VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
May 29 2020
SC Court of Appeals

Certiorari to Spartanburg County

Edward W. Miller, Circuit Court Judge

MICHAEL ANTHONY ROGERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002116

APPENDIX

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INDICTMENT 597

See also Dempsey v. State, 363 S.E. 365, 610 S.E.2d 812 (2005), State v. Gourdine, 322 S.E. 396, 472 S.E.2d 241 (1991).

For a defendant to be entitled to a jury instruction on a lesser included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (CT. app. 2003); State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1996).

ARGUMENT V

Trial counsel was ineffective for failure to request charge of accident along with the manslaughter charge. State v. Roogers, 766 S.E. 360, formerly 203k 309 (c)

ARGUMENT VI

Trial counsel was ineffective for failure to request dense of habitation. The defense of habitation is analogous to self-defense (which was charged) and should be charged when defendant presents evidence that he was defending himself from imminent attack on his own premises. State v. Sullivan, 547 S.E.2d 183 (S.C. 2001); State v. Lee, 362 S.E.2d 24.

ARGUMENT VII

Trial counsel was ineffective for failure to ask for additional instruction of withdrawal, after provocation of conflict, as reviving right of self-defense 55 A.L.R 3rd 1000, 1003 and 26 American Jurisprudence page 272, section 171 (1974) to go back with the jury during deliberation. State v. Starnes, 213 S.C. 304, 49 S.E.2d 209; State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

ARGUMENT VIII

Trial counsel was ineffective for failure to produce evidence of 911 call which was in favor of Applicant, which in turn prejudiced Applicant to the jury.

ARGUMENT IX

Trial counsel was ineffective by not bringing up one time defense of habitation or protection of person and property during pretrial or trial, resulting in deficient defense and not used for appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

ARGUMENT X

Trial counsel was ineffective for failing to do legal research to familiarize himself with case law similar to and of the exact nature of the Applicant's crime. Trial counsel lead Applicant to believe his case was unique knowing Applicant was uninformed in case law and legal matter. A breech of his ethical oath.

10(b)

Ineffective Assistance of Appellate Counsel.

11(b)

ARGUMENT I

Counsel was ineffective for failure to argue issue of immunity properly consistent with trial under protection of persons and property act resulting in Applicant being denied issue on direct appeal unfringed on Applicant's due process. Outcome of direct appeal would had been different had counsel not been deficient. Ezell v. State, 345 SE 312, 548 S.E.2d 852 (2001).

ARGUMENT II

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.

ARGUMENT III

Appellate counsel was ineffective for not bringing on direct appeal the fact of the trial court error of not charging the jury Involuntary Manslaughter in Applicant's trial.

2015 SEP 10 9:02

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Michael A. Rogers, #348110
Applicant,

C/A NO.:

v.

State of South Carolina,
Respondent.

PROOF OF SERVICE

I, Michael A. Rogers, (Applicant), hereby certify that I have this day served my applicati.n for Post-Conviction Relief with attachments upon the Spartanburg County Clerk of Court Office at the address listed bellow, by and through Perry Correctional Institution's Legal Mail System.

Spartanburg County Clerk of Court's Office
M. Hope Blackley, Clerk
P.O. Box 3483
Spartanburg, S.C. 29304

SUBSCRIBED AND SWORN TO before me
This 14 day of September 2015
Notary: [signature]
My Commission Expires
Expire September 25, 2023

s/ Michael A. Rogers
Michael A. Rogers
(Applicant)

2015 SEP 21 AM 9:02

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Michael Anthony Rogers, #348110, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-42-3862 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on September 16, 2015, would respectfully show this Court:

I.

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 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.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the transcript from Applicant's trial, and Applicant's records for the Department of Corrections and appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

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,
   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 errored in not charging the jury with involuntary manslaughter.

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance

must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise

viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Therefore, Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code Ann. § 17-27-10 *et seq.*; Rule 71.1, SCRCP. All claims should be made well in advance of the PCR hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Filings by Applicant will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[Signature page to follow]

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of trial counsel and appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By: ______________________
ATTORNEYS FOR RESPONDENT

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July 1st, 2016

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS
MICHAEL ANTHONY ROGERS, #348110, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	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** 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 1st day of July, 2016.

Ashley Haworth, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) 2015-CP-42-3862
COUNTY OF SPARTANBURG)

MICHAEL ANTHONY ROGERS,
PLAINTIFF,

vs. TRANSCRIPT OF RECORD

THE STATE OF SOUTH CAROLINA,
DEFENDANT.

February 1, 2017
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE

A P P E A R A N C E S:

SUSANNAH C. ROSS, ESQ.
Attorney for the Applicant

CAITLIN B. HASTINGS, ESQ.
Attorney for the Respondent

CHERYL A. SMITH
Circuit Court Reporter

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EXHIBITS

NO	DESCRIPTION	ID	EVD
	(Applicant's Exhibit)		
1	9-1-1 Call CD	8	8

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

1 P R O C E E D I N G S

2

3 (WHEREUPON, proceedings commenced at 10:09 a.m.)

4 MS. HASTINGS: May it please the Court.

5 THE COURT: Yes, ma'am.

6 MS. HASTINGS: This is the case of Michael Anthony

7 Rogers vs. The State of South Carolina, Case Number

8 2015-CP-42-3862.

9 This application was filed on September 16, 2015. He

10 is presently confined in the South Carolina Department of

11 Corrections, and he was indicted at the March 2011 term of

12 the Spartanburg County grand jury for murder. He was

13 represented by Clay Allen, and on October 4th to the 6th,

14 2011, he proceeded to trial before the Honorable

15 J. Derham Cole and a jury. He was found guilty of the

16 lesser included offense of voluntary manslaughter, and

17 Judge Cole sentenced him to a term of 21 years.

18 He filed a timely appeal, and the South Carolina

19 Court of Appeals affirmed the applicant's conviction.

20 He filed a petition for a rehearing, and this was

21 subsequently denied. The Supreme Court also subsequently

22 denied his petition for a writ of certiorari.

23 I will turn it over to PCR counsel at this time.

24 THE COURT: All right.

25 MS. ROSS: Thank you, Your Honor. May it please the

1 Court. Yeah. That's exactly the procedural history. Bob
2 Dudek wrote in his petition for writ that this case truly
3 turns the Defense of Property Act and stand your ground on
4 its head.
5 This is a case where there was testimony by
6 eyewitnesses that, after an initial fight over some
7 improper moves the decedent made towards Mr. Rogers'
8 girlfriend, there was a clear withdrawal. Both testified
9 to this. When Mr. Rogers left the fight, went into his
10 bathroom, his house, had a cigarette, told the decedent a
11 number of times to leave, one witness says three times, he
12 testifies he was just saying it over and over again, then
13 the decedent re-initiates the fight by punching
14 Mr. Rogers, again, in the face.
15 The witness, at this point, leaves out of the back of
16 the trailer and then walks around to the front of the
17 trailer. She comes in the front door, and Rogers yells to
18 her to call 9-1-1, stating, "I accidentally stabbed him."
19 I have the 9-1-1 tape, it wasn't put into evidence,
20 where you can hear the events from then on.
21 The decedent, Mr. Ryan, was cut under his armpit.
22 They say in the chest area, but it starts about right here
23 (indicating), and the cut is a deep, giant, sort of
24 grinding cut under his left armpit. It cut into an aortic
25 vein, and he bled out in five or so minutes. I don't know

1 if it was in the heart, but he cut into a large vein. He
2 bled to death.
3 He also had two cuts on his back, which I'll get into
4 later. They were said to be superficial.
5 We've alleged ineffective assistance of trial and
6 appellate conduct for failing to effectively argue the
7 Defense of Persons and Property Act in a pretrial motion,
8 not putting the 9-1-1 tape in there, failing to
9 immediately appeal the order denying relief based on that
10 hearing, which I believe was held in September, was given
11 to Mr. Allen the morning of the trial, the actual order.
12 It was filed the day prior. That was not immediately
13 appealed. And while now, under State v. Isaac, it doesn't
14 have to -- it can't be immediately appealed under State v.
15 Duncan, which was the law at the time and up to the law of
16 the time, it was immediately appealable.
17 Then we also say that ineffective assistance of
18 counsel for failing to request accident or involuntary
19 manslaughter as jury charges.
20 I guess while I'm looking at it, I've got two cases,
21 Bryant and Wigington. Wigington goes more to the defense
22 of -- I mean involuntary and accident, and Bryant more to
23 the defense of habitation. Neither of these were
24 requested, I don't believe. It's hard to tell from the
25 transcript because something went on back in chambers

1 about jury charges, but they were not given. There's no
2 argument on the record.
3 Also, we'd argue the withdrawal charge and the
4 self-defense charge were inadequate and did not suit the
5 facts of this case, and there was no objection made to the
6 jury charges as given.
7 Also, the State spoke a number of times about
8 stabbing in the back, stabbing in the back, how could
9 there be a stab in the back in a fight over a knife. He
10 went on and on about that, about stabbing in the back,
11 when clearly the testimony on page 202 was that the back
12 wounds were superficial.
13 We also say that the 9-1-1 should have been put in at
14 the trial level as well.
15 And there was no motion for a directed verdict for
16 murder. This was a murder trial.
17 Closing argument, it's clearly a fight. Closing
18 argument was all about a fight in heat of passion by the
19 State. So we'd argue that there was no proof of malice,
20 that the State really wasn't even attempting to get there
21 and would state that maybe a directed verdict for murder
22 should have been requested.
23 As far as appellate error, we'd say that they failed
24 to bring up the absence of self-defense charge, or they
25 just failed to go against the charge of the judge and

