

VOLUME FOUR OF FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

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

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DEC 29 2015

S.C. Supreme Court

DAVID ROCQUEMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001213

APPENDIX

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ISSUE PRESENTED

Whether the trial judge 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?

STATEMENT OF THE CASE

David Michael Rocquemoire was indicted for murder and possession of a firearm during the commission of a violent crime. R. 738-741. On July 9 through 19, 2007, David Rocquemoire stood trial in Charleston County, before the Honorable Daniel F. Pieper and a jury. He was represented by Andy Savage. R. 1, 10 – 2, 1. 2.

The judge charged the jury the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense. R. 682, 1. 8 - 697, 1. 16. The jury convicted Rocquemoire of voluntary manslaughter. R. 706, 11. 10-14. This case was Rocquemoire's first contact with the criminal justice system. R. 720, 11. 8-10. As defense counsel pointed out, he had never been thought of as "anything but a good young man." R. 720, 11. 10-12.

On direct appeal to the South Carolina Court of Appeals, one of the two issues Rocquemoire raised was:

The trial judge 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.

The Court of Appeals affirmed in an unpublished opinion holding, as to this issue, "[A]ssuming, without deciding, that the trial [judge] committed error, we find Rocquemoire failed to demonstrate any prejudice." State v. David Michael Rocquemoire, 2010-UP-331 (filed June 28, 2101. App. 1-3. Rocquemoire sought rehearing. App. 4-6. However, rehearing was denied. App. 7-8.

Rocquemoire sought certiorari which was granted by all five Justices of this Court. This brief of Petitioner Rocquemoire follows.

STATEMENT OF FACTS

Rocquemore acknowledged that he had shot and killed the decedent, Hershall Denson, but insisted that he did so while defending himself from a homicidal lynch-mob, which included Denson among its number. “[A]s I was tackled and beaten to the ground,” Rocquemore explained, “the gun went off.” R. 521, l. 14 – 522, l. 11. Denson was shot twice: once in the upper left abdomen – the fatal injury – and once close to the left armpit. R. 307, ll. 1-12.)

During the early morning hours of August 14, 2005, Rocquemore went to an after-hours party with a friend, but he did not know many of the people there. R. 393, l. 21 – 394, l. 7. A State’s witness remembered him as a polite and “[q]uiet guy” who “[b]arely said two words all night.” R. 77, ll. 1-8. In fact, Rocquemore appeared to be “the only sober one in the crowd.” R. 77, ll. 9-13.¹

The tone of the gathering abruptly turned ugly when another man became sexually aggressive toward a disinterested female and threw a drink, a beer, in her friend’s face when she sought to intervene. R. 108, l. 19 – 109, l. 14; R. 243, ll. 10-22; R. 325, l. 17 – 331, l. 8. This lout and his friends hastily departed before the friends of the woman he had assaulted could find him and retaliate. R. 359, l. 4 – 361, l. 8. However, they returned after the party had broken up and confronted Rocquemore and his friend, who were also preparing to leave, in the street. R. 110, l. 20 – 111, l. 10; R. 116, ll. 8-15; R. 178, ll. 13-22; R. 245, l. 17 – 246, l. 9; R. 397, l. 7 – 399, l. 6; R. 468, l. 11 – 471, l. 1.

¹ His attorney, Andy Savage, would later tell the judge that Rocquemore, had “no prior record with the criminal justice system. He has no contact with the police department. He had no problems in school, no problems with his family, never thought of him as being a bully or anything but a good young man.” R. 720, ll. 8-12.

These men, upon whom the State's case depended, testified that the killing of decedent Denson was "senseless" and unprovoked. R. 233, l. 16 – 234, l. 2. "Nobody laid a hand on [Rocquemore]" before he opened fire, one of them, Troy Eason claimed. R. 188, ll. 8-11. Two witnesses even went so far as to assert that the decedent's hands were raised in surrender and that he was backing away when Rocquemore fired the first shot. R. 185, l. 6 – 187, l. 2; R. 283, l. 22 – 284, l. 3.

But the physical evidence did not support this account of the incident. The decedent had traces of gunshot residue on the back of his right hand but not his shirt. R. 301, l. 20 – 302, l. 25. These findings indicate that he was in the process of throwing a punch at Rocquemore when he was shot. R. 306, ll. 8-14.

Detective Prindle confirmed that the scene was intense and as he approached "he saw a group of men fighting." R. 15, ll. 1-7. One officer testified:

[I]t was a pretty agitated scene. They were pretty agitated. It took several orders to tell them to get off. One of the individuals kicked him [Petitioner Rocquemore] in the groin. I think one more might have punched him.

R. 21, ll. 2-15. A lynch-mob atmosphere still prevailed. Officers feared for their own safety and called for backup. R. 40, ll. 11-18; R. 42, ll. 22-24.

As previously indicated, Rocquemore specifically testified that he shot the decedent in self-defense after he and his friend were brutally attacked without provocation. R. 469, l. 6 – 472, l. 9; R. 479, ll. 2-15. He believed he had no other choice. R. 490, ll. 7-9. Rocquemore's friend, who was also attacked, corroborated his account of the incident. They did nothing to provoke the altercation: "[A] young lady had got some beer poured on her or in her face, and they had shortly left. Shortly after that, a vehicle comes flying down the street with no lights on, a gentleman hanging out the

window, yelling all sorts of things. And they pulled up in front of Dexter Brown's house. They got out of the car in an aggressive manner, traveling towards myself, Chris, Dexter Brown, and David Rocquemoire. . . ." R. 398, l. 8 – 409, l. 7.

As stated above, the jury was given verdict options of not guilty by reason of self-defense, guilty of involuntary manslaughter, guilty of voluntary manslaughter or guilty of murder.

ARGUMENT

The trial judge 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.

None of the potential jurors responded when the judge asked:

Are any of you related by blood, connected by marriage, or have any social, business, or professional dealings with [the prosecutors on Rocquemore's case], or any dealings or connections with the Solicitor's office?

R. 1, ll. 16-22.

After the State had rested its case, the defense learned that a sitting juror was in fact the cousin of an Assistant Solicitor in that very office. R. 376, l. 6 – 380, l. 18. At no time did the State disclose this information to the judge or the defense. When this juror was seated, the defense had used only four of the ten peremptory strikes allotted. R. 2, l. 3 – 6, l. 16.

Further investigation by the defense revealed that the juror had been in contact with his cousin the Assistant Solicitor by text message and telephone **during the trial**. R. 380, l. 22 – 383, l. 14. Defense counsel then moved to have this juror dismissed and replaced with an alternate. R. 383, ll. 15-18. The State did not object. R. 384, ll. 11-12. The judge granted the motion. R. 389, ll. 3-6.

Defense counsel next asked the judge to determine whether this juror's presence on the jury had "tainted any other jury members." R. 384, l. 22 – 385, l. 4. Under questioning by the judge, the juror admitted that he had a cousin who worked in the Solicitor's office, but claimed he did not disclose that information during jury qualification because he did not feel it would have any effect

on his ability to be fair, *not that he did not understand the question*. R. 386, l. 7 – 387, l. 8. He and his cousin had “talked ... [a]bout his wedding and stuff” since the start of trial. R. 387, ll. 9-18. The juror denied having discussed the matter with his fellow jurors. R. 387, l. 19 – 388, l. 3.

But the incident continued to be troubling. R. 573, l. 8 – 575, l. 2. The Assistant Solicitor in question testified that his cousin had called to tell him that he was on Rocquemore’s jury and that he had responded to a second phone call made during the trial with a text message stating, “I’m sorry, I can’t talk to you.” R. 596, l. 16 – 598, l. 19. He communicated this information to one or two of the three attorneys prosecuting Rocquemore. R. 600, l. 14 – 601, l. 6. The Deputy Solicitor acknowledged that the Assistant Solicitor told him as they passed in the hall that “his cousin was on the jury.” R. 604, ll. 3-22. He claimed not to realize it was something he needed to follow up or disclose. R. 604, l. 23 – 605, l. 1.

“I think he told me that his cousin was on the jury panel,” he explained, “but I didn’t know who his cousin was.” R. 608, ll. 2-15. Another member of the prosecution team revealed that he also knew his colleague had “a cousin on the jury panel.” R. 607, ll. 20-24. “[T]hat was before qualification,” he added, and “I didn’t go to qualification. ... I didn’t know his name.” R. 607, l. 24 – 608, l. 5.

Defense counsel got right to the point:

[N]ames don’t matter. ... It could have been any juror. The name doesn’t matter. They’re on notice that “a juror” misled the court when he was seated on this jury.

R. 608, ll. 17-23. He suggested -- and the judge agreed-- that the remaining jurors should be questioned individually. R. 610, l. 3 – 611, l. 1.

Most of the jurors were unaware that their fellow juror had a cousin in the Solicitor’s Office. One had gone to school with him and knew of the relationship independently. R. 617, l. 24 – 618, l.

5. Another, on the other hand, had overheard the juror announce that his cousin was a prosecutor and that he was going to ask him what was going on in the courtroom while they waited in the jury room *after jury selection*. R. 621, l. 10 – 623, l. 18. Another juror partially corroborated this account. R. 627, ll. 1-13.

At this point, defense counsel moved for a mistrial:

The only reason that this is a problem before the court this morning is because the State failed to disclose [the relationship between the juror and the Assistant Solicitor] in a timely basis. *Therefore, the State should be sanctioned, and we believe that the sanction is a mistrial.*

R. 634, ll. 1-5. (emphasis added).

The Assistant Solicitor suddenly became less certain about when he had told the prosecution team “my cousin’s on the jury.” R. 638, l. 9 – 641, l. 16. He had assumed this information would have come to light during jury qualification. R. 641, l. 25 – 642, l. 4.

The judge observed, “I’m not prepared to say there was some kind of intentional conduct on the part of the State.” R. 644, ll. 11-17. He subsequently added, “I do believe that the juror should have disclosed that information, and I’m not convinced that the juror misunderstood the question.” R. 659, ll. 11-16.

The defense renewed its mistrial motion:

My client’s due process rights have been violated by the failure to disclose that there was a seated juror who was not honest with the court, who had a relationship – a special relationship – with a member of the Solicitor’s office.

R. 656, ll. 8-12. Defense counsel added: “If the information ... had been brought *to the attention of the defendant at that time, we could have exercised a peremptory.*” R. 659, ll. 20-24. The judge denied the mistrial motion. R. 660, ll. 7-15.

After Rocquemore had been found guilty of voluntary manslaughter, defense counsel renewed the mistrial motion based on “new information” the defense had uncovered. R. 708, ll. 19-

21. Specifically:

[I]t appears that the juror and the Assistant [Solicitor] were not forthright with the court in the court’s examination of the number of contacts. ... There has now been established twenty contacts between the juror and the member of the Solicitor’s staff.

R. 710, ll. 6-13. In support of this motion, counsel introduced telephone records documenting the contacts, but not their substance. R. 719, ll. 9-24; R. 723-728. Defense counsel subsequently filed a written motion requesting an order “for the release of the substance of the text-messages sent and received” by the Assistant Solicitor during Rocquemore’s trial. R. 735-736.

Following a conference call, the judge denied the motion by written order. R. 737. (The Court of Appeals denied a similar motion filed by his appellate attorney during the pendency of this appeal.) The judge denied the mistrial motion. R. 718, l. 17 – 719, l. 8.

S.C. Code Section 14-7-1020 states in relevant part, “The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party.”

In accordance with this directive, the trial judge asked the prospective jurors in Rocquemore’s case to reveal any relationship “by blood” with the Solicitor’s Office. By their own admission, two of the three prosecutors knew at that point that one of the potential jurors was the cousin of an Assistant Solicitor in their office. Yet they did not reveal this information to either the judge or defense counsel when no one responded to the judge’s inquiry. They apparently believed they were under no obligation to reveal the deception of a juror unless they had actual knowledge of his identity.

“It is fundamental that a defendant is entitled to a trial by an impartial jury.” State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488, 489 (1982), citing the Sixth Amendment to the United States Constitution and Article 1, Section 14, of the South Carolina Constitution.

Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy.

State v. Robertson, 53 S.C. 147, 31 S.E. 868, 869 (1899). Gulledge acknowledges that “a relationship with counsel” is a primary source of juror bias. 287 S.E.2d at 490. “Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial.” State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001). Nevertheless, “[t]here is no absolute rule of disqualification based on a juror’s relationship to an attorney in the case.” Thompson v. O’Rourke, 288 S.C. 13, 339 S.E.2d 505, 506 (1986). Here, obviously the problem is much more exacerbated because the Assistant Solicitor cousin and another Assistant Solicitor were not forthcoming when they knew the nature of the situation. “Prosecutors are ministers of justice and not merely advocates.” State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), citing Rule 3.8, Rules of Professional Conduct.

By neglecting to reveal the blood relationship between an Assistant Solicitor in their office and a juror on Rocquemore’s case, the State failed to exercise even a modicum of due diligence. See, for example, Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993). “All are duty bound to be on guard against any impropriety which might undermine confidence in our system of justice.” Jackson v. State, 374 A.2d 1, 3 (Del. 1977).

Their unconscionable silence prevented the defense from moving to strike for cause or from intelligently exercising its peremptory strikes. *Cf. Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998); *See State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284, citing *State v. Gullledge*, 277 S.C. at 370, 287 S.E.2d at 490 (“Through the judge, parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.”)

This relationship may have supported the challenge for cause but would definitely have been a material factor in the defense’s use of its peremptory strikes. If this information had been brought to his attention in a timely manner, defense counsel stated, “we could have exercised a peremptory.” R. 659, ll. 20-24. *Cf. State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), certiorari denied January 22, 1992.

In *Jackson v. State*, 374 A.2d 1, 2-3 (Del. 1977), the Delaware Supreme Court noted that prior to jury selection one of the jurors was aware he was the uncle of a Deputy Attorney General. The jury information card in the possession of the Attorney General’s Office contained a notation acknowledging the relationship. When neither the juror nor the prosecution revealed the relationship, the Court noted that: “Aside from protecting the rights of the parties, in the fair and impartial administration of justice, respect for the courts calls for their condemnation of any improper conduct, however slight, on the part of a juror, of a party, or of any other person, calculated to influence the jury in returning a verdict. So delicate are the balances of weighing justice that what might seem trivial under some circumstances would turn the scales to perversion. Not only the evil, in such cases, but the appearances of evil, if possible should be avoided.” *citing George F. Craig & Co. v. Pierson*, 169 Ala. 548, 53 So. 903 (1910).

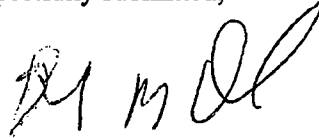
While it should be clear beyond cavil that the juror and the Assistant Solicitors should have revealed the Solicitor-cousin relationship, the Court of Appeals affirmed on direct appeal because it found "Rocquemore failed to demonstrate any prejudice." The Court's unpublished opinion does not address the culpability of the Solicitor's Office, nor does it acknowledge the trial judge's refusal – and its own – to allow trial and appellate counsel access to the content of the text-messages sent and received by the Assistant Solicitor and his cousin during Rocquemore's trial. It is deeply troubling to deny defense counsel access to the means of establishing actual prejudice -- if this is even necessary-- and then bootstrapping that restriction into a finding of no prejudice. Both of these omissions bear directly on the question of prejudice.

Based on the foregoing argument, this Court respectfully should reverse David M. Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime.

CONCLUSION

For the foregoing reasons, David Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

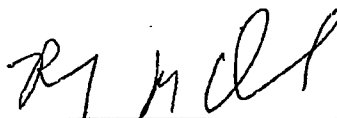
V.

DAVID M. ROCQUEMORE,

APPELLANT

CERTIFICATE OF SERVICE

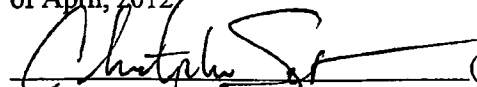
I certify that a true copy of the brief of petitioner, in this case has been served on Deborah R.J. Shupe, Esquire, this 4th day of April, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of April, 2012

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
On Certiorari to the Court of Appeals
The Honorable Daniel F. Pieper, Circuit Court Judge
Appellate Case No. 2010-173067

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Petitioner.

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STATEMENT OF ISSUE PRESENTED

The Court of Appeals properly affirmed the denial of Rocquemore's motion for a mistrial, because Rocquemore received the relief he requested, the juror in question was dismissed from the jury, and there was no evidence the remaining jurors, who actually deliberated and returned the verdict, were tainted by the dismissed juror's relationship to a prosecutor who was not involved in the case.

STATEMENT OF THE CASE

A jury convicted Petitioner on July 19, 2007, of one count of voluntary manslaughter and one count of possession of a firearm during a crime of violence. The Honorable Daniel F. Pieper, Circuit Court Judge, sentenced him to ten years and five years incarceration, respectively, with the sentences to run concurrent. This appeal followed.

By unpublished opinion filed June 28, 2010, the South Carolina Court of Appeals affirmed Petitioner's convictions. After the Court of Appeals denied his Petition for Rehearing, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, which was granted by Order dated December 1, 2011.

STATEMENT OF FACTS

At approximately 4:05 a.m. on August 14, 2005, Charleston County deputies responded to a "shots fired" call. When they arrived, two men were restraining Petitioner David Michael Rocquemore ("Rocquemore"), and another man, identified as Herschel Denson ("Denson"), was laying on the ground with a bullet wound. Denson was alive, but unconscious and unresponsive. The responding deputies got the two men off Rocquemore and took control of him. As a result of information conveyed to the Sheriff's Department, they also recovered the gun used to shoot Denson, which was registered to Rocquemore. (Record on Appeal [R.], pp. 9-12, 19- 31, 288-291).

Denson died from injuries sustained in the shooting. (R., pp. 311-314). On December 5, 2005, the Charleston County Grand Jury indicted Rocquemore on one count of murder and one count of possession of a firearm during a crime of violence. The case was called for a jury trial on July 9, 2007, before the Honorable Daniel F. Peiper, Circuit Court Judge.

Four eyewitnesses, Dexter Brown, Ronald Gibbs, Troy Eason and Rodney Gibbs, testified Rocquemore and his friend, Chris Thomas, started an altercation with them and Denson. Thomas made a statement about getting something out of his trunk, and the witnesses thought he meant a gun. Ronald Gibbs followed Thomas to his car and tackled him when he reached into the trunk.

While Ronald Gibbs and Thomas were struggling, Rocquemore went to his vehicle and got a gun. He swung the gun at Denson, dropped it on the ground, picked it up and shot Denson twice. Troy Eason and Rodney Gibbs wrestled with Rocquemore in an effort to get

the gun away from him, but it was underneath him on the ground, and Rocquemore did not release it until Ronald Gibbs came over and used a pressure point hold on him. (R., pp. 43-67, 97-130, 164-193, 237-261).

During the defense's case, defense counsel informed the court he learned that a seated juror was related to an assistant solicitor, Michael Nelson ("Nelson"), and had communicated with Nelson during the trial. Counsel indicated he had already talked to Nelson about his cousin being on the jury, and what Nelson told the assistant solicitors trying the case. When the court asked what relief counsel was requesting, he replied: "I think [the juror] should be dismissed." The court indicated it would dismiss the juror, and the State agreed. The court also agreed to ask the juror if he told other jurors about his relationship with Nelson. (R., pp. 376-385).

The court then called the juror, Austin Davey ("Davey"), into the courtroom, and confirmed his cousin worked at the Solicitor's Office. Davey admitted he did not inform the court of that relationship during jury voir dire, stating: "[w]ell, somebody stood up and you asked if that was going to have any affect, you know. And it wouldn't, wouldn't affect me." He also stated he had talked with Nelson since the trial started, but they did not talk about the case in any way, and he did not disclose his relationship to Nelson to the other jurors. (R., pp. 386-388).

Before dismissing Davey, the court again asked defense counsel what he wanted the court to do, and specifically if he had any further questions he wanted to ask Davey. Counsel stated he did not have any further questions. After the court dismissed Davey and instructed him not to discuss the case with anyone or contact Nelson until the case was over, defense

counsel stated: "[t]he defendant is ready to proceed." (R., pp. 388-390). Rocquemoire did not move for a mistrial, or ask the court to individually poll the remaining jurors about communications with Davey.

Rocquemoire then called Thomas, who testified that just prior to the shooting, he and Rocquemoire were standing outside talking to Dexter Brown when an SUV "came flying down the streets with no lights on, a gentleman hanging out the window, yelling all kind of stuff, sorts of things." After the car pulled up in front of Dexter Brown's house, the men inside got out "in an aggressive manner, traveling towards [Thomas], Dexter Brown, and David Rocquemoire." After a verbal altercation, one of the men started to put his hands in Rocquemoire's face and Rocquemoire slapped his hand down. Thomas turned "to go to [his] trunk to try to get something to hit [one of the men] with, and [the man] tackled [Thomas]." While the man was holding him on the ground, Thomas heard scuffling and two shots, but he could not see what happened. (R., pp. 392-424).

Rocquemoire testified he, Thomas and Dexter Brown were standing in front of Dexter Brown's house talking when a SUV came down the street, with loud profanities and noises coming from inside. When the SUV stopped, two men got out and came in Rocquemoire's direction, cursing and screaming at him. One man put his finger in Rocquemoire's face and poked his chest, saying Rocquemoire did not "belong there." Rocquemoire knocked the man's hand away and the man swung at him.

Rocquemoire stated he "took off running to his [truck]," but "was being hit from behind and pulled and just beat." He tried to get in his truck, but he "was being hit and pulled," and he held on to the steering wheel and console to keep from getting pulled out.

While all this hitting and pulling was happening, however, Rocquemore was able to open the console and get his gun. He testified the men then drug him from the truck, and he swung the gun at one of them. He dropped the gun, picked it back up and tried to run, but “was still being beaten and pulled and kicked.” The men fell on top of him, and he just remembered a loud noise. (R., pp. 468-537, 543-555).

The defense rested after Rocquemore’s testimony, and after a brief charge conference, court adjourned for the day. When court reconvened the next morning, Rocquemore’s counsel asked for further “discussion” of the dismissed juror, specifically stating he was “not asking for a mistrial.” After discussing the issue, the circuit court questioned Nelson and the assistant solicitors about the situation involving Davey. In addition, with the State’s agreement, the court individually questioned the remaining jurors to ascertain if they knew about the relationship between Nelson and Davey, and if so, did that knowledge impact their ability to give the parties a fair and impartial trial. (R., pp. 573-586, 596-610).

Ten jurors, including the remaining alternate, stated they were not aware of any relationship between the dismissed juror and someone in the Solicitor’s Office. One juror indicated he knew about the relationship only because he went to school with Davey, but it would not affect his ability to render a fair and impartial verdict. One juror stated Davey said he had a cousin in the Solicitor’s Office, but they never discussed the case and the knowledge would not affect his ability to render a fair and impartial verdict. The remaining juror stated Davey only said he had a relative who worked in the building, but did not say where the relative worked, and the knowledge would not affect her ability to render a fair verdict. (R., pp. 612-631).

Rocquemore then moved for a mistrial, arguing the State failed to disclose the relationship and should be sanctioned. After further questioning Nelson and the assistant solicitors, and based on the remaining jurors' responses, the circuit court denied the motion, finding there was insufficient evidence of intentional conduct by the State, Davey had been removed from the jury, and the remaining jurors were not tainted. (R., pp. 632-660).

The jury convicted Rocquemore of the lesser included offense of voluntary manslaughter on the murder indictment, and the possession of a firearm during a crime of violence charge. (R., pp. 706). After the verdict, Rocquemore moved for a mistrial on the dismissed juror issue, arguing Nelson and Davey communicated more often during the trial than they related to the court. The court denied the motion, again finding the jury was not tainted. (R., pp. 707-719).

The court sentenced Rocquemore to ten years incarceration on the voluntary manslaughter conviction and five years, concurrent, on the possession of a firearm conviction. (R., pp. 721-722). This appeal followed.

By unpublished opinion filed June 28, 2010, the Court of Appeals affirmed Rocquemore's conviction. Assuming (without deciding) error in denying Rocquemore's mistrial motion based on failure to disclose a juror's relationship to an assistant solicitor, the Court found Rocquemore did not demonstrate any prejudice. (Appendix, pp. 1-3).

The Court denied Rocquemore's Petition for Rehearing by Order dated August 27, 2010. (Appendix, p. 7). On September 23, 2010, Rocquemore filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review the Court of Appeals decision, which was granted on December 1, 2011.

ARGUMENT

The Court of Appeals properly affirmed the denial of Rocquemore's motion for a mistrial, because the circuit court dismissed the juror in question as Rocquemore requested, and took appropriate steps to ensure the remaining jurors were not tainted by the dismissed juror's relationship to a prosecutor who was not involved in the case.

Rocquemore contends the Court of Appeals erred in finding no prejudice from the failure to disclose the juror's relationship to an assistant solicitor without addressing "the culpability of the Solicitor's Office," or allowing counsel access to the content of text messages between the dismissed juror and the assistant solicitor. As he did in the circuit court and the Court of Appeals, Rocquemore ignores the evidence in the record regarding what the solicitors trying the case knew about the dismissed juror and when they knew it, the posture of the case at the time the information was revealed, and more significantly, the circuit court's actions, which granted the relief Rocquemore sought and essentially eliminated any potential prejudice to Rocquemore.

A. Preservation

As a threshold matter, the mistrial issue was not preserved for appellate review. When Rocquemore raised the juror issue, he told the circuit court he had already talked to Nelson about his cousin being on the jury, and what information Nelson had conveyed to the assistant solicitors trying the case. Thereafter, the court specifically asked counsel what relief he was requesting, and counsel responded: "I think [the juror] should be dismissed." (R., pp. 376-384). After questioning Davey, and affording Rocquemore the opportunity to question him, the circuit court granted Rocquemore's request, and seated an alternate juror. Rocquemore's counsel then stated: "The defendant is ready to proceed." (R., pp. 384-390,

391).

Thereafter, Rocquemoire presented another witness, testified on his own behalf and rested his case. (R., pp. 391-555). After a charge conference, court recessed for the day. (R., pp. 557-572).

When court reconvened the next day, Rocquemoire's expressly counsel stated he was not moving for a mistrial, but just wanted to discuss his "thoughts last night" about the dismissed juror. Counsel did not offer new evidence regarding the juror, and expressly stated he was not questioning the way the court handled the issue or the integrity of the Solicitor's Office. (R., pp. 573-578).

