

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

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

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Appellate Case No.: 2015-001213

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S.C. SUPREME COURT

DAVID ROCQUEMORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**BRIEF OF RESPONDENT**

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## **RESPONDENT'S ISSUES PRESENTED**

- I. Petitioner's claim that the PCR court erred by failing to rule on Petitioner's allegation of judicial misconduct is not preserved for appeal as Petitioner did not request the PCR court address the issue through a Rule 59(e) motion.
  
- II. Petitioner's claim that the trial court committed judicial misconduct is not preserved for appeal. Regardless, this issue is without merit as the trial court disclosed his communication during the trial, the communication was immaterial to Petitioner's case, and there was no evidence of bias.

## 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 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, 1. 10 - 1366, 1. 9. He was sentenced by Judge Pieper to ten years for voluntary manslaughter and five years concurrent for the weapons offense. App. 1383, 1. 22 - 1384, 1. 17.

Petitioner filed a timely Notice of Appeal and was represented on appeal by Appellate Defenders Robert Dudek and Joseph Savitz. Petitioner argued on appeal that the trial court committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial. App. 1413. On June 28, 2010, the Court of Appeals affirmed Petitioner's convictions and sentences, finding that Petitioner failed to demonstrate any prejudice resulting from the trial court's failure to grant a mistrial. 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, alleging the following grounds for relief:

1. "Abuse of discretion"
  - a. "Trial judge committed reversible error by refusing to grant mistrial once it was revealed the State neglected to disclose that a sitting juror was of blood relation to an assistant solicitor and the two had been communicating with each other throughout the trial."
  - b. "Trial judge failed refused to charge the jury on self-defense..."
2. "Prosecutorial misconduct"
  - a. "By their own admission two of the three prosecutors knew about the blood relation between the assistant solicitor and a seated juror but believed they were under no obligation to reveal the deception to either the judge or defense council during Jury pool, voir dire, and during the trial."
3. "Violation of Due process"
  - a. "I did not have a trial with a fair and impartial jury."

App. 1541-1542.

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." App. 1553. Petitioner's amendment stated the alleged newly discovered evidence was the text message communication between Michael Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom. App. 1553-1554.

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. Trial Counsel Andrew Savage, Appellate Counsel Joseph Savitz, and Assistant Solicitor Michael Nelson

testified at the hearing. App. 1593.

By an Order dated May 17, 2015, the PCR court denied Petitioner's application for post-conviction relief with prejudice. App. 1682. The PCR court found Petitioner's claim that the text message communication between Mr. Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom did not constitute newly discovered evidence warranting a new trial. App. 1712. The PCR court found that his evidence was not material to Petitioner's guilt or innocence, would not change the result if a new trial was granted, was not discovered since the trial, and was cumulative to Judge Pieper's disclosure during the trial. App. 1713-1716.

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. The Brief of Petitioner was submitted on June 16, 2017. This Brief of Respondent follows.

## STATEMENT OF FACTS

Petitioner proceeded to a jury trial on July 9-19, 2007 for murder and possession of a weapon during the commission of a violent crime. On Tuesday, July 17, 2007, shortly after the trial reconvened for the afternoon, Petitioner's trial counsel, Andrew Savage, informed Judge Pieper 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. 891, ll. 6-18. Mr. Savage added that while speaking with Mr. Nelson, he also learned Mr. Nelson was "asked to leave the courtroom by Your Honor because of his relationship with the jury member." App. 895, ll. 19-22. Judge Pieper responded by telling Mr. Savage that Mr. Nelson "just assumed" that he told Mr. Nelson to leave because of his relationship with a jury member. App. 895, l. 24 – 896, l. 2. Judge Pieper stated, "I generally told [Mr. Nelson] 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. Judge Pieper asked Mr. Savage what he wanted the court to do to remedy the situation, and Mr. Savage responded that he wanted to have the juror dismissed. App. 897, ll. 15-18. Judge Pieper said that he had no problem dismissing the juror. App. 898, ll. 8-9.

