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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID E. ROSIER, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001091

APPENDIX

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1 there was a couple of men inside there and I seen her, and
2 I was -- I was hearing them state to her, "This is how you
3 need to say this." And then they were telling her this is
4 what occurred on this such and such date right here, and
5 then they said, "This is exactly how you need to say it."

6 And then they seen me come in, and then I -- I -- so I
7 told the officer then, I'm like, "Listen," I said, "Get me
8 outta here." I said, "This is -- this is a problem." And
9 I was taken back to C1 to meet at -- top of the conference
10 room.

11 Q Okay. Did -- did you inform your lawyer what you had
12 observed?

13 A I mentioned it to her, but I -- I -- I didn't -- I
14 don't think that we had enough time to even go through that
15 because we had so much -- prior to my trial, they were at -
16 - for a weeks conference. The Solicitor and the Public
17 Defender's Office was out on a conference, and then she was
18 out sick with a couple of relatives that she was trying to
19 take care of and then some vacation time. And they dropped
20 this on her on a Friday prior to me being in court on a
21 trial on a Monday.

22 So she's trying to put everything together, she's
23 trying to get everything worked out, listen to all this new
24 evidence we've got, and it was, like, distorted CD's.
25 There was stuff that we requested that we hadn't never

1 received. I mean, it was just a continuous pattern of not
2 trying to cooperate with us.

3 Q You're talking about the State not trying to cooperate
4 with you guys?

5 A Yes, Mr. Maloney. Yes, sir.

6 Q Okay.

7 MR. BOOZER: Beg the Court's indulgence.

8 Q We get -- you have some very specific, like I said,
9 allegations and -- and legal issues in your case. But of
10 course, this is your day in court and you've waited
11 patiently for it.

12 Is there anything that we haven't covered as far as
13 what your lawyer was doing or not doing as it relates to
14 your PCR case, and her being, as you claim, ineffective?

15 A I -- I wish we would've been able to receive all the
16 *Brady* material in a proper time line, and I -- I really
17 wish we could've had the motion filed in a timely manner,
18 in the right court, where I could've been able to have the
19 stay pending until we could've got that Homeland Security
20 Act decided on by the three panel judge, sir.

21 And then, you know, I felt like my due process was
22 violated. Not only during that phase of it, but actually
23 dealing with not being able to actually -- you know,
24 *Strickland v Washington* guarantees me a right to assistance
25 and to being able to have -- being properly prepared for a

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1 defense. And I -- I feel like she would've probably been
2 able to do that if she would've been given the time
3 properly that she requested. And I feel like by them not
4 giving her the time and then them putting everything on her
5 at one time and then them not being there prior to that
6 time of actually putting us on trial on that following
7 Monday was a major violation too -- also.

8 Q Okay. Mr. Rosier, I don't have any questions for you
9 regarding anything else right now. If you would, please,
10 answer any questions the State may have for you.

11 A Yes, sir. Thank you.

12 THE COURT: All right. Ms. Coleman?

13 MS. COLEMAN: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MS. COLEMAN:

16 Q Mr. Rosier, you testified -- you testified at your
17 trial, right?

18 A Yes, ma'am.

19 Q Okay. And you told your side of the story to the
20 jury?

21 A Yes, ma'am.

22 Q Okay. So -- and you told the jury that you were
23 present at the scene of the crime that night, right?

24 A That's correct.

25 Q Okay. And I believe you're ---

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1 MR. BOOZER: Objection. Your Honor, I have not gone
2 into any of the background of the case with him. I've not
3 asked him to repeat any of his testimony. I focused only
4 on thE issues of the case -- of the PCR case.

5 THE COURT: Yes, sir.

6 MR. BOOZER: So I would object. He's already
7 testified. It's in the record what he said. So I would
8 object to any sort of testimony or anything further on
9 this, Your Honor.

10 THE COURT: Overruled.

11 MS. COLEMAN: Thank you.

12 Q So you testified at trial to the jury that you were
13 present at the scene of the crime; and is that right?

14 A Yes, ma'am.

15 Q Okay. And I believe your version of the story was
16 that you and another person there where wrestling over the
17 gun, and it went off on accident and shot the victim,
18 right?

19 A That's correct.

20 Q Okay. And then you were found not guilty of murder,
21 right?

22 A Yes, ma'am.

23 Q But you were convicted of voluntary manslaughter?

24 A That's correct.

25 Q Okay. Now, Autumn Sutton, is that how you pronounce

CROSS-EXAMINATION BY MS. COLEMAN - DAVID ROSIER, JR. 23

1 it?

2 A I'm not quite sure. It -- it's sort of close to that,
3 yes, ma'am.

4 Q Okay. You testified that you -- you witnessed the
5 prosecution coaching her into what to say; is that right?

6 A Yes, ma'am.

7 Q She didn't testify at trial, did she?

8 A No. They -- they never did bring her in. They didn't
9 bring her or Brittany Cook in, ma'am.

10 Q Okay. Now, the issue with the *Brady* materials and the
11 Solicitors Office handing over the -- the discovery before
12 trial, all that was discussed on the record before the
13 trial started, right?

14 A Yeah. My lawyer pleaded with them. She's begging
15 them, "Please, give me additional time. There's some
16 things that I just received as of today, as I've just
17 walked in the courtroom." She asked them over and over and
18 over for this material throughout the time, and -- and what
19 the did is is they just gave us what they wanted to have at
20 that certain period of time.

21 Just like the jail phone calls, they put what they
22 wanted to put and it was supposed to have been snippets
23 [sic] of each call. And instead of doing that, they put in
24 everything that made every -- everything that actually
25 transpired made it look like it was definitely negative to

CROSS-EXAMINATION BY MS. COLEMAN - DAVID ROSIER, JR. 24

1 my effect. And she tried to get that where it would be
2 ruled out to where it would be fair, and they put
3 everything into where it was a negative impact towards me.
4 So I felt like they showed deliberate indifference also
5 towards me.

6 Q Okay. And -- and your attorney -- you said your
7 attorney put in the full jail phone calls so the jury could
8 hear ---

9 A Yes. That's ---

10 Q --- the big picture?

11 A That's the only opportunity she had because she didn't
12 have enough time to be able to listen to the calls.. There
13 were calls that they were coming up with that me and her
14 neither one had actually even heard.

15 Q Uh-huh. But Judge Early heard all of these arguments
16 before the trial as -- and -- and she complained to Judge
17 Early and asked for more time.

18 A Yes.

19 Q But he denied it, right?

20 A Yes, ma'am.

21 Q Okay. Thank you.

22 MS. COLEMAN: Nothing further, Your Honor.

23 THE WITNESS: Thank you.

24 MR. BOOZER: No redirect, Your Honor.

25 THE COURT: Okay. Thank you, sir.

DIRECT EXAMINATION BY MR. BOOZER - WALLIS ALVES

25

1 THE WITNESS: Thank you, sir.

2 THE COURT: You may step down.

3 THE WITNESS: Yes, sir.

4 (The witness exits the stand.)

5 MR. BOOZER: Plaintiff calls Wallis Alves.

6 WALLIS ALVES, having been first
7 duly sworn, testifies as follows:

8 COURT CLERK: Please have a seat in the witness stand.
9 State your full name.

10 THE WITNESS: Wallis Alves. You need a spelling?
11 (Noone responds.)

12 DIRECT EXAMINATION

13 BY MR. BOOZER:

14 Q Ms. Alves, how are you doing today?

15 A Great. How are you?

16 Q I'm doing fine. Ms. Alves, did you represent Mr.
17 Rosier in his trial?

18 A I did.

19 Q All right. And what were -- what were the State's
20 allegations in this case?

21 A That he shot -- I'm sorry, I don't remember the young
22 man's name -- but that he shot a -- that he shot a man.

23 Q That he shot the victim in the case?

24 A Yes.

25 Q Okay. Now, did Mr. Rosier -- did he have some co-

1 defendants?

