STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Charleston County

The Honorable J.C. Buddy Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-001213

DAVID ROCQUEMORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

I.

Did the PCR court err by failing to rule on Petitioner's claim of judicial misconduct pertaining to the trial court's ex parte communication with an assistant solicitor through text message during Petitioner's trial despite the presentation of extensive evidence on the claim during the evidentiary hearing and the fact that the court requested, and the parties submitted, written memoranda on the issue.

II.

Did the trial court commit judicial misconduct by (1) engaging in ex parte communication with an assistant solicitor through text message during Petitioner's trial without making a contemporaneous disclosure to defense counsel thereby calling into question the impartiality of the tribunal, and by (2) failing to recuse itself sua sponte from ruling on Petitioner's July 23, 2007 posttrial motion for the release of the assistant solicitor's telephone records since the court's ex parte communication with the assistant solicitor through text message created the appearance that the court had an extrajudicial interest in denying the motion?

STATEMENT OF THE CASE

Petitioner was indicted in December 2005 in Charleston County for murder (2005-GS-10-8602) and possession of a weapon during the commission of a violent crime (2005-GS-10-8601). Petitioner was represented on these charges by Andrew Savage, Esquire, and Lauren Williams, Esquire. The State was represented by Deputy Solicitor Bruce Durant and Assistant Solicitors Brian Alfaro and Jennifer Shealy. Petitioner proceeded to trial on July 9-19, 2007. The Honorable Daniel Pieper presided over the trial.

On July 17, 2007, shortly after the trial reconvened for the afternoon, Mr. Savage informed the Court that he learned over the weekend that Michael Nelson, an assistant solicitor who was not involved in the prosecution of Petitioner's case, had a cousin on the jury. App. 895, ll. 6-12. Mr. Savage added that while speaking with Mr. Nelson, he also learned that Mr. Nelson was "asked to leave the courtroom by Your Honor because of his relationship with the jury member." App. 895, ll. 19-22. The Trial Court responded by telling Mr. Savage that Mr. Nelson "just assumed" that he told him to leave because of his relationship with a jury member and that he "generally told him to leave the courtroom". App. 896, ll. 2, 5-6.

Mr. Savage went on to report to the Trial Court that there had been some communication between Mr. Nelson and the juror via text message and telephone throughout the trial. App. 896, ll. 15-20. The Trial Court inquired of Mr. Savage about what he wanted the Court to do to remedy the situation. Mr. Savage responded that he wanted to have the juror dismissed. App. 897, ll. 15-18.

The Trial Court went on to tell the parties on the record that he was "joking with Mr. Nelson when [he] told [Mr. Nelson] to get out" and that he had no records or knowledge of the juror's relationship with Mr. Nelson. App. 898, ll. 1-7. The Trial Court personally assured Mr.

Savage that he would "never do such a thing" and that he "joke[s] around with all the people that work in this building every now and then, but that's about it." App. 899, ll. 11-20. Mr. Savage told the Trial Court that he was not seeking recusal of the Trial Court based on the Trial Court's communication with Mr. Nelson. App. 899, ll. 13-14.

Juror Davey, the juror in question, was then brought into the courtroom and questioned by the Trial Court regarding his communication and relationship with Mr. Nelson. The juror conceded he did not disclose to the Trial Court his relationship with Mr. Nelson and was removed from the jury. App. 900, l. 7 – 904, l. 19. One of the alternates was seated on the jury and Petitioner's trial continued.

On July 18, 2007, Mr. Savage again brought up to the Trial Court the issue regarding Mr. Nelson and the replaced juror. Mr. Savage told the Trial Court that he was not questioning the Trial Court's granting of his request to remove the juror, but was concerned that the juror disclosed things to the other jurors based on is communications with Mr. Nelson that may have tainted the other jurors. App. 1102, l. 12 – 1104, l. 8.

The Trial Court again stated that Mr. Savage made a faulty assumption that the Trial Court already knew about the relationship between Mr. Nelson and the juror. App. 1104, ll. 17-24; App 1111, ll. 19-21). The Trial Court agreed to question Mr. Nelson on the record regarding his communication with the juror and poll the jury regarding any statements the removed juror may have made about his relationship with Mr. Nelson. App. 1125, l. 12 – 1130, l. 16. After questioning Mr. Nelson *in camera* and polling the jury, Mr. Savage moved for a mistrial based on a due process violation for the juror's failure to disclose the special relationship he had with the Solicitor's Office. App. 1185, l. 6 – 1189, l. 18. The Trial Court denied Petitioner's motion on the basis that the issue was resolved by the removal of the juror.