1 complained about how it was put in, and that if Mr. Allen
2 did request accident or involuntary or habitation, that
3 should have been given, but it's not clear that they were.
4 We'd also allege due process violations in that in
5 the closing argument, the State makes arguments of fact
6 that go against what's in the 9-1-1 tape and what the
7 testimony at the trial showed.
8 So that's the overview of our issues in this case.
9 THE COURT: Okay.
10 MS. ROSS: Okay. We call Mr. Mike Rogers.
11 THE COURT: Go ahead and get up there, then put your
12 left hand on the Bible and raise your right hand. Put
13 your stuff down first.
14 WHEREUPON,
15 MICHAEL ANTHONY ROGERS
16 After having been duly sworn, testified as follows:
17 THE COURT: All right. Thank you. You can have a
18 seat. Pull up to that microphone.
19 DIRECT EXAMINATION
20 BY MS. ROSS:
21 Q Okay. Mr. Rogers, first, I'm going to ask you about
22 this 9-1-1 recording. Do you recognize this CD?
23 A Yes, I do.
24 Q What is it?
25 A It's a 9-1-1 recording of Tonya Lowery calling for

1 assistance, for medical assistance.
2 Q Had you ever listened to it before?
3 A The first time I heard it was about a month ago when
4 you came to see me on an attorney visit.
5 Q All right. And we listened to the recording.
6 A That was the first time I've ever heard the tape.
7 Mr. Allen was supposed to let me see it during one of his
8 visits to me while I was in the county, but he never got
9 around to it, and his answer was, "I bad."
10 Q Now, did you recognize the voices on the tape?
11 A Yes, I do.
12 MS. ROSS: I'd like this marked as Applicant's
13 Exhibit 1, and I'd move it into evidence at this time.
14 MS. HASTINGS: No objection, Your Honor.
15 THE COURT: Okay.
16 (WHEREUPON, Applicant's Exhibit No. 1 was marked for
17 identification and entered into evidence.)
18 MS. ROSS: Beg the Court's indulgence.
19 (WHEREUPON, Applicant's Exhibit No. 1 was played in open
20 court.)
21 MS. ROSS: I apologize. Judge, I'm not sure what
22 happened with my computer.
23 THE COURT: How much more time was there?
24 MS. ROSS: Not much. Maybe a minute. And there's
25 nothing more said, according to my notes, after the

1 paramedics were there. They were at the house at 8:40.
2 (WHEREUPON, Applicant's Exhibit No. 1 continued to play in
3 open court.)
4 MS. ROSS: This is about where we were. And you're
5 welcome to listen to the whole thing afterwards.
6 (WHEREUPON, Applicant's Exhibit No. 1 continued to play in
7 open court.)
8 BY MS. ROSS:
9 Q Now, you hear voices. Was John speaking at that
10 point?
11 A No. I don't believe he was.
12 Q Now, is that your recollection of what was happening?
13 A Yes, ma'am.
14 Q And yelling in the background, what were you doing?
15 What were you saying? What were you trying to do?
16 A I was trying to save the man's life. It was an
17 accident, the way he got stabbed. I never meant to stab
18 the man. I didn't know what else to do. He was just
19 bleeding profusely. And I put the towel on him, he passed
20 out, and gave him mouth-to-mouth resuscitation. He wasn't
21 responding. The ambulance was taking forever to get
22 there. I didn't know what else to do.
23 Come to find out, though, the ambulance was outside
24 in my driveway, and they didn't -- weren't able to come in
25 because the police hadn't arrived yet. I guess because

1 there was a crime involved, I guess, with the knife and
2 all, and that's why they were waiting in my driveway. I
3 don't know. It just seemed forever for them to come in
4 the house. But I honestly did the best to save his life.
5 Q All right. And I'd like to talk a little bit about
6 some of your testimony. You testified twice, right? You
7 testified twice, correct? One at the pretrial hearing,
8 and then one later at the trial?
9 A Yes, ma'am.
10 Q And in that testimony, you can see what it is for
11 what it is, there was a lot made about ejectment. And did
12 you know what -- that legal term, had you ever heard that
13 before?
14 A No, ma'am.
15 Q And on page 299, Line 9 of the transcript, I'll just
16 start. What was the solicitor cross-examining you about
17 on page 298?
18 A About myself having a dead -- the body -- a dead body
19 -- a dead man in my living room, he was stating.
20 Q And what was he accusing you of?
21 A Of not -- he asked me if I -- if I was trying to
22 eject him.
23 Q And what did you say?
24 A I said "no." I ---
25 Q Well, read exactly what you said on the transcript.

1 A Okay. You want me to start at 299?
2 Q Yeah. On line -- I think it's Line 9.
3 A He asked (as read):
4 Question: It was your home, but you
5 weren't trying to eject John at this time, were
6 you?
7 I wasn't trying to eject him. I didn't try
8 to eject John. I told him to leave before he
9 attacked me. I did not try to eject him. If I
10 -- if I wanted to try to eject him, I would have
11 accomplished just that, and I got him out of my
12 home.
13 Q Okay. I just want to go back to the transcript.
14 Line 9, you first start saying, "I was trying to eject."
15 A I was trying, yes. I was trying to.
16 Q And then you said, "I didn't try to eject, but I
17 stated many times that I wanted him out of my home."
18 A I thought that the solicitor meant, you know, his
19 body at the time being on the floor, how was I physically
20 picking him up and ejecting the man. I had asked John ---
21 Q When you said that, think about your feelings at the
22 time. Before the fight started, after you asked him to
23 leave, what did you want him to do after you asked him to
24 leave a number of times?
25 A Leave. Get out. Leave the home.

1 Q And at some point, you went into the bathroom and had
2 a cigarette and cleaned up because you were cut, correct?
3 A Yes, I was.
4 Q Your lip was bleeding. This was before the cut on
5 your eye. Your lip was bleeding ---
6 A Yes.
7 Q --- and you went in the bathroom and you came out.
8 Had John left at that point?
9 A No, he had not.
10 Q Who had left?
11 A Jackie.
12 Q And she left with whose car?
13 A With John's truck.
14 Q And who -- and did John give her the keys? Or
15 someone gave her the key?
16 A No. I had -- I had John's keys because he was highly
17 intoxicated and I didn't want him to drink and drive.
18 Q And then when you were asked for the keys, who did
19 you give them to?
20 A Yeah. I threw them. I threw them. I'm not sure. I
21 can't really recall who I threw them to. I think it might
22 have been John himself or maybe Tonya. And they had given
23 -- and I went to the bathroom.
24 Q Would it surprise you if Jackie said that John threw
25 her the keys?

1 A John threw her the keys?
2 Q That's what she said in her testimony. Would that
3 surprise you? You can look at the transcript to confirm.
4 A Yes, it would. But I had the keys, and I threw them
5 because I wanted him to leave the home.
6 Q Okay. And what happened -- when you'd gone in the
7 bathroom, smoked a cigarette, cleaned up and you came back
8 out, what did John do then?
9 A Well, after I had asked John to leave, I had
10 proceeded to the refrigerator, and I went inside the
11 refrigerator and I was getting something to drink. And
12 when I closed the door, John was right in the living -- in
13 the kitchen, and he hit me. He just hit me out of
14 nowhere. Just came at me and hit me.
15 Q And you say "out of nowhere." Is that because you
16 thought you had ended the fight, and you thought you had
17 left the fight behind and it was over?
18 A I made it clear to John that -- that our altercation,
19 it was -- it was over. I had gone to the bathroom, I
20 asked him to leave. I was in the bathroom for a good
21 five, ten minutes. I thought the -- I thought the
22 confrontation was over. All I wanted him was just to
23 leave the home and forget about what -- whatever happened.
24 And when I came out, I feel, Your Honor, that my
25 right of self-defense came back into play because of the

1 fact that I conveyed this to the victim, Your Honor, that
2 the confrontation was over. And when I came back out of
3 my bathroom and I became -- I became the victim then
4 because he attacked me.
5 Q Now, you testified a number of times about the knife.
6 Is it fair to say your recollection or right after it that
7 you were highly anxious after we heard on the 9-1-1 tape
8 this man had died and you're giving statements? Is it
9 fair to say you were pretty anxious and I think you'd been
10 drinking a little before that night as well?
11 A Yes, sir -- yes, ma'am.
12 Q And is that why there were some inconsistencies in
13 your story, that they weren't the exact same story every
14 time that you talked -- told law enforcement?
15 A Well, I was being asked -- I was being asked
16 questions by different officers. They were asking me
17 different questions at different times during the --
18 during the whole course of the event.
19 Q And even now, do you know exactly where the knife
20 came from?
21 A Last of my recollection, it was left on the kitchen
22 table.
23 Q Okay. Now, you said, at some point, that it must
24 have been in my pocket, or I had it in my pocket. Why
25 would you have said that? Or did you say that?

1 A Yes. I had said that. Usually I do keep it in my
2 pocket. I open mail with it, too, also. That's where --
3 that's where I had last left the knife, I had thought.
4 Q So when you say it was on the table, you're saying it
5 must have been on the table because ---
6 A It wasn't in my pocket.
7 Q Okay. And just I want you to testify to not what
8 must have been, but what happened.
9 At some point during this what we call -- we can call
10 the third fight after you came out of the bathroom, did
11 you realize that there was a knife involved?
12 A Yes, ma'am.
13 Q And what did you do then?
14 A I tried to get the knife from John.
15 Q And what did that entail? Did you ---
16 A We had a scuffle over the knife, we're fighting over
17 the knife, both of us.
18 Q And did you all fall on the floor and roll around on
19 the floor?
20 A Yes, ma'am.
21 Q And the forensic report states that there were
22 abrasions on his knees and elbow. Would that surprise you
23 in light of this scuffle or fight that was going on on the
24 floor?
25 A No, ma'am.

