offense of murder. R. 137. Prior to trial, petitioner filed a Motion to Dismiss Pursuant to S.C. Code Section 16-11-450 on August 18, 2011, arguing he was immune from prosecution because he was justified in using deadly force under the circumstances of the case. R. 1. An evidentiary hearing on the motion was held before the Honorable J. Derham Cole on September 2, 2011. The motion was denied by Judge Cole in his order dated October 3, 2011, which he referenced prior to trial the next day. R. 132, ll. 2-11; R. 126.

Petitioner's case was called to trial before Judge Cole on October 4, 2011, and a jury. Clay T. Allen represented petitioner. Danny Fulmer was the assistant solicitor. R. 131. On October 6, 2011, the jury found petitioner guilty of voluntary manslaughter. R. 133, ll. 8-11. Judge Cole sentenced petitioner to twenty-one year imprisonment. R. 136, ll. 20-21.

The Court of Appeals affirmed in State v. Michael Rogers, 2014-UP-332 (filed September 17, 2014). App. 1-3. Petitioner sought rehearing. App. 4-12. Rehearing was denied. App. 13.

This petition for a writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred by ruling the trial court correctly denied petitioner's Motion to Dismiss pursuant to S.C. Code §16-11-450 where the evidence showed petitioner had repeatedly demanded that the decedent leave petitioner's mobile home and where, instead of leaving petitioner's home, the decedent attacked petitioner with a knife which ultimately resulted in a struggle over the knife and injuries to petitioner and a fatal wound to the decedent.

### **Relevant Facts**

As noted, defense counsel Allen filed a Motion to Dismiss pursuant to S.C. Code §16-11-450 on August 18, 2011. R. 1-7. He cited State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), the premier case in South Carolina on immunity from prosecution under the Protection of Persons and Property Act, S.C. Code §16-11-420 et seq; S.C. Code §16-11-450 (the immunity provision itself). R. 2-3.

Petitioner argued in his Motion that at all times during the incident he was in his own dwelling, a place he had a right to be. Petitioner also wrote he was not engaged in unlawful activity, and he was attempting to remove the decedent, a non-resident of the home, against the decedent's will. Further, petitioner knew or had reason to know the decedent's unlawful and forceful act was occurring. Finally, petitioner argued he had no duty to retreat, he had the right to stand his ground; had the right to meet force with force; and he reasonably believed that his actions were necessary to prevent death or great bodily injury to himself or to another person or prevent the commission of a violent crime as defined by South Carolina Code Section 16-1-60. R. 2-3. Petitioner concluded he was entitled to immunity, and was justified in using deadly force, pursuant to South Carolina Code Section 16-11-450(a). R. 2-3.

An evidentiary hearing on the immunity motion was held on September 2, 2011. At the hearing, Tonya Lowery, petitioner's girlfriend at the time of the incident, testified that she went to petitioner's mobile home at 660 Carolina Drive Extension sometime after 11:00 pm on the night of November 12, 2010. R. 15, ll. 2-17; R. 16, ll. 23-25. When she arrived, Petitioner Rogers, Jackie Lance, and John Ryan ("the decedent") were at the home. R. 16, ll. 4-11. The three were drinking. R. 16, ll. 14-15. Tonya testified that the decedent came up from behind her and "put his arms around below my chest. And I asked him to please take his hands off, you know, because that just wasn't appropriate, especially in front of [petitioner]". R. 18, ll. 6-12.

Upon witnessing the improper and unwanted touching, petitioner said, "Get your hands off my woman." R. 19, ll. 1-3. The next thing Tonya knew, petitioner pushed the decedent who fell onto the stereo. R. 18, ll. 13-15. Petitioner was on top of the decedent. R. 18, ll. 15-16. Tonya asked petitioner to stop because "he proved his point." R. 18, ll. 16-17. Petitioner got off the decedent and the two stood up. Then the decedent kicked petitioner between the legs and the two started fighting again. R. 181, ll. 18-22. Eventually, Tonya and Jackie Lance were able to separate the two. Tonya took petitioner to the bathroom to clean him up and try to calm him down. R. 19, ll. 15-20.