2 A He did.

3 Q And who was that?

4 A His son, Joshua, his son, Calvin, a woman named "Autin
5 [phonetic] Sutton," and a woman named "Brittany Cook."

6 Q Okay. It sort of -- what was -- and your client
7 testified at trial.

8 A He did.

9 Q All right. And is that something he wanted to do the
10 whole time?

11 A Yes.

12 Q All right. What was sort of y'all's position and
13 y'all's defense in the case?

14 A We argued self-defense.

15 Q You argued ---

16 A Actually, it was more defense of others.

17 Q I'm sorry?

18 A It was self-defense and defense of others.

19 Q Okay. Now, initially did you make a motion for a
20 continuance in the case?

21 A I did.

22 Q And what was the basis of the motion for continuance?

23 A Less than a week before the trial, we got information
24 from the State that totally changed the State's theory of
25 the case. It turned out that the solicitor's had spoken

1 with -- they listened to the jail calls, and based on the
2 jail calls, they went and spoke with all of the co-
3 defendants and they all changed their stories.

4 And so as a result of that, the State changed the
5 theory of the case, and they gave me summaries of what the
6 co-defendants said. I believe they might've told me in
7 some instances, and they gave me in some of them about what
8 the co-defendant's were saying now.

9 Based on that, I needed to -- I had to change my
10 theory and how I was going to prepare the -- and present my
11 defense for Mr. Rosier. I had to re -- talk to some of the
12 witnesses over again. We had already talked to some of
13 them, and we had to go back and re-interview basically
14 everybody.

15 There was a witness who now -- who we had originally
16 talked to, who I had determined that he wasn't gonna be a
17 witness I was going to use at trial. I now had to talk to
18 him again. And I'll have to look to remember his name, but
19 he was one of the people who was in the car during the time
20 that Mr. Rosier went over to the home and the incident
21 occurred.

22 Q Okay. Was -- to your knowledge at the time, was
23 Joshua Rosier one of those people who changed his story?

24 A Yes.

25 Q Okay. Based on that and sort of the events

1 transpiring as they did, did you feel that you were
2 prepared for the trial?

3 A I didn't feel that I was fully prepared to cross-
4 examine all of those witnesses. And like I said, I had to
5 find another witness, and I told the judge at the time I
6 didn't feel I was fully prepared to go forward because at
7 that point, when the trial started, I had no idea what
8 these people were going to say because I had talked to them
9 before they changed their stories.

10 And there was a witness that we couldn't find who was
11 there that night, who I felt could have tied everything
12 together and -- and determine who was telling the truth at
13 this point, and we couldn't find him. He was actually in
14 Georgia.

15 Q Did y'all ultimately find him or ...

16 A He was brought to court. He was actually a minor, and
17 he was -- he had left the state without his parents'
18 permission. So the authorities in Georgia helped us to get
19 him back into his parents custody, and they had him brought
20 to court.

21 Q Did you call him as a witness?

22 A I did not.

23 Q Okay. Did you have some reasons for not doing that
24 obviously?

25 A The -- once he was brought to court, his parents came

1 to court. He was brought to court. We talked to him.
2 Based on what he was -- and at that point he was scared.
3 He wasn't really very forthcoming. Based on what he was
4 saying, I didn't think that it would further our defense.
5 So I ultimately decided not to use him.

6 Q Okay.

7 A But I will say that had I had time to talk to him in
8 a setting where he wasn't escorted into court by the
9 Sheriff's Department and his parents, we might've been able
10 to have a more relaxed conversation where he might've been
11 more forthcoming. But I'll never know that since I didn't
12 get the opportunity to do that.

13 And I don't remember at what point he was brought into
14 the courtroom, but -- I don't remember whether it was
15 before or after Mr. Rosier testified -- but he was -- he
16 was escorted into court.

17 Q And just going back to sort of your request for a
18 continuance, on page 24 of the transcript, you -- you
19 indicate the case is less than a year old, you're only
20 asking for one week to give you some time. And you
21 indicate (as read): "Obviously He's facing a life
22 sentence, and I think it's important that I do as much as I
23 can to prepare for the cross-examination of these
24 witnesses."

25 You go on to state (as read): "And that's why I'm

1 asking for the continuance. Not for months, I don't need
2 months. I just need enough time to feel comfortable that
3 I've done what I could. I have to go be able to handle the
4 tasks that I told you I wanted to complete in order to be
5 able to prepare -- fully prepare to defend Mr. Rosier."

6 So at that time do you think that you were fully
7 prepared to defend Mr. Rosier?

8 A I did not.

9 Q Okay. And -- and that's why you were asking the Court
10 that, right?

11 A Yes.

12 Q All right. And obviously that was denied.

13 A It was denied.

14 Q Okay. Let -- let's fast forward a little bit, and I'm
15 looking at page -- I think it's 33 of the transcript. You
16 were talking about these jail phone calls. And who was --
17 who were those between?

18 A Between Mr. David Rosier and his sons, Calvin and
19 Joshua.

20 Q All right.

21 A I think there might've been other people three-wayed
22 into the calls.

23 Q How did you become aware of these calls?

24 A The Solicitor gave me a copy of them.

25 Q When did you get copies of them?

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1 A I don't remember. If it says in the transcript, then
2 ...

3 Q Sure. And I guess it's not too terribly important,
4 but do you know if -- if that was something that was turned
5 over late, or was that something that had been out there
6 for awhile and you'd been provided with it awhile back?

7 A I don't remember. I -- I can look and see if I can --
8 if you need me to look and see if I can find a date when I
9 got those.

10 Q Okay.

11 A I can. I have the file.

12 Q That's okay. Did you -- ultimately you attempted to
13 essentially have those suppressed?

14 A I did.

15 Q All right. And you raised this issue before the trial
16 court, and you actually told the trial court -- you said,
17 "Look, it's my understanding that a panel of the Court of
18 Appeals has to determine whether the interception of these
19 phone calls was in violation of the Homeland Security act."

20 A Yes.

21 Q Okay. So what was the proper way to allege that there
22 had been some violation of the act?

23 A To ask for a continuance, to -- so that the Court of
24 Appeals could convene the three-judge panel so that they
25 could determine that there was a violation. However, Judge

1 Early ruled that it was not a violation, that -- that the
2 -- the calls did not come under the Homeland Security Act;
3 therefore, it didn't require the three-judge panel.

4 Q Okay. Did -- did you -- did you know that you had to
5 raise it with the Court of Appeals before the trial?

6 A I did.

7 Q Okay. Why didn't you just go ahead and raise it with
8 the Court of Appeals before the trial?

9 A I don't know.

10 Q Okay. Was that a mistake?

11 A Yes.

12 Q All right. Have you -- did you have any contact with
13 Mr. Rosier after the trial, for purposes of the appeal or
14 anything like that, or -- or with his appellate lawyer?

15 A Yes.

16 Q Okay. Are you aware that one of the issues that was
17 raised on appeal was about whether the trial judge erred in
18 -- in denying, I guess, either the continuance or the
19 motion to suppress per the Homeland Security Act?

20 A I -- I'm -- I'm aware of that now. I don't know if I
21 was aware of it before the Court of Appeals ---

22 Q Sure.

23 A --- rules.

24 Q But I mean, now -- have you read the opinion in his
25 case?

1 A I have.

2 Q Okay. And -- and you're aware that essentially the --
3 the appellate court ruled that really it wasn't properly
4 before the court to make a ruling; and had you made, I
5 guess, the appeal or had you brought it the way it
6 should've been brought before the Court of Appeals, the
7 case would've been stayed and there would've been no issue
8 for a continuance.

9 A If I can state what I understand the ruling was. It
10 said that I failed to preserve the issue because I didn't
11 ask for the continuance; and therefore -- and the -- and
12 the Court of Appeals is the one who should've determined
13 whether it came under the Homeland Security Act, not Judge
14 Early.