1 Q Were you fighting hard?
2 A Yes, ma'am.
3 Q And why?
4 A I was fighting to get the knife away from him. I was
5 in fear for my life just as much to get hurt.
6 Q Now, when did Tonya come back in?
7 A After John was stabbed.
8 Q How long after?
9 A The fight didn't -- wasn't long at all. Maybe a few
10 minutes.
11 Q Okay. And she had stated when she came in he was
12 standing up or sitting up. Is that your recollection or
13 do you know?
14 A I'm not sure.
15 Q Okay. And what did you do when you saw her? What
16 was the first thing you did when you saw her?
17 A I told her to call 9-1-1. John -- John is -- he's
18 stabbed.
19 Q And that was within minutes of when you realized he
20 was stabbed?
21 A The fight. Yes, ma'am.
22 Q Now, I say minutes. Minutes, seconds, how fast was
23 it after you realized John was hurt did she come in and
24 you say, "Call 9-1-1"?
25 A It was right after we -- we stopped scuffling. It

1 was right after I got up off the ground --
2 Q All right.
3 A -- and she walked in.
4 Q Now, at some point in your prior testimony, you said
5 you were cut and went to the bathroom and washed off your
6 cut. Is that true? Or what's your -- what happened?
7 A Yes, ma'am. During the scuffle, I had gotten cut on
8 my right -- my left forearm.
9 MS. HASTINGS: Objection, Your Honor. With respect
10 to Ms. Ross and the applicant, this seems outside the
11 scope of PCR.
12 THE COURT: Well, I'm going to let him do it. Just
13 go ahead.
14 BY MS. ROSS:
15 Q How many stitches did you get?
16 A Nine. Nine staples in my forearm.
17 Q And can you point to where that was on your arm?
18 A My left forearm, Your Honor, right here (indicating).
19 Q Are you right or left-handed?
20 A Right-handed.
21 Q Did you cut yourself?
22 A No.
23 Q Now I'd like to go on to your PC application. You
24 filled out an application, correct?
25 A Yes, ma'am.

1 Q Now, going through that, we've talked about the 9-1-1
2 tape coming in. You did a lot of page cites through it.
3 What would you like to tell the judge briefly about your
4 application? What's your allegations of ineffective
5 assistance of counsel?
6 A Your Honor, I believe that, number one, that trial
7 counsel failed to immediately appeal. Your Honor, I
8 became aware of the denial of immunity when the judge told
9 Mr. Allen that morning before trial. Mr. Allen never
10 discussed I was denied immunity and our motion was denied.
11 That was the first time I was hearing of it, and that's on
12 page 35 of my trial transcript.
13 Mr. Allen came to the county jail four or five days
14 before the trial and told me in advance my trial date a
15 couple -- he had to put up my trial date a couple of weeks
16 ahead from the original date. And I asked him why'd he do
17 that. We haven't heard the decision on immunity hearing.
18 And he said he will be told by Judge Cole the morning
19 of the trial.
20 I told him -- I told him that -- what does that tell
21 you? If he gave us a trial date, he's not going to rule
22 in my favor.
23 And Mr. Allen told me that we'll wait and we'll see.
24 Your Honor, that was the first time I heard I was
25 denied immunity from Judge -- Judge Cole the morning of

1 the trial. And I only became aware that Mr. Allen could
2 have objected and appealed the decision when I was
3 incarcerated about a year later when I received the
4 attorney general's brief to my direct appeal. I then
5 began to go to the law library, and I found out that the
6 denial of the motion was an interlocutory injunction in
7 nature.
8 Q Okay. Now, just going back to that initial hearing,
9 did one of the witnesses make some hearsay and clearly
10 prejudicial statements throughout the initial hearing on
11 the Defense of Persons and Property Act? I think you put
12 that in there. I'm trying to refer you back to testimony
13 by not Tonya but ---
14 A Jackie Lance.
15 Q Yes.
16 Now, what did she do? Did you have that handy?
17 A What page? Yeah. It's in my PCR application.
18 Q Okay. I just thought we would talk about that
19 initial one.
20 Page 22 through 26 of the stand your ground hearing.
21 A That's where Jackie Lance said I was a -- I killed
22 him in cold blood.
23 Q And was she there?
24 A No, she was not.
25 Q All right. Was there any objection made at that

1 point at the hearing?
2 A No, ma'am.
3 Q I'm sorry. I got you all -- let's go back to your
4 application. Can we talk about the jury charges that you
5 feel like your lawyer should have requested in your case?
6 Or what would you like to do next?
7 A Well, I'd like to address the failed to request
8 additional charges. Mr. Allen should have asked for
9 involuntary manslaughter because there was evidence during
10 the trial of a struggle of a weapon. A self-defense
11 charge, which was charged, and involuntary manslaughter
12 are not mutually exclusive. It should have been charged,
13 I believe, because there was testimony in there in -- in
14 the transcript and the trial that there was a struggle
15 over the weapon.
16 Q Okay. Now let's move on to defense of habitation.
17 A Yeah. It's in here, too.
18 The trial counsel was ineffective for failure to
19 request defense of habitation because the defense of
20 habitation is analogous to self-defense, which was charged
21 in my trial, and should be charged when defendant presents
22 evidence with defending himself on an imminent attack on
23 his own premises.
24 Q You do a lot of cites, but I saw that you told John
25 to leave the house on page 132, Line 22. I'm sorry. You

1 didn't say that. Tonya Lowery testified, "He just said he
2 kept on telling John he wanted him out of the house. He
3 told him like three times, I mean, right after each
4 other." Is that ---
5 A Yes, ma'am.
6 Q Was that what happened at trial?
7 A Yes, ma'am.
8 Q And then ---
9 A She states it three or four places in there.
10 Q And you do, too.
11 A In the -- in the transcript.
12 Q I have page 260.
13 And then you said it, too. And you also said it
14 during the stand your ground hearing on page 13 and 22
15 through 26. Over and over again there's testimony about
16 you asking John to leave the house, correct?
17 A Yes, ma'am.
18 Q Now, as far as accident, we heard some already on the
19 9-1-1 call, but there's also testimony throughout the
20 record that you said, "I accidentally stabbed him."
21 A Yes, ma'am.
22 Q And that was in testimony of Tonya over and over
23 again as well as yourself. And the testimony is
24 consistent that you hit Mike -- that John hit you after
25 you left the bathroom and had cleaned up, that he had

1 initiated it.
2 A Yes, ma'am.
3 Q Now, going back, what was your next -- we've got the
4 charges that weren't given. Were you happy with the
5 charge that was given for self-defense or withdrawal by
6 the judge?
7 A Yes, ma'am.
8 Q Okay. Well, go back to your argument. What are your
9 other things that your attorney should have done? How
10 many times did you meet with him?
11 A I believe Mr. Clay Allen came and seen me at least, I
12 think, maybe three or four times -- three.
13 Q Okay. Did you feel like he did all the investigation
14 you wanted him to do?
15 A No, ma'am. I asked him, Mr. Allen, about my case,
16 and he said he had a legal -- he had -- he had some
17 paralegals that do that work to look on -- for other
18 cases. And when he came back the next time after, I said,
19 "So how's it looking?"
20 He says, well, I couldn't find anything pertaining to
21 my -- to my case.
22 Q What would you say his familiarity was with the
23 Defense of Persons and Properties Act?
24 A That was the first time I heard about it was when we
25 had that hearing. I wasn't even aware. Mr. Allen asked

1 me to just tell the truth and tell him what happened. I
2 didn't understand about that stand your ground law or
3 anything like that.
4 Myself, Your Honor, when I -- when I had gotten the
5 brief back from the attorney general, that's when I
6 started going to the law library. And I'm far from
7 knowing anything really about the law, but for the last
8 three years that I -- that I have been digging and found
9 it, I found many, many cases that pertain to the same
10 situation that I -- that I went through, and I can't see
11 why Mr. Allen couldn't have brought any of those cases up
12 during my trial.
13 Q And when you made the comment on the record on
14 page 299 about you weren't trying to eject John at that
15 time, did Mr. Allen come up on redirect and ask you any
16 questions to clarify that your intent was that you did
17 want John to leave and that's why you'd asked him to leave
18 a number of times?
19 A Not that I know of.
20 Q You've also alleged ineffective assistance of
21 appellate counsel. What's the basis of that argument?
22 A For some reason, my -- my direct appeal was not
23 preserved. And the reason why it wasn't preserved, I was
24 told, was that they couldn't argue one way during a trial
25 and one way during the direct appeal.

1 Well, Mr. Allen, it's my understanding that he went
2 under the protection of person and property where
3 Mr. Dudek went into defense of habitation. But to me,
4 this is where I'm confused, it's all the same -- same
5 statute. And they're saying that it wasn't preserved
6 because it wasn't brought up during the trial.
7 But I have to give Mr. Allen credit, because on
8 page 307 in my transcript, Your Honor, Mr. Allen did
9 mention the Castle Doctrine in motion and matters. And --
10 but for some reason, the appellate court said the issue
11 was not preserved. But it's clear, Your Honor, it was
12 brought to the trial court's attention. So how can they
13 say that it could not be heard and it wasn't preserved
14 when Mr. Allen did bring it up during the matters of
15 motion before -- at the end of the trial? I don't know.
16 That's where it gets me. But nowhere during the trial or
17 before that time did the Castle Doctrine or stand your
18 ground law ever come up, the protection of persons,
19 property ever come up.
20 Q And that was the appellate opinion stated the Court
21 of Appeals' finding was that Mr. Allen did not properly
22 bring up the defense of habitation.
23 A Correct.
24 Q So they felt that that was not preserved, that
25 argument.

