STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

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

DAVID ROCQUEMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001213

BRIEF OF PETITIONER

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1.

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?

2.

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 post-trial 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

A Charleston County Grand Jury indicted Petitioner on December 5, 2005 for murder and possession of a firearm during the commission of a violent crime. App. 1718-1721. His case was called to trial on July 9, 2007 before the Honorable Daniel F. Pieper, and a jury. App. 1. Deputy Solicitor Bruce D. Durant and Assistant Solicitors Bryan A. Alfaro and Jennifer Shealy represented the state, and Andrew Savage and Lauren E. Williams represented Petitioner. App. 1. On July 19, 2007, the jury acquitted Petitioner of murder, but found him guilty of the lesser-included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime. App. 1365, l. 10 – 1366, l. 9. He was sentenced by Judge Pieper to ten years for voluntary manslaughter and five years concurrent for the weapons offense. App. 1383, l. 22 – 1384, l. 17.

On appeal, Petitioner argued, *inter alia*, that the trial judge erred by failing to grant a mistrial when the state neglected to disclose that a sitting juror was a close cousin of an assistant solicitor and that the two had communicated during the trial. App. 1459. The Court of Appeals affirmed Petitioner's convictions. State v. Rocquemore, Op. No. 2010-UP-331 (S.C. Ct. App. filed June 28, 2010). App. 1458-1460. On December 1, 2011, this Court granted Petitioner's Petition for Writ of Certiorari to the Court of Appeals on the issue stated above. App. 1497. However, after further briefing and oral argument, this Court ultimately dismissed the writ as improvidently granted by order filed December 12, 2012. App. 1537-1538.

On February 1, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 1539-1546. The state filed a return to this application on May 20, 2014. App. 1547-1552. With the assistance of counsel, James Falk , Petitioner filed an amended application on December 1, 2014 raising the claim argued in this brief. App. 1553-1555. The matter proceeded to an evidentiary hearing on January 14, 2015 before the Honorable J.C. Nicholson, Jr. App. 1592. Assistant

Attorney General Ashleigh R. Wilson represented the state, and Counsel Falk represented Petitioner. App. 1592.

Before the hearing, Petitioner subpoenaed the trial judge to appear and give testimony at the evidentiary hearing. On behalf of the trial judge, the state filed a Motion to Quash Subpoena on December 5, 2014. App. 1556-1565. Petitioner filed a Return to the Motion to Quash Subpoena on December 8, 2014. App. 1566-1590. Judge Nicholson ultimately issued a Form 4 Order partially denying the motion to quash, "finding that it may be necessary for [the trial judge] to testify."[1] App. 1591.

At the conclusion of the evidentiary hearing, Judge Nicholson ordered the parties to submit written memoranda within forty-five days. App. 1672, l. 11 – 1673, l. 24. On March 9, 2015, the state filed a Memorandum in Support of Denying Post-Conviction Relief. App. 1682-1696. On March 23, 2015, Petitioner filed a Memorandum in Support of Granting Post-Conviction Relief. App. 1697-1706.

By order dated May 17, 2015, Judge Nicholson denied Petitioner relief. App. 1707-1717. Petitioner filed a petition for writ of certiorari on December 29, 2015. The state filed a return on May 13, 2016. By order dated March 27, 2017, this Court granted the petition and ordered further briefing. This brief of petitioner follows.

[1] The trial judge appeared at the evidentiary hearing, but did not testify. Judge Nicholson orally granted the state's motion to quash the subpoena based on the evidence presented during the hearing. See App. 1651, l. 18 – 1652, l. 18.

STATEMENT OF THE FACTS

Petitioner's jury trial began on Monday, July 9, 2007. Shortly after the trial reconvened on the afternoon of July 17, 2007, Defense Counsel Savage told the court that he had recently learned Michael Nelson, an assistant solicitor with the Ninth Circuit Solicitor's Office in Charleston, had a cousin on the jury.[2] App. 890, l. 6 – 891, l. 18. The juror had failed to disclose his relationship with Nelson or his connection with the solicitor's office during *voir dire*. See App. 54, ll. 16-22. The state also neglected to disclose this relationship despite evidence that the members of the prosecuting team were aware Nelson's cousin was a member of the jury pool before qualifications. App. 890, ll. 22-24.

Defense counsel also told the judge that he had discovered there had been some communication between the juror and Nelson over the telephone and by way of text message throughout the trial and requested the juror be dismissed. App. 894, l. 22 – 895, l. 18; App. 896, ll. 15-19; App. 897, ll. 17-18. After questioning the juror, the judge granted counsel's request and dismissed the juror. He was replaced by an alternate. App. 900, l. 5 – 903, l. 6; App. 907, l. 7 – 908, l. 13.

The dismissed juror told the court before he was excused that he had not disclosed to any of the other seated jurors "in any kind of way" that he was related to an assistant solicitor or had a connection to the solicitor's office. App. 901, l. 19 – 902, l. 3. However, *at least two other seated jurors* contradicted these statements and told the court under oath that the dismissed juror mentioned his cousin (Nelson) worked for the solicitor's office or "worked in the building." See App. 1150, l. 14-17 and App. 1156, ll. 5-7.