Tonya continued that all of a sudden Jackie decided that she wanted to leave to go to the store. Tonya did not want Jackie to leave because the men had been fighting, but Jackie insisted on leaving. Jackie left in the decedent's truck. R. 19, l. 21 – 20. l. 6.

After Jackie left, petitioner demanded that the decedent leave his home. Tonya told petitioner that the decedent could not leave because Jackie had taken the decedent's truck. Petitioner "kept telling him I want you out of my house." *He asked three times.* R. 20, ll. 9-14; R. 33, ll. 3-14.

Tonya continued, "And then [the decedent] swung" at [petitioner]. Tonya "couldn't handle the fact that they were fighting" and left through the back door of the mobile home. R. 20, ll. 19-24. She walked around to the front of the dwelling, and entered the front door. Petitioner said, "dial 911, I accidentally stabbed him." The decedent was on the floor. R. 21, ll. 1-3. She dialed 911. R. 22, ll. 8-9. Petitioner tried to help the decedent by getting towels to help stop the bleeding and doing mouth to mouth when the decedent stopped breathing. R. 24, ll. 1-7. Tonya never saw a knife that night. R. 34, ll. 6-8.

Petitioner was the next to testify. He testified that the decedent spent the night at petitioner's trailer on November 11, 2010, the night before the incident, because he was too drunk to drive home. R. 40, ll. 9-25. When the decedent woke up the morning of November 12, 2010 he immediately began drinking again and continued to drink throughout the day and that night. R. 42, ll. 3-13.

On the night of the incident, petitioner, Jackie, whom petitioner had just met that day, the decedent, and Tonya were at petitioner's mobile home talking. R. 41, l. 22 – 42, l. 2. Petitioner excused himself to use the bathroom. On his way out of the bathroom he noticed the decedent "leaning against Tonya from behind with his arms around her waist." The decedent was pressed up against her with his head bent towards her shoulder saying something to her. R. 42, l. 23 – 43, l. 7. "And I was angry. I said what do you think you're doing. And I pushed him against the stereo." R. 43, ll. 8-16. The men began fighting. They stopped for a moment and then began fighting again. R. 43, l. 21 – 45, l. 9. Eventually, the fighting just ended. R. 45, ll. 9-10.

Petitioner remembered that he went to the bathroom to wash himself. He was bleeding from his lip and face. R. 45, ll. 11-17. While petitioner was in the bathroom, the decedent gave the keys to his truck to Jackie, who wanted to leave, and she did leave in the truck. R. 45, l. 24 – 46, l. 6.

When petitioner returned to the kitchen from the bathroom, “I told [the decedent] he had to leave. I kept telling him you gotta get out of here. I don’t care if . . . Jackie got your truck, leave. You want to wait for her . . . you wait somewhere else, *but I want you out of my house.*” R. 48, ll. 1-9. (emphasis added). *Then out of nowhere, the decedent hit petitioner.* “He got me right in the jaw big time.” R. 48, ll. 10-14. (emphasis added). Petitioner responded by hitting the decedent back and a fight ensued. “[H]e just kept coming at me and coming at me. And knowing me, I was fighting back for the simple reason to get him to stop. I wanted to get him off me.” R. 48, l. 18 – 49, l. 1.

Petitioner testified that he did not know where the knife came from. “I can only speculate on that, where it came from. *But I had noticed it in his hand. And we fought over it.*” R. 49, ll. 3-6. (emphasis added). Eventually, petitioner got the knife out of the decedent’s hand. Petitioner was in fear for his safety. R. 70, ll. 14-15.

There was blood everywhere. Petitioner tried to stop the bleeding for the decedent. “I tried to save his life. I took a rag and I put it on his chest.” He told Tonya to call 911. R. 72, ll. 13-25. Petitioner got cut on his left and right forearm and also had cuts on his knuckles and bruising to his face. He also broke a tooth from being punched in the jaw. R. 49, l. 19 – 51, l. 23. Petitioner does not remember stabbing the decedent. “It wasn’t an intentional thing.” R. 54, ll. 19-24.