1 A Correct.

2 But also, Mr. Dudek went under defense of habitation,

3 which they're saying it's arguing -- even though it's all

4 the same statute of stand your ground, they're saying

5 that, you know ---

6 Q So you were caught in a Catch-22.

7 A Amen.

8 Q On page 204, Line 4, Dr. Wren, what does he say about

9 injuries on the back?

10 A I believe he states that they were superficial.

11 Q 202, Line 5, right?

12 A Yes.

13 Q All right.

14 A That he had two stab wounds to the back. They were

15 superficial, too. The prosecution kept insisting that I

16 had stabbed the man in the back when he wasn't ever --

17 they never entered the body cavity at all. The only cut

18 he had received was under the armpit, which was the fatal

19 cut.

20 Q And on page 336 of the State's closing, on Line 17,

21 he talks about your raging anger and said, "He stabbed

22 John, stabbed John in the back." There was no objection

23 to that, was there?

24 A No, there was not.

25 Q All right. I think I've covered everything. Can you

1 -- is there anything else you'd like to put on the record?
2 A Well, I believe that my attorney could have brought
3 up -- when Jackie Lance testified, I believe that
4 Mr. Allen was aware of her criminal record of prostitution
5 and drug arrest, and not one time did he ever question her
6 character. Even though she was lying through testimony, I
7 think it was pertinent because of the district attorney
8 was wondering, and it states in the transcript where --
9 how do -- how does a man 53 years old and a man 42 years
10 old being with a woman who is 24 years old in the house
11 when it was apparent that, you know, she -- she was a
12 prostitute and she was there and John wanted to get with
13 her.
14 Now, as far as whatever transpired between that, it
15 never happened, but I'm just saying that -- that -- that
16 is the bottom line of why she was there in the first
17 place. And this was never brought up. And plus, like I
18 say, her past record, I believe her character would have
19 benefited me.
20 Q So he should have impeached her on her prior record.
21 A Absolutely. I believe so.
22 Q All right. Anything else?
23 A And the additional charges, like I said, of the
24 involuntary manslaughter, the defense of habitation, I
25 believe. It's my understanding, if the trial court

1 commits reversible error or fails to give a charge on the
2 issue raised by the evidence, that it commits -- it
3 commits error.
4 Q That goes to another question. Did appellate defense
5 raise the issue or make any comment that the judge's jury
6 charge on withdrawal and self-defense were inadequate and
7 didn't suit the facts of your case?
8 A No, he did not.
9 Q Again, Mr. Allen didn't object to those charges
10 either?
11 A No, he did not.
12 Q Go on. Is there anything else?
13 A I believe -- I believe, Your Honor, about the
14 withdrawal and abandonment after the first fight, Your
15 Honor, I really believe if Mr. Allen would have had
16 additional charges brought to the jury, it would have
17 shown that my right to self-defense would have -- would
18 have came back into play, and I had the right to protect
19 myself when John had attacked me after the confrontation
20 was over with. A good five, ten minutes went by. It was
21 clear to him that it was over, just leave my home, leave,
22 and it would have been the end of it. If he did not
23 attack me the second time, we wouldn't be standing here
24 today.
25 Q Okay.

1 A I've just got to make sure I get everything in.
2 Q Sure.
3 A And it's a reasonable probability, Your Honor, that
4 if my trial counsel wasn't ineffective, the outcome of my
5 trial would have been different. There wouldn't have
6 probably been a trial if my lawyer would have objected
7 before the trial started. The judge asked Mr. Allen and
8 the prosecution, "Is there anything else before the Court
9 before we proceed?" And my lawyer chose to remain silent.
10 It was incumbent, it was his duty. He knew the law better
11 than I did, and he remained silent. Myself, I would have
12 -- I would have objected right there. I believe I might
13 have kicked him in the leg or done something underneath
14 the table. But I don't know. I was -- I was -- I was --
15 flabbergasted because I did not win my immunity.
16 But anyway ---
17 Q That's on page 35?
18 A Yes, ma'am. It was on page 35 of the transcript.
19 And there would have been no trial. Let the Supreme
20 Court decide whether I had immunity or not, and if they
21 said "no," then so be it. I believe my due process was
22 violated, and it was my constitutional right. I believe
23 it's my lawyer's responsibility to argue the point of law
24 and how it affects the jury's interpreter of the evidence,
25 which he clearly failed to do so in State v. Mary

1 [phonetic].

2 There's a lot of other things, but you ---

3 Q And a lot of those things you put in your

4 application, correct?

5 A Yes, ma'am. I'd like to incorporate -- Your Honor,

6 I'd like to incorporate my argument on PCR -- my arguments

7 on the PCR application to my testimony.

8 MS. ROSS: And that's part of the Court's Exhibit, so

9 that's in there.

10 Okay. I've got no further questions.

11 THE COURT: Okay. Cross-examination.

12 CROSS EXAMINATION

13 BY MS. HASTINGS:

14 Q Good morning, Mr. Rogers.

15 A Good morning.

16 Q I just have a few questions for you.

17 A That's fine.

18 Q It's true that you were the initial aggressor of the

19 entire altercation, correct?

20 A Not the entire altercation. Not the entire

21 altercation.

22 Q Well, you saw that the victim, he had said you guide

23 his interactions with your girlfriend at the time. That's

24 correct?

25 A What I perceived -- when I came out of the bathroom,

1 what I perceived to me, being in my own home, I didn't
2 know whether he would -- what he was doing to Ms. Lowery.
3 I didn't know. All I had -- what I had seen was he could
4 have been attacking her or whatever. I didn't know what
5 he was doing to her. That's why I reacted the way he did.
6 It was -- yes, I did. I was the first one to push him
7 away.
8 Q Okay.
9 A I had no idea what he -- what he was doing. To me, I
10 had probably -- I mean, to me, it was on appearance. It
11 was wrong what he was doing. This is my own home.
12 Q And you always wanted to go to trial. You never
13 wanted to plead out. That's correct?
14 A Excuse me?
15 Q You always wanted a trial. You never wanted to take
16 a plea.
17 A Pretty much, yes.
18 Q And isn't it true that you were charged with murder,
19 you were facing murder?
20 A Yes, ma'am.
21 Q But the jury found you guilty of a lesser included
22 offense, right? You were found guilty of voluntary
23 manslaughter.
24 A Yes, ma'am.
25 Q Okay. And isn't it also true that Mr. Allen asked

1 for a stand your ground hearing to dismiss your entire
2 case before you went to trial?
3 A Yes, ma'am.
4 Q And isn't it also true that Mr. Allen prevented the
5 jury from knowing that she was currently incarcerated
6 during your trial?
7 A Who was incarcerated, ma'am?
8 Q Tonya.
9 A I imagine that's what transpired. I'm not -- I'm not
10 sure if they knew or didn't know.
11 Q Okay. And other than the 9-1-1 tape, did Mr. Allen
12 review the discovery with you?
13 A No. Not at all. I've never -- as a matter of fact,
14 the only time I saw my discovery was when I lost my direct
15 appeal, and Mr. Allen knows he mailed it to me personally
16 to Perry Correctional Institution. That was the first
17 time I ever saw my motion of discovery was when Mr. Allen
18 mailed it to me. I asked him for my motion of discovery,
19 and he advised me not to get it because he was afraid it
20 could get stolen inside the jail where I was at, and
21 people could use that against me. The first time, I got
22 it mailed back in maybe 2016. That was the first time I
23 saw it.
24 Q So in your three to four meetings with Mr. Allen,
25 what did you all do then?

1 A Well, he asked me what had transpired. I had told
2 him what had transpired. And like I said, he said that he
3 had paralegals that did that kind of work -- he -- to look
4 into my case and see if there's anything that -- other
5 cases that are like it, and see what kind of defense we
6 would come up with.
7 And as far as the immunity hearing, the only defense
8 that he had ever told me to do was tell the truth. He
9 says, "You go up there and tell them the truth." We never
10 sat down and explain what this was all about. I didn't
11 even know what the Castle Doctrine was. I had no clue
12 what the Castle Doctrine was. He never explained to me
13 any of this stand your ground rule.
14 MS. HASTINGS: No further questions, Your Honor.
15 THE COURT: All right. Thanks. You can step down.
16 THE WITNESS: Thank you, Your Honor.
17 MS. ROSS: That's the applicant's case. We don't
18 have any more witnesses.
19 THE COURT: Okay.
20 MS. HASTINGS: The State would call Mr. Allen to the
21 stand.
22 THE COURT: All right.
23 WHEREUPON,
24 CLAY THOMAS ALLEN
25 After having been duly sworn, testified as follows:

1 THE COURT: Please state your full name for the
2 record.
3 THE WITNESS: Clay Thomas Allen.
4 THE COURT: Okay.
5 DIRECT EXAMINATION
6 BY MS. HASTINGS:
7 Q Good morning, Mr. Allen. Thank you for being here
8 today.
9 A You're welcome. Good morning.
10 Q How long have you been practicing law?
11 A Since 1979.
12 Q And what portion of that has been criminal?
13 A Almost all of it. One year -- I was in the Judge
14 Advocate General court for -- active duty for four years,
15 one year as a prosecutor, two years as a defense attorney,
16 then three years as an assistant public defender in
17 Richland county, four years as a solicitor -- assistant
18 solicitor in Greenville county, ten years in private
19 practice where I had a contract with Greenville County to
20 provide public defender type work, and then I've been with
21 the Spartanburg Public Defender's Office in the seventh
22 judicial circuit since 2001.
23 Q Okay. And at the time of this trial, had you done
24 many trials with similar charges? Murder trials?
25 A How many is many, but I've had several murder cases

1 prior to this case, yes. I can't remember the number.
2 Q And you were appointed to this case?
3 A Eventually, I was. My office started representing
4 Mr. Rogers shortly after his arrest. He was initially
5 represented by Kathleen Hodges, who was an assistant
6 public defender in the office. When she left our
7 employment, then I took over this case.
8 Q And how would you describe the State's evidence
9 against Mr. Rogers? Would you describe it as overwhelming
10 evidence? Or how would you characterize it?
11 A I wouldn't describe it as overwhelming evidence, no.
12 I mean, it was a toss-up. I mean, you know, we had a
13 situation where Mr. Ryan and Mr. Rogers, they were in
14 Mr. Rogers' home drinking. Mr. Ryan may very well have
15 been using drugs. I don't know about Mr. Rogers. And
16 then they had an argument and a fight, and from what
17 Mr. Rogers tells me, which is corroborated to a great
18 degree about Tonya Lowery, it looked like Mr. Ryan was the
19 initial aggressor. Because Mr. Rogers was in his own
20 home, I thought we were in a pretty strong position. I
21 mean, but, you know, anything can happen in a trial.
22 Q And how many times do you recall meeting with
23 Mr. Rogers?
24 A I met with him several times. I can look at some of
25 my notes and let you know more specifically.

1 It looks like I had taken over the case sometime
2 around May of 2011, late April or early May of 2011.
3 Excuse me one moment. I met with him on May 20th, I met
4 with him August the 3rd, I met with him August 26th, I met
5 with him August 31st, I met with him September 22nd, I met
6 with him October 3rd. All this was 2011. I believe
7 that's the majority of the times I met with him.
8 Q So just within that time, that's six meetings.
9 During these meetings, did you review your Rule 5
10 materials?
11 A Oh, yes.
12 Q Did you provide the applicant with a copy of these
13 materials?
14 A I don't have a note that I did, so I can't say that I
15 did at this point.
16 Q Is that your standard practice?
17 A If they ask for it. Now, we do warn clients that if
18 we -- especially the clients who are in jail, we have
19 occasionally a problem with giving them their discovery.
20 They can't look after it day and night, even, you know.
21 Somebody is going to try to look into their discovery, get
22 some inside information. And we warn them that we've had
23 situations and I've heard of situations where then people
24 in jail review discovery, get some inside information, and
25 then go tell the officers that that person told them

1 something that, you know, the officers would believe it
2 because this is information that hadn't been put out there
3 yet and no one would be any wiser that they actually got
4 it through discovery.
5 We try to discourage clients from having their
6 discovery with them in the jail. I can't remember now if
7 Mr. Rogers took me up on my suggestion not to have it. I
8 understood that he testified that he did. That could very
9 well be accurate. He and I were getting along pretty
10 well, I thought. But I don't -- so I don't know when I
11 gave him the discovery, but we certainly would have
12 reviewed it in a great deal of detail.
13 Q Okay. During these meetings, did you discuss his
14 version of the facts of this case, and from those facts,
15 what defenses you thought were applicable?
16 A Yes.
17 Q And what defenses did you think were applicable?
18 A Primarily, it was self-defense and the statutory
19 Castle Doctrine or stand your ground defense, if you will.
20 In the -- became aware of the Duncan decision at that
21 time, you know, and the idea that we'd have a pretrial
22 hearing or that we need to have a pretrial hearing on the
23 stand your ground statute, stand your ground defense. We
24 discussed that. And then that's why we went that way.
25 And I was trying to not only win the stand your

1 ground motion, although I did tell him that we did have
2 some problems with that, but also to try to shake the
3 prosecutor up a little bit and either to dismiss the case
4 or to negotiate the case a little bit better.
5 The problems we had, as I explained to Mr. Rogers,
6 were the presumption that someone feels they're in danger
7 is when they have someone trying to break into their home.
8 And our problem here was Mr. Ryan was initially an invited
9 guest. But my position and the argument was, you know,
10 that when Mr. Rogers told him to leave, then he basically
11 became an intruder. And that's why I thought the statute
12 would apply in this particular case.
13 Q And just to jump ahead just a little and then we'll
14 jump back, actually, to draw the Court's attention to
15 page 310 of the transcript, you actually referred Judge
16 Cole, I believe it is ---
17 A Yes.
18 Q --- to a case that talked about that, when an invited
19 guest becomes an intruder. And this is referring to
20 hiding potential charges -- jury instructions. But isn't
21 it true that you tried to further define the Castle
22 Doctrine in the jury instructions? And I think the case
23 was State v. Brown. Sorry. Yeah. State v. Brown. Do
24 you recall that?
25 A Right. I've gotten a charge, let's see here, and

1 it's referring on page 310 to my Request to Charge
2 Number 2 and 3. And those were -- I saw them here a
3 minute ago. If you'd bear with me a little bit.
4 Q Yes. No problem.
5 A The Charge 2 dealt more with the lack -- you know,
6 the fact that there is not a duty to retreat when one is
7 in their own home. And then Charge 3 was the --
8 basically, a guest duty to retreat, in other words, that
9 if someone in their own home is attacked, they don't have
10 to retreat. And if the guest is told to leave, they have
11 -- or that they had a duty to retreat, essentially, when
12 they're told by the homeowner to leave. And that's the
13 point that I was trying to get across. But that was more
14 or less in connection with the charge on self-defense.
15 Q Right. So that was more to further instruct the jury
16 on the victim's duty to retreat.
17 A Right.
18 Q But ultimately, Judge Cole left that out; isn't that
19 correct?
20 A Well, he kept thinking I was trying to say the same
21 thing twice, which was the homeowner had no duty to
22 retreat. So -- but I was trying to get across to him
23 that, well, you've got the homeowner has no duty to
24 retreat, but I guess I may not have said it orally very
25 well, but the guest did.

1 Q In other words, you tried to get that in?
2 A Right, right.
3 Q So jumping back to the stand your ground hearing,
4 going to this hearing, did you review the Castle Doctrine
5 and what it entailed to Mr. Rogers?
6 A Yes, sir. Or yes, ma'am. Excuse me.
7 Q Did he ever seem to indicate that he didn't
8 understand the doctrine or what that hearing was for?
9 A Now, I know we had to explain it several times, I
10 mean, because it was kind of a new concept to him, you
11 know, that -- but I was trying to explain to him that what
12 we were trying to do is to establish that he had the
13 right, basically, to defend himself in that way under the
14 statute, and that if the judge viewed it that way, he
15 would have to rule in our favor and he could not be
16 prosecuted.
17 Q Okay. And you did not immediately appeal the stand
18 your ground hearing, correct?
19 A No, I did not.
20 Q But you did make a motion for a directed verdict
21 during the trial twice; is that correct?
22 A I believe I did. That's my standard practice.
23 Q And correct me if I'm wrong, but didn't you
24 ultimately reuse arguments that you made during the stand
25 your ground hearing?

1 A Yes.

2 Q So at the time, in your opinion, did you think that
3 you would then be able to appeal those arguments from
4 using them through your directed verdict motion?

5 A Right. I can't honestly sit here and say today that
6 I knew at the time, although apparently I should have,
7 that a denial of the stand your ground hearing was
8 immediately appealable. I mean, I can't say that I knew
9 that or remembered that at the time. And I'm confident
10 that I did not talk to Mr. Rogers about appealing that
11 issue, and I thought that it would be appealable with the
12 trial.

13 I would note, however, that in the appellate decision
14 that was attached to my packet, the Court did take up the
15 issue of the stand your ground motion and ruled on it on
16 the merits and did not rule on it on the -- as a
17 procedural issue. The defense of habitation was a
18 procedural issue, but they ruled on the merits of the
19 stand your ground motion. So he did get an appeal on the
20 merits of the judge's denial of our request for dismissal
21 for stand your ground.