On July 19, 2007, the jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Mr. Savage renewed Petitioner's motion for a mistrial and was given the opportunity to expand upon his arguments in support of his motion for a mistrial. The Trial Court again denied the motion for mistrial and stated that he was still satisfied that the jury was not improperly tainted by the removed juror. App. 1383, l. 7 – 1384, l. 16. The Trial Court allowed Petitioner to submit as a court's exhibit a document from SunCom Communications that listed all the phone calls made by the dismissed jurors between July 6th and July 18th. App. 1384, ll. 9-15).

On July 23, 2007, Petitioner filed a Motion for Release of Records requesting the court issue an order releasing the cell phone records of Assistant Solicitor Nelson. App. 1584-1586. A hearing regarding the motion was held on July 24, 2007. By Order filed August 20, 2007, the Trial Court denied Petitioner's request to release the records. App. 1588. The Trial Court affirmed its ruling regarding whether any improper tainting of the jury occurred during trial and concluded that there was no likelihood continued proceedings on the matter would demonstrate any impact upon the Petitioner's fair and impartial jury verdict. App. 1588-1590.

Petitioner filed a timely Notice of Appeal and was represented on appeal by Appellate Defenders Robert Dudek and Joseph Savitz. During the course of Petitioner's appeal, appellate counsel asked the Court of Appeals for an order releasing Mr. Nelson's cell phone records. By Order dated April 11, 2008, the Court of Appeals also declined to grant Petitioner an order releasing Mr. Nelson's cell phone records. On June 28, 2010, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Rocquemore, 2010-UP-331 (Ct. App. June 28, 2010). Petitioner filed a Petition for Writ of Certiorari in the South Carolina Supreme Court

which was dismissed as improvidently granted on December 12, 2012. The Remittitur was issued on December 28, 2012.

Petitioner filed an application for post-conviction relief on February 1, 2013. On October 23, 2013, Assistant Solicitor Michael Nelson was suspended from the practice of law by the Office of Disciplinary Counsel based on his communications with the juror in Petitioner's trial. In re Nelson, 406 S.C. 201, 750 S.E.2d 85 (2013). The opinion's narrative states the following:

> At an interview with ODC on August 1, 2012, respondent was asked if the trial judge had asked him to leave the courtroom during the trial or during jury selection. Initially, respondent replied "[n]o." However, respondent then remembered that he went into the courtroom during the trial and the trial judge texted him and told him to leave. Respondent stated the text occurred during a break in trial. He explained that, in hindsight, he assumed the trial judge was "messing with" him.

Id. at 208, 750 S.E.2d at 89.

Petitioner amended his post-conviction relief application on November 25, 2014, to allege "recent discovery of material facts not previously presented and heard which require vacation of the conviction or sentence". Petitioner's pleading stated the alleged newly discovered evidence was the text message communication between Mr. Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom.

Petitioner served the Honorable Daniel Pieper with a subpoena to appear at Petitioner's post-conviction relief hearing. Assistant Attorney General Courtney Lowell, on behalf of Judge Pieper, filed a Motion to Quash the Subpoena on December 5, 2014. App. 1556. Petitioner filed a Return to Judge Pieper's Motion to Quash on December 8, 2014. App. 1566. After a hearing, the Honorable J.C. Nicholson partially denied Judge Pieper's Motion to Quash. The Court held that Petitioner would only be able to call Judge Pieper as a witness during his post-conviction relief hearing if the testimony of Michael Nelson indicated the presence of additional

communications with Judge Pieper other than the one already reflected in the record. An evidentiary hearing was held on January 14, 2015. Assistant Attorney General Ashleigh R. Wilson represented the State and James Falk, Esquire, represented Petitioner. By Order dated May 17, 2015, the PCR Court denied Petitioner's application for post-conviction relief with prejudice. App. 1682.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The judicial misconduct issue is not preserved for appellate review because the issue was not ruled upon by the PCR Court and no Rule 59(e) was filed.

Petitioner argues that the PCR Court erred in failing to rule on Petitioner's claim of judicial misconduct. For the following reasons, Respondent contends that this argument should be dismissed.