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[2] The Ninth Circuit Solicitor's Office prosecuted Petitioner's case. However, Nelson was not involved in the prosecution.

Defense counsel later moved for a mistrial based the state's failure to disclose the close relationship between the seated juror and Nelson in violation of Petitioner's due process rights. He emphasized the evidence of *numerous communications* between the seated juror and Nelson throughout the trial and the inconsistent statements made by the juror and Nelson when questioned by the court. App. 1130, l. 18 – 1140, l. 1; App. 1161, l. 3 – 1163, l. 23; App. 1171, l. 18 – 1189, l. 6. For example, Nelson was inconsistent as to when he supposedly informed the assistant solicitors who were prosecuting the case that his cousin was a member of the jury panel. Nelson claimed under oath that he told Assistant Solicitor Durant *after jury selection* that his cousin was selected to serve on the jury. App. 1129, l. 14 – 1130, l. 6. However, Assistant Solicitor Durant contradicted this statement and told the judge that Nelson told him his cousin was merely in the jury pool *before qualifications*. Assistant Solicitor Alfaro confirmed this account. App. 1164, l. 1 – 1165, l. Based on this inconsistency, the trial judge questioned Nelson again. Nelson now claimed he did not remember when he told the prosecuting solicitors that his cousin was part of the jury pool or had been selected as a juror. App. 1167, l. 3 – 1170, l. 16.

Moreover, Nelson and the dismissed juror were inconsistent about the extent of their communication during Petitioner's trial. The dismissed juror told the judge that he and Nelson had talked to each other during the trial about Nelson's "wedding and stuff." App. 901, ll. 9-18. However, when Nelson was first questioned by defense counsel about the matter he told counsel that the dismissed juror called him during the trial, but "he [Nelson] refused to talk to him and hung up." App. 891, ll. 15-18. When Nelson was questioned further on the record, he admitted he and the dismissed juror had talked about his upcoming engagement party. App. 1126, l. 3 – 1129, l. 7.

After questioning all the remaining jurors about whether the dismissed juror had discussed his relationship with the solicitor's office, the court ultimately denied Petitioner's motion for a mistrial finding there was no evidence the remainder of the jury had been "improperly tainted."[3] App. 1187, l. 9 – 1189, l. 15; App. 1383, ll. 17 – 1384, l. 8; See App. 1141, l. 6 – 1161, l. 1

During the course of the discussion regarding the dismissed juror, defense counsel also reported to the judge that, while speaking to Nelson, he had learned Nelson "was asked to leave the courtroom by Your Honor because of his relationship with the jury member." App. 895, ll. 19-22. The judge responded by telling counsel that Nelson "just assumed" he had told him to leave because of his relationship with the juror and that he "just generally told him to leave the courtroom." App. 896, ll. 2-6. The judge later told the parties, "I was just joking with Mr. Nelson when I told him to get out [of the courtroom] . . . *if he had any connection to a juror*" and that he was "totally unaware" of the relationship between Nelson and the seated juror. App. 898, ll. 1-7 (emphasis added). The judge "personally assure[d]" defense counsel that he "would never so such a thing" and that he often "joke[s] around with all the people that work in this building every now and then, but that's about it." App. 899, ll. 12-20. Defense counsel did not seek to recuse the judge because of his *ex parte* communication with Nelson, but instead focused on both the juror and the state's failure to disclose the relationship between Nelson and the juror during *voir dire*. App. 899, ll. 13-14.

After the jury found Petitioner guilty of voluntary manslaughter, defense counsel renewed his motion for a mistrial. The judge again denied the motion and stated he was still satisfied that the "jury was not improperly tainted in any type of way." App. 1382, l. 17 – 1383, l. 8. The judge permitted counsel to submit records subpoenaed from SunCom Wireless that listed the telephone calls and text messages sent and received by the dismissed juror between July 6, 2007 and July 18,

[3] The issue related to the court's failure to grant a mistrial was raised by Petitioner on direct appeal. App. 1459.

2007. These records revealed **at least twenty contacts** or attempted contacts between Nelson and the dismissed juror during the course of the trial. App. 1585; App. 1709.

On July 23, 2007, four days after the trial ended, Petitioner filed a post-trial Motion for Release of Records. App. 1584-1586. The motion requested the trial judge issue an order requiring Verizon Wireless to release the cellular telephone records of Assistant Solicitor Nelson for the dates of July 6, 2007 through July 19, 2007. Specifically, defense counsel sought records containing the content of the text messages sent and received by Nelson during that time period in an effort to remove any ambiguity related to the issue concerning the dismissed juror.[4] App. 1584-1586. A "telephone hearing" was held on July 24, 2007 with defense counsel and Deputy Solicitor Durant participating. *Despite the state's lack of objection*, the trial judge orally denied the motion during the hearing and subsequently filed a written order denying the motion on August 20, 2007. App. 1588-1590.

On appeal, appellate counsel likewise filed a motion with the Court of Appeals seeking an order for the release of Nelson's cellular telephone records. By order dated April 11, 2008, the Court of Appeals also denied the motion.[5] App. 1710. Petitioner's convictions and sentence were ultimately affirmed by the Court of Appeals and this Court dismissed the writ of certiorari as improvidently granted. App. 1458-1460; App. 1537-1538.