15 Q Okay. And -- and just the language that they use --
16 and I think that's correct pretty much. There's some other
17 language in there. But it says (as read:) "Given that
18 Rosier acknowledged the Court of Appeals was the reviewing
19 authority for such a motion, yet sought a ruling from the
20 trial court anyway, he cannot complain on appeal an error
21 his own conduct induced," right?

22 A Yes.

23 Q Okay. So that -- obviously, that whole issue -- that
24 was a mistake on your part.

25 A It was a mistake on my part.

1 Q Okay. Let me ask you this: Let's say that you
2 would've gotten your suppression motion appropriately filed
3 or however you wanna call it, when you challenged the
4 interception of these phone calls with the Homeland
5 Security Act before the panel of the Court of Appeals, what
6 would've been your argument? And I know we're looking back
7 quite a ways, but do you recall what your argument may have
8 been?

9 A I filed a motion to suppress the jail calls. I'll
10 have to pull my -- I -- I -- I put it back in the file. It
11 would've been similar to what was in my motion.

12 Q Okay. Is it safe to say that you would've argued
13 that, one, the cause met the definition of a wire
14 communication?

15 A Yes.

16 Q That would've been one. You would've presented, or
17 obviously argued that the interceptions of the calls
18 weren't lawfully made. That would've been an argument?

19 A That was my argument.

20 Q Okay. And that there was no evidence that a judge had
21 ordered that those interceptions occur.

22 A That's correct.

23 Q All right. And that the contention is that doing
24 these interceptions, they're not SLED agents who would've
25 been the ones I think who would've had the authority do to

1 it, right?

2 A That's correct. Also that the detention staff did not
3 typically, as -- as a regular course of their business,
4 monitor the jail calls. These were solely being done for
5 law enforcement purposes.

6 Q So this isn't the situation where someone's picking up
7 the phone call, just calling out talking to someone, and
8 they happened to be listening in. This is -- this was
9 targeted, right? They chose Mr. Rosier's calls.

10 A No.

11 Q They did not?

12 A They listen to -- they tape all of jail calls.

13 Q Okay.

14 A They don't necessarily listen to all of everybody's
15 jail calls, as far as I know. And at that time -- I don't
16 know what the procedures are now, but at that time, there
17 was no person in the jail whose job was to listen to the
18 jail calls --

19 Q Okay.

20 A -- even though the State typically argues that the
21 jail calls are for jail security, the jail never listened
22 to the jail calls. The only people who ever listened to
23 the jail calls were law enforcement and the solicitors.

24 Q Had you argued your case before the Court of Appeals
25 under the violation of the Homeland Security Act, do you

1 have any opinion on how that would've went --

2 A I ---

3 Q -- based on your experience?

4 A I don't know. There was very few case law -- there
5 was very little case law about the Homeland Security Act
6 back when I tried Mr. Rosier's case. I don't know what the
7 case law is today. I know I've argued this issue numerous
8 times, never before the Court of Appeals, and the only -- I
9 think there might've been maybe three cases, and I don't
10 think anybody was successful. But I can't say whether I
11 would've been successful. I don't know.

12 Q But we do know what would've happened had you made the
13 motion is the case would've been stayed, right?

14 A The case would've been stayed.

15 Q Okay. He would not have gone to trial the day that he
16 went to trial when you felt that you weren't fully
17 prepared.

18 A That's right.

19 Q You would've had the trial down the road, and you
20 would've been fully prepared at that point, correct?

21 A Yes.

22 Q Okay. Let -- let's jump forward on another issue
23 that's in the appellate opinion. Do you recall --
24 obviously you objected to the -- the Solicitor's
25 characterization or using his nickname "Dollar." That was

1 one of your objections, right?

2 A Yes.

3 Q And that was one of the appellate issues, but the
4 other one was, do you recall, on 417, objecting where the
5 Solicitor said, when they're talking to the jury in closing
6 (as read): "Your decision that you're going to make in
7 this case is important. It's an important one for the
8 family and friends of D.J. Davis. It's an important one
9 for the community." Immediately you objected to -- to
10 those lines, and you said (as read): "Improper argument."
11 Do you recall that?

12 And if you've got the appellate copy, you might have
13 different numbers than I do.

14 A No, I have the transcript.

15 Q Okay. And this -- this is at the top of 417, lines 2
16 through 6.

17 A Yes. I see where I objected.

18 Q Okay. When -- when you said, "Improper argument" --
19 well, let me ask you this: Why were you objecting to
20 that?

21 A It's a Golden Rule violation.

22 Q I'm sorry?

23 A It's a Golden Rule violation.

24 Q Exactly. Have you since read the appellate opinion
25 where the appellate court thought that your objection was

1 not specific enough to alert the Court that you were making
2 and objection based on the Golden Rule?

3 A Yes.

4 Q Okay. Do you think you made the appropriate
5 objection? And looking back, do you think you should've
6 made specifically the objection, "Objection. Violation of
7 the Golden rule argument," according to the appellate
8 opinion as stated?

9 A According to the appellate opinion, I should have
10 said, "Golden Rule argument."

11 Q Okay. Did you think that that was a valid objection?

12 A I did.

13 Q And again, that's why you made it?

14 A I made it that way because -- I mean, I -- I felt that
15 the Court would understand what the objection was, that it
16 was an improper argument on behalf of the State. And I
17 think the solicitor understood, too, because he changed his
18 argument, but I can't dispute what the Court said.

19 Q Okay. And -- and would you agree with me that this
20 entire case hinged on credibility? Would you agree with
21 that as far as who -- which witness is the one whose
22 telling the truth?

23 A I would say so.

24 Q Okay. And in fact, on page 343, the trial judge even
25 stated (as read): "Credibility's not the only -- is not

1 only the central issue, but basically the sole issue in the
2 case, what -- who do you believe, which side of the story
3 do you believe."

4 A What's -- I don't know what page that's on.

5 Q Sorry. I'll find that for you.

6 A Five ...

7 Q Three -- 343, lines 11 through 13.

8 A Yes.

9 Q So when the solicitor's asking the jury to think about
10 the community, isn't that sort of ignoring -- or asking the
11 jury to do something that it's not supposed to do?
12 Essentially they're asking the jury, "Hey, you're the
13 community. You're the ones who can fix everything. Y'all
14 do it for the community." Not, "You need to figure out
15 whose telling the truth in this case." It -- is that kind
16 of your opinion on it?

17 MS. COLEMAN: Objection. That's leading, and he's
18 testifying for the witness.

19 THE COURT: Re-phrase your question.

20 MR. BOOZER: Absolutely, Your Honor.

21 Q Was credibility a huge issue in this case?

22 A Yes.

23 Q And to your knowledge, did the judge -- the trial
24 judge, actually comment that credibility was the only
25 central issue in the case, according to the transcript at

1 343?

2 A Yes. That is what the trial judge said.

3 Q Okay.

4 A One -- one second.

5 Q Sure.

6 A I don't think that was said to the jury.

7 Q Well, no. But -- but being said to the attorneys.

8 A Yes. That was an out-of-court hearing.

9 Q But that's the judge's opinion, though? Is it --
10 apparently from the transcript?

11 A Yeah. I just wanna be clear. You asked me if he said
12 it to the jury.

13 Q Oh, I'm sorry. That was not -- that wasn't my intent

14 ---

15 A Okay.

16 Q --- that he said it to the jury.

17 A That was -- I don't know what he -- I don't remember
18 what he said to the jury.

19 Q Sure. Do you feel that the solicitor was making
20 improper Golden Rule argument?

21 A I did. I objected to it.

22 Q Okay.

23 MR. BOOZER: Beg the Court's indulgence, Your Honor.

24 (Brief pause.)

25 Q Ms. Alves, do you recall your client ever mentioning

1 to you that he felt like he may have observed some
2 interaction between the State and witness? Do you recall
3 anything like that?

4 A I don't recall that.

5 Q Okay. Had you recalled that or had that been brought
6 to your attention, what would you have done?

7 A I can't say what I would have done. If -- if the
8 person testified, I would've asked them about it. I
9 might've asked the solicitor about it, but I don't recall
10 that ever being mentioned.

