

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Sep 18 2020

SC Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY  
Court Of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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Appellate Case No.: 2017-002116

Michael A. Rogers,

Petitioner,

v.

State of South Carolina,

Respondent.

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**MOTION TO SUPPLEMENT APPENDIX**

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, counsel for Respondent moves for this Court to allow Respondent to supplement the Appendix in this case. In support of this motion, Respondent would present the following:

**Procedural History**

Michael Rogers (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its March 2011 term, the Spartanburg County Grand Jury indicted Petitioner for Murder (2011-GS-42-1933). Petitioner was represented by Clay T. Allen, Esquire (hereafter “Counsel”). Assistant Solicitor Danny N. Fulmer, Jr., Esquire, from the Seventh Circuit

Solicitor's Office, represented the State.

A pre-trial hearing on the motion was convened before the Honorable J. Derham Cole, circuit court judge, on September 2, 2011, during which testimony was presented on the issue of Petitioner's motion to dismiss the murder charge on the ground he was immune from prosecution. Specifically, Petitioner alleged he was immune from prosecution because he was allegedly attacked in his house by the victim, he did not have a duty to retreat, and Petitioner reasonably believed his conduct was reasonable and necessary to prevent death, great bodily harm, or the commission of a violent crime. The motion was denied by written order because he failed to establish by the preponderance of the evidence that he was acting lawfully in committing an unlawful assault and battery on the victim, that he was the victim of an unprovoked attack in his home by someone who was not an invited guest, or that he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury to himself or another or to prevent the commission of a violent crime.

The matter proceeded to trial on October 4-6, 2011, before Judge Cole and a jury. On October 6, 2011, the jury found Petitioner guilty of voluntary manslaughter. Judge Cole sentenced Petitioner to twenty-one years' imprisonment.

Petitioner timely filed a notice of appeal. Carlyle R. Cromer, Esquire, and Robert M. Dudek, Esquire, represented Petitioner on appeal. The issue raised on appeal was:

Whether the court erred in denying appellant's Motion to Dismiss pursuant to S.C. Code 16-11-450 where the evidence showed appellant had repeatedly demanded that the decedent attack appellant with a knife which ultimately resulted in a struggle over the knife and injuries to appellant and a fatal wound to the decedent.

The South Carolina Court of Appeals affirmed Petitioner's conviction. *State v. Rogers*, Op. No. 2014-UP-332 (S.C. Ct. App. filed Sep. 17, 2014). Specifically, the Court found the

defense of habitation argument was not preserved for appeal and that Petitioner failed to carry his burden of proof in establishing by the preponderance of the evidence that he was permitted to use deadly force.

Petitioner's petition for rehearing was denied by the Court of Appeals on October 23, 2014. On December 4, 2014, Petitioner 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.

Petitioner timely filed a PCR application on September 16, 2015, alleging:

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 under S.C. Code § 16-11-450, which was denied.
  - b. Counsel failed to properly preserve the issue of immunity from prosecution from appellate review.
  - c. Counsel failed to object and adequately challenge statement made by State's witness Jackie Lance.
  - d. Counsel failed to request instruction on lesser included offense of involuntary manslaughter where evidence of a struggle between Petitioner and victim over the weapon.
  - e. Counsel failed to request accident charge along with the manslaughter charge.
  - f. Counsel failed to request habitation defense.
  - g. Counsel failed to ask for additional instruction of withdrawal, after provocation of conflict, as reviving right of self-defense.
  - h. Counsel failed to produce evidence of 911 call which was in favor of Petitioner.
  - i. Counsel failed to bring up defense of habitation, protection of person or property during pretrial or trial.
  - j. Counsel failed to conduct legal research to familiarize himself with case law similar to and of the exact nature of the Petitioner's crime.
2. Ineffective assistance of appellate counsel:
  - a. Counsel failed to argue issue of immunity properly consistent with trial under protection of persons and property act resulting in Petitioner being denied issue on direct appeal infringed on Petitioner's due process.
  - b. Counsel failed to object to Attorney General's direct appeal and writ of certiorari because of error.
  - c. Counsel was failed to bring up failure of Trial Counsel to request involuntary manslaughter jury instruction.

Respondent made its Return on July 1, 2016. The evidentiary hearing occurred on

February 1, 2017, before the Honorable Edward W. Miller. Susannah Ross, Esquire was the Petitioner's attorney. Caitlin B. Hastings, Esquire of the South Carolina Attorney General's Office represented Respondent. At the evidentiary hearing, Applicant moved forward on the following allegations:

1. Counsel was ineffective for failing to immediately appeal the denial of Applicant's motion to dismiss the case at the stand your ground hearing.
2. 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.
3. Counsel was ineffective for failing to introduce the 911 tape into evidence.
4. Counsel was ineffective for failing to request a jury instruction for defense of habitation, accident, withdrawal, and involuntary manslaughter.
5. Counsel was ineffective for failing to conduct a proper investigation.