Judge Pieper clarified his actions on the record, assuring the parties that he was "joking with Mr. Nelson when [he] told [Mr. Nelson] to get out" and that he had no record or knowledge of the juror's relationship with Mr. Nelson. App. 898, ll. 1-7. Judge Pieper 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 Judge Pieper that he was not seeking Judge Pieper's recusal based on his

communication with Mr. Nelson. App. 899, ll. 13-14.

Juror Davey, the juror in question, was then brought into the courtroom and questioned by Judge Pieper regarding his communication and relationship with Mr. Nelson. App. 899, l. 9. The juror conceded he did not disclose to Judge Pieper his relationship with Mr. Nelson and the two had simply talked about an upcoming wedding. App. 901, ll. 8-18. Mr. Davey told the court that he did not speak up at voir dire because his relationship would not have an effect on him. App. 901, ll. 4-6. He further stated that he did not disclose to any of the jurors that he had a connection to Mr. Nelson and assured the court that the issue had not come up in any way. App. 901, ll. 19-25. Judge Pieper removed Mr. Davey from the jury and instructed him not to discuss the case in any way. App. 903, ll. 3-17. One of the alternates was seated on the jury and Petitioner's trial continued.

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

Judge Pieper again stated that Mr. Savage made a faulty assumption that he already knew about the relationship between Mr. Nelson and the juror. App. 1104, ll. 17-24; App 1111, ll. 19-21. Judge Pieper 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. Mr. Nelson disclosed that he talked to Mr. Davey about an invitation to his engagement party and told Mr. Davey that he cannot talk about anything else. App. 1126, ll. 12-17. He further stated that Mr. Davey called him the

previous day during lunch and he did not answer the phone, but instead messaged Mr. Davey to say that he cannot talk to him. App. 1126, ll. 22-24. Mr. Nelson told the court, "I told [Mr. Davey] flat out in the beginning, I said I can't talk to you about anything about [the case]." App. 1127, ll. 4-6. After Judge Pieper questioned Mr. Nelson *in camera* and polled 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. Judge Pieper denied Petitioner's motion on the basis that the issue was resolved by the removal of the juror.

After Petitioner was found guilty, Mr. Savage renewed his motion for a mistrial and was given the opportunity to expand upon his arguments in support of his motion for a mistrial. App. 1372. Judge Pieper 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 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 juror 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.

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.

### STANDARD OF REVIEW

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). This 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).

It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (internal citations omitted). Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature. Id.

## ARGUMENT

### **I. Petitioner's claim that the PCR court erred by failing to rule on Petitioner's allegation of judicial misconduct is not preserved for appeal as Petitioner did not request the PCR court address the issue through a Rule 59(e) motion.**

Petitioner argues that the PCR court erred by failing to rule on his claim of judicial misconduct. This claim was first raised, not in Petitioner's application or amendment, but hesitantly by PCR Counsel at the PCR hearing where he stated, "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. PCR counsel did not repeatedly or consistently advance this allegation as Petitioner would suggest, but hesitantly suggested the allegation at the very end of the PCR hearing. The "extensive evidence" presented at the PCR hearing that Petitioner notes in his Brief did not address judicial misconduct, but instead was solely focused on his newly discovered evidence claim. At the close of the hearing, the PCR court asked both parties to submit briefs to inform the PCR court what type of judicial misconduct would justify granting PCR. App. 1672, ll. 11-25. Both parties submitted briefs on the issue. In Respondent's post-hearing brief, Respondent asked the PCR court to deny PCR relief based on Petitioner's newly discovered evidence claim and asked the PCR court to avoid making any findings regarding judicial misconduct, asserting that the issue was a direct appeal issue and the PCR court was not the proper forum to entertain the claim. App. 1688-1690. The PCR court issued an Order of Dismissal that denied relief without making any findings as to the judicial misconduct claim but finding the newly discovered evidence of the text message communication between Mr. Nelson and Judge Pieper did not warrant granting a new trial. After the Order of Dismissal was signed and served on both parties, Petitioner made no objections and took no further action until this appeal.