When the juror issue was initially before the court, Rocquemoire clearly had ample opportunity to request individual polling of the remaining jurors, or move for a mistrial based on Davey's admitted failure to disclose his relationship with Nelson.¹ Rocquemoire received all the relief he requested - dismissal of the juror - then affirmatively informed the court he was ready to proceed with presentation of his case, presented two more witnesses (including his own testimony), and rested his case. His failure to seek additional relief, particularly a mistrial, when the issue was before the court waived the mistrial issue for appellate review. Cf. Epting v. Brumble, 264 S.C. 114, 212 S.E.2d 711, 712 (1975) (since trial court granted only relief sought, appellant cannot complain that he should have been granted more); State v. McCord, 349 S.C. 477, 562 S.E.2d 698, 694 (Ct. App. 2002) (no issue for appellate review if objecting party accepts judge's ruling on admission of evidence and does not

¹As noted above, defense counsel had already talked to Nelson about his cousin being on the jury and what Nelson told the assistant solicitors trying the case (R., pp. 380-384).

contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial). Rocquemoire should not be allowed to accept the relief he requested, present the rest of his case, and then just in case his presentation of evidence did not go well, hedge his bet by seeking a mistrial on the same issue the court addressed the previous day, especially when he presented no new evidence on the issue.

B. Mistrial/Abuse of Discretion

Even if the belated mistrial motion preserved an issue for appellate review, however, the Court of Appeals properly affirmed the circuit court's ruling. Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. E.g., State v. Council, 335 S.C. 1, 515 S.E.2d 508, 514 (1999); State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). A mistrial is an extreme measure, and the court's power to declare a mistrial should be used with the greatest caution, and only when the defendant can show both error and resulting prejudice. Harris, 674 S.E.2d at 538; see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. White, 371 S.C. 439, 639 S.E.2d 160, 162-63 (Ct. App. 2006).

When Rocquemoire raised the juror issue the second time, even though counsel presented no new evidence indicating State misconduct, the circuit court summoned Nelson to the courtroom. Nelson then testified under oath that Davey called him after the jury was picked and they discussed Nelson's engagement party. Nelson stated Davey mentioned he had been selected for the jury, but Nelson told him he could not talk about it, and they never discussed the case. Davey also called him during lunch the previous day, but Nelson did not

answer the call, and subsequently told Davey by text message he could not talk to him. (R., pp. 596-600).

Nelson further testified he told the assistant solicitors trying the case that his cousin was on the jury panel, but it was just in passing in the hall, and he did not remember whether the conversations occurred before or after the jury was selected. One assistant solicitor (Alfaro) stated Nelson told him his cousin was on the jury panel before jury qualifications, he did not go to jury qualifications, and he did not know the cousin's name or that he was on the jury in this case. The other assistant solicitor (Durant) stated he thought Nelson told him his cousin was on the jury panel, but he did not know the cousin's name when the jury was selected. (R., pp. 600-608).

Rocquemore's counsel then argued there was a due process violation. The following colloquy occurred between counsel and the circuit court:

MR. SAVAGE: Perhaps at a minimum we have to individually voir dire the remaining jurors, at a minimum, and then the question is: If there has been any taint, then I don't think that there's any alternative to a mistrial.

THE COURT: Well, I don't need to speculate about a taint until I hear from the jurors.

MR. SAVAGE: Yes, sir.

THE COURT: And almost an hour ago we started with the assumption that I would talk to the jurors. I'm not sure that absent that type of taint disclosed by the jurors, though, you know - - I mean, I still don't know what remedy you're asking for, and I think the reason you want to ask for this is you don't know what the jury is going to say either.

MR. SAVAGE: Correct.

THE COURT: And the question that you would suggest would be?

MR. SAVAGE: The next step I think is an individual voir dire of the jury.

THE COURT: The question which would be to the juror?

MR. SAVAGE: Has the juror that's been dismissed had any conversation about his relationship with the Solicitor's Office or any information about the case?

It's just not about the case, but it's the relationship that would give credibility or believability to enhance credibility or believability to the state's position because of a voucher for, if you will, by that juror of the good name of the trial counsel.

(R., pp. 609-611) (emphasis added).

The court then called each juror out individually, and asked them whether the dismissed juror discussed his relationship with someone in the Solicitor's Office. (R., pp. 611-631). Ten jurors (including the remaining alternate) stated the juror did not say anything about a relationship with someone in the Solicitor's Office, or discuss the case in any way. One juror (McQueeney) indicated he knew the juror had a cousin with the Solicitor's Office only because he went to school with the juror, and it would not affect his ability to render a fair and impartial verdict. (R., pp. 617-619, 625).

One juror (Bowie) stated that during a general discussion about courtroom procedures, the dismissed juror said his cousin worked in the Solicitor's Office, but he did not discuss anything relating to the case. Bowie told the court nothing the dismissed juror said affected his ability to give everyone a fair and impartial trial. (R., pp. 621-623).

Another juror (Gallagher) stated the dismissed juror said his cousin worked in the building, but did not say where the cousin worked. Gallagher told the court the information did not affect her ability to give everyone in the case a fair and impartial trial. (R., pp. 626-

627).

After the circuit court questioned the jurors, Rocquemore's counsel argued the State knew an impaneled juror failed to disclose information to the court, and Davey's telling other jurors about his relationship with Nelson bolstered the State's credibility. He then asked that the State be sanctioned by way of a mistrial, which would trigger double jeopardy. (R., pp. 632-634).

The court again questioned the two assistant solicitors trying the case about what they knew regarding Nelson's cousin and when they knew it. Both stated Nelson told them his cousin was in the jury pool, but they did not know the cousin's name, or that he was seated on the jury until defense counsel raised the issue during trial. (R., pp. 635-636).

Nelson was summoned to the courtroom again, and testified Davey called him the Sunday before jury qualifications to ask how he could get off jury duty, and said he was going to tell the judge Nelson was his cousin. Based on their conversation, Nelson assumed Davey disclosed the relationship during jury qualification, and only learned it was not disclosed when Rocquemore's counsel informed him during the trial. Nelson stated he passed the assistant solicitors trying the case in the hall the day of jury qualifications and mentioned his cousin was on the jury, but could not recall whether he said jury or jury panel. He never told either of the assistant solicitors his cousin's name. (R., pp. 638-642).

Based on testimony from Nelson and the assistant solicitors, the circuit court determined the State did not intentionally fail to disclose Davey's relationship with Nelson. Rather, Nelson assumed Davey disclosed the relationship during jury qualifications, and the two assistant solicitors did not know Nelson's cousin was on the jury. The court further

noted the relationship would not have sustained a challenge for cause, and Rocquemore did not show he would have used a preemptory strike. The court then found the remaining jurors were not tainted, and denied the motion for a mistrial. (R., pp. 643-660).

Rocquemore asserts the two assistant solicitors “knew” one of the potential jurors was Nelson’s cousin, and failed to disclose that fact to the court or defense counsel. As noted above, both assistant solicitors testified Nelson told them his cousin was in the jury pool. (R., pp. 635-636). Nelson testified he was not sure when his conversations with the assistant solicitors took place or exactly what was said, but he never told them his cousin’s name. (R., pp. 597-601, 638-642). Since it is undisputed neither assistant solicitor actually trying the case knew the cousin’s name, they could not know the cousin was in the jury panel called for this case, much less that he was seated as a juror.

As to the cousin’s failure to disclose the relationship during jury qualifications, only one of the assistant solicitors trying the case was present during qualifications, and as defense counsel noted, there were over 300 potential jurors present.² (R., p. 643). There are a myriad of legitimate reasons why someone called for jury duty is not present for jury qualifications, so even if the assistant solicitor recalled Nelson’s passing comment about his cousin being in the jury pool, the cousin might have been excused from serving during that term for some reason, and therefore, was not present to respond to the court’s inquiry about relationships with the Solicitor’s Office. Rocquemore’s allegation of a nefarious, intentional effort by the solicitors to hide the juror’s relationship to the assistant solicitor is simply rank speculation.

²Nelson was not present during jury qualification, and had no reason to believe his cousin did not disclose the relationship at that time. (T. p. 641).

As to the use of a preemptory strike during jury selection, while a defendant's right to exercise preemptory jury strikes is to be protected, Rocquemore acknowledges he merely told the circuit court he "could" have exercised a preemptory strike if he was aware of the relationship between Nelson and Davey. In fact, when the circuit court noted it was "not clear that the defendant would have used a preemptory," counsel conceded "there may have been other prevailing reasons to seat [Davey]." Significantly, trial counsel did not even raise the preemptory strike issue until the very end of an extensive argument on the juror issue, and then almost as an afterthought when the circuit court indicated the information would not have supported a challenge for cause. (R., pp. 659-660)

Rocquemore's reliance on State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), and State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982), is misplaced. In Woods, a juror intentionally concealed information on voir dire regarding her prior work as a victims' advocate. In Gullledge, the juror failed to disclose a relationship with a deputy who viewed the crime scene and had custody of the defendant in the courtroom during the trial. In both cases, the jurors remained on the jury and participated in deliberations.

In this case, however, Davey was removed from the jury well before jury deliberations and the verdict, and the circuit court took appropriate steps to determine the remaining jurors were not tainted by anything Davey may have said while serving on the jury, and they could give Rocquemore a fair and impartial trial. Thus, the Woods and Gullledge analysis does not apply. See State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (mistrial properly denied in the absence of prejudice to the defendant from a juror's

failure to disclose a relationship with a witness).³

Rocquemore's reference to Jackson v. State, 374 A.2d 1 (Del. 1977), is also unavailing. In Jackson, the juror at issue failed to disclose he was a Deputy Attorney General's uncle, and he saw his nephew at the courthouse "often" while serving on jury duty. As in Woods and Gulledge, the juror remained on the jury throughout the trial, and participated in the jury deliberations and verdict. Reversing on other grounds, the appellate court set out the circumstances of the juror's failure to disclose, and commented on the need for vigilance in protecting the defendant's right to a fair trial by a panel of impartial jurors. Id. In this case, however, the issue was discovered during trial, and the circuit court took appropriate steps to ensure Rocquemore could receive a fair trial by a panel of impartial jurors.

Rocquemore also asserts that Davey's relationship with Nelson, and three of the remaining jurors' limited knowledge of the relationship, somehow bolstered the credibility and believability of the State's case. This assertion is belied by the fact the jury convicted Rocquemore on the lesser included offense of voluntary manslaughter, rather than the murder charge as indicted. In order to reach that verdict, the jury had to give some credence to

³Rocquemore's contention the number of contacts between Davey and Nelson changes the analysis is likewise unavailing. As the circuit court recognized in denying Rocquemore's Motion for Release of Records, the remaining jurors were not influenced or tainted in any way regardless of the level of communication between Davey and Nelson while Davey was on the jury. (R., pp. 732-734). Therefore, whether Davey and Nelson shared two or twenty conversations/text messages is irrelevant to the issue before this Court. See State v. Jarrell 350 S.C. 90, 104, 564 S.E.2d 362, 370 (Ct. App. 2002) (recognizing an overriding rule of civil procedure that "whatever doesn't make any difference, doesn't matter")(citing McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 [Ct. App.1987]).

Rocquemore's evidence regarding the incident.

The record amply supports the circuit court's determination the jury that ultimately heard all the evidence, deliberated the case and rendered a verdict, was capable of giving the parties a fair and impartial trial. See State v. Bell, 374 S.C. 136, 646 S.E.2d 888, 894 (Ct. App. 2007) (Determination of whether a juror is biased by the receipt of outside information concerning the case being tried, and the decision whether to dismiss a juror and replace him with an alternate, are matters within the trial court's discretion, and the court's decisions will not be reversed on appeal absent an abuse of discretion.). Thus, the extreme remedy of a mistrial was not warranted, there was no abuse of discretion, and the Court of Appeals properly affirmed the circuit court's ruling.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

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BY:


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ATTORNEYS FOR RESPONDENT

June 1, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
On Certiorari to the Court of Appeals
The Honorable Daniel F. Pieper, Circuit Court Judge
Appellate Case No. 2010-173067

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Petitioner.

PROOF OF SERVICE

I, Deborah R.J. Shupe, certify I served the Brief of Respondent on Petitioner by depositing three copies in the United States mail, postage prepaid, addressed to:

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 1st day of June, 2012.


DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

David M. Rocquemoire, Petitioner.

Appellate Case No. 2010-173067

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

Memorandum Opinion No. 2012-MO-051
Heard November 15, 2012 – Filed December 12, 2012

DISMISSED AS IMPROVIDENTLY GRANTED

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
of Columbia, and Scarlett A. Wilson, of Charleston, for
Respondent.

PER CURIAM: We granted a writ of certiorari to review the decision of the court of appeals affirming the denial of Petitioner's motion for a mistrial. We now dismiss the writ as improvidently granted.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

2013 CP-10-634

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)David D. Rocavemore #323014)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

BY)

JULIE J. ARMSTRONG
CLERK OF COURT

2013 FEB -1 PM 1:12

FILED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Walden Correctional Institute.
Columbia, S.C.
2. Name and location of Court which imposed sentence 9th Circuit Court
of Charleston County
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005-GS-10-8602
 - (b) 2005-GS-10-8601

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) July 19 2007
- (b) 10 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. State of South Carolina in the court of Appeals.
- ii. South Carolina Supreme Court.
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Dismissed as Improvidently Granted
- iii. _____
- (c) the date of each such result:
- i. filed June 28, 2010
- ii. filed December 12, 2012
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. opinion No. 2010-up-331
- ii. opinion NO 2012-MO-051
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Abuse of discretion
- (b) prosecutor misconduct
- (c) violation of Due process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Please SEE Reverse Side
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

A) 1542

11-(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.

Trial Judge also refused to charge the Jury with a self-defense verdict even after it was found that the Castle-Doutrine did not state that it could not be used or implemented retroactively.

B.)

11-(B)

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 counsel during jury pool, voir dire, and during the trial.

C.)

11-(C)

I did not have a trial with a fair and impartial jury

(c) the disposition thereof:

i.

ii.

iii.

iv.

(d) the date of each such disposition:

i.

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A
 (b) N/A
 (c) N/A

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

YES

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Mr. Andrew J. Savage @ Savage Law Firm
P.O. Box 1002 Charleston, S.C. 29402
 ii. Mr. Robert Dudek @ Division of Appellate Defense
P.O. Box 11589 Columbia, S.C. 29211-1589
 iii. _____

- (b) the proceedings at which each such attorney represented you:

i. Initial trial
 ii. Appellate process
 iii. _____

19. State clearly the relief you seek in filing this application:

I would like the sentence to be vacated and
reversed, so that I will be able to join
the U.S. Army.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, David Rocavemore, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

SWORN to and subscribed before me this 24
 day of February, 2013.

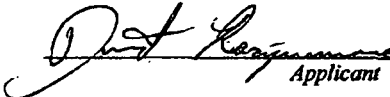
[Signature] (L.S.)
 Notary Public

My Commission Expires: My Commission Expires August 25, 2015

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

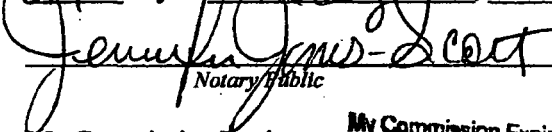
I, David D. Roquemore, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

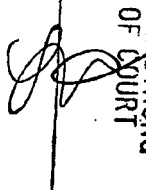
SWORN or affirmed to and subscribed before me this

24 day of January, 2013.


Notary Public

My Commission Expires: My Commission Expires August 25, 2015

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
David Rocquemore,)	2013-CP-10-0634
S.C.D.C. No. 323014,)	
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	

FILED
2014 MAY 20 PM 1:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

The Respondent, making its Return to the Application for post-conviction relief filed February 1, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the December 2005 term of the Charleston County Grand Jury for murder (2005-GS-10-8602) and possession of a firearm during the commission of a violent crime (2005-GS-10-8601). He was represented by Andrew Savage, Esquire. On July 19, 2007, the Applicant proceeded to trial and was convicted of the lesser included offense of voluntary manslaughter and possession of a weapon. The Honorable Daniel F. Pieper sentenced the Applicant to five (5) years imprisonment for possession of a firearm during the commission of a violent crime and ten (10) years imprisonment for voluntary manslaughter. The sentences are to be served concurrently.

The Applicant filed a timely Notice of Appeal. An appeal was perfected by Joseph L. Savitz, III, Esquire, and Robert Dudek, Esquire of the South Carolina Office of Appellate

Defense. The South Carolina Court of Appeals affirmed the Applicant's convictions. State v. Rocquemore, No. 2010-UP-331 (S.C. Ct. App. June 28, 2010). The South Carolina Supreme Court granted the Applicant's Petition for Writ of Certiorari. The Petitioner was later dismissed as improvidently granted by Order filed December 12, 2012. The Remittitur was issued on December 28, 2012.

II.

In his current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

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.

For the purposes of this Return, the Respondent incorporates herein and by reference the records of the Charleston County Clerk of Court, the Applicant's records from the Department of Corrections, and the appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

First, the Applicant alleges several errors by the judge proceeding over his trial. The Respondent submits challenges to the trial court's actions are direct appeal issues and not proper for review on post-conviction relief. This allegation raises a direct appeal issue that is procedur-

ally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal [and the issue was indeed raised and ruled upon during the Applicant's direct appeal]. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

IV.

The Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the issue of prosecutorial misconduct on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Therefore, the Court should summarily dismiss this allegation.

V.

Lastly, the Applicant alleges a violation of his due process rights. Specifically, the Applicant argues he did not have a fair trial and an impartial jury. The Respondent construes Applicant's claim as an allegation of infringement upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which these

constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

VI.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: AL R. WILSON

Attorneys for Respondent

May 15, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DAVID ROCQUEMORE, #323014

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-10-0634

BY

JULIE J. ANSTROM
CLERK OF COURT

2014 MAY 20 PM 1:25

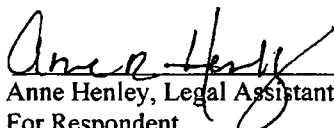
FILED

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the abovecaptioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

David Rocquemoore, #323014
Livesay Correctional Institution
104 Broadcast Drive
Spartanburg, SC 29303

DATED this 19th day of May, 2014


 Anne Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
David Rocquemore	)	CASE NO.: 2013-CP-10-0634
Applicant,	)	
vs.	)	
State of South Carolina	)	
Defendant,	)	

FILED
2014 DEC -1 PM 12:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

APPLICANT'S AMENDED APPLICATION FOR POST CONVICTION RELIEF

Applicant David Rocquemore, by and through undersigned counsel hereby amends his Application for Post-Conviction Relief. In addition to the grounds alleged in Applicant's original application, Applicant adds the following grounds for relief:

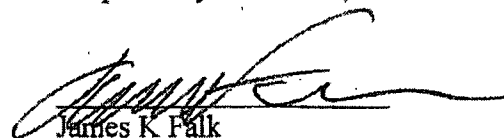
Recent discovery of material facts not previously presented and heard which require vacation of the conviction or sentence.

**SUMMARY OF EVENTS RELATING TO APPLICANT'S
AMENDED GROUNDS FOR RELIEF.**

1. During the course of Defendant's trial, Trial Counsel became aware that a member of the jury was a cousin of Michael Nelson, an Assistant Solicitor for the Office of the Ninth Circuit Solicitor. The juror failed to disclose this relationship when the appropriate question was asked during voir dire. Mr. Nelson was not on the team prosecuting the defendant.
2. Additionally, Trial Counsel became aware that during the course of the trial, the juror and the Mr. Nelson were communicating via text messages.
3. Eventually the juror was dismissed from the jury and replaced with an alternate.
4. In a post-trial motion, trial council renewed its motion for mistrial citing the improprieties relating to the ex parte communications with the juror.

5. The jury returned its verdict on July 19, 2014.
6. On July 23, 2007 trial counsel filed a MOTION FOR RELEASE OF RECORDS seeking the Court to issue an order requiring the release of the text messages sent and received by Mr. Nelson's phone.
7. On August 20, 2013 Judge Pieper entered an order denying Trial Counsel's request for disclosure of the text messages.
8. On February 1 2013, Applicant filed his original application for Post-Conviction Relief in which he alleged the following grounds for relief: a) Abuse of Discretion; b) Prosecutor Misconduct; and c) Violation of Due Process.
9. On October 13, 2013 the South Carolina Supreme Court issued an opinion on the disciplinary action against Michael Nelson which reflected an Agreement for Discipline by consent between Michael Nelson and the Office of Disciplinary Counsel. The Court's order states that during the trial Mr. Nelson received a text message from Judge Pieper.
10. Prior to reading the Court's order regarding Mr. Nelson's disciplinary action, neither trial counsel nor applicant was ever made aware of any ex parte text message(s) between Judge Pieper and Mr. Nelson.
11. On May 27, 2014 the undersigned was appointed to represent the Applicant.
12. This matter is set for a hearing December 11, 2014.

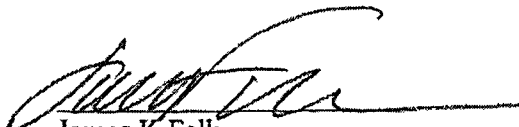
Respectfully Submitted,



James K. Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300-1047
jfalk@bushlaw.com

CERTIFICATE OF SERVICE

Undersigned certifies that a copy of the above was mailed this 25 day of November 2014 to the Offices of the Attorney General Attn: Ashleigh Wilson, Esq. PO Box 11549, Columbia, SC 29211-1549.



James K Falk

FILED
2014 DEC -1 PM 12:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

David Rocquemore,

Plaintiff,

vs.

State of South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS
) IN THE NINTH JUDICIAL CIRCUIT
)

) Civil Action No. 2013-CP-10-00634
)

) **MOTION TO QUASH**
) **SUBPOENA OF DANIEL PIEPER**
)

TO: James Falk, Esquire
Bush Law Group, P.C.
3 Broad Street, Suite 450
Charleston, South Carolina 29401

Ashleigh Wilson, Esquire
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

FILED
2014 DEC -5 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLEASE TAKE NOTICE that Mr. Daniel Pieper, through his undersigned attorneys, will move before the Judge for the Court of Common Pleas, Charleston County, within ten (10) days or at some other time as may be convenient to the Court and counsel, to quash the subpoena served upon him by counsel for Mr. Rocquemore on the following grounds among others that may be raised at the hearing:

1. Daniel Pieper is a former South Carolina Court of Appeals and Circuit Court Judge who served as the presiding judge for the trial that resulted in the conviction that is the subject of the instant post-conviction relief proceeding.

2. Mr. James Falk, counsel for Mr. Rocquemore, has stated in his November 14, 2014 letter that the purpose of the issuance of the subpoena would be to inquire about the text message between Mr. Pieper and Mr. Nelson.

3. Pursuant to South Carolina Code Section 17-27-20(A)(4) of the Uniform Post-Conviction Procedure Act, “[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. Section 17-27-20(A)(4). There are not any new material facts that have not previously been presented and heard.

4. Although the only prohibition on Judicial testimony by judges in the Code of Judicial Conduct is that a . . . judge shall not testify voluntarily as a character witness and the commentary states that a judge may testify when properly summoned (Rule 501, Canon 2 (B) and commentary, SCACR), such testimony in the instant matter would be contrary to the law and practice of this State. Testimony by Mr. Pieper as to the above matters would be irrelevant, immaterial and unnecessary.

5. “[T]he modern trend of courts [is] not allowing a judge to testify regarding a case in which he previously presided unless the testimony is: 1) critical; and 2) can be obtained by no other means.” *In re Whetstone* v. 354 S.C. 213, 216, 580 S.E.2d 447, 448 (2003). Mr. Pieper’s testimony as to this matter is irrelevant, immaterial and unnecessary because the same information can be obtained through other means, such as the trial transcript and Mr. Nelson.

6. The trial transcript shows Mr. Savage, trial defense counsel, brought to the Court’s attention the *ex parte* communication between Mr. Nelson and Mr. Davey. The dialogue below shows that the Court did *not* have any knowledge of Mr. Nelson’s connection to Mr.

Davey prior to Mr. Savage introducing the *ex parte* communication.

MR. SAVAGE: Judge, I have one matter that came up. I hope it's not too complicated. There is a member of the jury who's related to an assistant solicitor.

THE COURT: How did — how did that come up?

MR. SAVAGE: It just came up.

THE COURT: I mean. . .

MR. SAVAGE: So I - - -

THE COURT: - - - by what means did it come up? Did a juror talk with somebody? Because no one told me.

MR. SAVAGE: That's the point. The point is that I was told that you were told that he was related to a member of the Solicitor's Office during the time of qualification at the beginning of the matter, that the assistant solicitor reported it to Mr. Alfaro who is sitting as third chair for the prosecution.

THE COURT: *If he told me at qualification, I would have told him to bring it up before this.*

(TT, pp. 870). Judge Pieper investigated further to determine whether Mr. Davey reported he was related to Mr. Nelson by having his law clerk check notes and the Court Reporter reviewing the trial transcript. (TT, pp. 872-873).

7. During the dialogue at trial, Mr. Savage quoted Mr. Nelson with regard to Judge Pieper asking him to leave the courtroom; therefore, this material fact was previously presented during the trial. The transcript provides the following:

MR. SAVAGE: Michael Nelson is an assistant solicitor. Over the weekend, at some point in time, somebody brought to the attention of my office that a relative of Michael Nelson was on the jury that's sitting on this case. Before I approached the Court, I talked to Michael Nelson. Michael Nelson said that he talked to Mr. Alfaro, who is sitting as a prosecutor in this case, before the jury was selected. Mr. Nelson has reported to me that that juror has

called him since he was seated on the panel, but Mr. Nelson also told me that he refused to talk to him and hung up. It just creates a concern.

(TT, pp. 871). After a short break, Defense counsel further explained his conversation with Mr. Nelson and included the following:

MR. SAVAGE: . . . What he added in the most recent conversation is that he was asked to leave the courtroom by Your Honor because of his relationship with the jury member . . .

THE COURT: *I think he just assumed that.*

MR. SAVAGE: And he may have well assumed many things in this case. Your Honor.

THE COURT: *I just generally told him to leave the courtroom.*

(TT, pp. 875-876). Judge Pieper fully disclosed his communication with Mr. Nelson regarding Mr. Nelson's leaving the courtroom and the trial transcript has no indication whatsoever that they communicated about anything else. Judge Pieper stated to Mr. Savage "just to assure you, first of all, I was just joking with Mr. Nelson when I told him to get out . . ." (TT, pp. 878).