22 Q Okay. And at the time, if you had known to appeal
23 the stand your ground hearing, would you have done so?

24 A I would have talked to Mr. Rogers about it and gotten
25 his agreement to go one way or the other.

1 I was getting the impression that he was getting very
2 frustrated, that he wanted his trial, he wanted out of
3 jail. He was not able to make bond, may not have even had
4 a bond. I don't remember one way or the other.
5 MS. ROSS: I'm going to object to impression versus
6 what was directly said to him or not.
7 THE COURT: Well, it goes to the witness's state of
8 mind.
9 THE WITNESS: And so I knew he -- I felt like he
10 wanted a trial and I thought we probably would have a
11 better chance with the jury than with the judge and/or on
12 appeal simply -- and it's largely because this trial judge
13 is a good trial judge, he's smart, he knows the law, and I
14 have observed over the years of practice in front of him
15 that when we have issues -- pretrial issues, whether it's
16 confession or search and seizure, that he tends to rule
17 that we failed in our burden of proof or that he would
18 find that certain witnesses are more credible than the
19 other, basically discretionary rulings which are not
20 reversed on appeal absent a clear showing of an abuse of
21 discretion. So my feeling was we were -- you know, I
22 can't say that I felt that we stood a better chance at
23 trial than appeal because I don't think I really
24 considered the immediate appeal.
25 BY MS. HASTINGS:

1 Q And at the beginning of the trial, you made a couple
2 motions in limine. Can you talk about those for the
3 Court?
4 A Can you -- I guess I have to ask you what they were.
5 I don't recall. I'm sorry. I didn't review this
6 transcript prior to ---
7 Q I believe one was to -- if I'm allowed to answer. I
8 believe one was to prohibit the State from bringing up
9 that Ms. Lowery was currently incarcerated.
10 A Yes. She was in the detention center. She was
11 pending charges. Actually, when I had her brought to
12 court, of course she had to be brought to court in
13 custody, and the solicitor had her -- had her over in one
14 of the conference rooms across the hall which is different
15 than they normally put people in this courthouse. They
16 normally keep them back here in what we call the jail
17 room. And I knew they'd keep her separate because she was
18 a witness. They didn't want them talking.
19 But they had her in her jail clothes. I had brought
20 over civilian clothes that we had for her to wear. I was
21 told by the officers that she couldn't wear them, and we
22 had to go back in chambers to the judge, the prosecutor
23 and I, where I had to insist that she be allowed to wear
24 jail [sic] clothes so they wouldn't broadcast the fact
25 that she was in jail. And the judge agreed with me and

1 directed them to allow her to change. So I do know that.
2 I didn't want the prosecutors to bring up the fact that
3 she was currently in jail as long as we stayed away from
4 it.
5 Q And that was a strategic decision on your part
6 because she was your leading witness for the applicant and
7 you felt that that would be prejudicial?
8 A I thought it would be highly prejudicial. So yes.
9 Q And then I believe the other motion was to prohibit
10 some of the officers from characterizing Mr. Rogers'
11 changing of statements, because in the transcript, it
12 talked about how he gave different versions of the story.
13 And so I believe the second motion in limine was to
14 prevent them from characterizing it as him changing his
15 story.
16 A Okay. I mean, I don't recall, but if it appears in
17 the record, then I'm sure I said it.
18 Q And then lastly, other than Mr. Rogers' error in
19 saying that he was -- he failed to eject -- or he was not
20 trying to eject the victim, did you feel that the record
21 was otherwise very clear that he was trying to have the
22 victim leave his ---
23 A Well, I think he testified that he told him to leave,
24 and so that was what I was relying upon to argue the
25 ejectment of a trespasser and talk -- and when I was

1 making motions to that effect with the judge. Of course,
2 the judge was seizing on the statement that he made that
3 he wasn't -- on cross-examination that he wasn't trying to
4 eject him, and that if he had tried, he would have ejected
5 him. So, you know, that was a pretty strong statement
6 that he made at the end of the cross-examination. So --
7 but yeah. I was trying to get across the fact that he
8 told him to leave and that Mr. Ryan didn't leave.
9 Q And then last question. At the end of the trial, you
10 made a motion for a new trial, reiterating your former
11 arguments ---
12 A Yes.
13 Q --- of your two directed verdict motions?
14 A I believe I did, yes.
15 MS. HASTINGS: Okay. No further question.
16 THE COURT: All right. I'll tell you what. Let's
17 just take a short morning recess. So be back in five
18 minutes.
19 (WHEREUPON, a recess is taken at 11:28 a.m.)
20 CROSS EXAMINATION
21 BY MS. ROSS:
22 Q Good morning, Mr. Allen.
23 A Good morning.
24 Q Okay. We've gone over the history of the case, so
25 I'm not going to rehash that. But it looks like the

1 hearing on stand your ground, we'll call it, it's Defense
2 of Persons and Property Act, was September 2nd. Did you
3 ever order a transcript of that hearing?
4 A I did.
5 Q And did you review it with your client, the
6 testimony, or discuss it at any time with him?
7 A I don't recall discussing the transcript with him.
8 He was present at the hearing, so he heard the testimony.
9 Q Okay. Did you talk to him about his testimony and
10 about testifying? Did you review that with him before the
11 hearing?
12 A I had talked to him about his version of the case, I
13 mean, on more than one occasion prior to the hearing, so
14 -- to get a full understanding of what he would say.
15 So . . .
16 Q And when he talked to you, when you talked to him
17 each time, weren't those stories consistent of what he
18 would say?
19 A By and large. I mean, there were some times that I
20 would -- I wouldn't have asked him about a certain detail
21 or so, so I'd go back and ask about a detail. So -- but
22 yes. By and large, I mean, his version, I don't think,
23 changed significantly.
24 Q Okay. Now, during the trial, there was a plea offer
25 for ten years, wasn't there?

1 A That offer came during the trial. We previously had
2 an offer for 20 years prior to the trial for voluntary.
3 Q And Mr. Rogers turned it down saying that he wasn't
4 guilty and he turned it down?
5 A He turned down the offer for 20 years. He indicated
6 that he would consider an offer for involuntary
7 manslaughter, and I was reading -- prior to testifying, I
8 was reading my memo for file, which I believe you received
9 a copy of. There was some -- I mean, I didn't immediately
10 go to the solicitor with that offer because I wanted him
11 to be sure that if it was offered, that he would take it.
12 He wanted to think about it some more. And then when they
13 made the offer of ten years, we talked about it, the judge
14 gave us overnight to think about it. And then the next
15 morning, he decided he wanted to go forward.
16 Q All right. And that -- the ten years was not for
17 involuntary.
18 A No. I explained to him that during one of our -- or
19 during our in-chambers conference, because I believe the
20 testimony was pretty much complete or something to that
21 effect, that I acknowledge that those -- no evidence of
22 recklessness and extreme negligence, and that I explained
23 to him that we weren't going to be getting a charge on --
24 or that I didn't think that a charge on involuntary was
25 appropriate in this case. So I explained to him also that

1 ten years was -- an offer for ten years was extremely rare
2 and that he should actually consider it if he wanted to
3 plead guilty.
4 Q But in his testimony, you will admit, he did, at one
5 point, say -- well, there was testimony that it was an
6 accident.
7 A A lot of times clients -- yes. There was some
8 testimony that he said there was an accident. But a lot
9 of times ---
10 Q I'm just talking about what's on the record. Tonya
11 said a number of times on the 9-1-1 tape, and she said the
12 first thing he said was, "I accidentally cut him." So the
13 record showed testimony that there was an accident.
14 A Yes. But a lot of times -- I guess what I'm trying
15 to make is a lot of times, people use the word "accident"
16 in the colloquial sense. It was clear that Mr. Rogers was
17 defending himself, it was clear that he was trying to take
18 -- that he took the knife -- or his testimony is that he
19 took the knife from Mr. Ryan and that struggle continued.
20 He doesn't know how he got cut. He said that time and
21 again. He didn't know how he got cut or he may not have
22 even realized Mr. Ryan was cut until he was cut. I mean,
23 this was a Hawkbill knife, if I recall.
24 Q So he was saying all along it was an unintentional
25 killing during this struggle?

1 A He was indicating that he wasn't trying -- yes. He
2 didn't intend to kill him, but he was defending himself.
3 Q And the jury clearly saw no malice because they came
4 back with voluntary manslaughter, correct?
5 A They came back with voluntary manslaughter.
6 Obviously, malice is an element for murder.
7 Q Now, the pathologist testified that the decedent died
8 from a large wound under his left arm cutting an artery.
9 And that's on page 202. But is that your recollection of
10 the injury?
11 A I know that he was cut because I saw the pictures,
12 and he was cut from somewhere underneath the armpit, and
13 it was a gaping wound. It came across into the chest
14 area, and it was -- I don't think he hit any of the vital
15 organs. He didn't hit the lung, I don't think, or the
16 heart, but, I mean, the testimony was that he bled out --
17 I mean that Mr. Ryan died of -- I don't know if they used
18 the word "exsanguination," but that he died of loss of
19 blood.
20 Q And also, wasn't the testimony that the wound was
21 actually deeper than the knife itself as if either it was
22 sawing across or that the body was moving over the knife?
23 I think that's on page 202.
24 A I don't specifically recall that description, but if
25 it's in here, we knew it was said, yes.