An issue must be raised to and ruled upon by the trial court to be preserved for appellate review. State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004). This 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). 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. This Court has held PCR “counsel has an obligation to review the order and file a Rule 59(e), SCRCPP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCPP.” Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). See also Burgess v. State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (finding the State was precluded from raising on appeal the issue of prejudice where the PCR court’s order did not address the issue and the State did not file a Rule 59(e) motion on the issue); Harris v. State, 354 S.C. 382, 386, 581 S.E.2d 154, 155 (2003) (holding petitioner’s counsel should have filed a Rule 59(e) motion to amend the PCR court’s order to include a finding on the lack of a self-defense charge to preserve it for appeal); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding issues cannot be raised on appeal where Petitioner did not file a Rule 59(e), SCRCPP, motion requesting a ruling from the PCR court on these issues); Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) (holding petitioner’s issue is not preserved for review, as the PCR court did not rule on the matter and petitioner failed to make a Rule 59(e), SCRCPP motion to alter or amend the judgment to include specific findings of fact and conclusions of law).

It is clear in this case that Petitioner did not object to the Order of Dismissal and did not file a Rule 59(e), SCRCF, motion asking the PCR court to rule on the issue of judicial misconduct. By failing to take any action, Petitioner has waived his right to address judicial misconduct on appeal. Petitioner has also waived his right to assert, for the first time on appeal, that the PCR court erred in failing to rule on the issue when he had every opportunity to follow clearly established procedure and case law to file a Rule 59(e), SCRCF, motion asking the PCR court to rule on the issue. Petitioner's failure to do so mirrors his failure to allege judicial misconduct in his PCR application or amendment and his hesitancy to allege judicial misconduct at the PCR hearing. Both PCR counsel and the PCR court expressed their beliefs that Judge Pieper's communication with Mr. Nelson could simply be considered an administrative issue. App. 1658, ll. 13-25. PCR counsel stated, "I believe that's an administrative issue" and the PCR Court responded, "Right. And that's the only testimony I've heard today from you, your witnesses." App. 1658, l. 25 – 1659, l. 3.

This Court has held, only in very rare occasions, that the interests of justice would require remanding the case even though PCR counsel did not file a Rule 59(e), SCRCF, motion to preserve an issue for appeal. In Simmons v. State, this Court held that the State was correct in asserting that the petitioner's issue was not preserved for appeal because he did not file a Rule 59(e), SCRCF, motion. The Court held that remand was necessary because the issue on PCR involved the petitioner's challenge to the State's DNA evidence in a death penalty case. Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016). The Court held that remand was an "extraordinary action" and "[a] remand under these circumstances must, of course, be granted

sparingly and be reserved for the rarest of cases.” Id., 416 S.C. at 593, 788 S.E.2d at 225.<sup>1</sup> The Court also found that remand was more appropriate because a preemptive ruling on the merits would be unfair to the State. Id.

Petitioner’s case is not one of the rarest of cases that would require a remand despite Petitioner’s failure to file a Rule 59(e), SCRCP, motion to preserve an issue for appeal. Petitioner’s case was not a capital case and did not involve an evidentiary issue. The PCR court asked for briefs but did not rule on the issue of judicial misconduct. It is logical to assume that the PCR court found Respondent’s post-hearing brief persuasive and chose not to make any findings on the issue, deciding that Judge Pieper’s failure to recuse himself was a direct appeal issue and not proper for PCR. Respondent would also contend that the PCR court did not rule on judicial misconduct because it did not find PCR should be granted based on judicial misconduct, as the PCR court ruled that Judge Pieper’s communication was not material to Petitioner’s guilt or innocence, would not change the result if a new trial was granted, was not discovered since the trial, and was cumulative to Judge Pieper’s disclosure during the trial. App. 1713-1716. Accordingly, this Court should not allow Petitioner to bypass the procedural bar and raise to this Court that which he had the opportunity to raise to the PCR court.