8. Moreover, after finding out about the communication between Mr. Davey and Mr. Nelson, Judge Pieper asked defense counsel *multiple* times, "what are you asking the Court to do." (TT, pp. 877). When the court asked what relief counsel was requesting, Mr. Savage replied: "I think [the juror] should be dismissed." The court indicated it would dismiss the juror, and the State agreed. The court also agreed to ask the juror if he told other jurors about his relationship with Nelson. (TT, pp. 870-879). Judge Pieper then called Mr. Davey, into the courtroom, and confirmed Mr. Davey's cousin worked at the Solicitor's Office. Mr. Davey admitted he did not inform the court of that relationship during jury *voir dire*, stating: "[w]ell, somebody stood up and you asked if that was going to have any affect, you know. And it

wouldn't, wouldn't affect me." (TT, pp. 881). He also stated he had talked with Mr. Nelson since the trial started, but they did not talk about the case in any way, and he did not disclose his relationship to Nelson to the other jurors. (TT, pp. 880-882).

9. Before dismissing Mr. Davey, Judge Pieper *again* asked Mr. Savage what he wanted the court to do, and more specifically if Mr. Savage had any further questions he wanted to ask Mr. Davey. Defense counsel stated he did not have any further questions. After the court dismissed Mr. Davey and instructed him not to discuss the case with anyone or contact Nelson until the case was over, defense counsel stated: "[t]he defendant is ready to proceed." (TT, pp. 882-884). Mr. Rocquemore *did not move for a mistrial*, request Judge Pieper to recuse himself, or ask the court to individually poll the remaining jurors about communications with Mr. Davey.

10. After the defense rested, Mr. Rocquemore's counsel asked for further "discussion" of the dismissed juror, specifically stating he was "not asking for a mistrial." (TT, pp. 1077). After discussing the issue, Judge Pieper questioned Mr. Nelson and the assistant solicitors about the situation involving Mr. Davey. (TT, pp. 1077-1090, 1100-1114). In addition, with the State's agreement, the court individually questioned the remaining jurors to ascertain if they knew about the relationship between Nelson and Davey, and if so, did that knowledge impact their ability to give the parties a fair and impartial trial. (TT, pp. 1116-1135).

11. Ten jurors stated they were not aware of any relationship between the dismissed juror and someone in the Solicitor's Office. One juror indicated he knew about the relationship only because he went to school with Davey, but it would not affect his ability to render a fair and impartial verdict. One juror stated Davey said he had a cousin in the Solicitor's Office, but they never discussed the case and the knowledge would not affect his ability to render a fair and impartial verdict. The remaining juror stated Davey only said he had a relative who worked in

the building, but did not say where the relative worked, and the knowledge would not affect her ability to render a fair verdict. (TT, pp. 1116-1135).

12. After Judge Pieper polled the jury, Mr. Savage asked the Court to accept a fax from SunCom Communications that indicated the phone calls made by Mr. Davey between July 6th and July 18th. (TT, pp. 1359). After the trial on July 23, 2007, Mr. Savage filed a Motion to Release Records requesting the immediate release of the text messages sent and received by cellular telephone number (843) 810-4438 (Mr. Nelson's telephone number) for the dates July 6th through July 19, 2007. *Rocquemore's Motion for Release of Records*, dated July 23, 2007. Mr. Savage provided no reason for the information other than to supplement the record. On August 20, 2007, Judge Pieper denied the Motion. Order, dated August 20, 2007. The Order addresses that the defense was (1) allowed to put into evidence a list of the juror's cell phone records; (2) given a full opportunity to have the court ask the juror questions at the time the juror was excused; and, (3) given the full opportunity to question the assistant solicitor who was contacted by the juror. Order at 2. Additionally, Judge Pieper polled all of the other jurors and questioned the solicitors participating in the trial as to whether they received any information. *Id.* There was no indication that Mr. Savage was looking for communications between Judge Pieper and Mr. Nelson and the record contains no indication whatsoever that Judge Pieper and Mr. Nelson communicated other than Judge Pieper asking Mr. Nelson to leave the courtroom. See ¶ 7, *supra*.

13. At an interview with the Office of Disciplinary Council on August 1, 2012, Mr. Nelson was asked if the trial judge had asked him to leave the courtroom during the trial or during jury selection. *In re Nelson*, 406 S.C. 201, 208, 750 S.E.2d 85, 89 (2013). Initially, Mr. Nelson replied "[n]o." *Id.* However, he then remembered that he went into the courtroom during

the trial and during a break in the trial, the trial judge texted him and told him to leave. *Id.* Mr. Nelson explained that, *in hindsight*, he assumed the trial judge was “messaging with” him. *Id.*

14. When the juror issue was initially before the court, Plaintiff clearly had ample opportunity to request individual polling of the remaining jurors, or move for a mistrial based on Mr. Davey’s admitted failure to disclose his relationship with Nelson. Plaintiff received all the relief he requested - dismissal of the juror - then affirmatively informed the court he was ready to proceed with presentation of his case, presented two witnesses and rested his case. The information he seeks from Judge Pieper is not critical and is available from other sources including the record in this case. *Whetstone, supra*. Therefore, Applicant has failed to make the necessary showing to require Judge Pieper to testify.

For the foregoing reasons and any others that may be raised at the hearing herein, Mr. Pieper respectfully requests that his subpoena be quashed.

[Signature Page Follows]

Respectfully submitted,

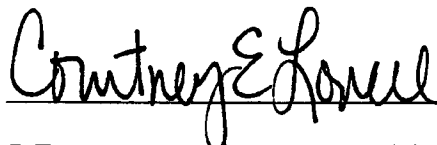
ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General

J. EMORY SMITH
Deputy Solicitor General

COURTNEY E. LOWELL
Assistant Attorney General

BY:



J. Emory Smith (SC Bar No. 5262)
Post Office Box 11549
Columbia, South Carolina 29211
Phone: 803.734.3642
Fax: 803.734.3677
Email: esmith@scag.gov

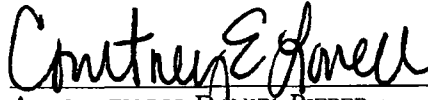
Courtney E. Lowell (SC Bar No. 77175)
Post Office Box 11549
Columbia, South Carolina 29211
Phone: 803.734.3177
Fax: 803.734.3677
Email: clowell@scag.gov

ATTORNEYS FOR DANIEL PIEPER

COLUMBIA, SOUTH CAROLINA
DECEMBER 3, 2014

Rule 11, SCRCP, Statement:

Undersigned counsel affirms that consultation with counsel for Plaintiff as to the foregoing Motion to Quash would serve no useful purpose.


ATTORNEY FOR DANIEL PIEPER

COLUMBIA, SOUTH CAROLINA
DECEMBER 3, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
) IN THE COURT OF COMMON PLEAS
) IN THE NINTH JUDICIAL CIRCUIT

David Rocquemore,) Civil Action No. 2013-CP-10-00634

Plaintiff,

vs.

State of South Carolina,

Defendant.

CERTIFICATE OF SERVICE

FILED
2014 DEC -5 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT

I hereby certify that I served the Motion to Quash Subpoena of Daniel Pieper in the above-referenced matter by placing a copy of said document in the United States mail, first class postage prepaid and addressed to:

James Falk, Esquire
Bush Law Group, P.C.
3 Broad Street, Suite 450
Charleston, South Carolina 29401

I hereby certify that I served the Motion to Quash Subpoena of Daniel Pieper in the above-referenced matter by hand delivering a copy of said document to:

Ashleigh Wilson, Esquire
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Mailed December 3, 2014 from Columbia, South Carolina.

By:

Courtney E. Lowell

Courtney E. Lowell
Assistant Attorney General
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
David Rocquemore)
Applicant,)
vs.)
State of South Carolina)
Respondent,)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-0634
**APPLICANT'S RETURN TO
DANIEL PIEPER'S MOTION
TO QUASH SUBPOENA**

FILED
2014 DEC - 8 PM 2:03
JUDIE J. ARMSTRONG
CLERK OF COURT

To: Ashleigh Wilson, Esq. Assistant Deputy Attorney General, Office of the Attorney General, PO Box 11549, Columbia SC 29211; Courtney E. Lowell, Esq. Assistant Attorney General, Office of the Attorney General, State of South Carolina, PO Box 11549, Columbia, SC 29211.

Applicant, David Rocquemore, by and through his undersigned attorney and for his Return to David Pieper's Motion to Quash Subpoena states as follows:

1. Applicant filed an Amended Application for Post-Conviction Relief in which he added that pursuant to S.C. Code Section 17-27-45(C), the recent discovery of material facts not previously presented and heard further supports his claim for vacation of his sentence imposed in Charleston County General Sessions Court Cases 05-GS-10-8601 and 05-GS-10-8602.

2. At issue is the newly discovered evidence that during the course of his trial the Presiding Judge, Daniel Pieper, transmitted at least one ex parte text communication to Michael Nelson.* Mr. Rocquemore's trial counsel were Andy Savage, Esq. and Lauren Williams, Esq. Neither Mr. Savage nor Ms. Williams were ever made aware that Judge Pieper had sent text

* Mr. Nelson is an attorney who was employed at the Ninth Circuit Solicitor's Office. Mr. Nelson was not participating in the trial on the State's behalf

communication(s) to Michael Nelson. (See Affidavits of Andy Savage and Lauren Williams attached hereto as exhibits 1 & 2).

3. The necessary factual inquiry is: 1) during the course of Mr. Rocquemore's trial, what was the extent of the text communication(s) between Judge Pieper and Michael Nelson; and, 2) did Judge Pieper make a contemporaneous disclosure to defense counsel of the existence and content of any text communication(s). Undersigned counsel anticipates that at Mr. Rocquemore's PCR hearing, there will be a factual dispute on these two issues, and Judge Pieper's testimony regarding these issues will be highly pertinent to a resolution of Mr. Rocquemore's PCR application.

4. During Mr. Rocquemore's trial Michael Nelson had numerous telephone and text communications with his cousin who was seated on Mr. Rocquemore's jury panel. These communications occurred during both jury qualification and *voir dire*. Mr. Nelson's conduct during Mr. Rocquemore's trial was investigated by the Office of Disciplinary Counsel. During an August 1, 2012 interview with ODC, Mr. Nelson was asked if the trial judge 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 the trial."* In re Nelson, 406 S.C. 201, 208, 750 S.E.2d 85, 89 (2013). (Emphasis added)

5. As shown in the following paragraph, there is some evidence in the trial record that Judge Pieper advised defense counsel that he communicated with Mr. Nelson. However, the record does not confirm whether this communication was verbal or via text. However, counsel for Judge Pieper fails to recognize the distinction in this case between a verbal and a text

communication. The existence and content of a text message can only be known by the parties to the text communication. Whereas the existence and content of verbal communications can be known by whomever is within earshot. Therefore a text message from a Judge that is directed to only one of the litigants in an action is an *ex parte* communication. Under these facts the two most significant distinctions between a verbal and a text message are: 1) Mr Rocquemore's trial counsel would have no contemporaneous knowledge of either the existence or content of a text message, and 2) the content of the text message was not recorded by the court reporter.

6. The trial transcript shows the following references to communication between Judge Pieper and Mr. Nelson:

1) *What he added in the most recent conversation is that he was asked to leave the courtroom by Your Honor because of his relationship with the jury member. I'm just - I'm not at all being accusatory. I'm just trying to relate what he said, that he was asked to leave the courtroom because of his relationship to the panel member.* (Defense counsel to the Court regarding a conversation he had with Mr. Nelson) (TT P. 875 L 19 through P. 876 L. 1)

2) *...that Judge Pieper said I couldn't talk, whatever that was...* (Defense counsel to the Court regarding a conversation he had with Mr. Nelson) (TT P. 877 L 5, 6)

3) THE COURT: *Well, we have gone to check -- just to assure you, first of all, I was just joking with Mr. Nelson when I told him to get out, after one plea, if he had any connection to a juror.* (TT P. 877 L 25 through 878 L 3)
(Emphasis Added).

7. It is unreasonable to conclude that trial counsel knew or should have known that the communications mentioned in the preceding paragraphs were anything other than verbal conversations. The most reasonable conclusion to draw from the preceding excerpts of the transcript is that Judge Pieper had a verbal conversation with Mr. Nelson. It is equally unreasonable to conclude that once defense counsel was made aware that Judge Pieper communicated with Mr. Nelson, defense counsel should have made further inquiry into the extent and nature of that communications.

8. Judges are not immune to being subpoenaed to testify in court. *"It is not disputed that a judge may testify on matters not touching upon his official duties"* In re Whetstone, 580 S.E.2d 447 448 (S.C.2003). The Court in Whetstone held that a judge may not testify regarding a case in which he previously presided unless the testimony is: 1) critical; and 2) can be obtained by no other means. Id.

9. Whether or not defense counsel knew that Judge Piper sent at least one text message to Mr. Nelson is the critical fact in Mr. Rocquemore's PCR. Rule 501, SCACR: Canon 3(B) (7) provides:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* 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 except that:

(a) Where 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.

Judge Pieper's testimony is critical in determining whether he ever advised defense counsel that he sent a text message(s) to Mr. Nelson. Moreover his testimony is critical in determining whether or not his ex parte communication with Mr. Nelson, via text message, complied with the above Judicial Canon.

10. At this point there is no direct evidence as to the content of any text messages between Mr. Nelson and the Court. At no point in the trial, appeal or disciplinary hearing was there a transcript of the text messages sent and received from Mr. Nelson's phone. Trial counsel submitted a MOTION FOR RELEASE OF RECORDS seeking an order directing Mr. Nelson's cellular carrier to provide the content of his text messages. (Attached hereto as Exhibit 4). The cellular provider would not release this information absent a court order. Judge Pieper denied defense counsel's motion. (Order attached hereto as Exhibit 5). Had Judge Pieper granted defense counsel's motion the content of any text messages between Mr. Nelson and the juror as well as those between Mr. Nelson and the Judge Pieper would have been produced.

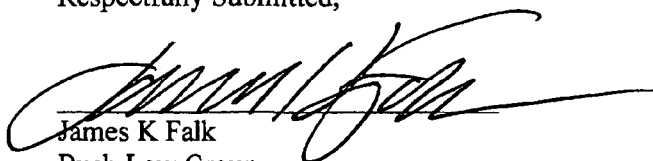
11. Knowledge that there were *ex parte* communications between Judge Pieper could have been critical for defense counsel's motion for a mistrial. (See Exhibits 1 & 2). Had there been a record of ex parte communication(s) in the trial record, Appellate Counsel would have raised the issue on appeal. (See Exhibit 1 & John Savitz Affidavit attached hereto as Exhibit 3)

12. Information regarding the content of the text messages between Judge Pieper and Mr. Nelson is only available through the testimony of both individuals. Information regarding whether Judge Pieper ever advised defense counsel of the existence of the text messages is only available through the testimony of Judge Pieper and defense counsel.

13. Undersigned respectfully contends that the information sought herein is critical to Mr. Rocquemore's PCR and the information is not available from another source. Undersigned counsel has met its burden under Whetstone.

THEREFORE, undersigned counsel moves this Court to enter an Order compelling Daniel Pieper to honor the subpoena requiring him to be present and testify at the above PCR hearing.

Respectfully Submitted,



James K Falk
Bush Law Group
3 Broad Street, Suite 450
Charleston, SC 29401
(843) 300-1047
jfkalk@bushlaw.com
SC Bar # 80125

EXHIBIT INDEX

1. Affidavit of trial counsel Andrew Savage III, Esq.
2. Affidavit of trial counsel Lauren Williams, Esq.
3. Affidavit of appellate counsel Joseph L Savitz, Esq.
4. Defense's MOTION FOR RELEASE OF RECORDS
5. Judge Daniel Pieper's August 20, 2007 ORDER on above defense motion.

EXHIBIT

1

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

DAVID ROCQUEMORE,)
Plaintiff,)
-versus-)
STATE OF SOUTH CAROLINA,)
Defendant.)

Civil Action Number: 2013-CP-10-00634

AFFIDAVIT OF ANDREW J. SAVAGE, III

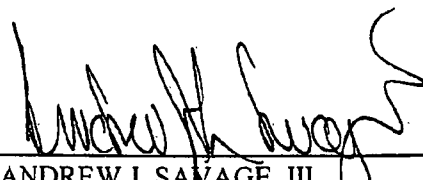
PERSONALLY APPEARED before me, Andrew J. Savage, III, who being duly sworn,
deposes and says as follows:

1. THAT I was retained to represent David Rocquemore following his arrest of August 14, 2005, and I was the attorney of record for his trial held in the Charleston County General Sessions Court from July 9 to July 19, 2007.
2. THAT I was assisted in Mr. Rocquemore's trial by Lauren E. Williams, an associate attorney who was employed with my firm at that time, and by Cheryl Savage, the litigation paralegal for this case.

3. THAT a "tainted" jury issue developed during the second week of trial when I became aware of over twenty (20) instances of communication between an Assistant Solicitor employed by the Ninth Judicial Circuit Solicitor and an empaneled juror, and that those communications occurred during the first week of trial.
4. THAT I became aware that the form of the majority of communications was by text messages.
5. THAT through the use of a subpoena, the cell phone carrier for the juror agreed to preserve the communications with the Assistant Solicitor until such time as I could obtain a Court Order.
6. THAT in accordance with the carrier's requirements, I sought an Order of the Court to allow me to read the content of the text messages to insure that the messages were not relevant to the issues of the trial.
7. THAT the Presiding Judge, without explanation, denied my request.
8. THAT at the time that the Presiding Judge denied my motion, throughout the trial, during post-trial motions, and appellate review, the Presiding Judge did not advise me of his conflict in that he was also involved in electronic (text) communication with the same Assistant Solicitor during the trial.

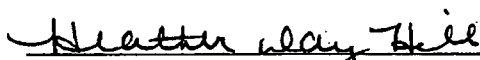
9. THAT I first became aware of the electronic communications/text messages that occurred during Mr. Rocquemoire's trial between Judge Daniel Pieper and Assistant Solicitor Michael Nelson when it was disclosed in South Carolina Supreme Court Opinion Number 27327 dated October 23, 2013.
10. THAT upon personal reflection and consultation of all members of the defense team, I am unable to recollect or find any documentation regarding any mention of any electronic communications between Judge Pieper and Mr. Nelson during the trial or post-trial proceedings.
11. THAT I have had an opportunity to review the pertinent portions of the trial transcript and can find no reference to any electronic communications between Judge Pieper and Mr. Nelson.
13. THAT if I had been made aware of the electronic communications between Judge Pieper and Mr. Nelson, I would have immediately moved for relief as there was no plausible explanation for the Court's denial of our request to have the readily available content of the emails released.

FURTHER, AFFIANT SAYETH NOT!


ANDREW J. SAVAGE, III
South Carolina Bar Number: 4946

SWORN to and SUBSCRIBED before me

this 8th day of December, 2014


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 11/3/2024

EXHIBIT

2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2013-CP-10-634
	)	
DAVID ROCQUEMORE,	)	
	)	
Plaintiff,	)	
	)	
-versus-	)	AFFIDAVIT
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	

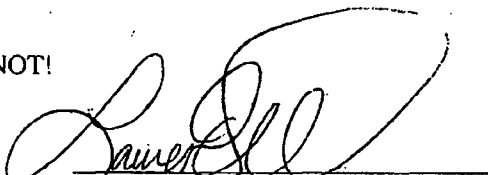
PERSONALLY APPEARED before me, LAUREN E. WILLIAMS, and states as follows:

1. That I am an attorney in good standing in the state of South Carolina;
2. That I was previously employed as an associate at Savage & Savage, P.A. from 2006-2010;
3. That during my employ at Savage & Savage, P.A., I served as second chair for the defense during trial in the matter of *State v. David Rocquemore*;
4. That jury selection in the above matter occurred on July 9, 2007 and trial commenced on July 11, 2007;
5. That the Honorable Daniel Pieper of the Ninth Judicial Circuit served as the trial judge in the above matter;
6. That during the course of the trial in the above matter, it was revealed to the defense team that a seated juror was related to an Assistant Solicitor (hereinafter "Mr. Nelson") with the Ninth Judicial Circuit Solicitor's Office.
7. That it was further revealed to the defense team that the same seated juror had both verbal and text communications with Mr. Nelson during the course of the trial;
8. That I do not recall the revelation to the defense of any text communications between

Mr. Nelson and Judge Pieper to the defense during the course of the trial.

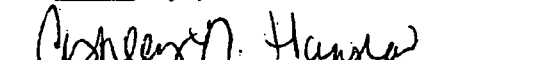
9. That I was unaware of the potential existence of any text communications between Mr. Nelson and Judge Pieper during the course of the trial in the matter of *State v. David Rocquemore* until the publication of the South Carolina Supreme Court's October 23, 2013 Opinion regarding *In the Matter of Michael O'Brien Nelson*.
10. That, had the defense team been made aware of text communications between Judge Pieper and Mr. Nelson at the time of trial, we would have raised the issue for further exploration and made the appropriate motions.

FURTHER THE AFFIANT SAYETH NOT!


LAUREN E. WILLIAMS

SWORN TO and SUBSCRIBED BEFORE me

this 4 day of December, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 11/26/2023

EXHIBIT

3

STATE OF SOUTH CAROLINA	)	IN THE COURT COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
DAVID ROCQUEMORE	)	CASE NO.: 2013-CP-10-634
Applicant	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent	)	

AFFIDAVIT OF JOSPEH L SAVITZ

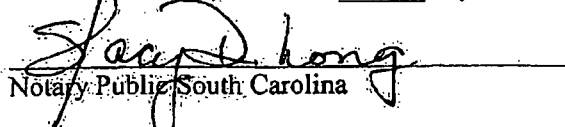
The Affiant, Joseph L Savitz, having been duly sworn hereby deposes and states:

1. In 2010 I was employed as the Senior Appellate Defender with the South Carolina Commission for Indigent Defense and represented David Rocquemore before the South Carolina Court of Appeals for the appeal of his conviction in Charleston County General Sessions case Nos. 05-GS-10-8601 and 05-GS-10-8602.
2. During the course of my preparation of his appeal, including a review of the trial court transcript, I was informed that Michael Nelson of the 9th circuit Solicitor's Office was communicating through voice and telephone calls with a sitting juror in the case.
3. I was unaware that Mr Nelson had also received at least one text message from the action's Presiding Judge.
4. Had I known of the ex parte communication between the Presiding Judge and Mr. Nelson I would have definitely raised that fact as a separate issue in Mr. Rocquemore's appeal.
5. Additionally, had I raised that as an issue on appeal, I would have moved for the appeal to be transferred from the Court of Appeals to the Supreme Court, given that the trial judge was by then sitting on the Court of Appeals.

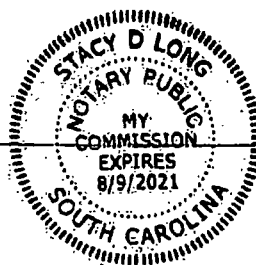
FURTHER THE AFFIANT SAYETH NAUGHT!


Joseph L. Savitz

Sworn to and before me this 5th day of December 2014


Notary Public South Carolina

My Commission Expires: 8/9/2021



EXHIBIT

4

STATE OF SOUTH CAROLINA	)	IN GENERAL SESSIONS COURT FOR
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	INDICTMENT NUMBERS: 2005-GS-10-8601
	)	2005-GS-10-8602
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
-versus-	)	MOTION FOR RELEASE OF RECORDS
	)	
DAVID M. ROCQUEMORE,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW the Defendant, DAVID M. ROCQUEMORE, by and through his undersigned counsel, and moves this Honorable Court to Order granting the Defendant's request for the release of cellular telephone records in this matter. Specifically, the Defendant requests that this Court Order the immediate release of the text messages sent and received by cellular telephone number (843) 810-4438 for the dates July 6 through July 19, 2007, as such information is necessary to supplement the record in the above-captioned matter.

On August 14, 2005, the Defendant was arrested and charged with Murder and Possession of a Firearm During Commission of a Violent Crime in Charleston County. On July 19, 2007, the Defendant was found guilty of the offenses of Voluntary Manslaughter and Possession of a Firearm During Commission of a Violent Crime by a Jury in the Court of General Sessions of Charleston County.

On July 17, 2007, the defense requested a mistrial based on the failure of Juror Number 309 to disclose his close familial relationship with an Assistant Solicitor with the Ninth Judicial Circuit

Solicitor's Office. Specifically, the defense urged a mistrial based on the fact that the Assistant Solicitors assigned to the above matter were informed of the juror's relationship to a member of their office and failed to disclose it to the Court. Additionally, the defense urged a mistrial on the basis that the entire panel was tainted by Juror Number 309, and the Defendant's due process rights were thus violated. Following argument, Juror Number 309 was dismissed by this Honorable Court. This Court denied the Defendant's Motion for Mistrial.

On July 18, 2007, the defense again urged its Motion for Mistrial. This Court questioned the petit jury panel individually regarding their exposure to Juror Number 309's relationship to the prosecutor's office. Assistant Solicitor Michael Nelson, cousin of Juror Number 309, was also questioned by the Court regarding his contact and communications with Juror Number 309 since July 9, 2007, when the petit jury was selected.

On July 19, 2007, the defense obtained the cellular telephone records of Juror Number 309 for the dates July 6 through July 18, 2007. The records revealed twenty (20) contacts or attempts to contact Mr. Nelson via text message since the selection of the jury in this matter. As a result, the defense requested that it be allowed to supplement the record in this matter once the actual text of any text messages could be obtained via subpoena requesting Mr. Nelson's cellular telephone records. The defense was informed by the cellular carrier, Verizon Wireless, that these records are not available without a Court Order to this effect.

Thereafter, the Defendant was found guilty of Voluntary Manslaughter and Possession of a Firearm during the Commission of a Violent Offense. The defense renewed its Motion for Mistrial, which this Court denied. At that time, this Court stated that the defense would be permitted to supplement the record with any new and relevant information in support of its Motion for Mistrial.

WHEREFORE, the Defendant, David M. Rocquemore, respectfully requests that this Honorable Court Order the immediate release of the text messages sent and received by cellular telephone number (843) 810-4438 for the dates July 6 through July 19, 2007, as such information is necessary to supplement the record in the above-captioned matter.