The rule is well established that if asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). An issue must be raised to and ruled upon by the trial court to be preserved for appellate review. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004). Our supreme court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations. Marlar v. State, 375 S.C. 407, 408–10, 653 S.E.2d 266, 266–67 (2007). See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992) ("counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings). The court in Marlar noted that "[p]ursuant to S.C. Code Ann. § 17–27–80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented," and the failure to specifically rule on the issues precludes appellate review of the issues. Id. at 408, 653 S.E.2d at 266. Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012).

The PCR Court's Order of Dismissal did not address Petitioner's issue that the Trial Court committed judicial misconduct. Petitioner did not file a Rule 59(e) motion requesting the PCR

Court to make findings and rule on that issue. It is unclear why the PCR Court failed to address this issue, but Respondent would submit that an allegation of judicial misconduct is not a cognizable allegation. Although raised, Petitioner's PCR counsel asserted his uncertainty as to the propriety of such a claim: "I mean, I don't feel I'm in a position to say that there was judicial misconduct in this case." App. 1658, ll. 4-6. Regardless, by following the clearly established law set forth above, Respondent contends that this issue is not preserved for appellate review.

Even if the issue of judicial misconduct had been preserved for review, this allegation is without merit. As Respondent argued in its memorandum to the PCR Court, a claim of judicial misconduct is not proper for post-conviction relief and has never been the basis for post-conviction relief in any South Carolina case thus far.

The granting of post-conviction relief warranting a new trial on the basis of judicial misconduct would require the PCR Court to make a finding that the trial judge's actions indeed constituted misconduct. Respondent submits findings of judicial misconduct are not proper for the post-conviction relief court and fall solely under the jurisdiction of the Commission on Judicial Conduct ("The Commission"). The Commission was created by Rule 502, South Carolina Appellate Court Rules, to investigate complaints of judicial misconduct and incapacity against judges who are a part of the South Carolina unified court system. Rule 502, SCACR, provides the procedure for resolving allegations that a judge committed ethical misconduct or that a judge suffers from a physical or mental condition which adversely affects the judge's ability to perform judicial functions. Rule 502, SCACR, explicitly states "The Commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge. The Commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred during

service as a judge." (citing Rule 3 of Rule 50). Rule 502 also outlines policies and procedures the Commission must follow when investigating a complaint of judicial misconduct. It is clear from the South Carolina Appellate Court Rules that the Legislature intended the Commission to have sole jurisdiction over investigating and resolving claims regarding judicial misconduct, rather than a circuit judge presiding over a PCR hearing.

Respondent submits the South Carolina Supreme Court's decision in Langford v. State is also dispositive on whether or not violations of ethical rules are valid considerations for the Court in post-conviction relief matters. 310 S.C. 357, 426 S.E.2d 793 (1993). In Langford, the Supreme Court rejected the applicant's argument in support of post-conviction relief that counsel's representation of both he and his codefendant was a violation of the Rules of Professional Conduct. Id. at 360. The Court held

> "in our view, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Their purpose is to regulate and guide the legal profession by defining proper ethical conduct, and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

Id. Respondent submits the Court's ruling in Langford should be extended to alleged violations of the Code of Judicial Conduct especially in circumstances like Petitioner's when the conduct in no way affected the constitutionality or validity of the Petitioner's criminal conviction.

Respondent further submits the PCR Court was correct in failing to make any findings regarding trial judge error based on Petitioner's judicial misconduct claim. Respondent contends that the PCR Court was correct in failing to rule that the trial judge should have *sua sponte* recused himself from ruling on matters which could have involved his communication with Mr. Nelson. Respondent also submits that any claims regarding errors by the trial judge should have been raised on direct appeal. A trial judge's failure to recuse himself is a direct appeal issue. See State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (2002). Since claims regarding trial judge

errors are direct appeal issues, they are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003) and cannot be raised on post-conviction relief. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Petitioner perfected a direct appeal and could have raised any issues regarding judicial misconduct and the trial judge's failure to recuse himself from ruling on matters which involved his communication with Mr. Nelson. Petitioner's failure to do so has waived this allegation as a ground for relief.

Respondent submits it is clear that even if Petitioner's claim of judicial misconduct by the trial judge was preserved for review, the claim lacks merit as post-conviction relief is not the proper forum to evaluate the trial judge's conduct, the Commission has sole jurisdiction over investigating judicial misconduct claims, and the issue could have been raised on direct appeal.