**II. Petitioner’s claim that the trial court committed judicial misconduct is not preserved for appeal. Regardless, this issue is without merit as the trial court disclosed his communication during the trial, the communication was immaterial to Petitioner’s case, and there was no evidence of bias.**

Petitioner argues that Judge Pieper committed judicial misconduct when he texted Mr. Nelson to leave the courtroom. Petitioner did not raise this as a Sixth Amendment ineffective assistance of counsel claim. For the reasons set forth in the preceding section, this issue is not

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<sup>1</sup> This Court also found a remand was appropriate in McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995), where the PCR court’s order did not address any issues raised at the PCR hearing but instead only addressed issues raised at a previous hearing. Petitioner’s case is clearly distinguishable from the circumstances in McCullough.

preserved for appellate review as it was not ruled upon by the PCR court. Making a determination that Judge Pieper's conduct constituted judicial misconduct would be *de novo* review by this Court and improper under the Rules. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (The appropriate scope of appellate review following a PCR is that any evidence of probative value is sufficient to uphold **the PCR judge's findings**) (emphasis added); Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (Only questions of law are reviewed *de novo* on appeal from a PCR ruling).

It is clear from the record that Judge Pieper did not commit judicial misconduct. It is important to note that Judge Pieper simply texted a member of the solicitor's office who had no involvement in Petitioner's case and was only acting as a spectator during a break in the trial and the text did not concern the trial. Petitioner had the opportunity to address the communication and ask for a recusal; however he explicitly told Judge Pieper that he was not seeking Judge Pieper's recusal based on his communication with Mr. Nelson. App. 899, ll. 13-14. When the question was raised about the propriety of Judge Pieper's conduct, he explained to Petitioner:

THE COURT: Mr. Savage, I just want to personally assure you I would never do such a thing.

PETITIONER: **Judge, I have no doubt about that. I didn't ask for a recusal of the Court.**

THE COURT: I understand, but I just want you to personally know I would never do such a thing.

PETITIONER: Thank you.

THE COURT: I do joke around with all the people that work in this building every now and then, but that's about it.

PETITIONER: Judge, the highest compliment that the judge can receive on the circuit bench is that you are right behind Hamilton Smith (phonetic). I've heard that comparison on numerous occasions.

THE COURT: Well, I appreciate the comment. Thank you. As you've seen throughout this trial, I try to disclose anything that could potentially be a problem.

App. 899, l. 11 – 900, l. 4. (emphasis added).

Most importantly, Judge Pieper **disclosed the contents of his communication** to Petitioner on several occasions where he stated, “I generally told [Mr. Nelson] to leave the courtroom”. App. 896, ll. 2, 5-6. This was confirmed by Mr. Nelson at the PCR hearing when he testified that Judge Pieper texted him telling him to get out of the courtroom. App. 1648, ll. 24-25. Judge Pieper clarified his actions on the record, assuring the parties that he was “joking with Mr. Nelson when [he] told [Mr. Nelson] to get out” and that he had no record or knowledge of the juror’s relationship with Mr. Nelson. App. 898, ll. 1-7. Judge Pieper 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. Petitioner is now mistakenly concerned with the medium by which Judge Pieper communicated. Petitioner believes the fact that Judge Pieper used a text message is suddenly of great concern; however Judge Pieper thoroughly explained on the record the full content of his communication with Mr. Nelson. Learning of the medium by which the communication was made does not impact Petitioner’s case in any way. Whether this communication occurred face-to-face or via text message, email, phone call, or any other form of media does not suddenly make this issue any more critical than when Judge Pieper fully disclosed the contents of his communication at trial and Petitioner had no concern. He had the full opportunity at trial to object, move for a mistrial, or move for a recusal based on Judge Pieper’s communication and not only failed to do so, but adamantly stated that he was not seeking recusal.

Contrary to Petitioner’s argument, the form of communication did not affect his motion for a mistrial or his argument on direct appeal because he was well aware of the communication’s contents at the time. The PCR court found this to be persuasive when it made

these findings in its Order of Dismissal (which have not been challenged by Petitioner and remain the law of the case):

“This Court does not find persuasive [Petitioner’s] argument that he was unaware that the communication between the trial judge and Mr. Nelson took place via text message. **This Court finds the form of the communication between the trial judge and Mr. Nelson is a distinction without a difference.** Contrary to [Petitioner’s] arguments, a **text message communication does not lend itself to any more secrecy than any other private two-party conversation.** This Court finds we do not have to speculate as to the substance of the text message between the trial judge and Mr. Nelson.”