1 Q And isn't it true that his testimony that the stab
2 wounds to the back were superficial on Line 5 of page 202?
3 A Yes. I believe that they referred to them as
4 superficial wounds, yes.
5 Q Okay. And then I'm going to refer you to page 331,
6 Line 15.
7 A 331?
8 Q Yeah. It's the State's closing, Line 15.
9 A Okay.
10 Q He's talking about how the decedent -- Mr. Rogers
11 stabbed the decedent in the back, and he said it a number
12 of times. You never objected or said anything to say
13 these were superficial wounds?
14 A I didn't object. Lawyers are allowed to talk about
15 the evidence and make reasonable conclusions, you know,
16 from the evidence. I mean, I didn't see that as really
17 objectionable in the sense that Mr. Ryan received those
18 cuts or wounds somehow. I mean, was it a cut? I mean, it
19 was superficial, and that was the testimony. But how did
20 it get there? I mean, nobody really knew. Mr. Rogers
21 didn't know, did not recall stabbing him in the back or
22 anything, so I didn't see it as something objectionable at
23 that time. I mean, the solicitor wants to refer to it as
24 a stabbing, but the jury heard that it was superficial.
25 Q And on page 337 of the closing, just briefly, the

1 solicitor, around Line 16, he's arguing involuntary
2 manslaughter to the jury. He's talking about heat of
3 passion, he's angry, fit of anger, in a fit of rage, and
4 you didn't object there either, even though he's indicted
5 for murder and the state was going forward on murder.
6 A Yeah. But we knew we were getting a charge on
7 voluntary manslaughter.
8 Q Okay. And you never moved for a directed verdict on
9 the actual murder charge?
10 A I ---
11 Q There was the lesser included, so it's a nonissue. I
12 apologize.
13 A Well, I did move for a directed verdict.
14 Q You did. Arguing self-defense, not lack of malice.
15 A Oh, okay. That's correct.
16 Q Now -- and beyond that, as far as -- well, let me go
17 -- did you request a jury charge for involuntary or
18 accident? It sounds like you ---
19 A No.
20 Q --- didn't because you felt it didn't apply.
21 A That's correct.
22 Q And then we've discussed that.
23 And then as far as when Mr. Rogers -- when the judge
24 seems to kind of cue in on the lack of ejectment, he said
25 he wasn't trying to eject him, did you ever try to

1 redirect Mr. Rogers to let him flush out what he meant by
2 that?
3 A No. At that point, I was kind of surprised that he
4 said it like that. It was pretty emphatic, and I did not
5 want to make matters worse by trying to get him to
6 elaborate on that. I mean, it was bad enough, but . . .
7 Q But I think before, he had always told you he was
8 trying to get ---
9 A He told him to leave.
10 Q --- Mr. Ryan out of the house, and he said over and
11 over again he was trying to get him out of the house.
12 A Right.
13 Q He told him to leave.
14 A Right. And then ---
15 Q Now, as far as the common law defense of habitation,
16 on -- it looks like on page 313, too, you didn't request
17 an instruction on the defense of habitation at the trial
18 or the hearing prior.
19 A No, I did not. I had looked at some charges and I
20 had pulled a charge, it's in my research file, on defense
21 of habitation. It was a short statement talking about
22 defending one's home, basically. But I didn't really view
23 this as he's defending his home. He was really defending
24 himself.
25 Q Oh, okay.

1 A And that's why I didn't think that applied.
2 Q I'm just going to refer you to the case State v.
3 Bryant, and I've got a copy here. That came out --
4 appellate court case that came out in 2010, and it's about
5 habitation. And you can look at the front. I just
6 flipped it to a telling quote.
7 A Are you talking about the circled part about the
8 trespasser?
9 Q I circled the part where they're citing State v.
10 Bradley.
11 A Okay.
12 Q Okay. When does someone -- and it addresses when
13 someone becomes a trespasser. You said your argument was
14 someone becomes a trespasser, your argument to the judge,
15 when the owner of the house asks the invited guest to
16 leave.
17 A Right.
18 Q Isn't it true that State v. Bryant supports that
19 point directly?
20 A (Reviews document) Yes. It ---
21 Q It essentially says once someone's been asked to
22 leave, then it goes back to defense of person or property,
23 A or B, where it doesn't have to be equal force. You have
24 a right to kill them under that defense of habitation,
25 correct?

1 A Right. You have -- right. You have the right to
2 even taking a life if -- as may be reasonably necessary to
3 prevent the intrusion or to accomplish the expulsion, yes.
4 Q And then you didn't bring that case to Judge Cole's
5 attention at the pretrial hearing or the trial itself.
6 A I did not.
7 Q Okay. And it says "necessary to prevent the
8 obtrusion or to accomplish the expulsion." I had to look
9 up "obtrusion." Do you know what it means?
10 A I can't define it right now, but I'm sure it has
11 something to do about ---
12 Q Would it surprise you if it was "become noticeable in
13 an unwelcome or intrusive way"?
14 A That would be fine.
15 Q Okay. Now -- and, again, there was plenty of
16 testimony by Lance and Rogers that John was told to
17 leave either one or a number of times throughout the
18 trial?
19 A I think it was.
20 Q And there was that testimony throughout the pretrial
21 as well.
22 A Right.
23 Q Now, on page 336, 337 of the closing, the State
24 begins to argue a story he calls it, a scenario of what
25 happened about -- and I'll let you look at it.

1 THE COURT: What page did you say?
2 MS. ROSS: 336, Line 7. Into 337, is what I meant.
3 BY MS. ROSS:
4 Q In that, he suggests that after stabbing John, he
5 goes into the bathroom, tries to think about how to get
6 rid of the evidence, tries to cover himself. And is
7 that consistent with what we heard earlier on the 9-1-1
8 tape?
9 A No.
10 Q And the solicitor had the 9-1-1 tape. He provided it
11 to you. So he knew that couldn't be --
12 A Well, we got it from 9-1-1.
13 Q Okay.
14 A Now, he, the solicitor, ultimately provided me, I
15 know, with the CAD report after we got it from 9-1-1. And
16 I can't remember now if the solicitor also provided us a
17 9-1-1 tape or not. But we subpoenaed it in August, the
18 solicitor provided me the CAD report in September ---
19 Q Okay. And you didn't object at that time and that
20 place?
21 A --- and may have -- and may have provided us a 9-1-1
22 call at that time.
23 And, no, I did not object.
24 Q Okay. And then on page 365, you did not express any
25 exceptions to the jury instructions like when the judge --

1 after the judge gave the jury the instructions on 365, you
2 did not express any objections to his instruction at that
3 time.
4 A 365?
5 Q Yes.
6 A No. I guess -- no, I didn't. I made my arguments
7 earlier. But I -- yeah. And I probably should have.
8 Q And I'll just refer you to page 355 through 359 where
9 the judge does give the instruction on self-defense and
10 withdrawal.
11 A Okay.
12 Q He talks about -- the beginning he talks about a duty
13 in the self-defense, and in the instruction he talks about
14 Mr. Rogers having a duty to retreat, essentially, but he
15 uses different words. He says "a duty to extricate
16 himself from the scenario" or something to that effect.
17 And then he comes back later and says, "However, if you
18 find Mr. Rogers was in his own home, he'd have no duty to
19 retreat." Would you agree that's somewhat confusing in
20 this case because he could have simply just said,
21 "Mr. Rogers was the owner of the home and had no duty to
22 retreat"?
23 A I would agree with that.
24 MS. ROSS: And as far -- okay. I've got no further
25 questions.

1 THE COURT: All right. Anything else?

2 MS. HASTINGS: Just a few Your Honor.

3 THE COURT: All right.

4 REDIRECT EXAMINATION

5 BY MS. HASTINGS:

6 Q Mr. Allen, briefly, why didn't you introduce the
7 9-1-1 tape at trial or pretrial? Did you find it helpful?

8 A In a way and in a way not. Some of the problems, as
9 I was looking at my notes on the 9-1-1 tape, is Tonya,
10 who's doing most of the talking that you heard, that's the
11 female voice that you heard, Tonya Lowery, who we used to
12 testify, she made it sound like he got mad because
13 Mr. Ryan made a pass at her and they fought as opposed to,
14 you know, he told him to leave and he wouldn't leave, you
15 know, and that kind of thing. So, you know, I'm a little
16 bit -- I was a little bit leery of that scenario that he
17 just got mad and fought him and killed him.

18 It was helpful in the sense that you do hear the
19 concern and the panic in Mr. Rogers' voice, you know, his
20 concern about, you know, they were saying he's losing him
21 or dying. I know we had conversations. They were aware
22 that the ambulance was outside and wouldn't come in, and I
23 know Mr. Rogers periodically asked me, you know, like,
24 "Why didn't they come in?" And I was trying to explain to
25 him that they were waiting for the police because these

1 reports that the attacker was still on the scene and the
2 knife -- they didn't know where the knife was, and the
3 ambulance people will not come in until it's been secured
4 by the officers. So, yeah, the ambulance apparently
5 arrived and was sitting out there for a while before the
6 officers arrived.
7 So it's good and it's also bad, and I just felt we
8 could do as good with their testimony, they're going to
9 have to testify anyway, to testify about what led up to
10 the fight or what led up to the scuffle and then what they
11 did afterwards.
12 Q So you waited. It was a strategic decision on your
13 part to leave it out?
14 A Right.
15 Q Okay. And just very briefly, you had a pretty
16 extensive jury charge conference with Judge Cole, correct,
17 where you tried to get in various charges regarding the
18 Castle Doctrine like we discussed before?
19 A Right.
20 MS. HASTINGS: Okay. No further questions.
21 THE COURT: All right. Thanks. You can step down.
22 All right. Call your next witness.
23 MS. HASTINGS: The State rests, Your Honor.
24 THE COURT: All right. Anything else?
25 MS. ROSS: Just argument, Your Honor.