11 Q Okay. What -- do you recall there being a plea offer
12 in this case?

13 A There was.

14 Q Do you recall what it would've been?

15 A And I'll have to look to see specifically exactly what
16 it was. I mean, if you have something that -- where I sent
17 him a letter or something.

18 Q I do not.

19 A But in -- but in any event, did he deny whatever plea
20 offers were made?

21 A He did.

22 Q Okay. And it was -- was it his position, in your
23 mind, based on your interactions with him, that there was
24 not going to be a plea, that this was going to be a trial?

25 A Mr. Rosier indicated to me that he would be willing to

1 plea to voluntary manslaughter. I don't recall exactly
2 what the plea offer was, and I don't recall exactly how far
3 we got with pleas. I'd have to look through a lot more,
4 and I tried to find something about it earlier but I
5 couldn't.

6 But the offer that was made -- I -- I don't -- all I
7 remember is that there was an offer made, it wasn't
8 satisfactory.

9 Q Okay. Going back to some of the Rule 5 materials, I'm
10 assuming did you make some Rule 5 requests?

11 A I did.

12 Q All right. Did you feel that they were being complied
13 with?

14 A For the most part until the -- right before the end of
15 the -- right before the trial started, we started to get a
16 lot of discovery. Like I said, we got the new statements,
17 we got other -- other -- other discs. I know Mr. Rosier,
18 in his testimony, mentioned some of the discs we couldn't
19 hear. There were problems with some of the discs. The
20 solicitor did give us replacements.

21 So for the most part, yes, I felt discovery was being
22 complied with right up until the week before when we
23 started to get a bunch of information at the last minute.

24 Q Okay. Thank you, Ms. Alves. That's all the questions
25 I have.

CROSS-EXAMINATION BY MS. COLEMAN - MS. WALLIS ALVES 43

1 A Okay.

2 THE COURT: All right, Ms. Colman.

3 MS. COLEMAN: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. COLEMAN:

6 Q Ms. Alves, these complaints about the Solicitor's
7 Office obviously providing you things at the last minute,
8 you raised all those to Judge Early, right?

9 A I did.

10 Q And that was part of the basis for your continuance
11 motions, right?

12 A Yes.

13 Q Okay. And he denied those motions?

14 A He did.

15 Q Okay. Do you feel -- do you feel like you had a full
16 opportunity to explain to him why that prejudiced you, or
17 why it would be useful to have more time?

18 A I did.

19 Q Okay. The Golden Rule argument, what's your
20 definition of the Golden Rule?

21 A I don't really have a definition. I just know it when
22 I hear it.

23 Q Okay. How would you describe a situation that would
24 trigger you to make an objection?

25 A Well, where the jury -- where the State is asking the

1 jury to put themselves in the place of the victim or where
2 they're trying to inflame the victim -- excuse me, inflame
3 the jury by referring to them as being part of the
4 community in which the Defendant has allegedly committed
5 the crime.

6 Q Okay. And there is case law in South Carolina that
7 says a Golden Rule argument is asking the jurors to place
8 themselves in the victim's shoes; is that right?

9 A Yes.

10 Q Okay.

11 MS. COLEMAN: And I'm looking at specifically *State v*
12 *Reese*, just for the record, 370-SC-31. That's a 2006 case.

13 Q So the line that Mr. Boozer's referring to there
14 saying that -- asking the jury to think about how important
15 their decision is to the community, do you believe -- do
16 you believe that that is asking the jury to put themselves
17 in the victim's shoes?

18 A I objected to it.

19 Q Okay. Looking back now, do believe that that's still
20 a Golden Rule violation?

21 A Yes.

22 Q Okay. If your objection had been sustained, do you
23 believe it would've changed the jury's verdict?

24 MR. BOOZER: Objection, Your Honor. Calls for
25 speculation obviously.

1 THE COURT: Overruled.

2 A My objection kind of -- the judge didn't say it, but
3 he kind of did sustain my objection. I kind of took it as
4 sustained, and I'm looking back and clearly the solicitor
5 took it as sustained, too, because he changed what he was
6 saying.

7 Q Okay.

8 A So my answer to your question would probably be "no"
9 because it looked like my objection was sustained.

10 Q Okay.

11 A I mean, I guess. The judge didn't make a ruling on it
12 and I didn't ask for a ruling.

13 Q Right. The jail phone calls, those were -- you
14 testified those were given to you at the last minute; is
15 that right, or ---

16 A No ---

17 Q --- something ---

18 A --- I don't remember. I honestly don't remember when
19 I got the jail calls.

20 Q Okay. Do you recall if you had a chance to listen to
21 all of them before the trial began?

22 A I -- I did.

23 Q You did? Okay. And what was your -- essentially, the
24 State was planning on introducing several snippets, small
25 pieces of the jail phone calls; is that right?

1 A If I remember, they only wanted to introduce -- yeah.
2 They wanted to introduce parts of them, and they didn't
3 want to introduce all of them.

4 Q Okay. And you objected to that, right?

5 A Since -- I objected to all of them coming in.

6 Q Right.

7 A But when the judge ruled that some of them could come
8 in, I wanted to put in the rest of them so that if they
9 were coming in, I wanted to have my client's full story out
10 from the jail calls. I didn't want to have it piecemealed
11 where it might be confusing or misleading to the jury.

12 Q Okay. In what way did you think those calls -- the --
13 the small portions of the calls were misleading to the
14 jury?

15 A Small portions? Because they didn't get the whole
16 story. In the jail calls, ultimately Mr. -- when Mr.
17 Rosier was talking to his sons, the -- the whole story came
18 out and that was somewhat consistent with what he testified
19 to at trial. The only problem was there was so much
20 cursing and bad language on those jail calls and offensive
21 statements on the jail calls, that I felt that it would
22 prejudice my client for the jury to hear them in general.

23 But for them to just hear a little piece of a
24 conversation -- piece of a conversation from another tape,
25 it didn't tell the whole story, and I didn't feel that it

CROSS-EXAMINATION BY MS. COLEMAN - MS. WALLIS ALVES 47

1 would be fair -- fair to -- to Mr. Rosier for there to just
2 be, like, three of the jail calls and that there were
3 really seven -- and I don't remember how many there were,
4 six or seven CD's, I think, we put in with the jail calls.

5 Q Okay. And Mr. Rosier testified at trial, right?

6 A Yes.

7 Q And did he kind of explain to the jury his language in
8 those calls and kind of explain that he wouldn't normally
9 speak that way?

10 A Yes.

11 Q Okay. Do you ---

12 A But we -- we wouldn't have had to explain that if the
13 calls hadn't been put in.

14 Q Right. That's true. Do you think that that -- his
15 testimony helped kind of ease the blow of some of that
16 language in the jail calls?

17 A No. It was pretty bad.

18 Q Okay. Witness coaching: Autumn Sutton, is that her
19 name?

20 A I thought it was "Sitton."

21 Q Sitton? Autumn Sitton? She didn't testify at trial,
22 right?

23 A That's right.

24 Q Okay. And you testified you couldn't recall if -- if
25 the applicant told you that he saw any kind of witness

1 coaching?

2 A I don't recall that.

3 Q Okay. Are you aware of any other *Brady* material or
4 any other discovery that you never received -- that you
5 still haven't received from the State in this case, or did
6 you eventually get all of the materials for trial?

7 A I'm not aware of anything that was withheld from me.
8 Like I said, they were giving me discovery right up until
9 trial. So I can't say anything that I know of that was
10 withheld from me.

11 Q Was there anything that was presented at trial that
12 you weren't aware of?

13 A I don't remember. I don't think so, but ...

14 Q Did you impeach all the State's witnesses in this
15 trial?

16 A I tried.

17 Q Okay. And what did you impeach them with?

18 A (No response.)

19 Q Had some of them given statements already that
20 differed from the trial testimony?

21 A I know I impeached Joshua Rosier with his multiple
22 inconsistent statements. I don't recall if I impeached him
23 with any records.

