

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

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October 12, 2017

S.C. SUPREME COURT

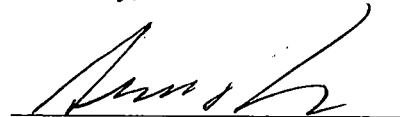
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Michael Anthony Rogers v. State
2015-CP-42-3862

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

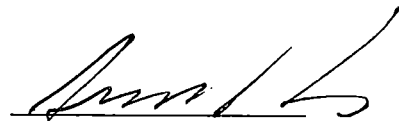
2015-CP-42-3862

Michael Anthony Rogers, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Michael Anthony Rogers appeals the Honorable Edward W. Miller's Order of Dismissal filed April 6, 2017, and denial of Applicant's Motion to Alter or Amend filed October 6, 2017.

This 12 day of October, 2017.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Valerie Giovanoli, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

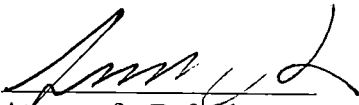
STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
MICHAEL ANTHONY ROGERS,)
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APPELLANT,)
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)
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VS.)
)
)
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THE STATE OF SOUTH CAROLINA,)
)
RESPONDANT.)
_____)

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IN THE SUPREME COURT
OCT 16 2017
S.C. SUPREME COURT

**CERTIFICATE OF SERVICE
BY MAIL**

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Attorney General
Alan Wilson
P.O. Box 11549
Columbia, SC 29211**


Attorney for Defendant

This 12 day of October, 2017



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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 3, 2017

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg, SC 29304-3483

Re: Michael Anthony Rogers v. State of South Carolina
2015-CP-42-3862

Dear Ms. Blackley:

Enclosed please find the original **Order of Dismissal**, signed by the Honorable Edward W. Miller, in the above-captioned case, for filing in your office. Please serve order on all parties involved.

Sincerely,

Ashley Haworth

Paralegal to

Valerie Garcia Giovanoli
Assistant Attorney General

/ah
Enclosure(s)

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
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Michael Anthony Rogers,)
S.C.D.C. No. 348110,)
))
Applicant,)
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v.)
))
State of South Carolina,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

2015-CP-42-3862

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 16, 2015. Respondent made its Return on July 1, 2016. An evidentiary hearing was held on February 1, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Chief Public Defender Clay T. Allen also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the 911 tape, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Michael Anthony Rogers ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the March 2011 term of the Spartanburg County Grand Jury for murder (2011-GS-42-1933). Clay T. Allen, Esquire, represented Applicant. On

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October 4-6, 2011, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Cole sentenced Applicant to imprisonment for a term of 21 years.

Applicant filed a timely notice of appeal. Carlyle R. Cromer, Esquire and Robert M. Dudek, Esquire, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. filed September 17, 2014). A Petition for Rehearing was filed on Applicant's behalf, which was subsequently denied by the Court of Appeals on October 23, 2014. On December 4, 2014, Applicant filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated January 23, 2015. The Remittitur was returned on January 29, 2015.

ALLEGATIONS

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
 - a. Counsel failed to respond, object and appeal to trial judge's pretrial decision on the matter of immunity from prosecution,
 - b. Counsel failed to properly preserve the issue of immunity from prosecution for appellate review,
 - c. Counsel failed to request instruction on lesser included offense of involuntary manslaughter,
 - d. Counsel failed to request charge of accident along with manslaughter charge,
 - e. Counsel failed to request defense of habitation,
 - f. Counsel failed to ask for additional instruction of withdrawal,
 - g. Counsel failed to produce evidence of 911 call which was in favor of Applicant,
 - h. Counsel failed by not bringing up one time defense of habitation or protection of person and property during pretrial or trial,