On October 23, 2013, while Petitioner's PCR action was pending, Nelson was suspended from the practice of law by this Court for a period of six months due to his improper communication

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[4] Verizon Wireless refused to release the actual content of the text messages without a court order.

[5] At the time the Court of Appeals denied appellate counsel's motion, the trial judge had been elected to the Court of Appeals and was serving as an appellate judge. Appellate counsel later testified that had he known the trial judge had communicated with Assistant Solicitor Nelson through text message during Petitioner's trial, he would have moved to certify the appeal for review by this Court. App. 1642, l. 12 – 1643, l. 16.

with the dismissed juror during Petitioner's trial. See In re Nelson, 406 S.C. 201, 750 S.E.2d 85 (2013). In the opinion, this Court noted the following:

> At an interview with ODC [Office of Disciplinary Counsel] on August 1, 2012, respondent [Nelson] was asked if the trial judge had asked him to leave the courtroom during the trial or during jury selection. Initially, respondent [Nelson] replied, "[n]o." However, respondent [Nelson] then remembered that he went into the courtroom during the trial and **the trial judge texted him** and told him to leave. Respondent [Nelson] stated **the text** occurred during a break in the trial . . . Respondent [Nelson] said he and the trial judge were friends, and that **texting with the trial judge was not uncommon**.

Id. at 208, 750 S.E.2d at 89 (emphasis added).

After this opinion was published, Petitioner amended his PCR application to allege the "[r]ecent discovery of material facts not previously presented and heard which require vacation of the conviction or sentence." App. 1553. Petitioner's amended application asserted that neither trial counsel nor Petitioner were "aware of any *ex parte* text message(s)" exchanged between the trial judge and Nelson during Petitioner's trial. Petitioner first learned of this *ex parte* communication from this Court's opinion suspending Nelson from the practice of law. App. 1553-1554. The focus during Petitioner's evidentiary hearing was on this claim of newly discovered judicial misconduct that violated Petitioner's due process rights to a fair trial. Petitioner presented extensive evidence in support of this claim during the hearing and the PCR court accepted detailed argument from Petitioner's counsel on the claim at the end of the evidentiary hearing. Moreover, the PCR court ordered Petitioner and the state to submit written memoranda on the specific claim of judicial misconduct in the context of a PCR action within forty-five days, and both parties complied. See App. 1682-1706.

Testimony at PCR Hearing

Petitioner's trial counsel, Andy Savage, testified that Petitioner's trial lasted two weeks and that over the weekend while the trial was ongoing he "was approached by an attorney, Frank

Cornley [Francis John Cornely], who told me that he had witnessed Michael [Nelson] in the company of one of the sitting jurors." Savage explained that after discovering Nelson's connection with the juror, he spoke to Nelson, who verified the relationship. App. 1607, ll. 8-20. He also obtained the juror's "background information," including his cellular telephone number, from the Clerk of Court and subpoenaed the juror's telephone records. The records revealed "**more than twenty contacts** during the first week of trial" between Nelson and the juror. App. 1601, l. 10 – 1602, l. 25 (emphasis added).

Savage asserted that his greatest concern was the "**constant contact**" between Nelson and the juror during the trial. When he learned of the extensive contact between the two, he "became quite alarmed." He was also concerned that the juror had lied about the extent of his communication with Nelson when questioned by the trial judge before he was dismissed. This was his focus during the trial. App. 1614, ll. 8-18 (emphasis added).

Savage was unaware of the relationship between the seated juror and Nelson because both the state and the juror had failed to disclose the relationship during *voir dire* or any time thereafter. He maintained that if he would have known of the relationship, he "never" would have "put" Nelson's cousin on the jury. App. 1604, l 22 – 1605, l. 8. However, once he discovered the relationship and the *extensive* communication between Nelson and the juror during the trial, he requested the juror be dismissed and moved for a mistrial. While the trial judge agreed to dismiss the juror and replace him with an alternate, the judge refused to grant a mistrial. App. 1611, l. 24 – 1613, l. 4.

Additionally, Savage testified that after Petitioner was convicted, he attempted to obtain Nelson's cellular telephone records, specifically the content of the text messages sent and received by Nelson, from Verizon Wireless, but the company said "if we wanted to read the texts, the [c]ourt

had to sign an order." Consequently, the defense "petitioned the [c]ourt" and requested the trial judge issue an order requiring Verizon to release the records so the defense could "verify that there was no communication [between Nelson and the juror] regarding the trial." Savage said, "[T]here was no reason in our minds why we couldn't take a look at the texts." However, the trial judge "felt that the inquisition of the [dismissed] juror and other jurors subsequent to that was sufficient to dispel any notion of impropriety" and refused to grant the motion. App. 1615, l. 6 – 1616, l. 17; App. 1623, ll. 15-18.

As far as any *ex parte* communication between Nelson and the trial judge, Savage explained that while he was speaking with Nelson during the trial about his relationship with the seated juror, Nelson told him that "he had had contact with the [trial] judge and that the judge had asked him to leave the courtroom." However, Savage "wasn't a party to any conversation between Mr. Nelson and the [c]ourt" and does not know what was actually exchanged between the two. App. 1608, ll. 13-19; App. 1609, ll. 23-24. He also never knew the communication between Nelson and the judge was through a text message until the Office of Disciplinary Counsel investigated the matter and this Court published its opinion suspending Nelson from the practice of law. App. 1611, ll. 15-23. Savage testified, "I had no idea that the [trial judge] had communicated with Mr. Nelson [through text message] until the [o]pinion In Re: Michael Nelson was published. And *I was shocked.*" App. 1622, ll. 2-21 (emphasis added); See App. 1613, ll. 5-8.