App. 1715 (emphasis added).

Additionally, the trial court did not err because the communication was not material to Petitioner’s guilt or innocence. Judge Pieper simply texted a member of the solicitor’s office, who was not prosecuting the case but **acting as a spectator**, to leave the courtroom. Petitioner did not raise any objection during trial. Mr. Savage testified at the PCR hearing he was not aware of any other communication between Judge Pieper and Mr. Nelson other than asking Mr. Nelson to leave. App. 1614, ll. 19-23. There is no evidence in the record whatsoever that any other communication existed and any speculation at this stage by Petitioner about the existence of other communications is unfounded. This is evidenced by the fact that the PCR court quashed Judge Pieper’s subpoena to testify at the PCR hearing, because there was no evidence presented that any other text messages existed between Judge Pieper and Mr. Nelson other than the one text at issue. App. 1652, 1711. Further, Mr. Savage testified at the PCR hearing, “If it was some nefarious communication going on, there would have been a mistrial. If there weren’t, it’s just a nonissue. You know, judges all the time have communications, administrative communications with the solicitor’s office. So that in and of itself was not — there was just nothing to it.” App. 1617, l. 24 – 1618, l. 6. The PCR court and Petitioner both echoed this sentiment at the PCR hearing where the judge asked “The only thing I’ve heard so far is that Mr. Nelson said he was

texted to leave the courtroom. Why wouldn't that be an administrative process?" Petitioner replied, "I was just about to say I believe that's an administrative issue." App. 1658, ll. 19-25.

Furthermore, Judge Pieper did not commit judicial misconduct because this communication had no bearing on Petitioner's case. The PCR court has already ruled on the merits of the communication as it relates to newly discovered evidence, and its findings make it clear that no judicial conduct was committed. The PCR court found "the trial judge's single communication with Mr. Nelson **was in no way relevant to the jury's finding** of the Applicant's guilt." App. 1713 (emphasis added). The PCR court correctly found that Judge Pieper's "conduct does not rise to the level of conduct that would have prejudiced the outcome of [Petitioner's] trial." App. 1713. The PCR court further found the communication was not material to Petitioner's guilt or innocence because Mr. Nelson was not prosecuting Petitioner's case and there was no evidence that the jury was influenced by Judge Pieper's communication in any way. App. 1713-1714. The PCR court further found that Judge Pieper's communication would not have aided in Petitioner's motion for a mistrial, especially since Petitioner **conceded** that he was unable to show how the communication is material to his guilt or innocence and affected the outcome of the trial. App. 1714-1715; See App. 1657, ll. 2-5 (Petitioner: "Now, the information that we were looking for **would certainly not pass** the fourth prong as far as being material to guilt or innocence.") (emphasis added). All of these findings were made by the PCR court, have not been challenged by Petitioner on appeal, and remain the law of the case. Given these findings, it is clear that no judicial misconduct took place.

The trial court did not commit misconduct and the cases cited by Petitioner are easily distinguishable. Petitioner asserts that *ex parte* communications in general are impermissible and cites three cases in support. In State v. Caulder, the *ex parte* communication at issue occurred