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- i. Counsel failed to do legal research to familiarize himself with case law similar to and of the exact nature of the Applicant's crime,
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. Counsel failed to argue issue of immunity properly consistent with trial under protection of persons and property act,
 - b. "Because of error in briefs of the Attorney General's direct appeal and writ of certiorari, appellate counsel was ineffective for allowing them to be introduced for review,"
 - c. Counsel failed to bring to light the fact that the trial court erred in not charging the jury with involuntary manslaughter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Counsel's testimony to be credible and Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Summary of the Testimony

Applicant testified that he met with Counsel three or four times. Applicant testified that Counsel did not review any of his rule five discovery materials with him nor did he review the tape of the 911 phone call made by his former girlfriend Tonya Lowery. Applicant further stated that Counsel failed to adequately investigate his case. Applicant testified that he believed Counsel's performance to be ineffective because Counsel failed to did not review the 911 tape with him or enter it into evidence. Applicant also testified that Counsel failed to appeal the denial of the stand your ground hearing and, therefore, failed to preserve that issue for appeal.

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Applicant also testified that Counsel was ineffective for failing to raise the defenses of habitation and accident. Applicant also testified that Counsel failed to request a jury instruction of involuntary manslaughter, withdrawal and defense of habitation. Applicant testified that Counsel was ineffective for failing to clarify Applicant's statement that he did not try and eject the victim from his home. Tr. p. 299. Applicant testified that he always wanted to go to trial rather than take a plea, unless the plea was to involuntary manslaughter. On cross-examination, Applicant admitted that he was the initial aggressor of the altercation between he and the victim.

Counsel testified that he has been practicing law since 1979, the majority being criminal law. Counsel testified that he took over Applicant's case in May of 2011. Counsel testified that he had handled other murder trials before handling Applicant's case. On the record, Counsel listed off at least six dates where he met with Applicant. Counsel testified that he reviewed all the evidence in Applicant's case with him multiple times. Counsel testified that he did not introduce the 911 tape into evidence because he did not find it particularly helpful to Applicant's case. Counsel also testified that he discussed with Applicant the elements of the charges and possible defenses to those charges and advised Applicant concerning his right to testify. Counsel investigated the leads that Applicant provided him, including possible defenses of habitation and self-defense. Counsel also testified that Applicant was offered two plea deals. The first plea offer was for 20 years for voluntary manslaughter. Applicant rejected this plea offer. During the trial, Applicant was offered a plea deal of 10 years for voluntary manslaughter. Counsel testified that he advised Applicant that this was a rare offer and that he should heavily consider it. Counsel testified that Applicant rejected the plea offer because he only wanted to plead guilty to involuntary manslaughter. Counsel testified that he explained to Applicant that it was highly unlikely he would receive a plea offer for involuntary manslaughter because it wasn't applicable

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to the situation in Applicant's case. Counsel testified that he explained to Applicant that the trial judge would likely not charge the jury with involuntary manslaughter because it was not applicable to the facts.

Additionally, Counsel testified that he researched the defense of habitation, but after conducting this research, he did not feel it was applicable because Applicant's theory of the case was that he was defending himself not his home. Counsel testified that he did not request an instruction for accident or withdrawal because he didn't feel they applied to Applicant's case. Counsel testified that he did not object to Applicant's statement that he did not try and eject the victim because, other than this one statement, Counsel believed the record clearly indicated that Applicant asked the victim to leave his home. Counsel also testified that while he did not immediately appeal the denial of Applicant's motion to dismiss at the stand your ground hearing, he reincorporated the arguments made at the preliminary hearing into the two motions for a directed verdict Counsel made at trial and that he believed the South Carolina Court of Appeals addressed the merits of this issue in its opinion. State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. filed September 17, 2014). Counsel also testified that he requested two additional jury instructions that further explained Self-defense and the *Castle Doctrine*. Counsel specifically introduced the case of *State v. Brown* to the trial judge to show that the victim had a duty to retreat from Applicant's home even though he was considered a lawful guest. Tr. pp. 310-13. The trial judge did incorporate this clarification into his jury instructions. Tr. pp. 357-58. Additionally, Counsel testified that he recalled making two motions in limine, two motions for a directed verdict, and a motion for a new trial, in addition to the stand your ground hearing.