Respectfully submitted,

SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charleston, SC 29402
Telephone (843) 720-7470

BY: _____
LAUREN E. WILLIAMS
SC Bar Number: 75158
ATTORNEY FOR DEFENDANT

Charleston, South Carolina

July 23, 2007

EXHIBIT

5

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

vs.

DAVID ROCQUEMORE
Defendant.

) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
) Case Nos: 2005-GS-10-8601
) 2005-GS-10-8602

ORDER

FILED
2007 AUG 20 PM 4:37
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the court on defendant's Motion for Release of Records filed July 23, 2007. The defendant requests the release of cellular telephone records for the cellular phone of an assistant solicitor who did not participate in the trial of this case. During the course of the trial, the defense informed the court that a juror seated in the case, Juror # 309, was the cousin of the assistant solicitor. After questioning the juror on the record, the court excused the juror from the trial in this case and seated one of the alternate jurors. Before the trial proceeded, the defense moved for a mistrial, which was denied.

The next day, defense counsel again raised the issue before the court and requested that the court poll the jurors to find out if any of them knew that the excused juror was related to someone in the Solicitor's office.¹ Counsel was given the opportunity to propose questions to each juror and indicated that he had no further questions than those asked. Counsel was also given the opportunity to examine the assistant solicitor, and

¹ The primary basis of counsel's concern is that the juror may have sent substantive text or voice messages to the Solicitor's office that could have provided direction to that office on how to adjust their case or presentation. All of those persons questioned denied any such conversations. The court is convinced that any concerns of defense counsel are merely speculative in nature.

ATTACHED TO THIS COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
[Signature]

again indicated that he had no additional questions. After defense counsel had introduced into the record the juror's phone records, the court directed the assistant solicitor to be available for questioning the following day; however, no further questioning was requested by counsel for the defendant.

A telephone hearing was held on July 24, 2007 (after the verdict), with Mr. Savage and Mr. Durant participating. Having reviewed the matter, the court denied the motion during the call notwithstanding the State's lack of objection.²

For the record, the defense was allowed to put into evidence a list of the juror's cell phone records. Moreover, the defense was given a full opportunity to have the court ask the juror questions at the time the juror was excused and was given the full opportunity to question the assistant solicitor who was contacted by the juror. All of the other jurors were also polled. In addition, the solicitors participating in the trial were questioned as to whether they received any information. Subsequently, upon receipt of the jury verdict, the court asked if there were any further matters before the jury was discharged in the event further polling became necessary and no action was requested.

While the court did not actually request the subpoena of the excused juror's records, the court nonetheless allowed their introduction into the record in an abundance of caution. Notwithstanding, the court stands by its original decision that upon polling each juror, no improper tainting of the jury occurred. No substantive conversation about the case occurred. In response to those jurors that heard that one juror had a cousin in the Solicitor's office, those jurors indicated that in no way would it affect their ability to be fair and impartial. The court is satisfied that the defendant was ably represented by counsel

² Had any of the jurors expressed any hesitation or concerns, this court may have had some more substantive basis to pursue the matter further. However, it appears that there would be just as many concerns about whether other records should also be subpoenaed if the speculative nature of the request did not lead to any useful information as to the assistant solicitor at issue. Again, all of the solicitors, as officers of the court, responded in the negative about any improper substantive communications.

and received a fair and impartial trial. The court is further satisfied that counsel has fully pursued the matter and has revisited the matter twice with the court. However, the court concludes, having fully examined the actual trial jurors about the matter, as well as the attorneys potentially involved, that there is no likelihood continued proceedings on this matter would demonstrate any impact upon a fair and impartial jury verdict.

The court further notes that there is no pending motion for a new trial.³ Therefore, for all the reasons expressed during the conference call, and herein, the request to subpoena additional records after the original hearing on this matter and to allow further argument on this issue is denied.⁴

IT IS SO ORDERED.

Charleston, South Carolina
August 20, 2007

Attorneys for the State:
Attorneys for Defendant:
Court Reporter:

Bruce Durant, Deputy Solicitor
Andy Savage, Esquire
Brenda Cooley

05-GS-10-8601-JEA

[Signature]
Daniel F. Pieper, Resident Judge
Ninth Judicial Circuit

FILED
2007 AUG 20 PM 4:37
JULIE J. ARMSTRONG
CLERK OF COURT

TESTED A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, 12, 05 & 60.
[Signature]
DEPUTY CLERK

³ After the verdict, a JNOV motion was made which this court construed as a renewed motion for acquittal.

⁴ The court originally denied this matter during the conference call. Defense counsel's office subsequently contacted this office by email on August 15, 2007, inquiring about the status of the matter. The court construed this inquiry as one seeking a final written order of this court's oral ruling.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-10-0634

David Rocquemore
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(e), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before this Court on Witness Judge Daniel Pieper's Motion to Quash Subpoena, argued before this Court on December 8, 2014. After oral argument, this Court partially denies the Motion to Quash, finding that it may be necessary for the Judge Pieper to testify should the testimony of Michael Nelson require it. However, any testimony shall be limited to the correspondence between Mr. Nelson and Judge Pieper.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

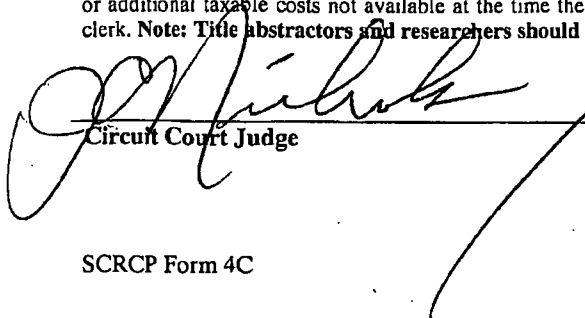
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2117
Judge Code

12/8/14
Date

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
David Rocquemore,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 13-CP-10-0634
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within hearing in the above-captioned matter was held on January 14, 2015, before The Honorable J.C. Nicholson, Jr. in Courtroom E of the Berkeley County Courthouse, 300 California Avenue, Moncks Corner, South Carolina; attended by counsel as follows:

APPEARANCES:

James Falk, Esq.
 BUSH LAW GROUP
 3 Broad Street, Suite 450
 Charleston, South Carolina 29401
 Appearing for Defendant

Ashleigh Wilson, Esq.
 OFFICE OF THE ATTORNEY GENERAL
 P O Box 11549
 Columbia, South Carolina 29211-1549
 Appearing for State of South Carolina

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

David Rocquemore v. State of South Carolina
Case No. 13-CP-10-0634
Hearing of January 14, 2015
Before The Honorable J.C. Nicholson, Jr.

2

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David Rocquemoire v. State of South Carolina

3

Case No. 13-CP-10-0634

Hearing of January 14, 2015

Before The Honorable J.C. Nicholson, Jr.

1 (DEFENDANT INTO COURTROOM @ 9:47 A.M.)

2 THE COURT: Let me see the attorneys up
3 here for just a second.

4 (OFF RECORD BENCH CONFERENCE)

5 THE COURT: All right. Mr.
6 Rocquemoire. How you doing this morning?

7 DEFENDANT: I'm doing good. You?

8 THE COURT: Let me ask you, you
9 were sentenced, I believe, I don't know the
10 date. You were convicted on July the 19th,
11 2007. You've served at least seven and a
12 half years. What's your release date?

13 DEFENDANT: September 2015.

14 THE COURT: I'm sorry, when?

15 DEFENDANT: September, 2015.

16 THE COURT: So September 2015.

17 So you have an additional, what, eight and a
18 half months for your release date?

19 DEFENDANT: Yeah. Somewhere
20 around there.

21 THE COURT: All right. Well, let
22 me explain something to you. I'm sure you've
23 talked to your attorney about it, but I want
24 to explain it to you. In reviewing your
25 relief that you requested in your post-

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1 conviction application, you stated that you
2 want your sentence vacated and reversed and
3 your name cleared so you can join the U.S.
4 Army; you understand?

5 DEFENDANT: Right.

6 THE COURT: Now, a post-conviction
7 will not vacate the sentence. It will not
8 reverse it, okay? It will vacate the
9 sentence but the charges do not go away. Do
10 you understand that?

11 DEFENDANT: Uh-huh.

12 THE COURT: What will happen is,
13 the State at that time, if I grant the PCR,
14 the State will decided whether to try you
15 again for manslaughter or not; do you
16 understand?

17 DEFENDANT: Yes, sir.

18 THE COURT: Now, the murder is
19 gone. In the Court's opinion there was an
20 acquittal on the murder because they found
21 you guilty of the lesser-included,
22 manslaughter.

23 But the only thing that's going to happen
24 is you're going to stay in jail or post a
25 bond and await trial for manslaughter; do you

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1 understand?

2 DEFENDANT: Yes, sir.

3 THE COURT: And then you are
4 facing additional -- what did you get ten
5 years?

6 DEFENDANT: (Affirmative nod).

7 THE COURT: Well, you'll get
8 credit for time served but you'll be facing
9 an additional fifteen years if you get
10 convicted of manslaughter; do you understand?

11 DEFENDANT: Yes, sir.

12 THE COURT: Whereas, right now you
13 walk in eight and a half months.

14 I'm not trying to take a position on
15 your PCR whether you're entitled to it or
16 not. That's why we're here today to have a
17 hearing. But if I do grant that PCR, I want
18 to make sure that the -- it won't be
19 reversed. Your name won't be cleared. The
20 charge will still be pending.

21 DEFENDANT: Right.

22 THE COURT: Do you understand?

23 DEFENDANT: Yes.

24 THE COURT: Do you want to proceed
25 with it or do you want to withdraw it and

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1 take your release date?

2 DEFENDANT: I want to proceed with
3 it.

4 THE COURT: You want to proceed
5 with it?

6 DEFENDANT: Yes, sir.

7 THE COURT: Okay. Thank you so
8 very much. Do you understand what I have
9 told you?

10 DEFENDANT: Yes, sir.

11 THE COURT: Have you had this same
12 conversation with your attorney?

13 DEFENDANT: Yes.

14 THE COURT: Did you understand
15 those conversations?

16 DEFENDANT: Yes, sir.

17 THE COURT: Do you need to talk
18 about this issue with your attorney anymore?

19 DEFENDANT: I don't believe it's
20 necessary.

21 THE COURT: Okay. You don't think
22 it's necessary?

23 DEFENDANT: No.

24 THE COURT: And I understand in
25 reading your application there was some issue

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1 about the Castle Doctrine where you could
2 raise the Castle Doctrine. But I think the
3 Court said that was not retroactive, so I
4 assume in a new trial you probably will not
5 be able to raise that; but that would be
6 decided at that time, do you understand?

7 DEFENDANT: Yes, sir.

8 THE COURT: All right. Do you
9 have any questions about what I've explained
10 to you?

11 DEFENDANT: No, sir.

12 THE COURT: Has anybody forced you
13 or threatened you to make you proceed with
14 the PCR?

15 DEFENDANT: No, sir.

16 THE COURT: All right. Thank you.
17 so very much, Mr. Rocquemoore.

18 MR. FALK: Your Honor, may I just
19 have two minutes with my client just to make
20 sure?

21 THE COURT: Yes, sir.

22 (OFF THE RECORD)

23 MR. FALK: We're ready to
24 proceed, Your Honor.

25 THE COURT: You're ready to

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1 proceed. Okay. Call your first witness.

2 MR. FALK: We'd like to call Andy
3 Savage to the stand.

4 THE COURT: Okay, Mr. Savage, if
5 you'll come around and be sworn.

6 WITNESS: Good morning, Judge.

7 THE COURT: Good morning, Mr.
8 Savage.

9 (WITNESS TAKES STAND)

10 ANDREW SAVAGE, having been duly sworn to
11 tell the truth, and nothing but the truth,
12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FALK:

15 Q. Mr. Savage, could you tell me your
16 relationship with David Rocquemore?

17 A. Good morning. A very good
18 relationship. David was my client several
19 years ago upon his arrest in a homicide case.

20 Q. So you represented him in this
21 underlying case?

22 A. I did. I was contacted by his
23 parents, who are in the courtroom. And I
24 think I was the second lawyer in, as I
25 recall. A case that we felt very strongly

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1 about, that we had a pretty good defense to.

2 And ---

3 THE COURT: Let me interrupt for
4 one second, please. This is a Charleston
5 County case. And I believe the parties
6 agreed for venue to be held here in Berkeley;
7 is that correct?

8 MR. FALK: That's correct, Your
9 Honor.

10 MS. WILSON: Yes, sir.

11 THE COURT: Okay. No question
12 about that from the State or the Petitioner?

13 ATTORNEY GENERAL WILSON: Nothing
14 from the State.

15 THE COURT: All right. Thank you
16 very much. Go ahead.

17 DIRECT EXAMINATION CONTINUED

18 BY MR. FALK:

19 Q. Well, just to kind of speed through
20 this a little bit, was there anything unusual
21 that happened in the Rocquemore, David
22 Rocquemore's trial?

23 A. Well, the legal issue, if that's
24 what you're referring to, the homicide was
25 effected before the new extension of self-

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1 defense was passed by the Legislature. So in
2 terms of a primary legal issue, the question
3 was whether he had a duty to retreat from his
4 vehicle at a time that, I believe, he felt he
5 was under attack and his response to that
6 was, therefore, lawful. That was pretty much
7 the center of our defense, was self-defense.

8 Q. Do you know Michael Nelson?

9 A. Yes, I do.

10 Q. And can you explain to the Court how
11 Michael Nelson became involved in this trial?

12 A. Michael is an Assistant Solicitor in
13 the Ninth Circuit office. He's a -- without
14 being disrespectful, he was just a really
15 good guy. He didn't try a whole lot of cases
16 but he had a very good reputation for his
17 honesty and integrity and the way he handled
18 himself around the courtroom.

19 He -- this trial was unusual. It
20 lasted two weeks, which even in murder cases
21 are -- is somewhat unusual.

22 And over the weekend, I was
23 approached by an attorney, Frank Cornley, who
24 told me that he had witnessed Michael in the
25 company of one of the sitting jurors.

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1 As soon as that information came out
2 and who the juror was, we immediately went to
3 the clerk's office and got that juror's back-
4 ground information, including the cellphone
5 number for that juror and subpoenaed from
6 Verizon the records of his phone calls.

7 I, at the same time, asked Michael
8 if he had any contact with a sitting juror.
9 And he readily admitted it and said, 'yes, I
10 have.' It was some family situation with
11 this juror that he had seen over the weekend.

12 He didn't tell me at that time that
13 he had any contacts with -- about the case or
14 any telephone contacts at all. So when we
15 got the Verizon records, which we got almost
16 immediately, which was very unusual as well,
17 there was some twenty -- more than twenty
18 contacts during the first week of trial.

19 We then went to the clerk's office
20 to document when the breaks were in the trial
21 and there was a very consistent pattern of
22 contacts between the Assistant Solicitor and
23 the seated juror during the course of the
24 trial. Most of them were texts, but there
25 were also phone calls.

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1 Q. And just to clarify things, he was
2 not prosecuting this case, Mr. Nelson?

3 A. There were three deputies. He was
4 not the prosecutor, Mr. Grant was. Ms.
5 Shealy and Mr. Alfaro were trying the case
6 for the State.

7 Q. And you had testified earlier over
8 the weekend, do you know which weekend -- do
9 you happen to know the date?

10 A. No, I don't.

11 Q. If I showed you a calendar ---

12 A. The trial lasted two weeks. It was
13 the weekend in between.

14 Q. Here's a calendar from July 2007.
15 The trial started the week of the 9th?

16 A. Well, if the trial started the week
17 of the 9th, it was either Saturday the 14th or
18 Sunday the 15th. I'm not sure.

19 THE COURT: The 9th of when?

20 WITNESS: July 2007. I'm sorry.

21 THE COURT: July. Okay. Thank
22 you.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. FALK:

25 Q. And do you recall whether or not

1 there was court on the next day, on the 16th?

2 A. All I know is the trial lasted over
3 a week and it was a two-week trial; which is
4 unusual.

5 I was contacted probably on Monday,
6 following that weekend. Frank Cornley was
7 the attorney who advised me of the situation.

8 Q. I reviewed the transcript in this
9 case and looks like some time after a break
10 in the trial, on the 17th is when you brought
11 this to the Court's attention. Does that
12 sound correct to you?

13 A. I think I brought it to the Court's
14 attention once Michael -- I didn't rely on
15 what I was told by this third party. I went
16 to Michael himself. As I say, he's a very
17 reputable fellow and I talked to him in the
18 hallway outside of the court and he said,
19 'yes, I did.' And so as soon as he said
20 that, then I went back into the courtroom and
21 raised the issue.

22 Q. So there's no question that you were
23 not aware of these contacts the first week of
24 trial while the jury was being qualified?

25 A. No. I think the original issue, as

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1 I'm thinking through this now, may have been
2 that he was a relative, the juror was a
3 relative of Michael and it was not disclosed
4 during *voir dire*. Those standard questions
5 were asked. There was no response.

6 I would never have put them on the
7 jury had I known that there was a relation-
8 ship there.

9 Q. Sure. All right. So once you found
10 out that there was this close relationship
11 between Michael and the juror, and I believe
12 the juror's name was Davey, D-A-V-E-Y. Does
13 that sound familiar?

14 A. I don't recall.

15 Q. Once you became aware of that, what
16 did you do?

17 A. I brought it to the Court's
18 attention. As I'm thinking through this --
19 and I know we're going towards the telephone
20 situation, but the original problem is
21 dishonesty to a question by the Court prior
22 to trial and not being responsive to the
23 Court's inquiry about any relationship.

24 And I think that's probably what
25 I brought to the Court's attention at that

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1 time, because I didn't have telephone records
2 probably at that time. I think that was sort
3 of -- they came later.

4 Q. Do you have a current recollection
5 of your conversation with the Court at that
6 time?

7 A. I don't. I mean, I remember there
8 was a conversation. I don't remember what
9 the details were.

10 MR. FALK: Your Honor, I'm going
11 to show Mr. Savage some pages from the trial
12 transcript starting on Page 874 to refresh
13 his recollection.

14 THE COURT: 874?

15 MR. FALK: 8-7-4. Yes, Your
16 Honor.

17 THE COURT: Okay. Okay.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. FALK:

20 Q. Can you take a moment and look
21 through that?

22 A. Sure, (reviewing). Do you want me
23 to go through it all or ---

24 Q. No. Where are you through?

25 A. So far in -- referencing to the

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1 Court, *"the highest compliment that a judge*
2 *can receive on the circuit bench is that*
3 *'you're right behind John Hamilton Smith.'*"

4 I've heard that on various
5 occasions. In other words I'm referencing to
6 the judge that his reputation is one of being
7 one of the top judges in the state.

8 Q. Well, then why didn't -- I think
9 possibly, if you've gotten to that point in
10 the transcript, now do you have a better
11 recollection of how you brought it to the
12 Court's attention?

13 A. Yes. Yeah, I actually didn't recall
14 any of that. Apparently, you know, the
15 information was provided to us. Then I went
16 to Michael, he verified it to me.

17 I then went to one of the prosecutors who
18 was trying the case and we both talked to
19 Michael, and then we brought it to the
20 attention of the Court.

21 THE COURT: Mr. Falk, let me just
22 ask you one question. All of this was dealt
23 with in the appeal, also, wasn't it? On the
24 failure to dismiss the juror?

25 MR. FALK: Yes, Your Honor.

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1 THE COURT: I mean, so that was
2 denied on direct appeal; correct?

3 MR. FALK: Yes, Your Honor.

4 THE COURT: Okay. All right. Go
5 ahead.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. FALK:

8 Q. You were saying ---

9 A. And then there was the conversation
10 between Mr. Durant, the Court and myself
11 about the presence of Mr. Nelson in the
12 courtroom.

13 The Court indicated that he had had
14 -- Mr. Nelson had indicated to me that he had
15 -- I don't know what Mr. Nelson and the judge
16 did. I wasn't privy to that. But Nelson
17 indicated to me that he had had contact with
18 the judge and that the judge had asked him to
19 leave the courtroom.

20 Q. If you would look on, I believe on
21 page 870 -- if you would look on Page 875
22 around Line 19?

23 A. Yes, sir.

24 Q. Can you tell me exactly how you, as
25 you -- can you tell me exactly what you told

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1 the Court regarding your conversation with
2 Mr. Nelson?

3 A. I can just read from the transcript,
4 (reading):

5 *"I had the opportunity to speak to*
6 *Mr. Nelson. He reported that he -- at the*
7 *time, he reported that he had brought to the*
8 *attention of one of the prosecutors trying*
9 *the case that following the empaneling of the*
10 *jury, he sat in the courtroom. What he added*
11 *in the most recent conversation is that he*
12 *was asked to leave the courtroom by Your*
13 *Honor because of his relationship with the*
14 *jury member."*

15 Q. Thank you. So at the time when he
16 told you that, that was your recollection and
17 he told you that he was asked to leave the
18 courtroom because he had a relationship with
19 a member of the jury?

20 A. That's what the transcript reflects
21 happened at that time.

22 Q. Okay. Thank you.

23 A. I wasn't a party to any conversation
24 between Mr. Nelson and the Court.

25 Q. No, I guess what I'm just trying to

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1 -- that was your -- you had just spoken to
2 him. You came into the courtroom and it was
3 your recollection of the conversation that
4 happened ten minutes before, that he said
5 that he was asked to leave the courtroom by
6 the Court because he had a relationship with
7 one of the jurors?

8 A. Yes.

9 Q. Thank you.

10 A. But it was certainly not an issue to
11 me at that time, given what I knew at that
12 time.

13 Q. I understand that. I understand
14 that. At any time during this -- was it ever
15 made clear to you that Judge Pieper had had
16 any conversations with Mr. Nelson?

17 A. Only what Mr. Nelson said, that the
18 Court had asked him to leave. I wasn't -- I
19 didn't take part in that. I had no knowledge
20 of that at all. Again, there was nothing at
21 that time that would raise any suspicion of
22 any of nefarious conversation between the
23 Court and a prosecutor. It just -- in
24 retrospect, going back, it is an issue. But
25 at the time, it was -- we were in the middle

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1 of the trial. We had a whole lot going on at
2 that time. Michael Nelson was, as I say, was
3 then and remains now with a great reputation.
4 He was almost childlike. So him being in the
5 courtroom to view a trial, there was nothing
6 suspicious about it. He was a young attorney
7 who wanted to do better. There are a lot of
8 people, a lot of young lawyers in that
9 courtroom watching that trial because it
10 generated a lot of interest among the young
11 members of the Bar to come see a murder case.
12 So Nelson being in the courtroom, without
13 tying all of the rest of it in, was no big
14 deal.

15 Q. And when you were -- as you read
16 that into the record, Mr. Nelson certainly
17 didn't tell you that Judge Pieper texted him,
18 did he?

19 A. There was never -- I think, and I
20 don't remember exactly, but I think the whole
21 issue in the context of a text or phone calls
22 came later when we got the information from
23 Verizon.

24 Remember, the only information I had was
25 Mr. Cornley told me that he had seen the

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1 juror and the Assistant Solicitor together
2 over the weekend. That, in and of itself is
3 not alarming, but it created a reason for us
4 to look into it more.

5 I talked to him. He admitted the
6 contact. He didn't tell me he was in the
7 contact with the juror by telephone. He
8 didn't tell me he was -- I think the second
9 time we talked to him he said that he had
10 contact with that juror that very day.

11 But the issue developed over a period of
12 time. It wasn't totally ripe. So the
13 interaction with the Court was that we were
14 concerned that this juror had contact with an
15 assistant solicitor and he didn't disclose
16 during the *voir dire* process that he had a
17 relationship. That was the initial issue.

18 It was only later when we got the
19 telephone records that we did the -- that we
20 saw that there was repeated, constant contact
21 between the juror and the assistant
22 solicitor. That was very suspicious. At the
23 time, it was during the breaks in the trial.
24 So my assumption was that the contacts were
25 about the trial, but that's my assumption.

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1 We looked into it further. And as it
2 progressed the Court became involved. We
3 moved to dismiss the juror, and the judge
4 gave us a hearing.

5 At no time, frankly, until I read the
6 Opinion of the assistant solicitor being
7 suspended, did I know that there was any
8 contact with the Court between the two.

9 Although then what Mr. Nelson said he
10 was asked to leave the courtroom by the
11 Judge.

12 Q. So Judge Pieper acknowledged to you
13 that, 'yeah, I sent him a text.' Or, 'I told
14 him to get out of the courtroom.' But he
15 never said it was a text message. Is that
16 correct?

17 A. I think Nelson is the one that told
18 us first. And maybe in the court said, the
19 judge said, --- you've got to know Michael
20 Nelson. Michael Nelson is a jovial guy and,
21 you know, had a lot of contact with everybody
22 all the time.

23 And he's -- no one would ever suspect
24 Michael Nelson of doing anything improper
25 intentionally. He's just not that kind of

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1 person. Now, was he naïve? Yeah, he sure
2 was naïve.

3 And, again, when I confronted Michael, it
4 wasn't like I didn't do it. You know, he
5 immediately told me everything that went on.
6 So there was no sense of any impropriety of
7 the Court or anybody with Nelson.

8 It was only when we got the constant
9 contact between the juror and Nelson that I
10 really became quite alarmed. And presented
11 that to -- so you have the qualification of
12 the jury, the juror lied. I don't know how
13 you can get around that. He perjured himself.
14 And then -- so that's an issue.

15 But then as you look into it it's
16 developed into a larger issue was the
17 constant contact, which was a real problem
18 for me.

19 We didn't address that with the Court. I
20 had no knowledge that the Court ever had any,
21 shall we say, ex-parte contact with the
22 assistant solicitor, other than asking him to
23 leave.

24 But that -- there would be no reason for
25 me to be involved in that of for the

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1 prosecutor to be involved I think was told to
2 leave the Court, the Judge is in charge.

3 I mean, it didn't affect me because there
4 was no any indication of any impropriety at
5 that point.

6 But the issue developed, if you will -- I
7 wanted to see the texts. I knew what Michael
8 told me. I think one of the prosecutors may
9 have seen the texts and vouched for them.
10 But I wanted to see them. My client, I owed
11 that to him.

12 So there wasn't any lingering for any
13 concern about why we're here today about the
14 process. There was no collusion, nothing
15 "underhand."