Savage asserted, "[W]hat lingers as a problem [now] is if there was contact between the presiding judge and the assistant solicitor [Nelson], other than what was made known to us [the defense]." App. 1617, ll. 5-23. He maintained, "If I had known that the [trial judge] had communicated by texting with the solicitor [Nelson], contemporaneous with the juror communicating with that same assistant solicitor [Nelson], I trust my judgment at that time would

have been to raise that, put it on the record, and probably raise hell about it." App. 1618, ll. 16-22. Moreover, Savage said the fact that the communication between Nelson and the trial judge was through text message "perhaps explain[s] the reason why the [trial judge] would not issue any [o]rder to allow me to see the text [messages sent and received by Nelson]. That's the only thing I can think of. Because it was such an easy thing to do . . . All we wanted to do was verify that there was no communication [between Nelson and the juror] regarding the trial . . . I couldn't understand why [the trial judge] would not allow us to see the texts." App. 1623, ll. 7-23; See App. 1625, l. 20 – 1626, l. 9. He continued, "[M]aybe there was something in the communication between the [trial judge] and the assistant solicitor [Nelson] that was not proper." App. 1626, ll. 6-8.

Lastly, Savage asserted that if he would have known the communication between Nelson and the trial judge was through text message he "absolutely" would have used the improper *ex parte* communication as an additional ground in his motion for a mistrial and he would have requested the trial judge recuse himself. App. 1624, ll. 12-21. He maintained that the text message between the trial judge and Nelson was not "the right thing to do because it's an *ex parte* communication without disclosure." App. 1624, ll. 22-25.

Petitioner's appellate counsel, Joey Savitz, testified that he likewise filed a motion with the Court of Appeals for the release of Nelson's cellular telephone records, but "Judge Cureton denied it." App. 1639, l. 24 – 1640, l. 18. Savitz explained that this motion was related to the appellate issue regarding the trial judge's refusal to grant a mistrial due to the state's failure to disclose the relationship between the juror and the assistant solicitor during *voir dire* and the extensive communication between the juror and the assistant solicitor during trial. He ultimately raised the issue related to the denial of the mistrial on appeal.

Savitz testified that he did not learn the *ex parte* communication between Nelson and the trial judge during Petitioner's trial was through text message until PCR counsel told him about a month before the evidentiary hearing. He asserted that if he would have known the *ex parte* communication was via text message, "it definitely would have been an additional issue [he] would have raised" on appeal. He stated, "[L]ooking at the big picture you've got a member of the prosecution team texting a juror and the judge during the trial, without disclosing any of this information to the defense lawyer. So, yeah, I would have raised that. And I certainly wouldn't have allowed the [motion for the release of the] text messages to be controlled by the Court of Appeals when the trial [j]udge was on the Court of Appeals at the time. I would have appealed that to the Supreme Court, if I didn't take the case to the Supreme Court right away[6] . . . I definitely wouldn't have let Judge Cureton's order be the last word on whether or not we got to see the text messages. I would have appealed or attempted to supersede that in the Supreme Court." App. 1641, l. 11 – 1643, l. 10.

In addition to the testimony of Savage and Savitz, the PCR court also accepted an affidavit from Lauren Williams in lieu of her testimony.[7] App. 1652, l. 21 – 1655, l. 19. Williams served as second chair for the defense during Petitioner's trial. She likewise asserted in her affidavit that she did not learn of the "existence of any text communications between Mr. Nelson and [the trial judge] until the publication of the South Carolina Supreme Court's October 23, 2013 Opinion regarding *In the Matter of Michael O'Brien Nelson*" and "had the defense team been made aware of text

[6] Petitioner interprets this testimony to mean experienced appellate counsel would have moved to certify the appeal for review by this Court pursuant to Rule 204(b), SCACR.

[7] PCR counsel subpoenaed Williams to testify at the evidentiary hearing, but an incorrect date for the hearing appeared on the subpoena, and as a result she did not appear. App. 1654, ll. 13-16.

communications between [the trial judge] and Mr. Nelson at the time of trial, we would have raised the issue for further exploration and made the appropriate motions." App. 1680-1681.

Arguments at the PCR Hearing

At the conclusion of the testimony at the evidentiary hearing, Judge Nicholson allowed PCR counsel to make oral argument on Petitioner's behalf as to why post-conviction relief should be granted. See App. 1656, l. 3. Petitioner raised the claim related to the trial judge's *ex parte* communication with Nelson through text message as both newly discovered evidence and as a separate claim of judicial misconduct. PCR counsel admitted Petitioner could not meet the five prongs of the newly discovered evidence analysis.[8] Specifically, counsel maintained that the newly discovered evidence related to the trial judge's *ex parte* communication with Nelson through text message during Petitioner's trial was not material to the issue of guilt or innocence. App. 1657, ll. 2-5. However, counsel argued Petitioner's claim should not be analyzed under the five-pronged newly discovered evidence standard outlined by this Court, but rather it should be analyzed as a separate claim of judicial misconduct under a different framework. In support of his argument, counsel cited McCoy v. State, 401 S.C. 363, 370, 737 S.E.2d 623, 627 (2013),[9] where this Court held that "[w]here a PCR applicant alleges *juror misconduct*, we reject the application of the *Clark*

[8] "To obtain a new trial based on newly discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Clark v. State, 315 S.C. 385, 387-388, 434 S.E.2d 266, 267 (1993).