24 I may have impeached Calvin Rosier with inconsistent
25 statements. I'll have to look to see specifically.

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1 Q What other evidence did the State present against the
2 Applicant?

3 A They had -- there were witnesses. Joshua Rosier was
4 an eye witness. I think Calvin Shaw may have been an eye
5 witness. I don't remember. They had -- I don't really
6 remember. There was -- I mean, there was forensic
7 evidence.

8 Q Okay. And Joshua Rosier is the Applicant's son; is
9 that right?

10 A Yes.

11 Q Okay. And he -- you testified he had testified at the
12 trial against his father, right?

13 A Yes.

14 Q And he gave statements about how his father was the
15 one who shot the victim, and -- and he did it on purpose,
16 essentially, right?

17 A Yes.

18 Q Okay. And you impeached him with all of his multiple
19 statements.

20 A I made every attempt to do so.

21 Q Okay. And then C.J. Shaw testified as well; is that
22 right?

23 A Yes.

24 Q Okay. And he also testified that he was present and
25 he saw the Applicant shoot the victim with his gun, right?

1 A Yes.

2 Q Okay. Nothing further. Thank you.

3 THE COURT: Any redirect?

4 MR. BOOZER: No redirect, Your Honor.

5 THE COURT: All right. Thank you, ma'am. You can
6 step down.

7 (The witness complies.)

8 MR. BOOZER: May we approach?

9 THE COURT: Yes, sir.

10 (Bench conference.)

11 MR. BOOZER: Your Honor, if it pleases the Court. On
12 behalf of my client, we do have one more witness. That
13 witness is his son, Joshua Rosier, who was a co-defendant
14 in the trial case.

15 Joshua -- who'll I'll just call "Joshua" from now on
16 to prevent confusion -- testified, in essence, against my
17 client at trial. Joshua is here today in the courtroom.

18 In my investigation of this case and to determine how
19 I might speak with Joshua, I discovered that Joshua had, in
20 fact -- he actually entered a guilty plea in this case and
21 he challenged his conviction on PCR.

22 I discovered that his PCR -- he was represented by Ms.
23 Aimee Zmroczek. Apparently at the PCR hearing they
24 discovered that he had an open and pending motion to
25 reconsider his sentence still in the trial court in the

1 Court of General Sessions. It was still open.

2 And so what happened was the PCR court dismissed
3 Joshua's PCR case without prejudice because technically
4 they didn't have jurisdiction since they were -- it was
5 still pending in the trial court.

6 I have reached out to Ms. Zmroczek, I think, about
7 three times via email to determine if she was still
8 representing him since she represented him on the PCR or
9 who might be representing him. I tried to reach out to his
10 former attorney, Courtney Pope, who I don't believe has any
11 connection with this -- with the PD's Office anymore. She
12 had nothing to do with the case anymore when she responded
13 to me.

14 My last correspondence with Ms. Zmroczek was we
15 weren't sure -- she -- she said she had not gotten any sort
16 of order formerly appointing her to represent him in any
17 sort of outstanding ---

18 THE COURT: Let me stop -- who technically represented
19 him at the plea?

20 MR. BOOZER: At the plea was Ms. Pope.

21 THE COURT: All right. So -- and she -- is she the
22 attorney that filed the motion to reconsider the sentence?

23 MR. BOOZER: It's my understanding she would have been
24 the one who made that filing, I believe.

25 THE COURT: And was she ever formerly relieved as

1 counsel at -- at that point?

2 MR. BOOZER: That I'm not sure of, Your Honor. I have
3 to ask Joshua those facts.

4 But she indicated to me she was not -- she was adamant
5 she was not representing him any longer. I believe she
6 left employment with wherever she was before, was my
7 understanding.

8 But -- but in any event, Your Honor, with the hearing
9 upcoming and me not getting any sort of responses to if he
10 did have counsel -- and Joshua, of course, is a grown man -
11 - I called and set up a call with him at his institution.

12 Immediately, the first thing I told him was -- I said,
13 "Let me tell you who I am before you make any sort of
14 statement to me." And I went through and told him who I
15 was, that I was representing his father on PCR case; that
16 he may have information that could assist in the PCR
17 hearing.

18 I said, "It is also my understanding" -- as I just
19 indicated to the Court -- "that you have an open motion to
20 reconsider in the trial court," and that, "I cannot tell if
21 you have a lawyer or not. Do you want to do one of two
22 things: Do you want to speak to a lawyer before you talk
23 to me? Do you want to not talk to me?"

24 I -- and I explicitly told him I would not be offended
25 if you don't speak to me, and I also said, "Or you're more

DIRECT EXAMINATION BY THE COURT - JOSHUA ROSIER 53

1 than welcome to talk to me even if you do or do not have a
2 lawyer. It is entirely up to you."

3 His response to me was, "I want to talk to you."

4 And so I told him, "I can't give you any legal advice.
5 I'm not your attorney. I am your father's lawyer."

6 And then we proceeded to have a conversation. I
7 caused his transport here through SCDC with a transport
8 request. So he's here today. Obviously he does not have a
9 lawyer with him, but I do intend to call him as a witness.

10 THE COURT: Okay. Could you bring Mr. Rosier around
11 to the microphone?

12 JOSHUA ROSIER, having been first
13 duly sworn, testifies as follows:

14 DIRECT EXAMINATION

15 BY THE COURT:

16 Q All right. Mr. Rosier, do you have an attorney?

17 A I'm not sure right now. Aimee was supposed to
18 represent me when I went back on my PCR, and Courtney never
19 -- never filed a reconsideration. So that's why they
20 stopped my PCR case whenever I went back on my PCR. So I'm
21 not -- I don't know if I got a attorney or not representing
22 me on a reconsideration.

23 Q Okay. What -- what sentence did you receive?

24 A 22 years.

25 Q And was -- and -- and what was the date of that?

1 A October the 16, 2013.

2 Q So the -- so do -- are you aware of when the motion
3 that -- Mr. Boozer indicates there's a pending motion
4 filed.

5 A Yes, sir.

6 Q Do you know when that was filed?

7 A When I went back on my PCR, that's why they stopped my
8 PCR because Courtney, Courtney Pope, the one that
9 represented me on my plea agreement -- she never filed no
10 reconsideration or time reduction. That's why they stopped
11 my PCR case.

12 Q Okay. Has that been set now? I mean, obviously, your
13 PCR can't be heard until that ---

14 A I'm not sure. I haven't heard anything else from
15 them, and that was, like, a year ago.

16 Q Have you applied to get a Public Defender or someone -
17 --

18 A Yeah. I wrote the Clerk of Court and I haven't heard
19 anything back.

20 Q Okay. Do you know what the grounds of your motion
21 are?

22 A I -- I got ---

23 Q Well, let me ask you ---

24 A --- them, but I don't ---

25 Q Hold on one second.

1 THE COURT: Mr. Clerk, do we have a copy of the
2 motion?

3 CLERK OF COURT: That's what we were just looking for,
4 Your Honor. We're trying to pull it up.

5 (Brief pause.)

6 THE COURT: Well, I see a motion to reconsider
7 sentence October 22, 2013, but there's not a copy in the
8 electronic system. So ...

9 (Brief pause.)

10 MR. BOOZER: Your Honor, may we stand down just for a
11 moment? I know we are standing down, but it may be ---

12 THE COURT: Yeah. Let's just take a -- (to the
13 witness) Sir, you can go back and sit over there while
14 we're looking for this document.

15 ((The witness complies.))

16 (Briefly off the record.)

17 THE COURT: Let's go back on the record. Yes, sir.

18 MR. BOOZER: Your Honor, thank you for allowing us
19 some -- some time to sort that out.

20 Judge, I've obviously extensively discussed this issue
21 with my client, obviously well in advance of this hearing,
22 but also today as we're going through the motions. My
23 client does not -- we're not going to be calling Joshua
24 Rosier to the stand. It's my client's decision. He does
25 not want to call him. He's assured me that this is his own

1 decision. He wishes to go forward only on those issues
2 which we've, of course, already raised. So we will not be
3 calling Joshua to the stand.