16 We had the texts. Verizon produced the
17 texts. And they said they would turn them
18 over to me if the Court would issue an order.
19 That a subpoena was fine for the records that
20 we had that documented the context, but if we
21 wanted to read the texts, the Court had to
22 sign an order.

23 Now, I'm getting a little off track here,
24 but in subpoenaing records from a
25 communication company, if you don't seek the

1 records within three to five days, they
2 disappear in cyber space. So what Verizon
3 agreed to do was to hold the text messages
4 for review by the Court or by us
5 indefinitely. But they said they wouldn't
6 turn them over to me unless the Court signed
7 an order authorizing them.

8 We petitioned the Court, as this issue
9 developed. I think the State might have
10 objected -- I'm not sure. But there was no
11 reason in our minds why we couldn't take a
12 look at the texts. It was just a matter of
13 documentation.

14 The Court felt that the inquisition of
15 the juror and other jurors subsequent to that
16 was sufficient to dispel any notion of
17 impropriety. We didn't -- I think the State
18 might have objected to it. And went on to
19 trial.

20 I've never -- you know, it's public
21 knowledge, I think we can say, that Mr.
22 Nelson was reprimanded by the Supreme Court.
23 I had nothing to do with that. I know
24 Michael Nelson. I don't think he then or
25 today has any nefarious idea about being

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1 corrupting the courtroom. That whole issue
2 about his impropriety was started by the
3 Supreme Court. I was shocked when I got
4 called in by ODC.

5 But what lingers as a problem is if there
6 was contact between the presiding judge and
7 the assistant solicitor, other than what was
8 made known to us.

9 You know, the contact between the Court
10 and Michel Nelson, I would never have known
11 about it because there was no reason for me
12 to be involved. It was a matter of
13 administration in the Court. But if he was
14 removed from the Court because he had a
15 relationship with the juror, then you wonder
16 how did the Judge know about that. And then
17 when you see all these text messages.

18 And, you know, it created an atmosphere
19 within the courtroom of 'something's going on
20 here and we don't know what it is.' If the
21 Court in its wisdom, on reflection, had shown
22 us the text, it would have ended the problem
23 one way or the other.

24 If it was some nefarious communication
25 going on, there would have been a mistrial.

1 If there weren't, it's just a nonissue.
2 You know, judges all the time have
3 communications, administrative communications
4 with the solicitor's office. So that in and
5 of itself was not -- there was just nothing
6 to it.

7 A lot of times you'll see with young
8 lawyers and young solicitors when they're --
9 the backdrop that you have a judge will say,
10 'What the hell you doing in here? You know,
11 get out there and get some of these cases
12 moved.'

13 So in that context, there was nothing to
14 it. It only developed when there was the
15 repeated contacts between the juror and the
16 assistant solicitor. If I had known that the
17 Court had communicated by texting with the
18 solicitor, contemporaneous with the juror
19 communicating with that same assistant
20 solicitor, I trust my judgment at that time
21 would have been to raise that, put it on the
22 record, and probably raise hell about it.

23 Q. Sure.

24 A. But I've got to say you've got to --
25 in trying a case, reputations matter. This

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1 judge who presided in that court had the best
2 reputation of any judge in the state.
3 Michael Nelson had a reputation of honesty,
4 integrity, so that all goes into your
5 thinking.

6 You know, if I had had a prior problem
7 with the Court or I had a prior problem with
8 Michael Nelson where I thought he was
9 dishonest or didn't keep his word, then that
10 would have reflected differently on it.

11 Q. Just to clear up some points, what
12 you earlier was the logs indicating that
13 there was a communication from one phone to
14 the other and it told you when it occurred
15 and the duration; is that correct?

16 A. (No verbal response).

17 Q. You just had phone logs from the
18 juror's phone; is that correct?

19 A. Yeah. See, if I had gotten Michael
20 Nelson's phone, which I could have done, I
21 guess, right? Then I would have picked up on
22 all the communications that he had. But
23 really, that was not my business. My
24 business was whether this juror lied in
25 getting, you know, to become a juror and

1 whether or not there was continuing contact
2 between the juror and the assistant
3 solicitor.

4 You know, and -- again, you're in the
5 middle of the trial. But the thinking was
6 not just the context but when they were. So
7 every break in a case, you start to wonder,
8 'well, did you hear this?' You know, I don't
9 know what the texts said, but it was just
10 very, very, very suspicious because not only
11 the communications but the time of the
12 communications.

13 Q. Yeah. I just wanted to make clear
14 for the record that you knew communications
15 occurred, but you didn't know what they were?

16 A. Correct.

17 Q. And ---

18 A. And it wasn't like one or two, there
19 were twenty-two, twenty-four, twenty-six
20 communications in four days of trial.

21 Q. If I tell you that the disciplinary
22 hearing for Mr. Nelson was some time around
23 July 10th, 2013, is it safe to say that you
24 didn't know about this until sometime in
25 2013?

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1 A. No, I was called by ODC out of the
2 blue one day. This case had gone to the
3 Court of Appeals. Joe Savitz was handling
4 it, they're all wired up pretty good about
5 the appeal. And I think that Mr. Savitz had
6 asked for the texts and he was denied by one
7 of the members of the Court of Appeals.
8 There was a continuing issue on appeal.

9 But I was shocked when I hear from ODC.
10 And I actually testified on behalf of Mr.
11 Nelson. That if he had done something, he
12 didn't have any intent to do something wrong.
13 I've known Michael. And I gave affidavits in
14 support of Michael when I was questioned by
15 the ODC.

16 Again, we didn't raise that issue. It
17 was not an issue with us. The Supreme Court
18 raised the issue.

19 Q. So you didn't know anything about
20 the texts when you were participating in any
21 of his appeals; is that correct?

22 A. Yeah, I kept in touch with Mr.
23 Savitz but I didn't participate in the
24 appeal. He always kept me informed of
25 whether a brief was filed or asked for

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1 comments on this or that.

2 I had no idea that the Court had
3 communicated with Mr. Nelson until the
4 Opinion In Re: Michael Nelson was published.
5 And I was shocked.

6 Q. Okay. I have just -- in that we are
7 going forward, because I believe there's
8 newly-discovered evidence in this case, and
9 I'm just trying to find out when it was
10 discovered. So it was some time after the
11 opinion?

12 A. The -- what is the new evidence?
13 The communications?

14 Q. That there was a text communication?

15 A. With?

16 Q. Mr. ---

17 A. The Court?

18 Q. The Court and Mr. Nelson?

19 A. Yeah. I had no knowledge of that
20 until I read it in the published opinion In
21 Re: Michael Nelson.

22 Q. Thank you. Had you known about --
23 what would you have done if -- and you may
24 have addressed this and I just want to go
25 over it a little bit further. If you had

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1 known that there was at least one text
2 communication between Mr. Nelson and the
3 Court, what would you have done during the
4 trial?

5 A. I didn't know.

6 Q. I know. I'm just trying to ---

7 A. If I had known that would have
8 perhaps explained the reason the Court would
9 not issue any Order to allow me to see the
10 text. That's the only thing I can think of.
11 Because it was such an easy thing to do.

12 There was no privacy evasion. These
13 were, you know, the communications that
14 everybody knew about.

15 All we wanted to do was to verify that
16 there was no communication regarding the
17 trial. If it was about a wedding or a
18 birthday, we could care less.

19 But I thought -- I couldn't understand
20 why Judge Pieper would not allow us to see
21 the texts. It would have been just a very
22 simple thing to do; you know, without any
23 consequences.

24 The Judge's opinion was that it was the
25 examination of the juror was sufficient. So,

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1 I mean, that was the issue.

2 Q. Post-verdict you'd moved for a
3 mistrial based on the juror contact; is that
4 correct?

5 A. Correct.

6 Q. You did not know it when you made
7 that Motion for a mistrial, you did not know
8 at the time that there was also a text
9 communication between the Court and Mr.
10 Nelson; is that correct?

11 A. I didn't know that until last year.

12 Q. If you would have known it at that
13 time, would you have raised that as further
14 grounds for a mistrial?

15 A. Absolutely.

16 Q. If you had known that at that time,
17 would you have possibly asked for a recusal?

18 A. It depends what -- yeah, it depends.
19 I don't know. I mean, I just couldn't tell
20 you without knowing what the text was and the
21 communication was.

22 If it was an administrative matter, a
23 text wouldn't be the right thing to do
24 because it's an ex-parte communication
25 without disclosure. But I don't. I mean, I

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1 never got to see the other text so I don't --
2 I didn't have the information available.

3 It would have been tough for me to move
4 to recuse the Judge based on his reputation.
5 He wasn't a Judge that was, you know, a
6 "hanging judge" or anything. You know that
7 'always ruled against the defense.' He was a
8 six o'clock Judge. I think any lawyer who
9 ever tried a case in front of him would tell
10 you, he didn't sway in the wind. I mean, he
11 was very disciplined in the courtroom. And
12 -- so reputations do matter.

13 And how I would have handled, I don't
14 know. Am I talking like a lawyer, or what?

15 Q. Yeah. You did seek -- you submitted
16 an Order to Judge Pieper so that you could
17 get the subpoena for the texts, for the
18 content of the text messages?

19 A. Correct.

20 Q. And that Order was never granted; is
21 that correct?

22 A. Correct. It was denied.

23 Q. It was denied?

24 A. And we couldn't figure out why,
25 because there was no downside to it. It was

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1 all upside. And I said, I still don't know,
2 you know. So that's why perhaps the
3 communication between the Court and Michael
4 exploded as an issue. Because then you know,
5 if you're suspicious, you would say, 'well,
6 maybe there was something in the
7 communication between the Court and the
8 assistant solicitor that was not proper.'
9 But I don't know that.

10 Q. Sure.

11 A. But I would have found out if I had
12 known that there was a communication.

13 Q. Based on your experience, I think
14 your prior testimony, there's no way to find
15 that out now; is that correct?

16 A. Yeah, what we could have done -- let
17 me emphasize this again with the telephone
18 communications. We didn't get Michael's
19 communications, which we could have easily
20 have done, which would have revealed the
21 communications with the Court, if there were
22 any, because we didn't have any idea there
23 were.

24 So what we did is we limited the exposure
25 to the lying juror who failed to disclose.

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1 So, I don't -- you may not realize this,
2 but we really were not interested in the
3 solicitor's communications. I was interested
4 in the juror's communication as it may have
5 pertained to the trial.

6 So it never crossed our mind to get
7 Michael's cellphone, which we could have done
8 just as easily as getting the juror's
9 information. But the issue was the juror,
10 not Michael.

11 Q. Whatever day it is today, January
12 14th, 2015, there's no way to get that
13 information now; is that correct? That's
14 your understanding?

15 A. I don't know. I know that it was --
16 Verizon agreed to preserve it. I know that
17 Mr. Savitz when he was in the Appellate
18 Defender's Office at that time, it was
19 available. And this is -- so I don't know.
20 You'll have to ask Mr. Savitz. It's been a
21 consideration amount of time since the trial.
22 But Verizon had agreed to preserve that until
23 we got a court order. When we didn't get a
24 court order from the district court, the
25 Court of General Sessions, then it was

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1 attempted to be gotten by Mr. Savitz and I
2 believe they talked about that in the Court
3 of Appeals.

4 MR. FALK: I have no further
5 questions.

6 THE COURT: Cross-examination.
7 Are you going to mark those excerpts from the
8 deposition or not?

9 MR. FALK: The section from the
10 deposition?

11 THE COURT: Those excerpts, are
12 you going to mark them?

13 MR. FALK: Well, I mean, I think
14 the record is already in the record.

15 THE COURT: I don't know if it's
16 in this record or not.

17 ATTORNEY GENERAL WILSON: I think
18 he just read it from the trial transcript.

19 THE COURT: Pardon.

20 MR. FALK: This is from the
21 trial. This is to the transcript to trial.
22 We'll mark that as an exhibit.

23 THE COURT: Well, I mean, the
24 transcript from that trial is not in this
25 trial is what I'm saying. To my knowledge,

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1 it hasn't been admitted unless y'all have
2 agreed to it ---

3 ATTORNEY GENERAL WILSON: It would
4 be filed with our return. But we can make it
5 ---

6 THE COURT: Oh, it has been
7 admitted already.

8 ATTORNEY GENERAL WILSON: It has
9 been.

10 THE COURT: Okay. All right.
11 That's fine.

12 ATTORNEY GENERAL WILSON: You have
13 everything in your packet.

14 THE COURT: Everything, okay.
15 That's fine.

16 MR. FALK: No further questions.

17 THE COURT: Okay. Cross-
18 examination.

19 CROSS-EXAMINATION

20 BY ATTORNEY GENERAL WILSON:

21 Q. Good morning, Mr. Savitz.

22 A. Good morning.

23 Q. Savage.

24 A. Savitz is the other guy.

25 Q. Yes, thank you. Mr. Savage, at some

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1 point during the trial you agree that you
2 were made aware that Mr. Nelson's cousin was
3 a jury member; that's right?

4 A. (No verbal response).

5 Q. Is that correct?

6 A. Yes.

7 Q. Okay. And, also, at some point
8 during the trial -- and you reviewed the
9 transcript and what kind of transpired when
10 it was initially brought to the Court's
11 attention.

12 A. (Affirmative nod).

13 Q. But at some point, you also learned
14 that the trial Judge had had some
15 communication with Mr. Nelson about getting
16 out of the courtroom. Is that your
17 recollection?

18 A. Yes. And by refreshing my memory
19 with the transcript here, Mr. Nelson brought
20 that to my attention.

21 Q. And, I mean, did you have a
22 strategic reason for not asking the trial
23 judge or Mr. Nelson more about their
24 communication? Or did you have any talks
25 with your co-counsel about it?

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1 I mean, what were your thoughts?

2 I mean, you kind of articulated it.

3 But, I mean, why wasn't that an issue for
4 you at the time?

5 Why was that not an issue?

6 A. Because of the reputation of the
7 parties involved. You know, Michael Nelson
8 was -- I don't mean to insult him when I say
9 this -- but he was innocent. He was
10 childlike. He was not a vengeful guy. He
11 was, you know, he was a young enthusiastic
12 prosecutor with no sense -- people complain
13 about young prosecutors all the time. I do
14 that myself. But Michael Nelson was never --
15 I never had any ill thoughts about him.

16 The Judge, as I've said repeatedly -- and
17 he's not a judge anymore so I'm not trying to
18 get on his good side -- had the finest
19 reputation of any trial Judge in the State of
20 South Carolina, Federal of State judge. That
21 was his reputation.

22 And I think I discussed with my client at
23 the time how fortunate we were to have that
24 judge. I think that's a judge I had another
25 murder case on in this courtroom, that made

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1 some legal decisions that were very helpful
2 to the defense that were -- you know, I just,
3 you know -- I don't know how to say this.
4 The thought didn't cross my mind that there
5 was any impropriety between the Court and the
6 Solicitor's Office. Never thought of it
7 then, never thought of it afterwards.

8 But when I read in the Opinion on Michael
9 that there had been communications between
10 the Court and Mr. Nelson, that obviously
11 raised the issue of perhaps that's why the
12 Order wasn't granted for us to see all his
13 text messages; because maybe one or two or
14 more of his text messages were communication
15 with the Court.

16 Q. Okay. So it was also your testimony
17 today that you didn't have any indication of
18 impropriety in that you knew of the -- you
19 knew there had been some communication
20 between the trial judge and Nelson, but you
21 didn't know it was in the form of a text; is
22 that correct? Is that ---

23 A. I don't know that if you read the
24 transcript more than I've read it today -- it
25 could -- because there's an exchange of

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1 information that passes over in that message
2 that doesn't develop unless there's return
3 communication. So, no, there was never any
4 -- I never believed that there was a text
5 between the Judge. If I had known that would
6 have created an issue in the Court and when
7 the Court has denied my motion to review, the
8 texts that I was most interested in were
9 those between the juror and the prosecutor.
10 No, I wasn't ever told there was a text
11 between the court and ---

12 Q. Now, talking about how you -- after
13 the OCD Opinion came out with regard to Mr.
14 Nelson, it was your thought that it's
15 possible that Judge Pieper decided to deny
16 your Motion to release the ---

17 A. The only explanation I could come up
18 with. And I don't know today why that order
19 was denied. I'm mad at him. You know, I'm
20 kind of upset and offended. That's my
21 opinion. That's my side of the story. But
22 the Court's story is -- it's different than
23 mine.

24 Q. And so you would agree that with
25 regard to that motion, that same motion was

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1 made on appeal and it was denied by the
2 Appellate Court. Is that your recollection?

3 A. You'll have to ask Mr. Savitz. I
4 believe that -- I know there was further
5 communications in my office and the Appellate
6 Defense Office and I -- because there was no
7 -- the Motion had been denied. But there was
8 no downside.

9 Again, from this adversary position there
10 was no downside to allow us to review the
11 text. These were not private communications.
12 These were improper communications between
13 the juror and the solicitor that were, per
14 se, improper. So not to allow us to review
15 them, I now understand.

16 Q. And do you recall in the Order
17 denying your motion, which was signed by
18 Judge Pieper what justification and
19 explanation he gave for not granting your
20 Motion?

21 A. (Negative gesture).

22 Q. Just don't recall?

23 A. No.

24 Q. But you agree he did sign an Order
25 in which he explained his justification for

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1 that?

2 A. No, it was denied. It wasn't
3 something we got hung up on. You know, today
4 it's the center of this controversy but at
5 the time it was just another Order, another
6 judge, another case.

7 You know, we felt we had a good defense
8 to the case and that's what we were focused
9 on, was the jury acquitting him.

10 I should have done the right thing, and
11 we wouldn't be here today.

12 MS. WILSON: Thank you, Mr. Savage.

13 THE COURT: Any redirect?

14 MR. FALK: No redirect.

15 THE COURT: Mr. Savage, thank you
16 so very much.

17 (WITNESS STEPS DOWN)

18 WITNESS: Always nice to be with
19 you, Judge.

20 THE COURT: Do you want to be
21 excused or do you want to hang around?

22 WITNESS: I don't want to hang
23 around.

24 THE COURT: Pardon?

25 WITNESS: Is it okay if I could

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1 be excused?

2 THE COURT: Any objection to Mr.
3 Savage being excused?

4 MR. FALK: No objection.

5 ATTORNEY GENERAL WILSON: Your
6 Honor, I would just ask for the record if Mr.
7 Rocquemore intends to testify that we have
8 Mr. Savage present in the event that the
9 State would like to recall him. But I don't
10 know if he's going to take the stand or not.

11 THE COURT: Do you want him to
12 stay?

13 ATTORNEY GENERAL WILSON: I do
14 want him to stay, Your Honor.

15 THE COURT: All right I understand
16 you have a plane to catch at some point in
17 time. What time?

18 WITNESS: I'm going to see
19 somebody of interest.

20 THE COURT: What time are you
21 supposed to catch the plane?

22 WITNESS: I have to be at the
23 airport by 2:00.

24 THE COURT: By 2:00?

25 WITNESS: But I can go directly

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1 from here to the airport.

2 THE COURT: I'm not asking you
3 particularly. If you want to stay in the
4 courtroom that's fine. But if you want to
5 leave the courtroom, just give -- if you
6 would give Ms. Wilson your mobile number so
7 you can get back here within ---

8 WITNESS: I can stay for a
9 while.

10 ATTORNEY GENERAL WILSON: Yeah. I
11 don't think it'll be much longer, but just if
12 it's okay.

13 THE COURT: Okay. All right.

14 ATTORNEY GENERAL WILSON: I don't
15 think it'll get close.

16 THE COURT: If you leave, give her
17 your phone number so you can get back in
18 fifteen, twenty minutes or whatever. There's
19 not a whole lot to see in Moncks Corner, but
20 you may go sightseeing, okay? Thank you so
21 very much. I appreciate it.

22 ATTORNEY GENERAL WILSON: Thank
23 you, Your Honor.

24 THE COURT: Call your next
25 witness, please?

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1 MR. FALK: Mr. Savitz, Joe Savitz
2 to the stand, please?

3 THE COURT: Who are you calling?

4 MR. FALK: Savitz.

5 THE COURT: Okay. All right.

6 (WITNESS TAKES STAND)

7 JOSEPH L. SAVITZ, III, having been duly
8 sworn to tell the truth, and nothing but the
9 truth, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. FALK:

12 Q. Mr. Savitz, could you tell me your
13 current employment?

14 A. I am retired right now from the
15 State.

16 Q. Good deal. Have you ever had any
17 relationship with David Rocquemoire's trial?

18 A. Yes, I did. I didn't have anything
19 to do with the trial. I did represent him on
20 appeal in his direct appeal. But the first
21 part of it, I represented him before the
22 Court of Appeals.

23 Q. Mr. Savage, ---

24 A. Savitz. Not Savage.

25 Q. I apologize.

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1 A. That's okay, everyone thinks we're
2 related.

3 Q. Were you with Indigent Defense?

4 A. Yes. I was the head of Appellate
5 Defense at the time and Andy was on our Board
6 at the time, so I took the case.

7 Q. Had you done lots of criminal
8 appeals by this time?

9 A. Yeah, I've done probably hundreds of
10 murder cases.

11 Q. When you were preparing the appeal
12 in this case, did you review the trial
13 transcript?

14 A. Yeah. Well, it took us a while.
15 It always takes a while to get the trial
16 transcript.

17 We made a Motion to preserve the text
18 messages first. I think that's the first
19 thing I did. Otherwise, they would have been
20 disposed.

21 But yeah, -- well, I definitely read the
22 transcript and identified, I think, the two
23 issues that we raised.

24 Q. You said you raised a Motion to
25 preserve the text messages?

1 A. Yes, sir.

2 Q. What was the outcome of that Motion?

3 A. It was denied. I think Judge
4 Cureton denied it. And I don't even know
5 that it was really -- I'm not sure we even
6 got to the point of asking them to give them
7 to us. I talked to Verizon. They didn't
8 have any problem with it. We just needed a
9 court Order for them to put in their files.
10 But I hadn't even read the transcript.

11 So I think the first thing I did was make
12 a Motion to maybe for them not to dispose of
13 the text messages, the content.

14 And I don't even think they granted that.
15 So we were -- that was disposed of pretty
16 early on. That may have been disposed of
17 before I even started working on the brief,
18 actually.

19 Q. So you did have an opportunity to
20 review the trial transcript?

21 A. Oh, yeah.

22 Q. What issues were there up for
23 appeal?

24 A. There were two issues. I haven't
25 looked at the record since I left appellate

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1 defense and that's been few years and this is
2 all based on my memory but the first issue
3 was whether or not the stand-your-ground
4 doctrine was retroactive. If the case
5 happened today, he definitely would get the
6 benefit of it. They decided that it wasn't.

7 The other thing was about the juror
8 contacting someone -- an assistant solicitor
9 in the solicitor's office -- and whether or
10 not he should have been removed, I think.

11 Q. Do you recall whether or not in your
12 review of the transcript you were ever made
13 aware or you ever uncovered the fact that
14 there was a text message, that there were
15 text communications between Michael Nelson
16 and the Court?

17 A. I did not know that until you told
18 me that last month; that was the first time I
19 heard of it.

20 Q. If you would have known that when
21 you were preparing your appeal, would that
22 have changed the issues that you would have
23 raised?

24 A. It wouldn't have changed the issue
25 as far as the communications between the

1 solicitor and the juror, but it definitely
2 would have been an additional issue that I
3 would have raised. Because -- I will be
4 kind. I'm sure all these people are
5 wonderful people, but my job on appeal was to
6 assume the worst. And looking at the big
7 picture you've got a member of the
8 prosecution team texting a juror and the
9 judge during the trial, without disclosing
10 any of this information to the defense
11 lawyer. So, yeah, I would have raised that.

12 And I certainly wouldn't have allowed the
13 text messages to be controlled by the Court
14 of Appeals when the trial Judge was on the
15 Court of Appeals at the time. I would have
16 appealed that to the Supreme Court, if I
17 didn't take the case to the Supreme Court
18 right away.

19 Q. I'm sorry. Could you explain that
20 further?

21 A. You've really got two issues here.
22 One, you've got about disclosure of the text
23 messages. Then you've got them deciding not
24 to let us see the text messages.

25 Had I know that a member of the Court

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1 of Appeals, the trial Judge, had been
2 communicating with this same assistant
3 solicitor, I am not sure I would not have
4 asked the Supreme Court to take the case away
5 from the Court of Appeals. I definitely
6 wouldn't have let Judge Cureton's order be
7 the last word on whether or not we got to see
8 the text messages. I would have appealed or
9 attempted to supersede that in the Supreme
10 Court.

11 Q. So it's your understanding that when
12 you raised this issue that Judge Pieper had
13 already been promoted to the Court of
14 Appeals?

15 A. I believe he was on the Court of
16 Appeals at the time when it was denied.

17 MR. FALK: No further questions.

18 THE COURT: Cross-examination.

CROSS-EXAMINATION

19
20 BY ATTORNEY GENERAL WILSON:

21 Q. Mr. Savitz?

22 A. Yes, ma'am.

23 Q. Good morning.

24 A. Good morning to you.

25 Q. I don't think you're related to Mr.

1 Savage?

2 A. That's good.

3 Q. Just one question for you. In your
4 view of the record while you were preparing
5 Mr. Rocquemoire's case on direct appeal, do
6 you recall a disclosure by Mr. Nelson to Mr.
7 Savage and then the Court kind of confirming
8 that the Court had communicated with Mr.
9 Nelson about leaving the courtroom?

10 A. Now that they've mentioned -- I
11 hadn't remember that but now that I heard
12 them talking about it today, it seems like I
13 do remember that.

14 But I would assume that was just
15 something like, 'hey, you need to get out of
16 the courtroom', you know. 'You don't need to
17 be texting the juror. You need to get out of
18 there.' I assumed it was that. I had no
19 idea that there was a text message involved.

20 Q. So you were aware that the record
21 reflected the communication and then it came
22 out later about it being a text?

23 A. Yes.

24 Q. Thank you.

25 A. Thank you.

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1 MR FALK: No redirect.