II. Petitioner was unable to show that his "newly discovered evidence" would change the result if a new trial was had, had been discovered since trial, was material to the issue of guilt or innocence, and was not cumulative. Thus, Petitioner was unable to satisfy all requisite factors in proving newly discovered evidence.

As Petitioner's claim that the trial court committed judicial misconduct is outlined extensively in the above section, Respondent will now argue that the PCR Court was correct in denying Petitioner's application for post-conviction relief based on his claim of newly discovered evidence.

Petitioner argued that he should be granted relief based on newly discovered evidence, the evidence being the existence of text message communication between Mr. Nelson and the trial judge where the trial judge told Mr. Nelson to leave the courtroom. It is well settled that a

motion for new trial based on newly discovered evidence may be granted only if the movant shows that the evidence upon which the motion is based:

1. Is such as would probably change the result if a new trial was had;
2. Has been discovered since trial;
3. Could not by the exercise of due diligence have been discovered before trial;
4. Is material to the issue of guilt or innocence; and,
5. Is not merely cumulative or impeaching.

State v. Caskey, 272 S.C. 325, 329, 256 S.E.2d 737, 738-39 (1979).

Our courts have held that the movant must prove all five prongs of this test to prevail. The PCR Court concluded that Petitioner was unable to prove all five factors. App. 1713. Most importantly, the PCR Court found that Petitioner failed to prove that the communication between the trial judge and Mr. Nelson was material to his guilt or innocence. The PCR Court found, and the PCR record reflects, that Petitioner conceded that he was unable to prove the materiality element. App. 1713. See also App. 1657, ll. 2-5 ("Now, the information that we were looking for would certainly not pass the fourth prong as far as being material to guilt or innocence.") The PCR Court found that the trial judge's single communication with Mr. Nelson asking him to leave the courtroom "was in no way relevant to the jury's finding of [Petitioner's] guilt." App. 1713. In support, the PCR Court noted that Mr. Nelson was not prosecuting Petitioner's case and the trial judge's conduct did not rise to the level that would have prejudiced the outcome of the trial. App. 1713.

The PCR Court further found that Petitioner could not meet his burden of proving three of the other Caskey factors. The PCR Court correctly found that this evidence would change the result if a new trial was had. In support, the PCR Court found that Petitioner failed to present any evidence that the jury's verdict was influenced by the one text message between Mr. Nelson and

the trial judge. App. 1714. The PCR Court noted, and the record reflects, that no discussion of any communication took place before the jury.

The PCR Court further found that Petitioner failed to prove that the evidence has been discovered since trial. The PCR Court found that Mr. Savage acknowledged that he was aware of a communication between Mr. Nelson and the trial judge during the trial. App. 1715. The trial judge disclosed to the parties on the record during the trial that he generally told [Mr. Nelson] to leave the courtroom." App. 1715, citing App. 896, ll. 5-6. Thus, this communication was discovered during Petitioner's trial. The PCR Court also correctly dismissed Petitioner's argument that Petitioner discovered that the communication between the trial judge and Mr. Nelson took place via text message. In support, the PCR Court found that the form of the communication is a distinction without a difference because a text message communication is no more secretive than any other private two-party conversation. App. 1715. Additionally, the PCR Court found that it did not have to speculate as to the substance of the text message because Mr. Nelson's testimony at the PCR hearing matched the trial judge's disclosure during trial. App. 1716.

Lastly, the PCR Court found that Petitioner failed to show that the evidence was not merely cumulative or impeaching. The PCR Court found, and the record reflects, that the trial judge disclosed this communication and its substance during trial on the record. App. 1716, App. 896, ll. 5-6. Respondent submits that simply learning of the form of the communication would not change the fact that it is cumulative to the trial judge's disclosure.

The PCR Court was also correct by not adopting Petitioner's argument that the five factor analysis should not apply in his case. Petitioner argued at the PCR hearing that the PCR Court should adopt the standard from McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013) which

holds that "juror misconduct discovered post-trial is not properly considered 'newly discovered evidence'; rather, it is a separate basis for a new trial." McCoy 401 S.C. at 371, 737 S.E.2d at 627. McCoy deals with only allegations of juror misconduct.

Based on the foregoing, there is certainly evidence of probative value to support the PCR Court's ruling that Petitioner did not meet his burden of proving that he is entitled to a new trial based on newly discovered evidence.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire
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This 13th day of May, 2016.

JOCELYN BAKER
LEGAL ASSISTANT