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Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

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Failure to Appeal the Stand Your Ground Hearing

Applicant alleged that Counsel was ineffective for failing to immediately appeal the denial of Applicant's motion to dismiss the case at the stand your ground hearing. This Court finds Applicant has failed to show that Counsel's decision was deficient nor resulted in any prejudice to Applicant. Counsel testified that he reincorporated the arguments made at the preliminary hearing in both of his motions for a directed verdict; therefore, Counsel believed he was preserving this issue for appeal. Tr. pp. 229-33, 305-09. Counsel also testified that he believed this issue was, in fact, addressed by the South Carolina Court of Appeals. This Court notes that the South Carolina Court of Appeals did address the merits of this issue in its opinion. State v. Rogers, Op. No. 2014-UP-332 (S.C. Ct. App. filed September 17, 2014). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Object to Applicant's Statement Regarding Ejection of the Victim

Applicant alleged that Counsel was ineffective for failing to object to the solicitor's question eliciting Applicant's answer that he did not try and eject the victim from his home. Counsel testified that he did not object to Applicant's statement that he did not try and eject the victim because, other than this one statement, Counsel believed the record clearly indicated that

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Applicant asked the victim to leave his home. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Introduce the 911 Tape into Evidence

Applicant alleged that Counsel was ineffective for failing to introduce the 911 tape into evidence. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel explained that he didn't believe the tape was especially helpful to Applicant's case. This Court finds Counsel's decision to leave the 911 tape out of evidence to be part of a trial strategy that falls within the scope of reasonable criminal representation. Further, Applicant has failed to show that this alleged deficiency prejudiced him. Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

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Failure to Request A Jury Instruction of Defense of Habitation, Accident, Withdrawal, and Involuntary Manslaughter

Applicant alleged that Counsel was ineffective for failing to request a jury instruction for defense of habitation, accident, withdrawal, and involuntary manslaughter. Counsel testified that he explained to Applicant that the trial judge would likely not charge the jury with involuntary manslaughter because it was not applicable to the facts of Applicant's case. Additionally, Counsel testified that he researched the defense of habitation, but after conducting this research, he did not feel it was applicable because Applicant's theory of the case was that he was defending himself not his home. Counsel testified that he did not request an instruction for accident or withdrawal because he didn't feel they applied to Applicant's case. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Investigate

Applicant alleged at the evidentiary hearing that Counsel failed to conduct a proper investigation. This Court finds Applicant has failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation

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of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Counsel reviewed all the evidence in the case, discussed possible defenses with Applicant and pursued leads that Applicant provided. Specifically, Counsel pursued a theory of self-defense. He also reviewed the State’s evidence with Applicant prior to trial. Such an investigation was reasonable under the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, Applicant has failed to show Counsel was deficient in investigating or developing a defense.

Likewise, Applicant has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (“A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). This Court can only speculate as to what additional investigation could have been done and what evidence that investigation would have uncovered. Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. Therefore, Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Jackson v. State,

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329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial.”).

This Court finds Applicant has failed to satisfy either prong of the Strickland analysis. Accordingly, this allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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CONCLUSION


Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 3/29/17, 2017.


 EDWARD W. MILLER
 Presiding Judge
 Seventh Judicial Circuit

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 H. PIERRE BLAKEY

Greenville, South Carolina

Applicant had asked Mr. Ryan to leave his home many times because he was trying to get an aggressive trespasser out of his house. The Applicant clearly did not understand the solicitor's confusing question which seemed to ask whether the Applicant was trying to eject Mr. Ryan after he was dead on the Applicant's floor in order to hide evidence. (Trial transcript p. 299)

The trial judge used the Applicant's uncontested or clarified statement to reason that since the Applicant, himself, testified that he did not try to eject Mr. Ryan from the residence, his right to eject a trespasser was not applicable. (Trial transcript p. 308) It was not a valid strategy to leave the judge and jury with the understanding that the Applicant was not trying to eject Mr. Ryan when the Applicant had maintained from the beginning that he had asked Mr. Ryan to leave a number of times that night because he wanted Mr. Ryan out of his home and away from him. It was ineffective to do so and effected the outcome of the case.