4 THE COURT: Okay. Thank you, Mr. Boozer.

5 All right. Anything -- anything further?

6 MS. COLEMAN: Nothing further, and the State has no
7 witnesses.

8 MR. BOOZER: Nothing further, Your Honor.

9 THE COURT: Okay.

10 MS. COLEMAN: And Your Honor, I would ask for the
11 opportunity to present a brief argument over the -- over
12 his issues -- I mean, his allegations, if you'll allow me
13 to.

14 THE COURT: All right. I'll allow each side. You go
15 first, and then I'll allow Mr. Boozer to respond.

16 MS. COLEMAN: Thank you, Your Honor. And I believe
17 you've got a copy of the amendment to his PCR application.

18 The Applicant today has alleged several allegations of
19 ineffective assistance. I would submit that he has failed
20 to meet his burden of proof on any of these specific
21 allegations. Although there was a big discussion on the
22 record and today about Ms. Alves requesting a continuance
23 for several reasons, she clearly presented her case to
24 Judge Early. She explained in detail exactly why she felt
25 she was prejudiced by not having more time to prepare the

1 case, and Judge Early denied the motion. And he explained
2 several of his rulings in the record about why he believed
3 she could go forward without another week to prepare.

4 So it was raised, it was ruled upon. We believe that
5 would be a direct appeal issue. That's really not proper
6 for PCR. She can't be deficient because she moved for a
7 continuance.

8 And I -- I also don't think that this really shows
9 that she wasn't prepared or that she was ineffective at
10 trial just because she didn't have more time to prepare.
11 The record fully shows that Ms. Alves thoroughly impeached
12 and cross-examined every witness the State presented. She
13 presented a defense. The Applicant testified at trial
14 about self-defense or defense of others, which she
15 testified was their plan all along.

16 I don't see anything wrong with any of her actions in
17 this case, and I -- I don't think that the Applicant can
18 meet his burden of proof just by speculating as to what
19 could have happened if she had had another week to prepare.

20 As far as a Golden Rule argument goes, the statement
21 to which he's referring just isn't a Golden Rule violation.
22 The Golden Rule requires -- or a violation is asking the
23 jurors to place themselves in the shoes of the victim.
24 That didn't happen here. The -- the Solicitor just told
25 the jury to think about how important the decision -- the

1 case was to the community -- to the victims, to the
2 victim's family, to the community. I don't believe that's
3 asking anything improper of the -- of the jury.

4 And as Ms. Alves testified to today, she believed her
5 objection was sustained, and although the -- the -- excuse
6 me -- the judge didn't make a ruling on the record, the
7 Solicitor kind of changed his argument in response to her
8 objection.

9 So even if the Court of Appeals found that she failed
10 to preserve that issue properly, there's no prejudice
11 because it's not a Golden Rule violation, and it wouldn't
12 have changed the outcome of the trial.

13 As far as witness coaching goes, there was some
14 testimony about witness coaching of Autumn Sitton. She
15 didn't even testify at trial, so even if that were true, it
16 wouldn't have affected the outcome of the trial. There's
17 no prejudice there under *Strickland*.

18 And finally, the jail phone calls, the Court of
19 Appeals did rule that trial counsel improperly raised the
20 issue, and it should have been raised before the Court of
21 Appeals. If that was improper, the State would submit that
22 there's no prejudice because it wouldn't have made a
23 different. Even if the -- the objection had been properly
24 made to the Court of Appeals and a Court of Appeals panel
25 would have heard it, we don't believe this -- the jail

1 phone call recording was a violation of the Homeland
2 Security Act. It's -- the Applicant consented to those
3 phone calls being recorded, and the argue -- and really, if
4 you -- if Your Honor would refer to the final brief of
5 Respondent, which should be included in your packet in the
6 direct appeal materials there -- and if it's not, I can
7 certainly send Your Honor a copy.

8 But this was essentially an argument that we made in
9 our direct appeal when the issue came up. The Court found
10 it wasn't preserved; but even if it had been preserved,
11 then we argued that it's -- it's simply not a violation of
12 the Homeland Security Act because every time Mr. Rosier
13 makes a phone call from the jail, a recording is played
14 that warns him that his phone call will be recorded and by
15 continuing the call, he's consenting to it being recorded
16 and used against him. So by continuing the call, we
17 believe he consented to it. So it's not a violation of the
18 Homeland Security Act.

19 And I think that's everything. Thank you, Your Honor.

20 THE COURT: Thank you, Ms. Coleman. All right, Mr.
21 Boozer.

22 MR. BOOZER: Thank you, Your Honor. If it pleases the
23 Court. Your Honor, everything that this Court, I think,
24 needs is in the Court's opinion. And is also -- I would
25 urge the Court to read, which I -- I know it will, the --

1 the briefs on the appellate issues before the Court. That
2 contains all of the arguments in -- in addition to Ms.
3 Alves own admissions that she made some mistakes, and she
4 acknowledged those mistakes.

5 One thing I do want to point out is the State
6 references that the motion for continuance is an appellate
7 issue. Well, exactly. It was an appellate issue and that
8 was actually raised on appeal. It was -- did the Court err
9 in some -- deny -- failing to suppress the jail phone calls
10 or, in the alternative, denying his motion for continuance?
11 And because of what we discussed with Ms. Alves, the -- the
12 Court could not make a ruling because it wasn't preserved.
13 They said basically this was something that was his own
14 making, so he couldn't then go back and complain about it,
15 both on the continuance side of it and on the jail phone
16 call side of it. So those were errors that she made that
17 did not allow the Court of Appeals to make a review of the
18 case.

19 Secondly, on the community issue in the Golden Rule
20 argument, I'm not just talking about it's -- the comment
21 "It's an important one for this community." I'm also
22 talking about -- and of course, it's in the appellate --
23 the appellate brief -- where the -- the Solicitor says,
24 "It's an important one for the family and friends of D.J.
25 Davis and it's an important one for this community. Your

1 decision you're going to make in this case is important."

2 We would argue that that very language that you're
3 putting -- you're asking the jury to put themselves in the
4 shoes of the community, which they are, in the shoes of the
5 family of the victim and the victim. So that's where we go
6 with -- with the Golden Rule argument. And Ms. Alves
7 testified that that's what she thought her objection was
8 to. So we think that that is certainly an issue in this
9 case, and for those reasons, Your Honor, we believe his
10 application should be granted.

11 THE COURT: Thank you, Mr. Boozer.

12 Well, I -- I appreciate counsel from both sides well
13 thought-out arguments. I have a lot of material to read.
14 So I'm going to take this under advisement and I'll have my
15 law clerk send you my decision.

16 MS. COLEMAN: Thank you, Your Honor.

17 MR. BOOZER: Thank you, Your Honor.

18

19 -- END OF TRANSCRIPT OF RECORD --

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CERTIFICATE

1
2 I, the undersigned Bonnie H. Kelly, Official Court
3 Reporter for the Fifth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the hearing
7 of the captioned cause, relative to appeal, in the Second
8 Circuit Court for Aiken County, South Carolina, on the 7th
9 day of May, 2018.

10 I do further certify that I am neither of kin,
11 counsel, nor interest in any party hereto.

12
13
14 E/BONNIE H. KELLY

15 Bonnie H. Kelly, CVR

16 Official Court Reporter

17
18 Columbia, South Carolina

19 August 24, 2018
20

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS)
SECOND JUDICIAL CIRCUIT)

David E. Rosier, Jr., #141435,)

2016-CP-02-02273)

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 11, 2016. Respondent was served with the application on February 14, 2017, and submitted its Return and Motion for More Definite Statement on December 28, 2017. An evidentiary hearing into the matter was convened on May 7, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Wallis Alves, Esquire ("Trial Counsel"). This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, appellate records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant was indicted at the May 2013 term of the Aiken County Grand Jury for murder and possession of a weapon during the commission of a violent crime. These charges arose from a shooting on November 10, 2012, which resulted in the

RSS

victim's death. Applicant and his son entered the victim's residence around 10:30 P.M. that evening, and following an altercation, Applicant shot the victim in the center of his chest. Applicant proceeded to trial on October 7-10, 2013, before the Honorable Doyet A. Early, III. Applicant was represented by Wallis A. Alves, Esquire, and C. David Hayes, Esquire. Kevin Molony, Esquire, and David W. Miller, Esquire, prosecuted the case. Applicant was found guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Judge Early sentenced him to imprisonment for thirty years for the voluntary manslaughter offense and five years for the possession of a weapon offense. The sentences run concurrently.