The knife belonged to petitioner. He used it to open mail and must have left it on the table where he kept his mail. Petitioner does not know how the decedent got ahold of the knife. R. 52, ll. 12-22; R. 56, l. 17 – 57, l. 6.

Jackie Lance was the next to testify. She had never met petitioner or the decedent prior to the day of the incident. She knew Tonya from the neighborhood. R. 77, l. 25 – 78, ll. 9.

Jackie was at petitioner's mobile home that night. Petitioner and the decedent were drinking. Petitioner poured Jackie a drink, but she did not drink it. Tonya was also present. R. 78, l. 15 – 79, l. 11.

Jackie was only at the petitioner's home for ten to fifteen minutes before the altercation occurred. The decedent was very intoxicated. He walked up and "it looked like he leaned on [Tonya] to catch his balance. He was not trying to touch her in any kind of way," according to Jackie. R. 79, l. 12 – 80, l. 13.

Petitioner came around the corner in a rage and jumped on the decedent. "[Petitioner] threw him to the ground, [the decedent's] whole head bounced off of a stereo system." Petitioner was on top of the decedent and kept hitting him and hitting him. Petitioner was "yelling: 'You M.F. 'r this, you disrespecting my woman.'" R. 80, ll. 4-14. Petitioner eventually got off the decedent and the fight broke up. When the men stood up, the decedent kicked petitioner between the legs and the fight ensued further. Jackie claimed the decedent was staggering and could not defend himself because he had been drinking and taking "nerve medication." R. 81, l. 6 – 82, l. 19.

Jackie remembered three episodes of fighting before she "couldn't take it anymore." The decedent did not want her to walk so he let her borrow his truck. R. 82, l. 20 – 83, l. 4.

She went home and smoked a cigarette and then told her roommate she was going to go back to return the truck. When she arrived back at petitioner's home "there were police everywhere" so she returned home. R. 83, ll. 5-17. She never saw a knife that night. "There was no knife on that table."

The decedent's mother, Suzanne Kolmer, testified that she called the decedent on the night of the incident, and she claimed "he was too drunk to speak." Ms. Kolmer also maintained she heard petitioner in the background being very belligerent as she talked to Tonia, petitioner's

girlfriend. Kolmer said Tonya assured her “everything’s going to be alright, Suzanne, just – they’re just having a little beer and a little guitar playing.” App. 108, l. 10 – 109, l. 4.

Kolmer said the decedent was an alcoholic, and that he drank to excess. However, she denied on cross-examination that the decedent would get violent and get into fights while intoxicated. R. 111, l. 6 – 112, l. 2.

The final witness at the pre-trial hearing was Spartanburg County Sheriff’s Deputy William Gary. Gary testified that he talked to Tonya and Jackie at the scene on the night of the incident but that he did not talk to petitioner until the following day. Petitioner had been taken to the hospital for treatment for his injuries. Tr. 114, l. 6 – 115, l. 13.

Gary testified that petitioner was not consistent in his versions of what occurred but that he did tell Gary that the fight started when the decedent was touching Tonya. Petitioner also told Gary that ultimately the decedent began beating him and he realized he “was cut on the arm. And that was the reason he wasn’t there when I got there. He actually was transported to Regional for some treatment to some injuries that he had . . . [Petitioner told him that] he didn’t have a choice. He pulled his knife from his pocket and stabbed John. And that’s when he told Tonya to call 9-1-1. That was the first version he gave. R. 116, l. 3 – 119, l. 19.

While Gary maintained petitioner’s statements were not totally consistent a fair reading of his testimony shows petitioner consistently told Gary there was a knife involved during his fatal altercation with the decedent, and that he got injured. R. 116, l. 3 – 119, l. 19.

On cross-examination, Gary admitted he never even asked petitioner “if he told John to leave” before the decedent attacked him. App. 122, ll. 13-21. At the conclusion of the cross-examination the solicitor stated he did not have any more questions and the pre-trial immunity hearing ended without oral argument. R. 124, ll. 12-23.