2 THE COURT: Okay. You may step
3 down.

4 (WITNESS STEPS DOWN)

5 THE COURT: Any reason you can't
6 be excused?

7 MR. FALK: No reason.

8 THE COURT: Ms. Wilson?

9 ATTORNEY GENERAL WILSON: No
10 reason, Your Honor.

11 THE COURT: Thank you so very
12 much.

13 WITNESS: Thank you.

14 (WITNESS STEPS DOWN)

15 THE COURT: Call your next
16 witness, please?

17 MR. FALK: Is Lauren Williams
18 present?

19 THE COURT: I'm sorry -- who?

20 MR. FALK: Lauren Williams. Let
21 me just make sure she's not outside.

22 (MR. FALK LEAVES COURTROOM/REENTERS)

23 MR. FALK: We'd call Mr. Nelson
24 to the stand.

25 THE COURT: All right. Mr.

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1 Nelson, come around and be sworn, please sir.

2 (WITNESS TAKES STAND)

3 MICHAEL NELSON, having been duly sworn
4 to tell the truth, and nothing but the truth,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. FALK:

8 Q. Mr. Nelson, were you with the
9 solicitor's office when Mr. Rocquemoire's case
10 went to trial?

11 A. Yes, I was.

12 Q. And prior to Mr. Rocquemoire's trial,
13 was -- how long had you been with the
14 solicitor's office prior to the trial?

15 A. I started in '04. I have no clue
16 when the trial took place, what year?

17 Q. Can you characterizer your relation-
18 ship with Judge Pieper?

19 A. Friends.

20 Q. Is that social friends, you go to
21 the movies, go on vacations together, or what
22 level? I'm just trying to get an idea of how
23 close a friendship?

24 A. We've hung out together in groups
25 with other people.

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1 Q. Okay. Thank you. And how far back
2 does that relationship go? Did you know him
3 prior to when he was on the bench?

4 A. No.

5 Q. And you did have communications with
6 a juror during Mr. Rocquemore's trial; is
7 that correct?

8 A. Yes.

9 Q. Did you ever communicate with Judge
10 Pieper that your cousin was on the bench ---

11 A. No.

12 Q. --- was on the panel?

13 A. No.

14 MR. FALK: May I approach?

15 THE COURT: Yes, sir.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. FALK:

18 Q. Earlier Mr. Savage testified that
19 when he read from the record that when you --
20 excuse me. When did you tell Mr. Savage
21 about the relationship?

22 A. I don't remember the exact time, but
23 Mr. Savage stopped me in the hallway, outside
24 court -- I wasn't in here for his whole
25 testimony, so I'm not sure what he said. --

1 and asked me if my cousin was on the jury.

2 I said 'yes.'

3 Q. Okay.

4 A. And I described him as the 6'3"
5 redhead.

6 Q. Thank you. Mr. Savage, when he
7 disclosed this relationship to the Court,
8 when he advised the Court of this
9 conversation that he had with you, he said
10 that you were asked to leave the Courtroom
11 by Your Honor because of his relationship
12 with a juror, jury member?

13 A. That's what I thought, yes. My
14 understanding was that my cousin had told the
15 Court that we're related. Everybody knew and
16 was on the same page. So my thought process
17 at that point was when the Judge asked me to
18 leave, it was because of that. And I
19 realized it was foolish of me to be in there
20 because of that.

21 Q. Did you ever send a text message to
22 the Judge?

23 A. I do not believe so. I believe
24 Judge Pieper texted me something to the
25 effect of 'get out of the courtroom', which

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1 in hindsight was him -- just us being
2 friends, just messing with me.

3 Q. When you say you don't believe so,
4 can you say that with any certainty?

5 A. Seven years ago? I'm going to say
6 probably not. But a hundred percent -- I
7 have no recollection but I do not believe
8 that I texted him back.

9 Q. Do you think -- I know this was
10 seven years ago, but do you think when you
11 told Mr. Savage about receiving a text,
12 receiving a communication from the Judge that
13 it was a text message?

14 A. I couldn't answer that question, but
15 it would have had to have been if I was in
16 the courtroom and the Judge is on the bench.
17 He's not calling me from a phone.

18 Q. It could have been in the courtroom
19 during a break and him telling you from the
20 bench; is that correct?

21 A. Excuse me?

22 Q. You could have been in the courtroom
23 during a break in the action and he could
24 have spoken ---

25 A. I wasn't in the courtroom on a

1 break.

2 Q. Did you sit in on any of this trial?

3 A. I believe for about five minutes
4 before I left, five or ten minutes.

5 Q. Do you recall telling the Office of
6 Disciplinary Council that you had received a
7 text message from the judge?

8 A. I believe so.

9 Q. But you don't recall whether or not
10 you ever made that aware to defense counsel;
11 is that correct?

12 A. Like I said, I can't remember
13 exactly what I told Mr. Savage. But I told
14 him that I was in the courtroom and the Judge
15 asked me to leave. I could have said
16 'texted'. I could have said 'told.' I don't
17 remember the specifics.

18 Q. Was it a common occurrence to
19 receive text messages from the judge?

20 A. We're friends, yes.

21 Q. And I'm not sure if I've asked you
22 this. Do you recall if you received other
23 text messages from the Judge during the
24 trial?

25 A. None whatsoever.

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1 MR. FALK: I have no further
2 questions.

3 ATTORNEY GENERAL WILSON: Nothing
4 from the State.

5 THE COURT: No cross? Okay. You
6 may step down. Thank you very much.

7 (WITNESS STEPS DOWN)

8 WITNESS: May I leave?

9 THE COURT: Any objection to Mr.
10 Nelson being excused?

11 ATTORNEY GENERAL WILSON: Nothing
12 from the State, Your Honor.

13 THE COURT: Anything from the
14 Petitioner?

15 MR. FALK: No, he's excused.

16 THE COURT: All right. You may be
17 excused. Thank you Mr. Nelson.

18 ATTORNEY GENERAL LOWELL: Your
19 Honor, may Judge Pieper, former Judge Pieper
20 be excused as well?

21 THE COURT: I'm sorry?

22 ATTORNEY GENERAL LOWELL: May
23 former Judge Pieper be excused?

24 THE COURT: Yeah. Judge Pieper,
25 where are you? You may be excused. Have a

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1 good day.

2 MR. PIEPER: Thank you, Judge.

3 ATTORNEY GENERAL LOWELL: Thank
4 you, Your Honor.

5 COURT REPORTER: Counsel, your name
6 for the record?

7 ATTORNEY GENERAL LOWELL: It's
8 Assistant Attorney General Courtney Lowell.

9 THE COURT: For the record, I had
10 issued a previous Order on a Motion to
11 suppress the subpoena where Judge Pieper was
12 subpoenaed. And I did not suppress it unless
13 I've heard at trial that Mr. Nelson had --
14 there'd been more text messages between Mr.
15 Nelson and Judge Pieper. And that's the only
16 reason I would allow him to testify. And the
17 Motion to suppress is granted. Thank you
18 very much.

19 ATTORNEY GENERAL LOWELL: Thank
20 you, Your Honor.

21 MR. FALK: Thank you, Your Honor.
22 I'm going to make one last call for Lauren
23 Wilson. Can you see if she is out there?

24 THE COURT: Do you know ---

25 BAILIFF: I'll call her name.

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1 MR. FALK: We had a conversation
2 this week.

3 THE COURT: Is she supposed to be
4 here? Did you subpoena her or ---

5 MR. FALK: I subpoenaed her.

6 THE COURT: All right. Have you
7 got any means of communicating with her?

8 MR. FALK: Let me see if she's
9 tried to send me a ---

10 THE COURT: Yeah. See if you can
11 get her on the phone. Do you have any other
12 witnesses, other than her?

13 MR. FALK: No, this would be my
14 last witness.

15 THE COURT: Bruce, can you help?

16 BRUCE DURANT: With Ms. Williams?

17 THE COURT: Yeah.

18 BRUCE DURANT: I'll give her a
19 call, Your Honor.

20 THE COURT: All right. Go ahead
21 and call her -- let's get this thing moving.
22 Well, we're going to take a short break while
23 y'all trying to locate her, okay? We'll take
24 about a ten-minute break.

25 (BRIEF RECESS)

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1 (DEFENDANT PRESENT)

2 MR. FALK: When I filed my
3 response to the Attorney General's motion to
4 quash, I submitted an affidavit from Lauren
5 Williams. And we would like to offer that as
6 her testimony in this matter in lieu of live
7 testimony. And so I just submit, as, I guess
8 a ---

9 THE COURT: All right. The State
10 doesn't have any objection to it?

11 ATTORNEY GENERAL WILSON: No
12 objection from the State.

13 THE COURT: I mean, I'll be happy
14 to get her here. I understand the subpoena
15 had the wrong date on it; is that correct?

16 MR. FALK: That's correct.

17 THE COURT: I'll be happy to get
18 her here and take a break and take a break
19 and give her time to get here if you want to
20 do that.

21 MR. FALK: I'm fine with what
22 she'd said here.

23 THE COURT: Okay. And the State
24 has no objection. You don't want me to bring
25 her for cross-examination?

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1 ATTORNEY GENERAL WILSON: No
2 objection, Your Honor.

3 THE COURT: All right. I'll
4 accept the affidavit as her testimony on
5 direct.

6 MR. FALK: Your Honor, we would
7 have no further witnesses.

8 THE COURT: All right. I'm going
9 to mark the Affidavit of Lauren Williams
10 that's dated December 4, 2014 and signed by
11 Lauren Williams as a Court's Exhibit. Is
12 that number one?

13 COURT REPORTER: Yes, sir.

14 THE COURT: Number 1 and accept
15 that as her testimony on direct, of which the
16 State has no objections of admitting the
17 affidavit and does not want Ms. Williams to
18 be present for cross-examination.

19 (SO ENTERED AS COURT'S EXHIBIT 1)

20 THE COURT: Do you have any
21 further witnesses?

22 MR. FALK: No further witnesses.

23 THE COURT: All right. Is the
24 State going to call any witnesses?

25 ATTORNEY GENERAL WILSON: The

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1 State has no witnesses, Your Honor.

2 THE COURT: Okay. All right.

3 I'll be glad to hear you.

4 MR. FALK: Your Honor, we've ask
5 for PCR relief in this case. And there is --

6 THE COURT: Hold on just a second.
7 All right. Go ahead.

8 MR. FALK: We've asked for PCR
9 relief on the ground of ineffective
10 assistance of counsel.

11 And we think another ground for PCR
12 relief that's recognized in the Court's in
13 South Carolina is newly discovered evidence.

14 Now, typically, if you follow the
15 decision in *Clark*, which is 435 S.E.2d 266,
16 there's a five-prong test that would be my
17 burden to show in order for us to be granted
18 the relief we're requesting.

19 Under *Clark* it said that we must
20 show that the evidence would probably change
21 the result if a new trial is had; that the
22 evidence had been discovered since the trial;
23 it could not have been discovered before the
24 trial; and is material to the issue of guilt
25 and innocence; is not merely cumulative or

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1 impeaching.

2 Now, the information that we were
3 looking for would certainly not pass the
4 fourth prong as far as being material to
5 guilt or innocence. However, there are also
6 South Carolina cases that when there's a
7 possibility of misconduct that we adopt a
8 separate standard, specifically in the case
9 of *McCoy v. State*, which is 737 S.E.2d 623.
10 And this is a case that was juror misconduct,
11 where a juror failed to represent contacts
12 that he had had with one of the witnesses.

13 And just reading from the Court's
14 opinion in *McCoy* is says where a PCR
15 Applicant alleges juror misconduct, we reject
16 the application of the *Clark* five-pronged
17 newly discovered evidence standard as it does
18 not lend itself properly to evaluating the
19 claim of juror misconduct.

20 In addition, the *Clark* framework is
21 not conducive for determining whether a PCR
22 applicant is entitled to a hearing where
23 intentional juror misconduct is alleged.

24 And it goes on to say that if there
25 is misconduct that is a separate claim for

1 relief. It's a separate basis for relief and
2 we don't have to follow the *Clark* standard.

3 Now, we're not going so far as to
4 say that -- I mean, I don't feel I'm in a
5 position to say that there was judicial
6 misconduct in this case, but I do think it is
7 clear that there was an ex-parte
8 communication by the Court to a member of the
9 Solicitor's office. That there was not a
10 contemporaneous disclosure of that
11 communication, which is what I believe would
12 be required.

13 An ex-parte communication of the
14 judicial canons, I think, is acceptable when
15 there is a contemporaneous disclosure and it
16 is only related to an administrative issue.
17 Possibly if he was just asking Mr. Nelson to
18 leave ---

19 THE COURT: Well, let me ask you
20 this. The only thing I've heard so far is
21 that Mr. Nelson said he was texted to leave
22 the courtroom. Why wouldn't that be an
23 administrative process?

24 MR. FALK: I was just about to
25 say I believe that's an administrative issue.

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1 THE COURT: Right. And that's the
2 only testimony I've heard today from you,
3 your witnesses.

4 MR. FALK: That is correct. And
5 as I said, I don't believe there was -- I
6 think the second requirement there is there's
7 got to be contemporaneous disclosure. Now, I
8 think we have heard ample testimony from Mr.
9 Savage that had he know there was a text
10 message from the Court to Mr. Nelson, he
11 would have possibly his -- I think there's
12 ample testimony on the point that he would
13 have taken his investigation further?

14 THE COURT: I believe he said he
15 would have gotten Mr. Nelson's records from
16 Verizon, which would have shown the messages,
17 if he had known it.

18 MR. FALK: Well, then that leads
19 us to the problems that he was unable to get
20 them ---

21 THE COURT: I'm sorry, not -- he
22 had Mr. Nelson's. I'm sorry. He had the
23 juror's. Mr. Nelson's records.

24 MR. FALK: And, again, I'm hoping
25 that it was clear from Mr. Savage's testimony

1 -- what he had at that time was just like
2 when you get your cellphone bill. It shows
3 that there was, you know, incoming call,
4 outgoing call and duration.

5 THE COURT: And the number. And
6 the number it went to.

7 MR. FALK: And the number called.

8 THE COURT: Right.

9 MR. FALK: It had the numbers but
10 it didn't show, doesn't show the content.
11 And what Mr. Savage was seeking was the
12 content of any text messages that were on Mr.
13 Nelson's telephone. And he was unable to get
14 those and ---

15 THE COURT: Mr. Nelson's or the
16 juror's phone. I thought he said all he had
17 was the juror's records from Verizon. He
18 never got Nelson's. I may be wrong.

19 MR. FALK: No, again, what I
20 believe, and I'm sure we could call Mr.
21 Savage back to the stand, but what I believe
22 his testimony was he had it from the juror,
23 he had just the log information.

24 THE COURT: Right the log. The
25 Verizon phone records is what he had.

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1 MR. FALK: Right.

2 THE COURT: Calls to and from and
3 there were twenty-two to twenty-six between
4 Nelson and the juror, between the juror and
5 Mr. Nelson. He never got Nelson's records.

6 MR. FALK: Right. And, also, but
7 he was seeking from Mr. Nelson was not just
8 that log information but he was seeking -- if
9 I could have a moment. He was seeking the
10 content of the text messages.

11 THE COURT: Right.

12 MR. FALK: And I think there's an
13 appearance of impropriety on the fact that
14 when he was seeking the content of the text
15 messages the reason why he could not get the
16 text messages was because Judge Pieper did
17 not sign the Order. And there's an
18 appearance of impropriety. I'm not saying
19 that there is, but an appearance because --

20 THE COURT: Well, let's assume
21 there's an appearance. I mean, we're not in
22 -- we're not here on ethical violations. So
23 what? As far as the PCR and how the trial,
24 the outcome of the trial would have been
25 different? And I'm not trying to be flippant

1 with you. I just ask you that question.

2 MR. FALK: No. And I appreciate
3 that, Your Honor. And I think the whole
4 issue is whether or not there was the
5 communication from Mr. Nelson to the Court.
6 And if you read the trial transcript, Mr.
7 Savage testified that Mr. Nelson told him
8 that he was asked to leave the court because
9 of his relationship to one of the other
10 attorneys -- I mean, one of the jurors. Had
11 he advised the Court earlier -- well, first
12 of all, he'd have had to send a text message.
13 That would have been inappropriate. And then
14 I think there would be an additional issue of
15 when Judge Pieper knew about this juror
16 question.

17 THE COURT: I think Mr. Nelson's
18 testimony was he assumed he got the text
19 after it had been revealed. I mean, if I
20 recall correctly. That's basically what he
21 testified to.

22 And I'm not trying to say the text
23 message was proper. But my problem is,
24 assuming it is unethical and has an
25 appearance of impropriety, I mean, how would

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1 that affect the outcome of the trial?

2 MR. FALK: I can't say how it,
3 would affect the outcome of the trial. I do
4 think that it would, as Mr. Savage testified,
5 it certainly would have given further grounds
6 for his Motion for a mistrial that he made
7 post-verdict; because in addition to
8 communications, which are on their face
9 inappropriate, between a member of the
10 Solicitor's office and the juror, there's a
11 communication that wasn't disclosed to
12 counsel between the Court and the Solicitor's
13 office. I think that would have given
14 certainly more meat to his request for a
15 mistrial. And we heard testimony from Mr.
16 Savitz that there would have been further
17 grounds that he could have raised on appeal.

18 THE COURT: Well, let me ask you
19 this. What do the South Carolina cases say
20 about misconduct and granting PCRs?

21 MR. FALK: Well, the two cases
22 that if you would like to -- I would suggest
23 that you have an opportunity to review, I
24 would ask you to look at *Washington v. State*,
25 which is 478 S.E.2d 833.

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1 THE COURT: Okay.

2 MR. FALK: And, again, McCoy.

3 THE COURT: Tell me what they say,
4 if you would?

5 MR. FALK: That if there is
6 proven misconduct, that is a separate for PCR
7 with no further proof. And here's the
8 standard that they were talking about in --
9 in McCoy, the standard was the statement is,
10 (reading): "A new trial is warranted on the
11 basis of juror misconduct if it is shown that
12 the juror intentionally concealed
13 information. And the information concealed
14 would have supported a challenge for cause or
15 would have been a material factor in the use
16 of the parties' preemptory challenges."

17 Now, again, we're talking about a
18 juror, impropriety versus a judicial
19 impropriety. But I think if you could fit
20 in that there was concealment that it was a
21 text message and -- I think that it would
22 have -- instead of providing as in the juror
23 case, they would have had to provide grounds
24 for a preemptory challenge or a challenge for
25 cause. I think in this case it would have

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1 provided further grounds for mistrial post-
2 verdict. And it would have provided further
3 grounds for an appeal. These are issues that
4 the Court of Appeals and the Supreme Court
5 never had an opportunity to hear. And I
6 think that they certainly would be something
7 that would have caused concern.

8 I mean, nobody can sit here and
9 predict what the Court of Appeals would say
10 whether or not this raises to the same level
11 as misconduct.

12 But the fact that the person that
13 stopped the disclosure of the information is
14 the same person for whom it would have been
15 revealed that he was making an inappropriate
16 text communication is the basis of our case.
17 And we believe that that approaches judicial
18 misconduct.

19 It's always difficult, I think, in a
20 PCR case to ever show prejudice. And I mean,
21 it's impossible to sit here, as I said
22 earlier, to say what a reviewing court would
23 say. But it certainly -- I mean, you
24 piggyback that issue on top of the juror
25 issue.

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1 THE COURT: All right. So your
2 position is that misconduct by a text, and
3 the only thing we know about the text, and
4 this Court has to assume it was a text
5 between Judge Pieper and Mr. Nelson asking
6 him to leave the courtroom once they found
7 out that he was related to the juror.

8 I mean, isn't that -- why do you
9 think that's necessarily mis--, -- I
10 understand it should have been
11 contemporaneously revealed to defense
12 counsel. I have no -- I understand that.
13 But he's trying to stop the influence between
14 the solicitor and the juror. So how is that,
15 other than not contemporaneously relating it,
16 revealing it to Defense counsel, why is that
17 misconduct?

18 MR. FALK: Well, we have to
19 accept the position that ---

20 THE COURT: I mean, I've got to
21 accept what I've heard from the parties.

22 MR. FALK: He testified that he
23 was assuming that the judge knew about his
24 relationship with the juror.

25 THE COURT: Right. That's

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1 correct. Now, the timeframe when that
2 occurred, I don't know.

3 MR. FALK: And that's what we
4 can't find out.

5 THE COURT: Well, I understand
6 that it's unfortunate the text were not
7 gotten, either by the Circuit Court or the
8 Appellate Court at some point in time. So
9 we're having to make a lot of suppositions
10 that may be right, may be wrong. I don't
11 know. Anything else you want to tell me?

12 MR. FALK: One moment, please?

13 THE COURT: Yes, sir.

14 MR. FALK: If we could have a
15 moment, please?

16 THE COURT: I'm sorry?

17 MR. FALK: If I may have a
18 moment?

19 THE COURT: Yes, sir.

20 MR. FALK: (Sidebar with
21 Petitioner).

22 THE COURT: Mr. Falk, I'll be glad
23 to take a short break to give you some time
24 to get it together. I'll be happy to do
25 that.

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1 MR. FALK: Thank you, Your Honor.

2 THE COURT: Okay. Just let me
3 know when you're ready to proceed okay?

4 MR. FALK: Okay.

5 (BRIEF RECESS 11:15 - 11:25 A.M.)

6 (DEFENDANT PRESENT)

7 THE COURT: I'll be glad to hear
8 you?

9 MR. FALK: Before the Court
10 reaches its decision in this case, I hope
11 that you'll have the opportunity to read
12 Judge Pieper's order, which I am going to
13 submit. It would Judge Pieper's order in
14 which he denied ---

15 THE COURT: I don't think I have
16 looked at it, but I'll be glad to receive it
17 and look at it.

18 MR. FALK: And, also, a copy of
19 the disciplinary hearing for Mr. Nelson.

20 THE COURT: I'll be glad to
21 receive that.

22 MR. FALK: It seems that the
23 Court is willing to draw the most innocent
24 inferences from the facts that we've
25 established today. However, if you would

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1 read the disciplinary hearing from Mr.
2 Nelson, I think there's certainly reason to
3 question his candor regarding the facts in
4 this case.

5 First of all, Mr. Nelson was first
6 asked had there been any contact. He said,
7 maybe one or two. And then all of sudden it
8 turns out to be twenty. If you read the
9 report in this -- if you read the
10 disciplinary hearing notes, it sounds as
11 though there was possibly even more lack of
12 candor in some of his responses to the Office
13 of Disciplinary Counsel. He was first asked
14 whether or not he received any communication
15 in a text message from the Judge. At first
16 he said 'no.' And then, 'Oh, yeah. Now I
17 remember. I got one.'

18 Again, Mr. Savage testified and the
19 transcript reveals on Page 875 that when he
20 represented to the Court he said that Mr.
21 Nelson (sic) told him to leave because he was
22 related to somebody in the courtroom. The
23 explanation here is that he was assuming that
24 the judge already knew because the juror had
25 disclosed the fact of that relationship.

1 I think it is just as reasonable to
2 conclude that had, and Mr. Nelson should have
3 know, that had that relationship been
4 disclosed at the time, Mr. Savage certainly
5 wouldn't have allowed that juror to be
6 seated. He would have taken one of his
7 strikes for him. So I think it's just as
8 likely to assume that Mr. Nelson knew ahead
9 of time that -- well, I think it's likely to
10 assume that Mr. Nelson said that to Mr.
11 Savage because he knew that he had already
12 told the judge that he was related to the
13 juror. And I think that that is information
14 that possibly could have been revealed in the
15 request for the text messages, the content of
16 the text messages.

17 It seems that that was such an
18 innocent request. It just -- I mean, again,
19 I'm from the advocate's point of view, but it
20 just seems like it was such a simple,
21 innocent request. And the fact that Judge
22 Pieper denied it based on his statement that
23 he thought it would be too speculative, I
24 have concerns with that decision.

25 And, also in there, it sounds as

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1 though Judge Pieper's saying that he was
2 convinced that there was no substantive
3 disclosure of information from Mr. Nelson.
4 And, again, you can't help from getting to
5 the point that we were looking for
6 information and the person who had control
7 over disclosing that information was the same
8 person who, at least, would have been
9 embarrassed by the fact. Whether or not it
10 would amount to judicial misconduct itself,
11 he would have been embarrassed by the fact
12 that he had sent text messages and they could
13 have possibly had a more onerous conclusion;
14 that he actually had received text messages
15 from Mr. Nelson, and that he knew prior to
16 anybody else that there was an extensive
17 relationship between Mr. Nelson and the
18 juror.

19 THE COURT: Okay. Thank you,
20 Mr. Falk. I appreciate it. Ms. Wilson?

21 (OFF THE RECORD DISCUSSION WITH COUNSEL
22 WAITING ON CASES)

23 THE COURT: All right. Please
24 proceed, Ms. Wilson.

25 ATTORNEY GENERAL WILSON: May it

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1 please the Court, Your Honor, and just for
2 the record, Ashleigh Wilson for the State of
3 South Carolina.

4 Just as an initial matter, Your
5 Honor, this is not a judicial misconduct --
6 a juror -- this is not a case about juror
7 misconduct so we shouldn't be able to use the
8 juror misconduct standards in the case law
9 that boggles that line of thinking in this
10 matter.

11 THE COURT: Let me put something
12 out to y'all, and I'm not trying to cut you
13 short. I'm going to take this under
14 advisement to read. And I'm going to ask the
15 two of you to do some research outside of
16 South Carolina. And my research -- I want
17 you to do is what type of misconduct,
18 judicial misconduct, would warrant granting a
19 PCR factually in other states, either in
20 federal court or -- I guess you can use
21 federal court on habeas corpus, I would
22 assume, or state court. I would like to know
23 factually what type of conduct would be
24 classified as misconduct and justify granting
25 a PCR. I'm going to ask you to do that.

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1 Now, how much time y'all need to do that?

2 ATTORNEY GENERAL WILSON: Your
3 Honor, can I have ---

4 THE COURT: I'll give you as much
5 as you want. I'm not ---

6 ATTORNEY GENERAL WILSON: Okay.
7 Can I have maybe forty-five days?

8 THE COURT: That's fine.

9 ATTORNEY GENERAL WILSON: Just
10 because I have a term of court.

11 THE COURT: I understand. You
12 want thirty days after that to respond or ---

13 ATTORNEY GENERAL WILSON: We can
14 just respond at the same time.

15 THE COURT: Or do you want to
16 respond to hers or you just want to do it
17 independent.

18 MR. FALK: I guess I shouldn't
19 miss the opportunity to respond to her.

20 THE COURT: Well, why don't you
21 give me something within forty-five days?
22 If you need to respond, I'll give you time to
23 respond to hers.