[9] In McCoy, this Court held, "Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy, 401 S.C. at 371, 737 S.E.2d at 627.

five-pronged newly discovered evidence standard, as it does not lend itself to properly evaluating a claim of juror misconduct." See App. 1657, l. 5 – 1658, l. 2 (emphasis added). Just as there is a separate framework used to evaluate newly discovered juror misconduct, counsel urged the PCR court to evaluate Petitioner's claim of newly discovered judicial misconduct under a separate framework as opposed to utilizing the Clark five-pronged test.

Counsel further argued the *ex parte* communication between the trial judge and Nelson through text message during Petitioner's trial created the "appearance of impropriety" and the judge was required under the "judicial canons" to make a "contemporaneous disclosure" of the *ex parte* communication to the defense. App. 1658, ll. 13-16; App. 1661, ll. 6-19. The PCR court agreed the trial court's *ex parte* communication through text message with Nelson should have been contemporaneously disclosed to the defense during trial.[10] App. 1666, ll. 9-12.

Counsel maintained that the communication was "on [its] face inappropriate" and created the "appearance of impropriety" particularly because the trial judge denied Petitioner's motion for the release of Nelson's cellular telephone records which would have shown the existence of the text message the trial judge sent Nelson, the content of that text message, and perhaps revealed additional text message communications between the judge and Nelson during Petitioner's trial. App. 1661, ll. 6-19; App. 1663, ll. 3-17. Specifically, counsel stated, "[T]he fact that the person [the trial judge] that stopped the disclosure of the information [the release of Nelson's telephone records] is the same person for whom it would have been revealed . . . was making an inappropriate text communication is the basis of our case." Counsel strongly suggested this conduct constituted judicial misconduct. App. 1665, ll. 12-18; See App. 1670, l. 17 – 1671, l. 18.

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[10] The PCR court further stated that "it's unfortunate the texts were not gotten, either by the [c]ircuit [c]ourt or the [a]ppellate [c]ourt at some point in time" because now the parties are "having to make a lot of suppositions that may be right, may be wrong." App. 1667, ll. 5-10.

Lastly, counsel argued that this additional evidence related to the improper *ex parte* communication between the trial judge and Nelson would have created additional grounds for a mistrial and additional grounds for appeal. App. 1663, ll. 3-17; App. 1664, l. 17 – 1665, l. 18.

The assistant attorney general argued in response that Petitioner's claim should only be analyzed under the Clark five-pronged test for newly discovered evidence and not under a separate framework for judicial misconduct. The PCR court interrupted the assistant attorney general and ordered the parties to submit written memoranda on the separate claim of judicial misconduct. The court specifically requested the parties include research from other state courts and the federal courts on the claim of judicial misconduct in a post-conviction relief action. It gave the parties each forty-five days to file the memoranda. App. 1672, l. 11 – 1673, l. 25. Counsel for the state indicated that she would submit her arguments in the written memorandum as opposed to continuing to make oral argument on the record. App. 1675, ll. 3-13.

Both parties complied with the PCR court's order and filed memoranda in support of their positions regarding Petitioner's claim of judicial misconduct. See App. 1682-1706. PCR counsel argued in his memorandum that the trial judge committed judicial misconduct by engaging in *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial without making a contemporaneous disclosure to defense counsel and by failing to recuse himself *sua sponte* from ruling on Petitioner's July 23, 2007 post-trial motion for the release of Nelson's telephone records. Moreover, he argued that, pursuant to McCoy, a separate framework should be used to analyze the claim as opposed to the traditional five-pronged test used to evaluate claims of newly discovered evidence. App. 1697-1706.

Order of Dismissal

In its order of dismissal, the PCR court only analyzed Petitioner's claim of judicial misconduct under the Clark five-pronged analysis used to evaluate newly discovered evidence. The court failed to make any ruling whatsoever on Petitioner's argument that the standard five-pronged newly discovered evidence test has no application and that a separate framework should be used to evaluate judicial misconduct in a post-conviction relief action. The PCR court also failed to rule on the merits of Petitioner's particular claim that the trial judge's *ex parte* communication with Assistant Solicitor Nelson constituted judicial misconduct and violated his right to due process and a fair trial. App. 1707-1717.

ARGUMENT

1.

The PCR court erred 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.