The Court issued an Order of Dismissal, denying Petitioner's PCR Application and remanding him to the custody of South Carolina Department of Corrections, filed on April 6, 2017. The request for relief was denied for the following reasons:

1. Counsel was not ineffective for failing to immediately appeal the denial of the motion to dismiss because Counsel credibly testified that he thought the issue was preserved for appeal because he reincorporated the arguments made at the preliminary hearing in both of his motions for directed verdict and that he believed the issue was addressed by the South Carolina Court of Appeals.
2. Counsel was not ineffective for failing to object because, other than that one statement, Counsel believed the record clearly indicated that Petitioner asked the victim to leave the home.
3. Counsel was not ineffective for failing to introduce the 9-1-1 tape because he did not think the tape was helpful, Counsel's decision to leave out the tape was reasonable, and Petitioner failed to demonstrate any prejudice.
4. Counsel was not ineffective for failing to request jury instructions of defense of habitation, accident, withdrawal, and involuntary manslaughter because:
  - a. Counsel credibly testified that he thought involuntary manslaughter was inapplicable to the case and, thus, Counsel did not think the judge would charge the jury on involuntary manslaughter.
  - b. Counsel credibly testified he thought defense of habitation was inapplicable because Petitioner acted in defense of himself, not his home.
  - c. Counsel did not request an accident or withdrawal instruction because he did not feel they applied to Petitioner's case.
5. Counsel was not ineffective for failure to investigate because Counsel reviewed all evidence in the case, discussed all possible defenses with Petitioner, pursued any leads provided, pursued a theory of self-defense, and reviewed the State's evidence with Petitioner prior to trial, and Petitioner has failed to demonstrate any prejudice resulting

from Counsel's alleged failure to investigate.

On April 2, 2017, Petitioner filed a Motion to Alter or Amend the Judgment, which was denied on October 6, 2017. Petitioner appeals from the denial of relief based upon the allegations that Counsel was ineffective for failure to offer the 911 audio recording into evidence and because Counsel was ineffective for failing to request a jury charge on involuntary manslaughter or on defense of habitation.

### **Motion to Supplement**

The Appendix does not contain any of the appellate documents from the underlying criminal case. Without these documents, the appellate record in this PCR matter is incomplete. Therefore, Respondent submits the appellate records from *State v. Rogers*, Op. No. 2014-UP-332 (S.C. Ct. App. filed Sept. 17, 2014), should be included in the Appendix to the Petition for Writ of Certiorari, as the issue Petitioner raises in his petition is directly related to one of the issues raised on direct appeal. These records were also attached to the return as an exhibit and PCR pleadings in both the circuit and appellate courts directly reference them.

Inasmuch as the underlying direct appellate record is relevant and pertinent material under Rule 243(f), SCACR, that should be included in the Appendix, counsel moves this Court to allow Respondent to include the same in a Supplemental Appendix, provisionally filed along with this Motion.

WHEREFORE, as the Appendix is incomplete, counsel for Respondent requests this Court: (1) grant the motion to allow Respondent to supplement the Appendix, and (2) accept Respondent's Supplemental Appendix for filing today.

Respectfully submitted,

ALAN WILSON  
Attorney General

Chelsey F. Marto  
Assistant Attorney General  
S.C. Bar # 104191

P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

By: /s Chelsey F. Marto  
ATTORNEYS FOR RESPONDENT

September 18, 2020

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In the Court of Appeals

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CERTIORARI TO SPARTANBURG COUNTY  
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MICHAEL ROGERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

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**CERTIFICATE OF SERVICE**

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the **Motion to Supplement Appendix** and the **Supplemental Appendix** have been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

**Taylor D. Gilliam, Esquire**  
**[tgilliam@sccid.sc.gov](mailto:tgilliam@sccid.sc.gov)**

s/ Chelsey F. Marto  
Chelsey F. Marto  
Assistant Attorney General

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
[ChelseyMarto@scag.gov](mailto:ChelseyMarto@scag.gov)

This 18<sup>th</sup> day of September, 2020.

**From:** Chelsey Marto  
**To:** [Gilliam, Taylor](#)  
**Cc:** [Eva Cook](#); "[Allgire, Mary](#)"  
**Subject:** Rogers, Michael - Supplemental Appendix and Motion to Supplement (2017-002116)  
**Date:** Friday, September 18, 2020 11:13:00 AM  
**Attachments:** [ROGERS Michael- Cover letter sending Sup. Appendix and motion FINAL AND SIGNED \(02382062xD2C78\).PDF](#)

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Good morning,

Attached please find the Motion to Supplement and Supplemental Appendix in Michael Rogers' case (2017-002116), to be filed with the Court of Appeals momentarily.

Best,  
Chelsey Marto

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ALAN WILSON  
ATTORNEY GENERAL

September 18, 2020

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**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

**Re: Michael A. Rogers, #348110 v. State of South Carolina**  
**Appellate Case No. 2017-002116**  
**Lower Court Case No. 2015-CP-42-3862**

Dear Ms. Kitchings:

Attached is a copy of Motion to Supplement Appendix and one copy of the Supplemental Appendix, in the above matter for filing in your office. By attached email, a copy of these filings have been served on opposing counsel today.

Sincerely,

/s Chelsey F. Marto  
Chelsey F. Marto  
Assistant Attorney General  
SC Bar No. 104191

CFM/ec  
Enclosures

cc: Taylor D. Gilliam, Esquire