1 THE COURT: Okay.

2

3 CLOSING ARGUMENT

4

5 MS. ROSS: I think prehearing we went through a lot
6 of it. I just want to make sure that you have access to
7 the order denying the motion to dismiss. I believe it
8 should be in the package that Judge Cole had, the
9 transcript of the record. On that argument, I think,
10 Wigington v. State -- well, I'm sorry, the State v. Bryant
11 was certainly a strong case that had it been brought to
12 the attention of the judge, it could well have made a
13 difference. Regardless of that ---
14 THE COURT: Wait a minute. If it would have been
15 brought to his attention, it would have made a difference
16 how?
17 MS. ROSS: Well, I think it would turn -- based on
18 the testimony of that first hearing, it would turn the
19 decedent, Mr. Ryan, into a trespasser. It says, you know,
20 a man who forces himself into a dwelling or refuses to
21 leave when the owner makes -- or someone in there by
22 invitation who refuses to leave when the owner makes that
23 demand is a trespasser.
24 THE COURT: Mr. Allen argued that to the Court.
25 MS. ROSS: That's true, but he didn't have that case

1 law, and he did not present that to the judge, which
2 clearly supports that.
3 Furthermore, it goes directly to habitation, which
4 the Court of Appeals found was not effectively preserved
5 on the record. Certainly, if it had been, that could well
6 have made a difference. So we would argue that that was
7 prejudicial and could have resulted in a reversal of this
8 conviction, which I think is clearly one where I've
9 certainly seen other scenarios that seem more egregious
10 fall under the Defense of Person and Property Act than
11 Mr. Rogers who seems to be completely remorseful and has
12 been attempting to be truthful and honest in his breakdown
13 of the case from the beginning.
14 Also, State v. Wigington talks about accident and
15 involuntary manslaughter. It's clear that they were
16 fighting over a weapon. Someone was stabbed -- fatally
17 stabbed in the process. I do believe there was no malice.
18 I do believe that that would require an involuntary or
19 certainly bring to question an involuntary or accident
20 instruction. I think that would have made a difference in
21 the outcome of the case, especially with the habitation.
22 I think, clearly, Mr. Rogers falls under that. Whichever
23 -- if, in fact, that was properly argued, Mr. Dudek failed
24 to preserve it properly to get that clearly before the
25 Court of Appeals because they seem to suggest directly

1 that the defense of habitation is not an issue, and that's
2 where -- I believe that's why the writ of certiorari was
3 denied, because it was finding that it had already been
4 addressed.
5 Also, in closing argument, the State testifies about
6 a scenario or story that is in conflict with what you
7 heard on the 9-1-1 tape but was evidence in their case. I
8 would argue that that is improper under State v. Huggins,
9 481 S.E.2d 114, 1997, amounted to a denial of due process.
10 They turned a self-defense or defense of habitation case
11 into a voluntary manslaughter, and a lot of the jury heard
12 facts that weren't in evidence. So that was certainly
13 prejudicial to Mr. Rogers.
14 And I believe that's all I have, Your Honor.
15 THE COURT: Okay. Yes, ma'am.
16 MS. HASTINGS: Your Honor, the State would argue
17 that, while we sympathize with Mr. Rogers, within PCR, he
18 has failed to meet his burden under Strickland. He's
19 failed to show that Mr. Allen, who is a very experienced
20 criminal attorney, was ineffective or caused Mr. Rogers
21 any prejudice. Mr. Allen, on the stand throughout this
22 hearing, explained his strategic decisions, his
23 reasonings, the motions he made, and so we would argue
24 that the applicant has failed to meet his burden.
25 Additionally, in regards to the appellate issues, if

1 you look at the second paragraph, it appears that the
2 Court of Appeals did address the issue of immunity on the
3 merits. They say, "We disagree and find the Circuit Court
4 properly denied Rogers' motion to dismiss because Rogers
5 failed to carry his burden of proof and establish by a
6 preponderance of the evidence that he was permitted to use
7 deadly force under any section of the act or other
8 applicable provision of law."
9 The State would also argue that his allegations
10 against appellate counsel have failed to establish any --
11 he's failed to meet his burden with those arguments as
12 well regarding Mr. Dudek's performance.
13
14 RULING BY THE COURT
15
16 THE COURT: Okay. All right. Well, I am going to
17 agree with the State on this, although I commend the
18 applicant and his attorney for leaving no stone unturned.
19 I do find that the conduct of the trial counsel and
20 appellate counsel did not fall below an objective standard
21 of reasonableness, so I'm going to deny the application.
22 All right. Thank you very much.
23 MS. ROSS: Thank you, Your Honor.
24 (WHEREUPON, proceedings concluded at 12:05 p.m.)
25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF GREENVILLE)

5

6

7 I, CHERYL A. SMITH, Official Court Reporter for the

8 Thirteenth Judicial Circuit of the State of South

9 Carolina, do hereby certify that the foregoing is a true,

10 accurate and complete Transcript of Record of the

11 proceedings had and evidence introduced in the trial of

12 the captioned case, relative to appeal, in the Court of

13 General Sessions for Spartanburg County, South Carolina,

14 on the 1st day of February, 2017.

15 I do further certify that I am neither of kin,

16 counsel, nor interest to any party hereto.

17

18 November 9, 2017

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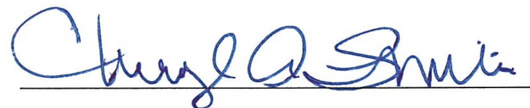
21 

22 Cheryl A. Smith, CVR-M

23 Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

Michael Anthony Rogers,
S.C.D.C. No. 348110,

Applicant,

v.

State of South Carolina,

Respondent.

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

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 errored 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

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.

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 Ejectment 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

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

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,

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.

<u>All Other Allegations</u>

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

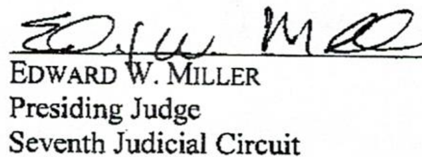
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

2017 APR -6 AM 9:13

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2015-CP-42-3862
COUNTY OF GREENVILLE	)	
	)	
MICHAEL ANTHONY ROGERS,	)	
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

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COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on April 6, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989)

The Order of Dismissal addresses the Applicant's argument of ineffective assistance of trial counsel for failure to object to Applicant's statement regarding ejectment on page seven. It states that the decision was strategic because trial counsel testified that he believed that, other than this one statement, the record clearly indicated that the Applicant asked Mr. Ryan to leave his home. However, the allegation was that trial counsel not only failed to object but also failed to redirect and clarify that the

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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 objected 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).

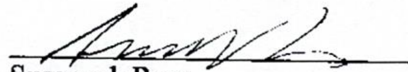
Appellate counsel argued defense of habitation, but the Court Of Appeals found that the Applicant did not preserve the defense of habitation. State v. Rogers, No. 2014-UP-332. The Order of Dismissal addresses this omission stating that trial counsel gave a strategic reason for failure to argue the defense 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 that 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

(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 2 day of April, 2017.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	CASE NUMBER 2015-CP-42-3862
MICHAEL ANTHONY ROGERS, APPELLANT,	)	
VS.	)	AFFIDAVIT OF SERVICE BY MAIL
THE STATE OF SOUTH CAROLINA, RESPONDANT.	)	

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 **Motion to Alter or Amend** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

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

Attorney for Defendant

Greenville, South Carolina
This 6 day of April, 2017.

2017 APR 11 AM 8:47

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Michael Anthony Rogers, #348110,

Applicant,

v.

State of South Carolina,

Respondent.

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) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

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M. HOPE BLACKLEY

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 of 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

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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.

2017 MAY -1 AM 10: 45
M. HOPE BLACKLEY

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IV.

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

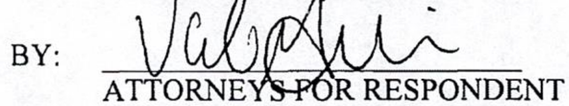
Respectfully submitted,

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

2017 MAY -1 AM 10:44
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)
)
) 2015-CP-42-3862
MICHAEL ANTHONY ROGERS, #348110)
)
Applicant,)
)
vs) AFFIDAVIT OF SERVICE BY MAIL
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)

1. I am an employee of the Respondent in the above-captioned action.

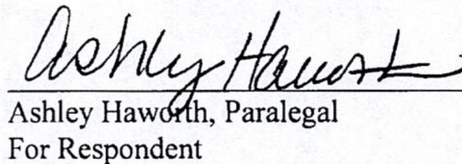
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

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

2017 MAY -1 AM 10:44
M. HOPE BLACKLEY

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)**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ______

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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.

2017 OCT -6 AM 11:51
M. HOPE BLACKLEY
CLERK OF COURT SPARTANBURG COUNTY

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.

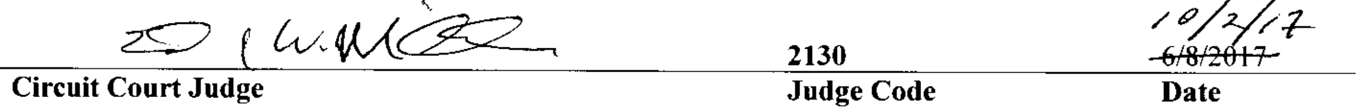
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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

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.



Circuit Court Judge	2130 **Judge Code**	~~6/8/2017~~ 10/2/17 **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.

2017 OCT -6 AM 11:54
M. HOPE BLACKLEY

597

WITNESSES

Spartanburg County Sheriff's Office

T.A. Culbertson

1. SENTENCE MADE

2. REPORT ENDED Compute

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

5. CHECKED WARRANTS

M751084 6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE Compute

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: MAR 2 5 2011

VERDICT

Guilty - voluntary manslaughter

Pamela Mantie

Foreperson of Petit Jury

Date:

October 6, 2011

DOCKET NO. - 11-GS-42- 1933

The State of South Carolina

County of Spartanburg

Barry J. Barnette, *Solicitor*

COURT OF GENERAL SESSIONS

2 8 2011

TERM

THE STATE

vs.

Michael Anthony Rogers

Indictment for
MURDER

SC Code: 16-03-0010, 0020
CDR CODE: 0116
CLASS: FEL-EXM: FEL/F

CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 29 AM 10:00
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on MAR 2_ 2011, the Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Michael Anthony Rogers did in Spartanburg County on or about November 12, 2010, feloniously, willfully and with malice aforethought, kill one John William Ryan, by stabbing the victim, and that the said victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ASSISTANT SOLICITOR