Throughout the lower court proceedings, as seen *supra*, Petitioner repeatedly urged the PCR court to analyze his claim of newly discovered judicial misconduct under a framework similar to the standard created by this Court to evaluate claims of juror misconduct. See McCoy v. State, 401 S.C. 363, 370, 737 S.E.2d 623, 627 (2013). Just as this Court has held the standard is improper when evaluating a claim of juror misconduct, Petitioner argued the five-pronged test used to evaluate claims of newly discovered evidence set forth by this Court in Clark v. State, 315 S.C. 385, 387-388, 434 S.E.2d 266, 267 (1993) is ineffective to properly evaluate a claim of judicial misconduct. Petitioner also presented extensive evidence during the evidentiary hearing to support his claim that the trial judge's *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial constituted judicial misconduct that violated his rights to due process and a fair trial. Additionally, the PCR court both entertained oral arguments on the claim at the conclusion of the hearing and ordered the parties submit written memoranda on the issue.

However, for whatever reason, the PCR court only ruled on Petitioner's claim of newly discovered evidence based on the 2013 discovery of the existence of at least one text message exchanged between the trial judge and Nelson during Petitioner's trial utilizing the Clark five-pronged test. The court wholly failed to rule on Petitioner's separate claim that this five-pronged

standard does not lend itself to properly evaluate a claim of judicial misconduct. Moreover, the PCR court also failed to rule on the merits of Petitioner's underlying claim that the trial judge committed judicial misconduct during Petitioner's trial by engaging in improper *ex parte* communication without disclosing the communication to the defense and by failing to recuse himself *sus sponte* from ruling on Petitioner's July 23, 2007 post-trial motion for the release of Nelson's telephone records thereby violating Petitioner's right to due process and a fair trial. This was error.

Pursuant to S.C. Code Ann. § 17-27-80, the PCR judge must make "specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." See Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007). The PCR court erred by failing to comply with this statute and this Court's numerous reminders to circuit court judges that "specific findings of fact and conclusions of law [are] required." Marlar, 375 S.C at 410, 653 S.E.2d at 267; See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991) and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). It appears the PCR court, for whatever reason, *intentionally* failed to rule on Petitioner's argument that the five-pronged standard was inapplicable to Petitioner's claim of judicial misconduct and address the merits of Petitioner's claim that the judge who presided over his trial committed judicial misconduct ultimately causing him prejudice and violating his due process rights. Petitioner presented extensive evidence in support of this claim during his evidentiary hearing and the PCR court not only accepted oral arguments on the claim at the conclusion of the hearing, but also ordered the parties to submit written memoranda.

Respectfully, this Court should remand this case to the PCR court to allow the court to rule on Petitioner's claim of judicial misconduct that was extensively argued during the PCR hearing and in the post-hearing memoranda. In the alternative, this Court should address the merits of

Petitioner's argument that a separate framework must be used to evaluate allegations of judicial misconduct and rule on the merits of Petitioner's claim that his due process rights were violated by the trial judge's judicial misconduct.

2.

The trial court committed 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 himself *sua sponte* from ruling on Petitioner's July 23, 2007 post-trial 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.

The trial judge who presided over Petitioner's trial committed judicial misconduct in violation of this Court's long standing precedent and the Code of Judicial Conduct by engaging in *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial without making a contemporaneous disclosure to Petitioner's counsel. The judge's failure to disclose this *intimate form* of communication calls into question his impartiality. Moreover, the trial judge further committed judicial misconduct by failing to recuse himself *sua sponte* from ruling on Petitioner's July 23, 2007 post-trial motion for the release of Nelson's telephone records since the judge's *ex parte* communication with Nelson created the appearance that he had an extrajudicial interest in denying the motion.

Petitioner suffered *extensive* prejudice due to this judicial misconduct not only because of the appearance of impropriety, but also because it prevented him from raising the existence of the improper *ex parte* communication as an additional ground for a mistrial during trial and on appeal. Moreover, the trial judge's failure to disclose the improper *ex parte* communication, particularly its intimate form, to Petitioner denied trial counsel notice of grounds for requesting the trial judge's recusal.

The five-pronged analysis used to evaluate claims of newly discovered evidence outlined in Clark is inapplicable to properly evaluate a claim of judicial misconduct because even the most egregious misconduct will not be "material to the issue of guilt or innocence." See Clark, 315 S.C. at 387-388, 434 S.E.2d at 267. Just as this Court held a separate standard is necessary to evaluate a claim of juror misconduct in McCoy, this Court should likewise hold a separate, but similar, framework, as urged by PCR counsel, should be used to evaluate claims of judicial misconduct. See McCoy, 401 S.C. at 370-371, 737 S.E.2d at 627.

In McCoy, this Court held, "Because juror misconduct is a separate basis for a new trial, it is governed by a separate standard. Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." McCoy, 401 S.C. at 371, 737 S.E.2d at 627. In accord with McCoy, in the case of judicial misconduct, this Court should consider (1) whether the trial judge intentionally concealed the misconduct; and (2) whether the concealed misconduct would have supported a motion to recuse the trial judge.

This Court has repeatedly "held that *ex parte* communications between the [trial] court and the solicitor are impermissible." State v. Caulder, 287 S.C. 507, 511, 339 S.E.2d 876, 879 (1986) (citing Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979)); See State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977) In Locklear, this Court granted Locklear post-conviction relief after it was revealed that the trial judge had met with the solicitor, the prosecuting witness, and her mother after the jury had begun its deliberations but before sentencing without inviting Locklear or his counsel to be present or giving them notice of the meeting. Locklear, 273 S.C. at 59, 254 S.E.2d at 293. In granting Locklear relief, this Court asserted, "Because defense counsel

was excluded from the meeting and because the discussion was off the record, this Court has no way of knowing whether the rights of appellant [Locklear] were prejudiced. While it is unlikely that anything improper was said, *it is the possibility of prejudice* that we are concerned with." Id. (emphasis added). This Court ultimately remanded for resentencing. Id. at 59-60, 254 S.E.2d at 293.