A timely Notice of Appeal was filed and an appeal was perfected. LaNelle Cantey DuRant, Esquire, of the South Carolina Commission on Indigent Defense, represented Applicant on appeal. By written Order signed on May 1, 2015 and filed June 3, 2015, the South Carolina Court of Appeals affirmed the convictions. State v. David Eugene Rosier, Jr., Up. No. 2015-UP-275. Applicant filed a Petition for Rehearing, which was denied by written Order on August 26, 2015. Applicant subsequently submitted a Petition for Writ of Certiorari to the South Carolina Supreme Court. On February 16, 2016, the Supreme Court of South Carolina issued the Order denying the petition. The Remittitur was issued June 30, 2017.

During the pendency of his direct appeal, Applicant filed this application for post-conviction relief. Because the direct appeal is was resolved before the post-conviction relief hearing, the Court of Common Pleas properly had jurisdiction to hear the post-conviction relief action. The evidentiary hearing was held on May 7, 2018. This Order of Dismissal follows.

II. ALLEGATIONS

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

1. Violation of Due Process
 - a. "Will explain to my attorney once appointed by the courts."
2. Ineffective Assistance of Counsel
3. Rule 5 and Brady Violations

Applicant filed an amended application on April 30, 2018, adding the following allegations:

- (a) Counsel failed to properly raise whether the jail phone calls should have been suppressed. See *David Rosier v. State*, Op. No. 2015-UP-275.
- (b) Counsel failed to object to Solicitor's closing argument as violating the "Golden Rule." See *David Rosier v. State*, Op. No. 2015-UP-275.
- (c) Newly discovered evidence exists in the form of testimony from Applicant's former co-defendant and trial witness, Joshua Rosier.
- (d) Applicant believes he observed witness coaching and claims improper actions on the part of the Solicitor.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he went to trial for murder and was convicted of the lesser included offense of voluntary manslaughter. He stated he was arrested on November 12, 2012, and Trial Counsel first contacted him the following January. He stated he went to trial less than a year later. Applicant testified he met with Trial Counsel at least six times. He stated he was offered a plea deal for a sentence ranging from two to thirty years, and he rejected the offer. He stated he testified at trial. He stated Trial Counsel made motions for a continuance before his trial, but they were denied, and he is concerned that she was not able to effectively represent him because she was not given enough time to prepare for the trial.

Applicant testified Trial Counsel's motion to suppress the jail phone calls was improperly made, because the South Carolina Court of Appeals found her motion was improper in his direct

appeal. He stated she should have sought to exclude the phone calls under the Homeland Security Act with the Court of Appeals before the trial rather than with the Circuit Court. Applicant stated Trial Counsel failed to object to the Solicitor's closing argument where he told the jury their decision was "important for the community." Tr. 417. He opined this statement was a Golden Rule violation and Trial Counsel should have specifically objected to it as a Golden Rule violation to preserve it for appeal.

Applicant testified that before his trial, he walked into a room where he witnessed the Solicitor coaching one of their witnesses and telling her what to say. He stated the solicitor was telling witness Autumn Sitton how to testify, but he stated Autumn Sitton did not testify at trial. He stated he mentioned what he saw to Trial Counsel, but there was too much going on before the trial to discuss it. Applicant testified the State would not cooperate with them, and he wishes they could have had all Brady material in a timely manner. He opined that Trial Counsel could have been ready if she had more time to prepare before trial.

Trial Counsel's testimony

Trial Counsel testified the applicant was accused of traveling to the victim's house with his sons Josh and Calvin, as well as two women, Autumn Sitton and Brittany Cook, entering his home, getting into a fight, and shooting and killing the victim. She stated their defense at trial was self-defense and defense of others. She stated Applicant always wanted to testify at trial, and he testified about a struggle over the gun which resulted in the gun going off and shooting the victim on accident. Trial Counsel testified she was given new evidence and information from the State one week before the trial that totally changed their theory of the case, and she moved for a continuance based on her need to re-interview witnesses. She stated she did not feel fully prepared to cross-examine all witnesses before the trial, but the trial court denied her motions for

a continuance. She testified there was one witness they could not find before the trial, but they were able to bring him into court, and after interviewing him, she chose not to call him as a witness based on what his testimony would have been. Although she opined the witness might have been more helpful if there had been more time to meet with him without the pressure of his parents and the police watching, her motion for a continuance was denied.

Trial Counsel testified the solicitor gave her a copy of all the jail phone calls before the trial, and she was able to listen to all of them. She stated she moved to suppress the phone calls based on a violation of the Homeland Security Act. She testified she knew before the trial that she had to raise the issue to the Court of Appeals and she does not know why she did not properly do so. She stated this was a mistake. Trial Counsel testified that if she had properly raised the motion to the Court of Appeals, she would have argued the issue exactly the way she did in her motion to the trial court. She testified that, if she had properly made the motion, the trial would have been stayed until the issue was resolved, and she would have had more time to prepare for trial.

Trial Counsel testified she thought at the time that her objection to the solicitor's closing argument was a valid and proper objection to the statement as a violation of the Golden Rule, but the Court of Appeals found her objection was not specific enough to preserve the issue for appeal. Trial Counsel testified that if Applicant had told her he saw witness coaching before the trial, she would have asked the witness about it at trial and asked the solicitor about it. However, she stated that Autumn Sitton did not testify at trial. Trial Counsel testified that Applicant told her he would be willing to plead to voluntary manslaughter. She stated a plea offer was made, but the offer was not satisfactory, so Applicant rejected it. Trial Counsel testified that the State

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complied with Rule 5, and although some of the discovery materials were not turned over until the last minute, she did receive all Rule 5 and Brady materials before the trial.

Trial Counsel testified she moved to suppress and objected to the admission of the jail phone calls, but when the trial judge denied her motion and ruled that they would be admissible, she strategically chose to move all of the phone calls into evidence. She stated she did this because the small portions of conversation that the State wanted to use did not tell the whole story, and she felt she had to put the full calls in to put them in context.

IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the 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. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. After considering the testimony, judging the credibility of the witnesses, and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden of proof. Accordingly, post-conviction relief is denied. Each individual allegation is addressed below.

Failure to properly move to suppress jail phone calls

Applicant alleges Trial Counsel was ineffective for failing to properly move to suppress the jail phone calls introduced at trial. At trial, the State sought to introduce several small snippets of recordings of jail phone calls between Applicant and his son and co-defendant,

Joshua Rosier. The phone calls were probative of Applicant's plan to go to the victim's house when he was released from jail and fight the victim and others who they believed had wronged them. Trial Counsel made a pre-trial motion to suppress the phone calls as a violation of the South Carolina Homeland Security Act. Tr. 33. She explained to the trial court that under the statute the motion was required to be heard by a panel of judges on the South Carolina Court of Appeals. Tr. 33. Trial Counsel submitted a memorandum over the motion and requested a continuance for the purpose of submitting her motion to the Court of Appeals before the trial. The trial judge denied her motion for continuance. Tr. 37. Trial Counsel then argued the merits of her motion to suppress the phone calls to the trial court, arguing that the recordings were a violation of the South Carolina Homeland Security Act, S.C. Code Ann. Section 17-30-10. Tr. 42-58. The trial court denied the motion to suppress. Tr. 60.