between the trial judge and the prosecuting solicitor and involved the State's ability to disclose blood test results. State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct. App. 1986). In State v. McGuinn, the *ex parte* communication at issue occurred between the trial judge and the prosecuting solicitor at a private bench conference prior to the trial court's sentencing, where the trial judge explicitly would not allow defense counsel to partake in the discussion. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977). In Locklear v. Harvey, the *ex parte* communication at issue occurred where the trial judge had a private meeting, after the jury had begun its deliberations but before sentencing, with the prosecuting solicitor, the prosecuting witness, and the witness's mother. Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979). The most obvious and notable difference between these cases and Petitioner's case is that all of these cases involved *ex parte* communication between the trial judge and the prosecuting solicitor during the defendants' trials and concerned evidentiary or sentencing discussions pertaining to the defendants' cases. Petitioner's case is drastically different. Here, the only evidence in the record, disclosed several times by Judge Pieper and confirmed by Mr. Nelson, is that Judge Pieper texted Mr. Nelson, a member of the solicitor's office but a spectator in the courtroom, to tell him to leave the courtroom. App. 896, 898-899, 1648; In re Nelson, 406 S.C. 201, 750 S.E.2d 85 (2013). No communication was ever made to the prosecuting solicitors in any way, the communication did not concern Petitioner's trial in any way, and Petitioner's case is clearly distinguishable.

Petitioner's cite to Canon 3(B)(7) of the Canons of the Code of Judicial Conduct, Rule 501, SCACR, is also misplaced.<sup>2</sup> Again, the communication at issue took place during a recess

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<sup>2</sup> Respondent would point out that the Judicial Canons fall under the purview of the Commission on Judicial Conduct. Rule 502, SCACR, provides the procedure for resolving allegations that a judge committed ethical misconduct. No proceeding has been brought before the Commission concerning Judge Pieper's conduct at issue in this case.

between the trial judge and a non-prosecuting assistant solicitor where the judge told the solicitor to leave the courtroom. This communication was completely unrelated and immaterial to Petitioner's trial, was not related to scheduling or an emergency, and can hardly be considered related to "administrative purposes" as the Code of Judicial Conduct is concerned because it was not to a party member and did not concern the trial. It is clear from the comments to the Code of Judicial Conduct that the communication at issue concerns *ex parte* communication between the judge and a party of the action, or between the judge and persons who are not participants if the communication concerns the proceeding. See Canon 3(B)(7) and related Commentary. Judge Pieper's conduct does not fall within the purview of this Canon as his single text message had nothing to do with Petitioner's trial and was not sent to a party of the case. As stated above, this message had no effect whatsoever on Petitioner's trial. Additionally, the communication was fully disclosed at trial and Petitioner did not object or move for a mistrial and explicitly stated that it was not seeking recusal. Although this communication may have been "unwise" as the PCR court referred, it certainly does not rise to the level of judicial misconduct to warrant a new trial on post-conviction relief.

Furthermore, this communication does not in any way show evidence of bias. As Petitioner points out, a party seeking recusal must show some evidence of bias. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (internal citations omitted). Here, the message from Judge Pieper telling Mr. Nelson to leave the courtroom does not show any evidence of bias because it was simply a short friendly message to a non-party and was not about the trial. Again, Petitioner was made fully aware of the contents of the message and made it clear that he did not believe it affected his trial. This is evident by Petitioner's own

admissions to Judge Pieper during trial that he **was not seeking recusal** and that he had no doubt that Judge Pieper would not act inappropriately in his communication. App. 899, ll. 13-14 (emphasis added). Petitioner believes bias exists because Judge Pieper had an extrajudicial interest in denying Petitioner's motion to release the phone records. Petitioner's argument is searching for something not in the record. There is no evidence before this Court that Judge Pieper continued his communications or engaged in other improper communication with Mr. Nelson. After Petitioner subpoenaed Judge Pieper for the PCR hearing, the PCR court stated that it would not require Judge Pieper's testimony unless there was evidence that there had been more text messages between Mr. Nelson and Judge Pieper other than the one text at issue. App. 1652. As there was no other evidence before the PCR court after all testimony, the PCR court granted the motion to quash Judge Pieper's subpoena. App. 1652, 1711. There is no evidence anywhere to suggest that Judge Pieper lied to the parties at trial and Petitioner's argument is based on pure speculation. Such speculation is not evidence of judicial misconduct and does not warrant relief.

**CONCLUSION**

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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September 15, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

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

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Appellate Case No. 2015-001213

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David Rocquemore, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**CERTIFICATE OF SERVICE**

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I, Justin J. Hunter, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

**Lara M. Caudy, Esquire  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 15<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
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