When court convened at the beginning of trial on October 4, 2011 the judge stated to defense counsel: "Alright Mr. Allen you are aware that I have denied the defendant's Motion to Dismiss this case pursuant to 16-11-450, copy of the Order has been provided to you?" Defense counsel Allen responded: "Yes, your Honor. Yes, your Honor. I'm aware of that, I received it by e-mail today." R. 132, ll. 1-6. Counsel acknowledged he had discussed the order with petitioner. R. 132, ll. 9-13.

The Order Denying the Motion for Dismissal dated October 3, 2010 stated:

After a consideration of the evidence presented this Court finds that the defendant has failed to carry his burden of proof. He has failed to establish by a preponderance of the evidence that he was acting lawfully as it may be reasonably determined that he engaged in an unlawful assault and battery upon Ryan. **He has failed to establish by the preponderance of evidence that he was the victim of an unprovoked attack in his home by one who was not an invited guest. He has failed to establish by the preponderance of evidence that he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime.**

Order at 4-5. R. 129-130. (emphasis added).

The presumption of reasonable fear of imminent peril in the use of deadly force as provided in *Section 16-11-440 (A)* is not applicable under the facts as presented in this case because Ryan did not unlawfully or forcefully enter now was he in the process of unlawfully and forcefully entering the resident of Rogers. **Ryan gained entry into the home by invitation from Rogers and had in fact spent the night before in the home.** In order to be immune from prosecution for the death of Ryan the burden is therefore upon Rogers to prove by a preponderance of the evidence that at the time he committed any act resulting in Ryan's death he; (1) was not engaged in any unlawful activity; (2) was attacked in his home by Ryan; and (3) reasonably believed that the use of deadly force was necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined by statute. *S.C. Code Section 16-11-440(C)*

Amended Supp. R. 3. (emphasis added).

## **Court of Appeals**

In a summary opinion, the Court of Appeals emphasized that to be entitled to immunity from the law of retreat, must be “*without fault on his own part*” to claim immunity from law of retreat and self-defense.” App. 2. The Court held that petitioner “failed to carry his burden of proof and establish by a preponderance of the evidence that he was permitted to use deadly force under any section of the Act or other provision of law.” *Citing* S.C. Code §16-11-450(A). App. 1.

## **Rehearing**

Petitioner argued on rehearing that “the decedent’s attack on petitioner, ignored the purpose of the immunity statute, and as well as petitioner’s defense of habitation **implicit in the statute. R. 129.** Petitioner further noted that it was difficult to understand the precise reasoning of the Court’s summary opinion and “[t]hat alone is reason to grant rehearing and issue an opinion specifically applying the facts to the law. Since it appears the Court’s emphasis that petitioner had to be “*without fault on his own part*” constitutes a factual finding against petitioner by this Court, the Court should grant rehearing to explain how petitioner’s actions after the decedent attacked him in petitioner’s own home, where the petitioner had ordered the decedent to leave, and the decedent attacked him instead, were not protected under the immunity statute. State v. Michael Rogers, 2014-UP-332 (filed September 17, 2014) at p. 3.” App. 5.

## **Discussion**

Petitioner was in his own home, and he had no duty to retreat. While it is true the decedent entered petitioner’s home the prior day as an “invited guest” the evidence showed petitioner ordered him to leave the home after he groped petitioner’s girlfriend. Instead of leaving, the decedent again engaged in a physical fight with petitioner which injured him, and caused him to be sent to the

hospital so he was not immediately available to speak with Investigator Gary when he arrived following the 911 call.

The error of both the trial court and the Court of Appeals is it treats petitioner, and the decedent who undisputedly fought with him as **equals** while in petitioner's home, his Castle. Petitioner had every right even **before** the Protection of Persons and Property Act to order the decedent to leave his home once he no longer wanted him there. He had the right to expel the decedent forcefully to protect his property under another provision of law: the defense of habitation. This common law defense provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (citing State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)). "For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejection were reasonable under the circumstances. Id. at 124, 651 S.E.2d at 323. "The defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger sustaining serious injury or damage." Id.