The recording of the 911 call shows the Applicant was trying to keep Mr. Ryan from bleeding to death right after the stabbing. Witness Tonya Lowery was the caller and you can hear Mr. Ryan and the Applicant in the background. She narrates events as they occur stating that the Applicant was trying to save Mr. Ryan's life. You can hear at the beginning Mr. Ryan is alive. The 911 tape significantly strengthens the Applicant's case and stands in strong contrast the Solicitor's argument to the jury that the Applicant saw Mr. Ryan laying there dead on his floor and did what a guilty person would do, goes to wash his hands and wash and hide the knife. (Trial transcript p. 336) Trial counsel failed to object to those comments made in the State's closing and was ineffective for failing to do so. The solicitor's argument went beyond reasonable inferences of what the

Solicitor knew to be the facts and was highly prejudicial. The solicitor must confine his arguments to the evidence in the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The 911 call recording would have shown the Solicitor's comments in closing were not reasonable inferences but misstatements of the facts which so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). See also Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Appellate counsel argued defense of habitation, but the Court Of Appeals found that the Applicant did not preserve the defense of habitation. State v. Rogers, No. 2014-UP-332. The Order of Dismissal addresses this omission stating that trial counsel gave a strategic reason for failure to argue the defense of habitation because Applicant's theory of the case was defense of self, not of property. This is a misstatement of the law because defense of self and of property are not mutually exclusive. "The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was 'defending himself from imminent attack on his own premises is entitled to a charge of defense of habitation.'" State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001) (quoting State v. Lee, 293 S.C. 536, 537, 362 S.E.2d 24, 25 (1987)).

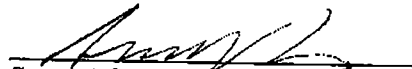
The facts presented in the Applicants case amounted to classic defense of habitation. "A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes the demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion." State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242

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(1923). Valid trial strategy cannot be based upon a misunderstanding of the law. The failure to get a charge on defense of habitation likely changed the outcome of the case. Trial counsel was ineffective for failing to preserve the defense of habitation for appellate review. Alternatively, if the record reflects that trial counsel adequately argued the defense of habitation appellate counsel failed to effectively argue that for appellate review. In either case, the Applicant was denied a fair trial and is due post-conviction relief. The order fails to address these arguments.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,


Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 4 day of April, 2017.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
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Michael Anthony Rogers, #348110,)
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Applicant,)
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v.)
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State of South Carolina,)
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Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2015-CP-42-3862

**RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND
THE JUDGMENT**

This matter comes before the Court by way of Applicant's Motion to Alter or Amend the Judgment in which Applicant asks the Court to reconsider its Order dismissing his Application for post-conviction relief (PCR). Respondent (the State) would submit the following:

I.

Respondent submits that the Order of Dismissal of the Honorable Edward W. Miller, dated March 29, 2017, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

II.

Applicant's motion states that Applicant takes issue with the findings of fact and conclusions of law in that Counsel was not found to be ineffective. Applicant reasserts the same claims and arguments made at the evidentiary hearing – that Counsel was ineffective for failing to object to or clarify Applicant's testimony that he did not try to eject the victim from his home, failing to admit the 911 call recording into evidence, failing to argue defense of habitation and that Appellate Counsel was ineffective for failing to effectively argue defense of habitation on appeal. Respondent submits Applicant's motion is without merit and should be denied.

III.

Respondent submits Applicant's Motion to Alter or Amend should be denied. Applicant is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reverse its decision. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to, but not ruled upon by, the trial court).