Similarly, in State v. McGuinn, this Court remanded for resentencing after the trial judge engaged in an *ex parte* bench conference with the solicitor immediately prior to sentencing. 268 S.C. at 117, 232 S.E.2d at 231. Before sentencing, the trial judge called the solicitor to the bench. When McGuinn's counsel asked to approach the bench as well, the judge stated that he wished to speak with the solicitor in private. Id. at 116, 232 S.E.2d at 230. Counsel objected, and McGuinn later appealed asserting that the *ex parte* bench conference denied him his Sixth Amendment right to counsel. Id. at 116-117, 232 S.E.2d at 231. In remanding the case for resentencing, this Court asserted, "It is not likely that anything improper was said between the judge and the prosecuting attorney (for whom this Court has high esteem), but *prejudice is possible*. In that this discussion was off the record, this Court has no way of knowing whether the rights of the appellant [McGuinn] were prejudiced and, accordingly, we remand to the lower court for the purpose of resentencing." Id. at 117, 232 S.E.2d at 231 (emphasis added).

In accord with this Court's precedent, Canon 3(B)(7) of the Canons of the Code of Judicial Conduct, Rule 501, SCACR, states a "judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." However, the rule indicates "[w]here circumstances require, *ex parte* communications for *scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits* are authorized

provided (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond." Canon 3(B)(7)(a), Rule 501, SCACR (emphasis added). The commentary for this rule states, "[A] judge must discourage *ex parte* communications and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) . . . regarding a proceeding pending or impending before the judge."[11] (emphasis added).

Even if one were to accept, which is nearly impossible to do, that the trial judge's undisputed *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial was for "scheduling, administrative purposes, or an emergency," the judge violated Canon 3(B)(7)(a)(ii) by failing to disclose the communication to Petitioner's counsel. Canon 3(B)(7)(a)(ii), Rule 501, SCACR. During Petitioner's evidentiary hearing, the PCR court agreed the trial judge violated this judicial canon by failing to contemporaneously disclose his *ex parte* communication through text message with Nelson to the defense. App. 1666, ll. 9-12.

Not only was the trial judge's *ex parte* communication with Nelson a violation of Canon 3(B)(7) and this Court's precedent, it was also a violation of Canon 2(A), which states, "A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary." Canon 2(A), Rule 501, SCACR (emphasis added). The commentary for this rule states, "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety . . . The test for appearance of

[11] The *ex parte* communications described in Section 3(B)(7)(a) include "communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits."

impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, *impartiality* and competence is impaired." Id. (emphasis added).

Here, the trial judge's *ex parte* communication with Assistant Solicitor Nelson in the middle of Petitioner's jury trial **through text message**, *which is a more intimate form of communication than merely an oral statement in the courtroom*, created the "appearance of impropriety" and called into question the impartiality of the judge. This is a clear violation of this Court's precedent forbidding *ex parte* communications between a trial judge and a solicitor, as well as the judicial canons. See Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979).

The trial judge's conduct led Petitioner and his counsel to later question, once they finally discovered the existence of the text message, the fairness and impartiality of the judge and whether Petitioner received a fair trial. It also led the parties to speculate whether additional text messages or communications were exchanged between the trial judge and Assistant Solicitor Nelson during Petitioner's trial and the possible content of those communications. See In re Nelson, 406 S.C. at 208, 750 S.E.2d at 89 (Nelson admitted "he and the trial judge were friends, and that texting with the trial judge was not uncommon.").

The only evidence as to the number and content of text messages sent by the trial judge to Nelson during Petitioner's trial came from Nelson's statements during ODC's investigation into his professional misconduct and his testimony during Petitioner's evidentiary hearing. Nelson claimed the judge merely told him "to leave the courtroom." Nelson, 406 S.C. at 208, 750 S.E.2d at 89. However, Nelson also admitted that "he and the trial judge were friends, and that *texting with the trial judge was not uncommon*" suggesting that perhaps additional text messages were exchanged. Id. (emphasis added). Nelson also confirmed during the evidentiary hearing that it was common

for him to receive text messages from the trial judge because they were friends. App. 1650, ll. 18-20. Unfortunately, Nelson's claims cannot be verified because his telephone records were never obtained.

However, Nelson's credibility is questionable since he was not entirely candid with the judge during Petitioner's trial when questioned about his relationship with the seated juror, if and when he disclosed this relationship to the prosecuting team, the extent of his communication with the juror during Petitioner's trial, and the content of that communication. When questioned under oath on the record, Nelson repeatedly provided inconsistent answers. See App. 1124, l. 25 – 1130, l. 16 and App. 1167, l. 1 – 1171, l. 15. Moreover, when interviewed by ODC years after Petitioner's trial, Nelson first claimed the trial judge had never asked him to leave the courtroom during the trial, but later admitted he received a *text message* from the trial judge. Nelson, 406 S.C. at 208, 750 S.E.2d at 89.