The Court of Appeals refused to rule on the defense of habitation issue because it was not specifically cited to the trial judge. This respectfully was unfair because petitioner's pre-trial motion to dismiss asserted that Petitioner was not engaged in unlawful activity, *and he was attempting to remove the decedent, a non-resident of the location, against the decedent's will.* Further, petitioner knew or had reason to know the decedent's unlawful and forceful act was occurring. Finally, petitioner argued he had no duty to retreat, he had the right to stand his ground; had the right to meet force with force . . . R. 2-3.

The trial court ignored the fact that the decedent was no longer an invited guest but a trespasser after he refused to leave and chose to attack petitioner instead. It is elementary that even before the Protection of Persons and Property Act, which enlarged the common law defense of one's home, a person had the right to use reasonable means to eject a trespasser. This court most recently spoke on the defense of habitation, which differs from self-defense in State v. Rye, 375 S.C. 119, 123, 651 SE2d 321, 323 (2007). Petitioner should not be faulted because the trial judge chose to ignore the obvious evidence offered by the defense at the immunity hearing that the decedent was no longer an invited guest but a trespasser at the time of the fatal encounter.

Petitioner argued to the Court of Appeals that this case was similar to the facts of Duncan and that petitioner should not be penalized because the decedent in this case simply ignored repeated orders to leave petitioner's home and attacked petitioner instead of leaving as he was ordered to do.

Pursuant to S.C. Code §16-11-450(A), "a person who uses deadly force as permitted by the provision of this article or another applicable law is justified in using deadly force and is *immune from criminal prosecution* . . . for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer . . ." The proper standard in determining immunity under the act is a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).

In Duncan, the victim was a guest in Duncan's home. The victim made improper comments about a photograph of Duncan's daughter in a cheerleading outfit and, as a result, Duncan asked the victim and his girlfriend to leave his home. The decedent left as requested, but returned a few minutes later he returned. It was rational inference that the decedent attempted to enter the home through a screened porch door. Duncan was cursing at the decedent to get away, and Duncan shot

the decedent in the face. Id. at 406-407, 709 S.E.2d at 663. The trial court granted Duncan's motion to dismiss pursuant to S.C. Code §16-11-450, and this Court affirmed holding that Duncan was immune from prosecution under the Act. The same result should have occurred in this case.

The evidence shows that an altercation broke out between petitioner and the decedent because the decedent improperly was groping petitioner's girlfriend. During a break in the altercation, petitioner repeatedly demanded that the decedent leave his home. Unfortunately, the decedent refused and instead attacked petitioner inside petitioner's kitchen. A knife was involved, and petitioner testified the decedent had the knife, which the two struggled over, ultimately ending in injuries to petitioner and fatal wound to the decedent. Petitioner was "fighting back for the simple reason to get him to stop. I wanted to get him off me."

The only difference between the facts in this case and the facts in Duncan are that the decedent in Duncan heeded Duncan's request to leave his home, where the decedent in this case refused to do so. Petitioner should not be penalized because the decedent contemptuously refused a legitimate direction to leave. While the decedent was originally an invited guest, petitioner made it clear that the decedent was no longer welcome on the property and thus he was now a trespasser. Petitioner was defending himself from attack within his own home after he had asked the decedent to leave. The opinion of the Court of Appeals assigns fewer rights to petitioner to defend himself, his property, and to forcefully eject a trespasser from his own home than he had before the immunity Act was signed into law. The General Assembly could not have meant that result, and certiorari should be granted.

CONCLUSION

Based on the foregoing arguments, a writ of certiorari should issue to allow full briefing on these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
J. Derham Cole, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY ROGERS,

PETITIONER.


APPELLATE CASE NO. 2014-002518

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CERTIFICATE OF SERVICE

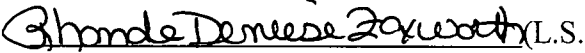
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Salley W. Elliott, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals, this 4th day of December, 2014.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day  
of December, 2014.

  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021.