On direct appeal, Applicant argued the trial court erred in denying the motion to suppress or in failing to grant a continuance in order to make the motion before the Court of Appeals panel, as required by the statute. The Court of Appeals held that the trial court did not have jurisdiction to determine whether the calls should be suppressed under the Homeland Security Act, and its ruling denying the motion was therefore void. State v. David Eugene Rosier, Jr., Up. No. 2015-UP-275. However, the Court of Appeals found that Applicant waived his opportunity to seek a determination on this issue by failing to make the motion properly under the statute to the Court of Appeals. Id. The Court of Appeals confirmed Applicant's conviction.

Applicant now claims that he was denied effective assistance of counsel because of Trial Counsel's failure to properly present the motion to the Court of Appeals before his trial, rather than waiting until the day of trial to raise the issue to the trial judge. This Court disagrees and finds Trial Counsel's error did not result in ineffective assistance of counsel where there is no

prejudice under the second prong of the Strickland test. “[A] court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ...that course should be followed.” Strickland, 466 U.S. at 697.

To succeed in proving ineffective assistance of counsel, Applicant must prove that Trial Counsel’s error would have changed the outcome of the trial. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. See United States v. Morrison, 449 U.S. 361, 364–365 (1981). To prove prejudice in this situation, Applicant must show that the motion to suppress would have been successful if Trial Counsel had properly raised it to the appropriate panel of Court of Appeals judges, as required by the Homeland Security Act, and that the suppression of these jail telephone calls would have changed the jury’s verdict. This Court finds Applicant cannot prove prejudice because the motion to suppress the phone calls likely would not have been successful if properly raised.

At the evidentiary hearing, Trial Counsel testified that, if she had properly made the motion to the Court of Appeals panel, she would have made the exact argument she presented to the trial court in the trial transcript. Trial Counsel’s argument in encompassed through page 42 to page 58 of the trial transcript. She argued that the recording of the jail phone calls was a violation of the Homeland Security Act, which requires that any interception of wire communications which is an oral transfer—such as a telephone call—must be made in conjunction with the Act, and here it was not. Tr. 42. Trial Counsel further argued Applicant was incarcerated at the time he made the telephone calls and had no other option to communicate

with family members but to use the telephones that were tapped by the government, and therefore his use of the phones does not imply voluntary consent to the recording. Tr. 43.

In response to the argument presented at trial, the State, through Deputy Solicitor David Miller, argued the South Carolina Homeland Security Act does not apply to jail phone call tapes because it is telephone equipment used in the ordinary course of business, which is excluded from the Act, and that even if it did apply, Applicant consented to the recording by choosing to place the telephone call despite his other alternatives and despite the recorded warning that his call would be recorded at the beginning of each phone call. The State's argument was made from page 48 to page 55 of the trial transcript. The State referenced South Carolina case law holding prisoners had a greatly diminished expectation of privacy, and argued that the purpose of the Act is to prevent the recording of a person's activity without their knowledge, which is clearly not the case here where Applicant knew his call was being recorded and chose to proceed.

This Court finds the motion to suppress would not have been successful if presented to the Court of Appeals panel as required by the statute because Applicant consented to the recording of his phone call and understood the call would be recorded and monitored. Applicant received a recorded message before each phone call warning him that his call would be monitored and recorded. Knowing that he had no expectation of privacy in each phone call, he chose to proceed with the calls despite his other alternatives, such as writing letters or visiting with his family in person. Accordingly, this Court finds the motion to suppress the phone calls would have been denied on at least this basis, and possibly others. Accordingly, because the motion would not have been successful if properly made, Applicant cannot prove any resulting prejudice from Trial Counsel's failure to properly raise the issue before the trial. Because Applicant has failed to prove both prongs of the Strickland test, this allegation is denied and

dismissed with prejudice.

Failure to properly object to Golden Rule violation

Applicant alleges Trial Counsel was ineffective for failing to properly object to the solicitor's statement in closing argument that the jury's decision was "important for the community" as a Golden Rule violation. This allegation is meritless, as this statement is not a violation of the Golden Rule. Furthermore, Trial Counsel did object to the statement, although it was not specifically phrased as a Golden Rule violation, and in response to her objection, the solicitor changed his closing argument. Tr. 417, line 2-12. Accordingly, there is no prejudice, because the objection she made was successful.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

In the present case, the solicitor never asked the jurors to place themselves in the victim's shoes to arouse their passion and prejudice. The solicitor simply informed them that their decision was important to the family and friends of the victim, for the defendant, and for the community in which they live. The argument did not destroy their impartiality, but simply asked

the jurors to take their duty and responsibility as jury members very seriously because of its impact on everyone involved with the case. Accordingly, this Court finds this statement was not an improper Golden Rule argument and was not objectionable as such. Therefore, Trial Counsel is not deficient for failing to frame her objection as a Golden Rule violation, and there is no resulting prejudice from her failure to do so. Applicant has failed to meet either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

NEWLY DISCOVERED EVIDENCE

Applicant alleged in his amended application that newly discovered evidence existed in the form of testimony from Applicant's son and former co-defendant, Joshua Rosier. Although Joshua Rosier was transported to the evidentiary hearing and was available to testify, Applicant chose not to present his testimony at the hearing. Accordingly, this Court finds Applicant failed to present any evidence on this claim and this allegation is deemed abandoned, and is denied and dismissed.

PROSECUTORIAL MISCONDUCT

Applicant alleges prosecutorial misconduct in the form of witness coaching. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant testified at the evidentiary hearing that he observed the solicitor telling witness Autumn Sitton how to testify before the trial. He stated he told Trial Counsel what he saw, but there was no time to do anything about it before the trial. Trial Counsel testified she did not recall him telling her about witness coaching, but if he had, she would have asked the solicitor about it and cross-examined the witness about it at trial. This Court finds Applicant's testimony about this subject incredible. Applicant has failed to present any credible evidence that any witness coaching occurred. Furthermore, even if Autumn Sitton had been

coached regarding her testimony, it had no effect on Applicant's trial because Autumn Sitton did not testify at trial. Applicant has failed to meet his burden of proving prosecutorial misconduct in any form, and this allegation is denied and dismissed with prejudice.

VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

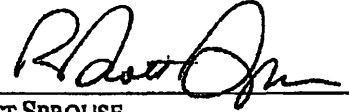
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an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

[signature page to follow]

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of June, 2018.



R. SCOTT SPROUSE
Presiding Judge
Second Judicial Circuit

Waltham, South Carolina

ELECTRONICALLY FILED - 2018 Jun 11 2:44 PM - AIKEN - COMMON PLEAS - CASE#2016CP0202273

WITNESSES

Aiken County Sheriff

Brad Wertz

Law Enforcement Case #: 12-066085

DOCKET NO. 2013GS0200766

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

MAY TERM 2013

ARREST WARRANT NUMBER

2012A0210200597

May 9 2013
Leif Hordland
U.C.C.P. & G.S.
Charles E. Wentzell
Deputy Clerk

THE STATE
vs.

DAVID EUGENE ROSIER, JR.

ACTION OF GRAND JURY

TRUE BILL

Ronnie M. Hall

Foreperson of Grand Jury
Date: May 9, 2013

VERDICT

CDR #: 0116

Indictment for

MURDER

§ 16-03-0010; 16-03-0020

Foreperson of Petit Jury
Date:

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

INDICTMENT FOR
MURDER

§ 16-03-0010; 16-03-0020

At a Court of General Sessions, convened on May 13, 2013, the Grand Jurors of Aiken County present upon their oath:

That DAVID EUGENE ROSIER, JR. did in Aiken County on or about November 10, 2012, feloniously, wilfully and with malice aforethought, then and there kill and murder [REDACTED] by means of shooting him in the chest and that the victim did die in Aiken County at [REDACTED] Church Street, Bath, South Carolina as a proximate result thereof on November 10, 2012. All in violation of Section 16-3-10 of the South Carolina Code of Laws (1978), as amended.

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


J. STROM THURMOND, SOLICITOR