24 MR. FALK: Thank you.

25 ATTORNEY GENERAL WILSON: Okay.

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1 THE COURT: All right. I didn't
2 mean to interrupt you, but I just want to put
3 that out to you.

4 ATTORNEY GENERAL WILSON: And,
5 Your Honor, just for ---

6 THE COURT: And I understand we're
7 talking about judicial conduct on the case he
8 presented. It may be a different standard.
9 I don't know, okay?

10 ATTORNEY GENERAL WILSON: I was
11 just going to say just for purposes of your
12 homework, do you want it to be any type of
13 misconduct for post-conviction relief or
14 specifically judicial misconduct that you
15 want us to research?

16 THE COURT: I'm looking -- because
17 I think what we're talking about here is
18 judicial misconduct. I'm not sure the jury
19 issue has already been resolved by the Court
20 of Appeals.

21 MR. FALK: I believe so.

22 ATTORNEY GENERAL WILSON: Okay.
23 So just in the context of judicial?

24 THE COURT: Right. And you may
25 not find anything. I don't know. But I want

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1 to at least try.

2 MR. FALK: Thank you.

3 ATTORNEY GENREAL WILSON: Well,
4 Your Honor, based on that homework, if it
5 would be okay for me to just make any
6 additional arguments in that memo with your
7 research, ---

8 THE COURT: Unless you just want
9 to talk to me. Be happy for you to.

10 ATTORNEY GENERAL WILSON: I always
11 do, but I might be better able to articulate
12 something in writing. So I'll just submit
13 any arguments then.

14 THE COURT: All right. Let me
15 just ask you one question, what's your
16 position on the newly-discovered evidence?

17 ATTORNEY GENREAL WILSON: Well,
18 Your Honor, and I guess this kind of goes
19 kind of hand in hand with this, whether or
20 not the newly-discovery evidence, which is
21 the State's position that we should apply the
22 newly discovered evidence standard. And
23 that's outlined in *Hayden v. State*. And
24 according to *Hayden* you have to meet a five-
25 pronged test. You have to meet each prong in

1 order to be successful.

2 THE COURT: And there's one prong
3 they can't meet.

4 ATTORNEY GENERAL WILSON: Exactly.
5 That's the prong with -- well, there are
6 several prongs that they can't meet according
7 to the State, but particularly he's conceded
8 that he can't meet the prong with material to
9 get to Mr. Rocquemoire's guilt or innocence.
10 So, I mean, it's the State's position that he
11 can't prove this newly-discovered evidence,
12 and that we should apply the standard of
13 *Hayden* and not some standard that's applied
14 in a totally different context. It's also
15 the State's position that judicial misconduct
16 isn't something that's really proper for us
17 to address or look at on post-conviction
18 relief because not only is the standard for
19 review different in that context, but also we
20 don't -- we're just not the -- we're not the
21 body, proper body to investigate particular
22 claims like that with regard to a Judge's
23 ethical obligation and disclosure and things
24 of that nature. But, I can blab on about it
25 in my memo.

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1 THE COURT: I understand. Well,
2 let me do this on the record. I'm going to
3 find that under this circumstances it is
4 newly discovered and the Court's going to
5 consider it as such, okay?

6 MR. FALK: Thank you, Your Honor.

7 THE COURT: And that's a factual
8 finding based upon what I've heard I'm going
9 to make orally today on the record.

10 MR. FALK: Thank you.

11 ATTORNEY GENERAL WILSON: Okay.

12 THE COURT: Now, on the issue that
13 I'm going to resolve based on your research
14 is whether or not that type of conduct --
15 i.e., not -- in my understanding, that he
16 didn't contemporaneously reveal it to the
17 other counsel, even though, in my opinion it
18 was an administrative matter asking Mr.
19 Nelson to leave the courtroom, whether that
20 is judicial misconduct to justify PCR. And
21 that's the issue I want addressed.

22 MR. FALK: Thank you.

23 THE COURT: And I don't know the
24 answer to that. I'm not trying to pre-judge
25 it one way or the other.

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1 MR. FALK: Thank you.

2 THE COURT: All right.

3 ATTORNEY GENERAL WILSON: And just
4 for clarification purpose, Your Honor, is
5 your finding that he met all of the
6 requirements of *Hayden*?

7 THE COURT: It's a finding that
8 he, his argument about the one he can't find
9 is sufficient and I accept that argument,
10 okay?

11 ATTORNEY GENERAL WILSON: Okay.

12 THE COURT: All right. I don't
13 know if that answered your question or not.
14 Okay?

15 ATTORNEY GENERAL WILSON: That's
16 fine.

17 THE COURT: I don't remember the
18 five prongs right off the top of my head.

19 ATTORNEY GENERAL WILSON: Okay.
20 That's fine. Thank you.

21 THE COURT: All right. Thank
22 y'all very much.

23 (HEARING CONCLUDED)

24

25

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STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on January 14th, 2015, before The Honorable J.C. Nicholson, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.



Deborah Garrison

Charleston, South Carolina
February 12, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2013-CP-10-634
	)	
DAVID ROCQUEMORE,	)	
	)	
Plaintiff,	)	
	)	
-versus-	)	AFFIDAVIT
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	

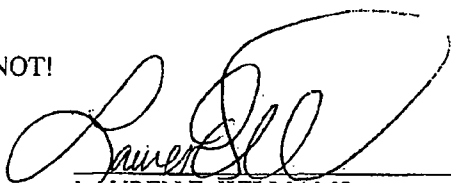
PERSONALLY APPEARED before me, LAUREN E. WILLIAMS, and states as follows:

1. That I am an attorney in good standing in the state of South Carolina;
2. That I was previously employed as an associate at Savage & Savage, P.A. from 2006-2010;
3. That during my employ at Savage & Savage, P.A., I served as second chair for the defense during trial in the matter of *State v. David Rocquemore*;
4. That jury selection in the above matter occurred on July 9, 2007 and trial commenced on July 11, 2007;
5. That the Honorable Daniel Pieper of the Ninth Judicial Circuit served as the trial judge in the above matter;
6. That during the course of the trial in the above matter, it was revealed to the defense team that a seated juror was related to an Assistant Solicitor (hereinafter "Mr. Nelson") with the Ninth Judicial Circuit Solicitor's Office.
7. That it was further revealed to the defense team that the same seated juror had both verbal and text communications with Mr. Nelson during the course of the trial;
8. That I do not recall the revelation to the defense of any text communications between

Mr. Nelson and Judge Pieper to the defense during the course of the trial.

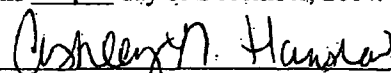
9. That I was unaware of the potential existence of any text communications between Mr. Nelson and Judge Pieper during the course of the trial in the matter of *State v. David Rocquemore* until the publication of the South Carolina Supreme Court's October 23, 2013 Opinion regarding *In the Matter of Michael O'Brien Nelson*.
10. That, had the defense team been made aware of text communications between Judge Pieper and Mr. Nelson at the time of trial, we would have raised the issue for further exploration and made the appropriate motions.

FURTHER THE AFFIANT SAYETH NOT!


LAUREN E. WILLIAMS

SWORN TO and SUBSCRIBED BEFORE me

this 4 day of December, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 11/26/2023

[illegible]

2013-CP-10-0634

Memo in Support of Denying Post-Conviction Relief

015 MAR -9 PM 2:55
JULIE J. ARNSTRONG
CLERK OF COURT

State of South Carolina,
Respondent.

)

On July 17, 2007, shortly after the trial reconvened for the afternoon, trial counsel told the Court that he learned over the weekend that Assistant Solicitor Michael Nelson, who was not involved in the prosecution of the case, had a cousin on the jury. (Trial Tran. 875:6-12). Trial counsel added that while speaking with Mr. Nelson, he also learned that Mr. Nelson was “asked to leave the courtroom by Your Honor because of his relationship with the jury member.” (Trial Tran. 875:19-22). The Court responded by telling counsel that Mr. Nelson “just assumed” that he told him to leave because of his relationship with a jury member and that he “generally told him to leave the courtroom”. (Trial Tran. 876:2-6).

Trial counsel went on to report to the Court that there had been some communication between Mr. Nelson and the juror via text and telephone throughout the trial. (Trial Tran. 876:15-20). The Court inquired of trial counsel about what he wanted the Court to do to remedy the situation. Mr. Savage responded that he wanted to have the juror dismissed. (Trial Tran. 877:15-18).

The Court went on to tell the parties on the record that he was “joking with Mr. Nelson when I told him to get out” and that he had no records or knowledge of the juror’s relationship with Mr. Nelson. (Trial Tran. 878:1-7). The Court personally assured trial counsel that he would “never do such a thing” and that he “joke[d] around with all the people that work in this building every now and then, but that’s about it.” (Trial Tran. 879:11-20). Trial counsel told the Court that he was not seeking recusal of the Court based on the Court’s communication with Mr. Nelson. (Trial Tran. 879:13-14).

Juror Davey, the juror in question, was then brought into the courtroom and questioned by the Court regarding his communication and relationship with Mr. Nelson. The juror conceded he did not disclose the relationship with Mr. Nelson and was removed from the jury. (Trial Tran. 880:7-884:19) One of the alternates was seated and the Applicant’s trial continued. (Trial Tran. 888:1-13).

On July 18, 2007, trial counsel again brought up to the Court the issue regarding Mr. Nelson and the replaced juror. Mr. Savage told the Court that he was not questioning the Court’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. (Trial Tran. 1077:12-1079:8).

The Court again stated that there was a faulty assumption that he already knew about the relationship between Mr. Nelson and the juror. (Trial Tran. 1079:17-24, 1086:19-21). The Court agreed to question Mr. Nelson on the record regarding his communication with the juror and poll the jury regarding any statements the removed juror may have made about his relationship with Mr. Nelson. (Trial Tran. 1100:12-1105:16). After questioning Mr. Nelson *in camera* and polling the jury, trial counsel 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. (Trial Tran. 1160:6-164:18). This Court denied the Applicant's motion on the basis that the issue was resolved by the removal of the juror.

On July 19, 2007, the jury found the Applicant guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. (Trial Tran. 1340:7-25). Trial counsel renewed the Applicant's motion for a mistrial and was given the opportunity to expand upon his arguments in support of his motion for a mistrial. The Court again denied the motion for mistrial and stated that he was still satisfied that the jury was not improperly tainted by the removed juror. (Trial Tran. 1358:7-1359:16). The Court allowed the Applicant to submit as a court's exhibit a document from SunCom Communications that listed all the phone calls made by the dismissed jurors between July 6th and July 18th. (Trial Tran. 1359:9-15).

On July 23, 2007, the Applicant filed a Motion for Release of Records requesting the court issue an order releasing the cell phone records of Assistant Solicitor Nelson. A hearing regarding the motion was held on July 24, 2007. By Order filed August 20, 2007, the Honorable Daniel Pieper denied the Applicant's request to release the records. The 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 a fair and impartial jury verdict.

The Applicant filed a timely Notice of Appeal. The Applicant was represented on appeal by Appellate Defenders Robert Dudek and Joseph Savitz. During the course of the Applicant's appeal, appellate counsel asked the Court of Appeals for an order releasing Mr. Nelson's cell phone records. By Order dated April 11, 2008, the Court of Appeals also declined to grant the Applicant an order releasing Mr. Nelson's cell phone records. On June 28, 2010, the Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rocquemore, 2010-UP-331 (Ct. App. June 28, 2010). The Court of Appeals held "the trial court did not err in refusing to grant Rocquemore a mistrial based on the State's failure to disclose Mr. Nelson's relationship with the juror. Assuming, without deciding, that the trial [court] committed error, we find Rocquemore failed to demonstrate any prejudice." The Applicant 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.

The Applicant filed an application for post-conviction relief on February 1, 2013. On October 23, 2013, Assistant Solicitor Michael Nelson was suspended from the practice of law by the Office of Disciplinary Counsel based on his communications with the juror in the Applicant's trial. 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."

The Applicant 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". The Applicant's pleading stated the alleged newly discovered evidence was the text message communication between Mr. Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom.

The Applicant served the Honorable Daniel Pieper with a subpoena to appear at the Applicant'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. The Applicant filed a Return to Judge Pieper's Motion to Quash on December 8, 2014. After a hearing, the Honorable J.C. Nicholson partially denied Judge Pieper's Motion to Quash. The Court held that the Applicant 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. This memo follows.

Standard of Review

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)).

Judicial Misconduct and Post-Conviction Relief

At the conclusion of the Applicant's evidentiary hearing, this Court asked both parties to research cases from across the country in both state and federal courts where post-conviction relief was granted on the basis of judicial misconduct. After a thorough search of the case law, the Respondent is unable to find any South Carolina state or federal cases where post-conviction relief was granted on the basis of judicial misconduct. The Respondent was also unable to find

any cases from other state or federal jurisdictions where post-conviction relief was granted on the basis of judicial misconduct.

The closest the Respondent found on this issue was an Iowa Court of Appeals holding the defendant did not receive a fair hearing due to ineffective assistance of counsel and actions and statements of the presiding judge. In Blum v. State, 510 N.W.2d 175 (1993), the Appellant (Blum) pled guilty to second-degree murder shortly before the start of trial. A few days later, counsel for Blum filed a motion to withdraw the guilty plea and a motion to arrest judgment. These motions were based on statements made by the plea court which Blum claimed intimidated him to plead guilty and statements made by a juror during jury qualification. Id. at 176. During the hearing on Blum's motions, the plea judge insisted that plea counsel make professional statements regarding his recollection of what was said by both the juror and the Court. At the plea judge's urging, counsel was forced to make statements that were contrary to Blum's claims. Blum's motions were denied. Id. at 177. Blum subsequently filed an application for post-conviction relief which was also denied. On appeal, the Iowa Court of Appeals reversed and remanded the matter for a new hearing on Blum's motion to withdraw his guilty plea and motion to arrest judgment. The Court held that "the synergetic effect of the conduct of Blum's attorney and the presiding judge was to deny effective representation of counsel at the hearing and that Blum did not receive a fair hearing on his motions." Id. at 180.

The Respondent submits there are several reasons why this Iowa case should not be dispositive in the Applicant's case. First, the Applicant's claim is not based on a claim of ineffective assistance of counsel. Because there is no claim of ineffective assistance of counsel, this Court cannot adopt Blum's holding that the plea judge's conduct affected the effective representation of counsel. Second, the judge's conduct in the Applicant's case in no way affected

the fairness of the Applicant's proceeding. Lastly, the Respondent also notes that the Blum court analyzed the conduct of both counsel and the judge under Iowa's Disciplinary rules. The South Carolina Supreme Court has explicitly held it will not consider the Rules of Professional Conduct dispositive on the constitutionality of criminal convictions. Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

The lack of case law in support of a finding of judicial misconduct warranting a new trial in a post-conviction relief matter is further evidence that judicial misconduct is not a proper issue to be addressed by this court on post-conviction relief. The granting of post-conviction relief warranting a new trial on the basis of judicial misconduct requires this Court to make a finding that the trial judge's actions indeed constituted misconduct. The Respondent submits findings of judicial misconduct are not proper for the post-conviction relief court and fall solely under the jurisdiction of the Commission on Judicial Conduct.

The Commission on Judicial Conduct ("The Commission") was created by Rule 502, South Carolina Appellate Court Rules, to investigate complaints of judicial misconduct and incapacity against judges who are a part of the South Carolina unified court system. Rule 502, SCACR, provides the procedure for resolving allegations that a judge committed ethical misconduct or that a judge suffers from a physical or mental condition which adversely affects the judge's ability to perform judicial functions. Rule 502, SCACR, explicitly states "The Commission has jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge and regarding allegations of incapacity during service as a judge. The Commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred during service as a judge." (citing Rule 3 of Rule 50). Rule 502 also outlines policies and procedures the Commission must follow when investigating a complaint of

judicial misconduct. It is clear from the South Carolina Appellate Court rules that the Legislature intended the Commission on Judicial Conduct to have sole jurisdiction over investigating and resolving claims regarding judicial misconduct.

The Respondent submits the South Carolina Supreme Court's decision in Langford v. State is also dispositive on whether or not violations of ethical rules are valid considerations for the Court in post-conviction relief matters. 310 S.C. 357, 426 S.E.2d 793 (1993). In Langford, the Supreme Court rejected the Applicant's argument in support of post-conviction relief that counsel's representation of both he and his co-defendant was a violation of the Rules of Professional Conduct. Id. at 360. The Court held "in our view, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Their purpose is to regulate and guide the legal profession by defining proper ethical conduct, and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.'" Id. The Respondent submits the Court's ruling in Langford should be extended to alleged violations of the Code of Judicial Conduct especially in circumstances like the Applicant's when the conduct in no way affected the constitutionality or validity of the Applicant's criminal conviction.

The Respondent submits further this Court should avoid making any findings regarding trial judge error based on the Applicant's judicial misconduct claim. Specifically, this Court should avoid accepting any argument from the Applicant that the trial judge should have *sua sponte* recused himself from ruling on matters which could have involved his communication with Mr. Nelson. The Respondent submits any claims regarding errors by the trial judge should have been raised on direct appeal. A trial judge's failure to recuse himself is a direct appeal issue. See State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (2002). Since claims regarding trial

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

This Court should avoid making any findings regarding judicial misconduct as the Applicant requests. It is clear that this Court is not the proper forum to evaluate the trial judge's conduct in this case. The Commission on Judicial Conduct has sole jurisdiction over investigating claims of judicial misconduct. This Court should instead focus its findings on the Applicant's sole claim of newly discovered evidence.

Newly Discovered Evidence

The Applicant has failed to carry his burden of proving he is entitled to a new trial on the basis of newly discovered evidence. This Court should deny and dismiss this application for post-conviction relief on this basis. The Respondent submits the Applicant is unable to prove all prongs of the five-part test required to support a finding of newly discovered evidence.

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(4) (2007). It is well settled that a motion for new trial based on newly

discovered evidence may be granted only if the movant shows that the evidence upon which the motion is based:

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

State v. Caskey, 272 S.C. 325, 329, 256 S.E.2d 737, 738-39 (1979) (emphasis added).¹ The South Carolina Supreme Court and Court of Appeals have both affirmed many times over the requirement that the movant prove all five prongs of the test outlined in Caskey in order to prevail on a claim of newly discovered evidence. See State v. Wright, 228 S.C. 432, 438, 90 S.E.2d 492, 495 (1955); State v. Wells, 249 S.C. 249, 262-63, 153 S.E.2d 904, 911 (1967); State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974); State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 198 (1978); State v. Allen, 276 S.C. 412, 413, 279 S.E.2d 365, 366 (1981); Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668-69 (1993); Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993); State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 874-75 (Ct. App. 1995); State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999); State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (emphasis added). Therefore, the failure of the Applicant to prove any one of the Caskey factors defeats a claim of newly discovered evidence.

¹ Georgia Supreme Court case Berry v. State is credited as first developing the multi-factor standard for newly discovered evidence adopted by most modern federal and state courts. 10 Ga. 511 (1851). The Berry court stated to satisfy the Court on the ground of newly discovered evidence, the movant must show "1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That is it so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only...5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness." Id. at 527. While the Berry case divided the newly discovered evidence standard into six elements, many federal and state courts including South Carolina have given the test five elements without changing the standard's substance.

In this case, the Applicant is unable to prove at least four of the five Caskey factors.² First, the Applicant is unable to prove the communication between the trial judge and Mr. Nelson was material to his guilt or innocence³. At the evidentiary hearing, the Applicant conceded that he was unable to prove the materiality element of his newly discovered evidence claim. (PCR Tran. 66:2-5). The Respondent agrees the Applicant is unable to carry his burden of proving the materiality of this alleged newly discovered evidence. The trial judge's single communication with Mr. Nelson was in no way relevant to the jury's finding of the Applicant's guilt. See U.S. v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999) ("Evidence which touches only issues tangential to defendant's defense cannot serve as an adequate foundation for granting a new trial.")

The Applicant claims that since he is unable to prove the materiality element of newly discovered evidence, this Court should set aside the Caskey factors and apply the standard outlined by the Supreme Court in McCoy v. State, 401 S.C. 363, 757 S.E.2d 623. The Respondent submits the standard outlined in McCoy is not applicable to this case because the Applicant's newly discovered evidence claim does not involve any claims of juror concealment. In McCoy, the Court held that the standard test governing newly discovered evidence is not properly applied to evidence discovered post-trial regarding intentional juror concealment. Id. at 370. The Court went on to explain that juror misconduct is not properly considered "newly discovered evidence" and is a separate basis for a new trial. Id. Unlike McCoy, the Applicant's post-conviction relief claim has nothing to do with juror misconduct or intentional concealment.

² By arguing the Applicant's failure to prove at least four of the five Caskey factors, the State is in no way conceding the Applicant's ability to prove the remaining one prong. The Respondent submits the Applicant's inability to prove one Caskey factor is sufficient to dismiss the post-conviction relief application on the basis of newly discovered evidence.

³ For purposes of a motion for new trial based on newly discovered evidence, "material evidence" is evidence which is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case. U.S. v. Riggs, 496 F.Supp. 1085 (M.D. Fla. 1980).

This Court should not depart from the Caskey test to apply the claim specific standard outlined in McCoy.

The South Carolina Supreme Court has held that a motion for newly discovered evidence is properly refused on the ground that the new testimony was immaterial. State v. Murphy, 13 S.C. 254, 102 S.E.2d 288 (1920) (holding “There is nothing in the new testimony which throws light on the circumstances which led to or resulted in the homicide, or which tends to mitigate the commission of the crime, and therefore nothing which properly could have had the effect claimed.”). The Respondent submits the Applicant’s inability to prove the materiality element is a sufficient basis for this Court to deny post-conviction relief since the Supreme Court has affirmed time and time again that the movant is required to prove all five prongs of the newly discovered evidence standard in order to obtain a new trial.

However, if this Court is inclined to depart from the well-settled case law on this issue, the Respondent submits the Applicant has also failed to carry his burden of proving at least three other Caskey factors. The Applicant is unable to prove the claimed “newly discovered evidence” would change the result if a new trial was had. The Applicant has failed to present any evidence that the jury’s verdict was influenced by the communication between Mr. Nelson and the trial judge. The record is also void of any disclosure of the communication to the jury during the trial. The initial discussion regarding the communication took place *in camera* and outside of the jury’s presence. The record also reflects Mr. Nelson was not involved in the prosecuting of the Applicant’s case on behalf of the State and had no involvement in the trying of the State’s case. The Respondent submits the alleged newly discovered evidence does not tend to prove the crime was convicted by someone other than the Applicant and does not call into question the jury verdict.

The Applicant argues the alleged newly discovered evidence if known by counsel at the time of trial would have aided trial counsel's motion for mistrial. The Respondent submits the likelihood of evidence regarding the form of a disclosed communication between Mr. Nelson and the trial judge would not have aided the Applicant's motion for mistrial. "A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). Based on the error and prejudice standard required for success on a motion for mistrial, it is unlikely the Applicant's "newly discovered evidence" would have aided counsel's prejudice argument for the Applicant's motion for mistrial. This is especially unlikely since the Applicant has conceded that he is unable to show how the "new evidence" is material to his guilt or innocence and by extension affected the outcome of his trial. The Respondent submits the Applicant has failed to carry his burden of proving the alleged new evidence would have affected the outcome of his trial. Therefore, this Court should deny his claim of newly discovered evidence.

The Applicant is also unable to prove the alleged newly discovered evidence has been discovered since trial. The record is clear that the communication between Mr. Nelson and the trial judge was disclosed during the Applicant's trial. Not only was the communication disclosed, but the **substance** of the communication was also disclosed. Both trial and appellate counsel for the Applicant testified at the evidentiary hearing that they were aware of a communication between Mr. Nelson and the trial judge during the trial. (PCR Tran. 17:13-19, 18:10-14, 19:4-8, 19:13-23, 22:5-11, 23:19-23, 31:14-21, 39:13-18, 42:10-11). The record also reflects the trial judge disclosed to the parties on the record during the Applicant's trial that "he generally told

Nelson to leave the courtroom.” (Trial Tran. 876). The communication between Mr. Nelson and the trial judge was discovered during the Applicant’s trial.

The only thing that the evidence shows has been discovered since trial is the **form** of the communication. The Applicant claims that he was unaware that the communication between the trial judge and Mr. Nelson took place via text message. The Respondent submits the form of the communication- via text message, is a distinction without a difference. Contrary to the Applicant’s argument, a text message communication does not lend itself to any more secrecy than any other private two-party conversation. This Court should disregard the Applicant’s red herring arguments about the communication being via text message and look to the disclosure of the communication that is reflected via the record. The Respondent also notes that we do not have to speculate as to the substance of the text message between the trial judge and Mr. Nelson. Mr. Nelson confirmed the trial judge’s disclosure at the evidentiary hearing. Mr. Nelson testified the trial judge sent him one message telling him to get out of the court room. (PCR Tran. 57:23-25, 59:22-25). Because the trial judge disclosed the communication with Mr. Nelson during the Applicant’s trial, the Applicant has failed to show that the evidence has been discovered since trial.

Finally, the Applicant is unable to prove the evidence is not merely cumulative of impeaching. The Applicant alleged newly discovered evidence is the communication between the trial judge and Mr. Nelson. As noted above, the trial judge disclosed this communication and its substance to the both parties on the record during the Applicant’s trial. Any “new evidence” regarding this disclosure is merely cumulative to the trial judge’s disclosure.

The Respondent submits the Applicant has failed to carry his burden of proving all five prongs of the newly discovered evidence standard. Specifically, the Applicant has failed to show

how the trial judge's communication with Mr. Nelson affected the jury's verdict or the constitutionality of his criminal conviction. Therefore, this Court should deny post-conviction relief. This Court should also avoid making any rulings regarding judicial misconduct, since that issue is not properly before this Court.

Conclusion

For these reasons, the Respondent asks this Court to deny and dismiss the Applicant's post-conviction relief application with prejudice.