Because it is apparent the trial judge violated at least two of the judicial canons and this Court's precedent by engaging in *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial and by failing to contemporaneously disclose this communication to the defense, this Court should hold the record establishes judicial misconduct that violated Petitioner's rights to due process and a fair trial.

Not only did the trial judge commit judicial misconduct by engaging in improper *ex parte* communication with Assistant Solicitor Nelson while presiding over Petitioner's trial, he also committed judicial misconduct by failing to recuse himself *sus sponte* from ruling on Petitioner's July 23, 2007 post-trial motion requesting the judge issue an order for the release of Assistant Solicitor Nelson's cellular telephone records. Had the wireless carrier been ordered to produce Nelson's telephone records, specifically the content of the text messages Nelson sent and received

during Petitioner's trial, their disclosure would have revealed at least one *ex parte* communication between Nelson and the judge and the communication's content. The records containing the content of Nelson's text messages would have produced evidence of the trial judge's violation of Canon 3(B)(7), Rule 501, SCACR. The trial judge therefore had, or at least there is the *very strong appearance* he had, an extrajudicial interest to deny the motion.

"It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution." Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) (citing In re Murchison, 349 U.S. 133 (1955)). "It is well settled judges should recuse themselves where questions of impartiality or impropriety are raised." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). "The Code of Judicial Conduct requires a judge to 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned.'" Id. at 111, 561 S.E.2d at 624 (quoting Parker v. Shecut, 340 S.C. 460, 497, 531 S.E.2d 546, 566 (Ct. App. 2000)); See Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." Id. (citing Parker v. Shecut, 340 S.C. at 497, 531 S.E.2d at 566); See Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994)). A party seeking recusal must show some evidence of bias. "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." Id. (citing Parker v. Shecut, 340 S.C. at 497, 531 S.E.2d at 566).

Here, the trial judge's failure to disclose his *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial to the defense is undisputable evidence of the judge's personal bias. It demonstrates a personal extrajudicial reason why the trial judge denied Petitioner's post-trial motion for the release of Nelson's telephone records *even though the state did*

not object. Moreover, it certainly calls into question his impartiality. Thus, the trial judge should have recused himself *sus sponte* and committed judicial misconduct by failing to do so. See Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR.

Petitioner suffered prejudice as a result of the trial judge's judicial misconduct because it violated his right to due process and a fair trial with an impartial judge. Trial counsel testified that if he would have known of the existence of the text message communication between the trial judge and Nelson while Petitioner's trial was ongoing, he would have raised this improper *ex parte* communication as an additional ground for a mistrial. He also testified that he likely would have moved for the judge to recuse himself. Further, trial counsel would have raised this *ex parte* communication as an additional reason why Nelson's cellular telephone records should be released for review by the defense.

Moreover, Petitioner's appellate counsel testified that had he known about the improper *ex parte* communication *via text message* between the trial judge and Nelson he would have raised judicial misconduct as an issue on appeal or as an additional ground related to the trial court's refusal to grant a mistrial.[12] He also asserted that if he had known about the communication he would have moved to certify Petitioner's appeal for review by this Court since the trial judge had been elected to the Court of Appeals and was serving as an appellate judge at the time.

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[12] The state argued in its return that "any claims regarding errors by the trial judge should have been raised on direct appeal." Return at 12. The state continued, "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." Return at 13. The state blatantly ignores the fact that Petitioner did not learn the *ex parte* communication between the trial judge and Assistant Solicitor Nelson was *through text message* until this Court issued its opinion suspending Nelson from the practice of law in October 2013 when Petitioner's PCR action was already pending, which is why Petitioner raised this claim as *newly discovered* judicial misconduct. He could not have raised it on direct appeal.

Respectfully, this Court should hold the five-pronged newly discovered evidence standard is inapplicable to evaluating claims of judicial misconduct, as urged by PCR counsel, and that the trial judge engaged in judicial misconduct in violation of Petitioner's due process right to a fair trial when he engaged in improper *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial and when he failed to recuse himself *sus sponte* as a result of this communication. This Court should further hold that Petitioner suffered prejudice due to the judge's judicial misconduct, reverse his convictions and sentence, and remand for a new trial.

CONCLUSION

Respectfully, this Court should hold the five-pronged newly discovered evidence standard is inapplicable to evaluating claims of judicial misconduct and that the trial judge engaged in judicial misconduct in violation of Petitioner's due process right to a fair trial when he engaged in improper *ex parte* communication with Assistant Solicitor Nelson through text message during Petitioner's trial and when he failed to recuse himself *sus sponte* as a result of this communication. This Court should further hold that Petitioner suffered prejudice due to the judge's judicial misconduct, reverse his convictions and sentence, and remand for a new trial. In the alternative, the Court should remand this case to the PCR court to allow the court to rule on Petitioner's claim of judicial misconduct that was extensively argued during the PCR hearing and in the post-hearing memoranda.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable J.C. Buddy Nicholson, Circuit Court Judge

DAVID ROCQUEMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Judah VanSyckel, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served upon David Rocquemore, at 153 Jupiter Lane, Summerville, SC 29483, this 16th day of June, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of June, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.