Furthermore, despite Applicant failing to allege in his PCR application that Counsel was ineffective for failing to object to and clarify the Solicitor's question and Applicant's response that he was not trying to eject the victim from his home, this Court properly found from the record and the testimony presented at the PCR hearing that Counsel was not ineffective for failing to object to Applicant's testimony, during cross-examination, that he was not trying to eject the victim from his home. The record of the trial is littered with testimony that Applicant asked the victim to leave more than once, therefore Counsel's decision not to object or clarify (or draw more attention to) the one time Applicant testified he did not "eject" the victim was reasonable and harmless. The Solicitor's question was not objectionable, he was cross-examining Applicant on his earlier testimony that he asked his house guest – who he had beaten, was heavily intoxicated, and knew did not have a vehicle at the time – to leave his home. Applicant has failed to set forth any basis for a valid objection.

This Court also properly concluded that Counsel was not ineffective for failing to argue defense of habitation. Applicant's version of the facts as told to his Counsel prior to trial and as he testified to at trial, never supported a claim of defense of habitation. At trial, Applicant never claimed he stabbed the victim to force the victim from his home or because the victim posed a

danger. In fact, he stated that he never saw the victim with a weapon, did not know where the knife came from, did not know how the deceased was stabbed and also claimed the stabbing was *unintentional* or accidental. The record also shows Applicant was clearly not without fault in bringing about the altercation that led to the victim's stabbing death.

This Court also properly found that Counsel was not ineffective for failing to introduce the 911 call recording into evidence. Counsel did not find the 911 recording particularly useful to Applicant's case and made a strategic decision not to introduce it. This decision was reasonable, did not amount to a deficiency and did not cause Applicant prejudice. Additionally, Applicant fails to meet his burden to prove how the 911 recording would have changed the outcome of his trial.

Applicant's claim that Appellate Counsel failed to effectively argue the defense of habitation on appeal has never been raised prior to this Motion. Applicant did not allege this in his PCR application and did not present any evidence in support of the allegation at the PCR hearing. Regardless, the claim is without merit because Appellate Counsel did argue the defense of habitation, but the Court of Appeals found the issue was not preserved for review.

[Remainder of page left blank intentionally]

IV.

WHEREFORE, having made its Return to Applicant's Motion to Alter or Amend, the State requests that the Motion be denied.

Respectfully submitted,


ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

BY:



ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

April 27th, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
MICHAEL ANTHONY ROGERS, #348110)
)
Applicant,)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS


2015-CP-42-3862

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion to Alter or Amend the Judgment** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 27th day of April, 2017.



Ashley Haworth, Paralegal
For Respondent

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2015CP4203862

Michael Anthony Rogers, #348110 [Applicant]

State of South Carolina, [Respondent]

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: Plaintiff Defendant

Self-Represented Litigant

Submitted by:

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);

Rule 43(k), SCRPC (Settled); Other: _____

ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;

Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____

STAYED DUE TO BANKRUPTCY

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Applicant filed an application for post-conviction relief (PCR). An order dismissing the Applicant's PCR case was entered into on March 29, 2017. The Applicant moved to alter or amend the Order of Dismissal pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After considering the Applicant's motion, the requested relief is hereby DENIED.

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

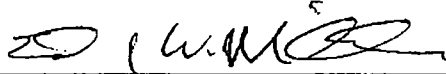
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional

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 M. HOPE BLACKLEY
 SPARTANBURG COUNTY
 CLERK OF COURT

taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



2130

10/2/17
~~6/8/2017~~

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Susannah C. Ross

Valerie Garcia Giovanoli
Caitlin B. Hastings

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

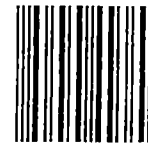
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SPARTAN COUNTY
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M. HOPE BLACKLEY

IAH ROSS ESQ.

FFEE ST.
SC 29601



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