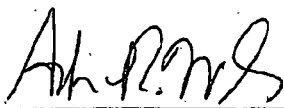
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 6, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
David Rocquemoire	)	CASE NO.: 2013-CP-10-0634
Applicant,	)	
vs.	)	MEMO IN SUPPORT OF
	)	POST CONVICTION RELIEF
State of South Carolina	)	
	)	
Respondent,	)	
	)	

**MEMO IN SUPPORT OF
POST CONVICTION RELIEF**

FILED
2015 MAR 23 PM 3:28
JULIE J. ARMSTRONG
CLERK OF COURT

CHRONOLOGY OF RELEVANT EVENTS

1. July 6 2007 through July 19, 2007 - David Rocquemoire's trial in Charleston County General Sessions Court.
2. July 17, 2007 - Trial counsel advises the Court that a member of the jury is a cousin of a 9th Circuit assistant solicitor. (Michael Nelson).
3. July 17, 2007 - Trial counsel requested a mistrial based upon the failure of juror 309 to disclose the relationship between him and Michael Nelson
4. July 17, 2007 - Trial judge denied the motion for mistrial, excused the juror and replaced him with an alternate.
5. July 18, 2007 - Mr. Nelson is questioned (in camera) by the Court about specific communications between him and juror 309. Mr. Nelson admits to one communication the prior Saturday (July 14) regarding a wedding. Mr. Nelson denies any additional contact between him and the juror.
6. July 18, 2007 - Trial counsel renewed its motion for mistrial. Trial judge denied the motion and questioned each remaining juror individually.

7. July 19, 2007- Jury returns a guilty verdict on the lesser included offense of voluntary manslaughter.
8. July 19, 2007 - Trial counsel renews his motion for mistrial and provides the court with the call log revealing 20 contacts between Mr. Nelson and the juror occurring during the trial.
9. July 19, Trial, 2007 – Trial counsel sends Mr. Nelson’s wireless carrier a request to preserve the content of text messages incoming/ outgoing from his phone.
10. July 19, 2007 – Court sentences Mr. Rocquemoire to ten years.
11. July 23, 2007 - Trial counsel files MOTION FOR RELEASE OF RECORDS.
12. July 24, 2007 – Telephone conference regarding trial counsel’s motion for release of records.
The trial judge denied the motion during the call notwithstanding the State’s lack of objection. (See page 2 of the Court’s August 20, 2007 written order.).
13. August 20, 2007- Trial judge files written Order denying trial counsel’s motion.
14. August 1, 2012- During the course of an interview with ODC, Mr. Nelson revealed that he received a text message from the trial judge during the trial. This is the first disclosure of the existence of text communication(s) between him and the trial judge.
15. January 14, 2014- Mr. Nelson confirmed receiving a text message from the trial judge; and denied receiving any additional messages.

LEGAL DISCUSSION REGARDING JUDICIAL MISCONDUCT

Counsel for Mr. Rocquemoire contends that the trial judge committed two acts of judicial misconduct in this case. First the trial judge sent an *ex parte* communication to an assistant solicitor without making a contemporaneous disclosure to Applicant’s trial counsel. Second, the trial judge should have recused himself, *sua sponte*, from ruling on trial counsel’s July 23, 2007 MOTION FOR RELEASE OF RECORDS. Although the facts relating to these two instances are

intertwined, Applicant's counsel contends that they amount to two independent grounds for relief.

Ex Parte Communication

Mr. Nelson was the only recipient of the communication from the trial judge, therefore it was an *ex parte* communication. The only evidence we have of the content of the text message is found in the decision from Mr. Nelson's disciplinary hearing where Mr. Nelson stated that the trial judge told him by text message to leave the courtroom. In Re Nelson, 750 S.E.2d 85, 89 (S.C. 2013). Provided Mr. Nelson accurately remembered the content of the message, the *ex parte* communication appears to be authorized as it would have been an *ex parte* communication *for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits*. Rule 501, SCACR: Canon 3(B) (7) (a). However although the *ex parte* communication falls within the definition provided in Canon 3(B)(7)(a), the trial judge failed to make a contemporaneous disclosure to defense counsel as required by Canon 3(B)(7)(a)(ii).

Mr. Nelson provided the only testimony as to the number and content of any text messages he received from the trial judge. However Mr. Nelson has not been entirely candid and forthright in his prior testimony on this matter. Evidence of Mr. Nelson's lack of candor and or poor memory regarding this text message are found in his disciplinary order. Nelson 750 S.E. 2d at 87-89. The unreliability of Mr. Nelson's testimony on this matter is also apparent from the transcript of Mr. Rocquemoire's trial. On July 17, 2009 Mr. Nelson initially testified that the extent of his conversations between him and the juror was one phone conversation on Friday (July 14th) and a second call on July 16th to which he did not answer and responded by text "I'm sorry, but I can't talk to you" (Trial Transcript. 1101, line 7 through p. 1102 line through p. 1104 line 7). However, on July 18, 2007 Applicant's trial counsel obtained a copy of the call log from

the juror's telephone number showing there were over 20 communications between Mr. Nelson and the juror since the juror's selection. (Trial Transcript p. 1350 lines 11-13). Nowhere in the trial transcript does Mr. Nelson mention that he received a text message from the trial judge, instead Mr. Nelson testified what the trial judge **told** (not **texted**) him. During his August 1, 2012 interview with ODC, Mr. Nelson was asked whether the trial judge ever asked him to leave the courtroom. Mr. Nelson initially denied receiving any communication from the trial judge, verbal or text. Mr. Nelson then apparently changed his testimony and then remembered that he went into the courtroom during the trial and the judge **texted** him to leave. Nelson 750 S.E.2d at 89.

Failure to Recuse

On July 23, 2007, defense counsel filed a MOTION FOR RELEASE OF RECORDS, to require Mr. Nelson's wireless carrier to produce the content of the text messages to and from Mr. Nelson's phone. When defense counsel filed this motion they did not know of any communications between the trial judge and Mr. Nelson's phone. Had the wireless carrier been ordered to produce the content of these text messages, their disclosure would have revealed at least one *ex parte* communication between Mr. Nelson and the judge. The content of the text messages would have produced evidence of the trial judge's possible breach of Rule 501, SCACR: Canon 3(B) (7) regarding *ex parte* communications. The trial judge therefore had, or at least there is the appearance that he had, an extra judicial interest to deny the motion. As a result, the trial judge should have ruled *sua sponte* to recuse himself from ruling on 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, 473 S.E.2d 804, 808 (S.C. Ct. App 2005), *citing* In re Murchison, 349 U.S. 133, 75

S.Ct. 623, (1955). In South Carolina, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned and a judge must exercise sound discretion in making this determination. State v Cheatham, 349 S.C. 101, 561 S.E.2d 618, 624 (S.C. Ct. App 2002). A party seeking recusal must show some evidence of bias stemming from an extra-judicial source. Mallett v. Mallett, 473 S.E.2d at 807. Applicant's counsel asserts that the existence of non-disclosed *ex parte* communications between the judge and the solicitor shows an extra-judicial source of the trial judge's bias to rule against the disclosure of the content of Mr. Nelson's text communications.

Prejudice

The trial judge's failure to disclose the existence of the *ex parte* communication prejudiced trial counsel's post-trial motions. Trial counsel testified that if he had known of the existence of a text communication between the trial judge and Mr. Nelson he would have raised it as further grounds for a mistrial. (PCR hearing transcript p. 33 l. 6-15). Trial counsel also testified that had he known about the text he would have raised the issue in his motion to release Nelson's text messages. (PCR hearing transcript, p. 32 l. 7-11). The failure to disclose the *ex parte* communication also prejudiced Mr. Rocquemore's appeal. Appellate counsel testified that had he known about the *ex parte* communication he would have raised it on appeal. (PCR hearing transcript, p. 51 l.1-11) Appellate counsel testified further that he believed by the time he was filing the appeal, the trial judge had been promoted to the S.C. Court of Appeals, therefore he would have taken the appeal directly to the S.C. Supreme Court. (PCR hearing transcript, p. 51 l. 12 through p. 52 l. 16). Finally by failing to disclose the *ex parte* communications to Mr. Nelson's phone, the trial judge denied trial counsel notice of grounds for requesting the trial judge's recusal.

Mr. Rocquemore took all available measures to discover the content of the text messages from Mr. Nelson's phone. It is now impossible to know with certainty the extent of the *ex parte* communications between Mr. Nelson and the trial judge. There are at least two South Carolina decisions discussing the requisite showing of prejudice in cases where a party is excluded from *ex parte* communications. In State v McGuinn, defendant was convicted of possession of marijuana with intent to distribute. 268 S.C. 112, 232 S.E.2d 229 (S.C. 1977). Prior to sentencing the trial judge called solicitor to the bench for a discussion on a matter that may have related to sentencing. Defense counsel asked to join the conference. The trial judge stated that he wished to speak with the solicitor in private. Defense counsel objected and Defendant appealed asserting that the *ex parte* bench conference denied defendant his Sixth Amendment right to counsel. In remanding the case for resentencing the court stated: *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 were prejudiced and, accordingly, we remand to the lower court for the purpose of resentencing.* *Id* at 231 (emphasis added). Similarly in Locklear v. Harvey, testimony at appellant's PCR hearing established that, at some point during the proceedings, after the jury began deliberations but before rendering a verdict, the trial judge met with victim, the victim's mother and the solicitor. 273 S.C. 58, 254 S.E.2d 293 (S.C. 1979). Neither defense counsel nor the defendant were given notice of the meeting. During the meeting the trial judge apologized to the victim on behalf of the state of South Carolina, and advised the victim that, in the event of a guilty verdict, he was not inclined to give the defendant the maximum sentence. The PCR judge held that the defendant could not demonstrate he was prejudiced by being excluded from the meeting. In remanding the case back for resentencing the

South Carolina Court stated: *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 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).

Examples of judicial misconduct supporting PCR relief

Applicant agrees with Respondent's counsel that there are few cases in which PCR relief was granted as the result of judicial misconduct. One reason for this scarcity may be that Mr. Rocquemore's case involves **newly discovered evidence** of judicial misconduct. If evidence of judicial or prosecutorial misconduct was discovered during the trial the issue would have had to be raised on appeal and not through a PCR. S.C. Code § 17-27-20(B).

One case where judicial misconduct was at issue in a PCR case is Blum v. State, 510 N.W.2d 175, (IA.1975) (the facts of the case are set forth in the respondent's brief). In addition to the Blum case from Iowa, the Florida Supreme Court granted PCR relief to a defendant that was prejudiced by *ex parte* communications between the trial judge and the prosecution. In Rose v State, defendant was appealing the denial of his PCR relief. 601 So.2d 1181 (Fla. 1992). The Florida Supreme Court reversed and remanded the case. In Rose the Florida trial court judge without a hearing and as a result of an *ex parte* communication, adopted the State's proposed order denying relief without providing counsel notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents. Id. at 1182. In granting the defendant a new sentencing hearing the appellate court stated: *We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question... This Court is*

committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial trial judge. Id at 1183. (ellipsis added).

Examples of non-judicial misconduct supporting PCR relief.

In South Carolina PCR relief has been granted as the result of newly discovered evidence of prosecutorial misconduct where Brady violations were shown. Washington v State, 324 S.C. 232, 234 478 S.E. 2d 833, 834 (S.C. 1997) (PCR relief granted where State failed to adequately explain to the jury the state's relationship with one of its witnesses); Gibson v State, 334 S.C. 515, 528 514 S.E.2d 320, 327 (S.C. 1999) (PCR relief granted where Prosecutor failed to provide inconsistent statement from identifying witness); Simpson v Moore, 367 S.C. 587, 599, 627 S.E. 2d 701, 708 (S.C. 2008). (PCR Relief granted where State failed to turn over mitigating physical evidence in armed robbery and murder trial, resulting in prejudice to defendant during penalty phase); and, Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (S.C. 2006). (PCR relief granted where State failed to disclose inconsistent statement given by co-defendant.). Newly discovered evidence of Brady violations is not the only form of prosecutorial misconduct that can justify PCR relief. *See State v Feaster*, 184 NJ 235, 258, 877 A.2d 229, 243 (N.J. 2005) (PCR granted based on newly discovered evidence that prosecutor intimidated a witness when he advised him that if he recanted trial testimony he would be prosecuted for perjury).

South Carolina Courts have also addressed whether new found evidence of juror misconduct can provide PCR relief. In McCoy v. State, defendant was convicted of Burglary First degree, and Assault and Battery With Intent to Kill. 737 S.E.2d 623 (S.C. 2013). During *voir dire* jurors were asked if they were related to anyone working in the Seventh Circuit Solicitor's office. *Id* at 625. A juror who has a cousin that was married to the Seventh Circuit Solicitor, and who did not respond to the questions was seated on the jury. *Id*. Approximately

four years later, defendant's counsel discovered that the juror and the Solicitor were related by marriage, and filed a PCR application. In granting PCR relief the Court in McCoy held that evidence of juror misconduct discovered post-trial is not properly considered newly discovered evidence; rather it is a separate basis for a new trial. Id. at 627. The Court held that under these circumstances a PCR applicant need not prove that the newly discovered evidence is material to the accused guilt or innocence. Id. The Court went on to hold that: the standard five-pronged newly discovered evidence test as set forth in Clarke v. State, 315 S.C. 385, 434 S.E.2d 266 (1993), has no application and should not be used as the basis for summary dismissal of PCR claims. Id. at 628.

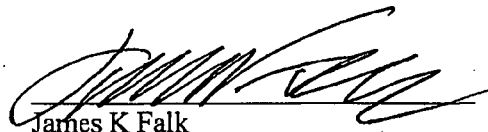
Examples of judicial misconduct supporting motions for new trials

Judicial misconduct has also supported motions for new trials in non-PCR cases. In South Carolina appellate courts have granted new trials in criminal cases as a remedy for judicial misconduct. In State v Pace, the S.C. Supreme Court granted defendant a new trial where the trial judge made comments, in the presence of the jury, that were both condescending toward defense counsel and critical of her cross examination of a State witness. 316 S.C. 71, 447 S.E. 2d 186 (SC 1994). In State v Simmons, the South Carolina court granted a new trial where, during the defense's closing argument, the trial judge threatened defense counsel with a jail sentence, and thus caused defense counsel to cease any further closing argument. 267 S.C. 479, 229 S.E. 2d 597 (1976).

Conclusion

Mr. Rocquemore was prejudiced by the trial judge's misconduct. Without the ability to review the actual text messages sent and received from Mr. Nelson's phone, it is impossible to

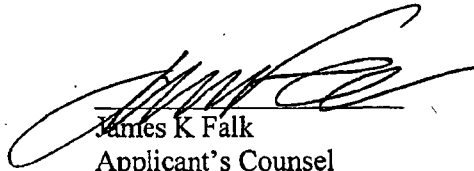
know the extent of prejudice Mr. Rocquemore suffered. However, when considering whether a party is prejudiced by being excluded from an *ex parte* communications, the issue is whether there is the appearance or the possibility of prejudice. See. State v McGuinn, 232 S.E.2d at 231 and Locklear v. Harvey, 254 S.E.2d at 293. Having shown the existence of prejudicial misconduct, this Court must grant Mr. Rocquemore the requested PCR relief.



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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the above was emailed to Ashleigh Wilson, Esq. at arwilson@scag.gov on March 20, 2015 and was served upon same by depositing in the U.S. Mail sufficient first class postage affixed and addressed to PO Box 11549 Columbia, SC 29211-1549 on March 20, 2015.



James K Falk
Applicant's Counsel

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

David Rocquemore, #323014,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-10-0634

ORDER OF DISMISSAL

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Trial Counsel:

Date of Hearing:

Court Reporter:

The Honorable J. C. Nicholson

James Falk, Esquire

Ashleigh R. Wilson, Esquire

Andrew Savage, Esquire

Lauren Williams, Esquire

January 14, 2015

Deborah Garrison

PROCEDURAL HISTORY

The Applicant 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). The Applicant 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. The Applicant proceeded to trial on July 9-19, 2007. The Honorable Daniel Pieper presided over the trial.

On July 17, 2007, shortly after the trial reconvened for the afternoon, trial counsel told the Court that he learned over the weekend that Michael Nelson, an assistant solicitor who was not involved in the prosecution of the Applicant's case, had a cousin on the jury. (Trial Tran. 875:6-12). Trial counsel added that while speaking with Mr. Nelson, he also learned that Mr.

Nelson was "asked to leave the courtroom by Your Honor because of his relationship with the jury member." (Trial Tran. 875:19-22). The Court responded by telling counsel that Mr. Nelson "just assumed" that he told him to leave because of his relationship with a jury member and that he "generally told him to leave the courtroom". (Trial Tran. 876:2-6).

Trial counsel went on to report to the Court that there had been some communication between Mr. Nelson and the juror via text message and telephone throughout the trial. (Trial Tran. 876:15-20). The Court inquired of trial counsel about what he wanted the Court to do to remedy the situation. Mr. Savage responded that he wanted to have the juror dismissed. (Trial Tran. 877:15-18).

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The Court went on to tell the parties on the record that he was "joking with Mr. Nelson when I told him to get out" and that he had no records or knowledge of the juror's relationship with Mr. Nelson. (Trial Tran. 878:1-7). The Court personally assured trial counsel 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." (Trial Tran. 879:11-20). Trial counsel told the Court that he was not seeking recusal of the Court based on the Court's communication with Mr. Nelson. (Trial Tran. 879:13-14).

Juror Davey, the juror in question, was then brought into the courtroom and questioned by the Court regarding his communication and relationship with Mr. Nelson. The juror conceded he did not disclose to the Court his relationship with Mr. Nelson and was removed from the jury. (Trial Tran. 880:7-884:19). One of the alternates was seated on the jury and the Applicant's trial continued. (Trial Tran. 888:1-13).

On July 18, 2007, trial counsel again brought up to the Court the issue regarding Mr. Nelson and the replaced juror. Mr. Savage told the Court that he was not questioning the Court'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. (Trial Tran. 1077:12-1079:8).

The Court again stated that there was a faulty assumption that he already knew about the relationship between Mr. Nelson and the juror. (Trial Tran. 1079:17-24, 1086:19-21). The Court agreed to question Mr. Nelson on the record regarding his communication with the juror and poll the jury regarding any statements the removed juror may have made about his relationship with Mr. Nelson. (Trial Tran. 1100:12-1105:16). After questioning Mr. Nelson *in camera* and polling the jury, trial counsel 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. (Trial Tran. 1160:6-164:18). This Court denied the Applicant's motion on the basis that the issue was resolved by the removal of the juror.

On July 19, 2007, the jury found the Applicant guilty of the lesser included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. (Trial Tran. 1340:7-25). Trial counsel renewed the Applicant's motion for a mistrial and was given the opportunity to expand upon his arguments in support of his motion for a mistrial. The Court again denied the motion for mistrial and stated that he was still satisfied that the jury was not improperly tainted by the removed juror. (Trial Tran. 1358:7-1359:16). The Court allowed the Applicant to submit as a court's exhibit a document from SunCom Communications that listed all the phone calls made by the dismissed jurors between July 6th and July 18th. (Trial Tran. 1359:9-15).

On July 23, 2007, the Applicant filed a Motion for Release of Records requesting the court issue an order releasing the cell phone records of Assistant Solicitor Nelson. A hearing

regarding the motion was held on July 24, 2007. By Order filed August 20, 2007, the Honorable Daniel Pieper denied the Applicant's request to release the records. The 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 Applicant's fair and impartial jury verdict.

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The Applicant filed a timely Notice of Appeal. The Applicant was represented on appeal by Appellate Defenders Robert Dudek and Joseph Savitz. During the course of the Applicant's appeal, appellate counsel asked the Court of Appeals for an order releasing Mr. Nelson's cell phone records. By Order dated April 11, 2008, the Court of Appeals also declined to grant the Applicant an order releasing Mr. Nelson's cell phone records. On June 28, 2010, the Court of Appeals affirmed the Applicant's convictions and sentences. State v. Rocquemoire, 2010-UP-331 (Ct. App. June 28, 2010). The Court of Appeals held "the trial court did not err in refusing to grant Rocquemoire a mistrial based on the State's failure to disclose Mr. Nelson's relationship with the juror. Assuming, without deciding, that the trial [court] committed error, we find Rocquemoire failed to demonstrate any prejudice." The Applicant 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.

The Applicant filed an application for post-conviction relief on February 1, 2013. On October 23, 2013, Assistant Solicitor Michael Nelson was suspended from the practice of law by the Office of Disciplinary Counsel based on his communications with the juror in the Applicant's trial. 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 "messaging with" him."

The Applicant 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". The Applicant's pleading stated the alleged newly discovered evidence was the text message communication between Mr. Nelson and Judge Pieper where Judge Pieper told Mr. Nelson to leave the courtroom.

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The Applicant served the Honorable Daniel Pieper with a subpoena to appear at the Applicant'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. The Applicant filed a Return to Judge Pieper's Motion to Quash on December 8, 2014. After a hearing, the Honorable J.C. Nicholson partially denied Judge Pieper's Motion to Quash. The Court held that the Applicant 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. This Order follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record¹ in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. This Court finds the testimony presented by the parties to be credible.

¹ The record included the following: application for post-conviction relief, State's return, Charleston County Clerk's records, SCDC records, the Applicant's appellate court records, the trial and PCR hearing transcripts, Applicant's Exhibit 1 (a sworn affidavit from Lauren Williams), and memos from each party.

Newly Discovered Evidence

The Applicant claims he is entitled to a new trial on the basis of newly discovered evidence. The Applicant claims the newly discovered evidence is a text message communication between Mr. Nelson and the trial judge where the trial judge told Mr. Nelson to leave the courtroom. This Court finds this allegation is without merit and the Applicant has failed to carry his burden of proving the existence of newly discovered evidence warranting a new trial.

The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(4) (2007). It is well settled that a motion for new trial based on newly discovered evidence may be granted only if the movant shows that the evidence upon which the motion is based:

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

State v. Caskey, 272 S.C. 325, 329, 256 S.E.2d 737, 738-39 (1979) (emphasis added).² The South Carolina Supreme Court and Court of Appeals have both affirmed many times over the

² Georgia Supreme Court case Berry v. State is credited as first developing the multi-factor standard for newly discovered evidence adopted by most modern federal and state courts. 10 Ga. 511 (1851). The Berry court stated to satisfy the Court on the ground of newly discovered evidence, the movant must show "1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence, that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness." Id. at 527. While the Berry case divided the newly discovered evidence standard into six

requirement that the movant prove all five prongs of the test outlined in Caskey in order to prevail on a claim of newly discovered evidence.³ Therefore, the Applicant's failure to prove any one of the Caskey factors defeats a claim of newly discovered evidence.

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This Court finds the Applicant is unable to prove all five of the Caskey factors. First, this Court finds the Applicant has failed to carry his burden of proving the communication between the trial judge and Mr. Nelson was material to his guilt or innocence⁴. At the evidentiary hearing, the Applicant conceded that he was unable to prove the materiality element of his newly discovered evidence claim. (PCR Tran. 66:2-5). This Court finds the trial judge's single communication with Mr. Nelson was in no way relevant to the jury's finding of the Applicant's guilt. See U.S. v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999) ("Evidence which touches only issues tangential to defendant's defense cannot serve as an adequate foundation for granting a new trial.") This Court finds that while the trial judge's communication with Mr. Nelson may have been unwise, his conduct does not rise to the level of conduct that would have prejudiced the outcome of the Applicant's trial. This Court also finds it is particularly unlikely the communication was material to the Applicant's guilty or innocence since Mr. Nelson was not the solicitor prosecuting the Applicant's case. This Court finds the Applicant's inability to prove this prong of the Caskey test is a sufficient basis for the denial of post-conviction relief.

elements, many federal and state courts including South Carolina have given the test five elements without changing the standard's substance.

³ See State v. Wright, 228 S.C. 432, 438, 90 S.E.2d 492, 495 (1955); State v. Wells, 249 S.C. 249, 262-63, 153 S.E.2d 904, 911 (1967); State v. Pierce, 263 S.C. 23, 32, 207 S.E.2d 414, 419 (1974); State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 198 (1978); State v. Allen, 276 S.C. 412, 413, 279 S.E.2d 365, 366 (1981); Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668-69 (1993); Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993); State v. Freeman, 319 S.C. 110, 123, 459 S.E.2d 867, 874-75 (Cl. App. 1995); State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999); State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Cl. App. 2011) (emphasis added).

⁴ For purposes of a motion for new trial based on newly discovered evidence, "material evidence" is evidence which is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case. U.S. v. Riggs, 496 F.Supp. 1085 (M.D. Fla. 1980).

Since the Applicant is required to prove all five prongs of the Caskey test, this Court does not have to address the Applicant's ability to prove the remaining four prongs of the Caskey test to deny this application for post-conviction relief. However, this Court finds the Applicant has also failed to carry his burden of proving at least three of the remaining four Caskey factors.

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This Court finds the Applicant has failed to prove the claimed "newly discovered evidence" would change the result if a new trial was had. This Court finds the Applicant has failed to present any evidence that the jury's verdict was influenced by the communication between Mr. Nelson and the trial judge. The record is also void of any disclosure of the communication to the jury during the trial. The initial discussion regarding the communication took place *in camera* and outside of the jury's presence. The record also reflects Mr. Nelson was not involved in the prosecuting of the Applicant's case on behalf of the State and had no involvement in the trying of the State's case. This Court finds the alleged newly discovered evidence does not tend to prove the crime was convicted by someone other than the Applicant and does not call into question the jury verdict.

This Court rejects the Applicant's argument that the alleged newly discovered evidence if known by counsel at the time of trial would have aided trial counsel's motion for mistrial. This Court finds it is unlikely evidence regarding the text message communication between the trial judge and Mr. Nelson would have aided the Applicant's motion for a mistrial. "A motion for a mistrial is, by its very nature, both an allegation of error and an allegation of prejudice sufficient to warrant a mistrial." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). Based on the error and prejudice standard required for success on a motion for mistrial, it is unlikely the Applicant's "newly discovered evidence" would have aided counsel's prejudice argument for the Applicant's motion for mistrial. This is especially unlikely since the Applicant

has conceded that he is unable to show how the "new evidence" is material to his guilt or innocence and by extension affected the outcome of his trial. This Court finds the Applicant has failed to carry his burden of proving the alleged new evidence would have affected the outcome of his trial. This Court finds the Applicant's inability to prove this prong of the Caskey test is also a sufficient basis for the denial of post-conviction relief.

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This Court finds the Applicant has also failed to carry his burden of proving the alleged newly discovered evidence has been discovered since trial. This Court finds the record is clear that the communication between Mr. Nelson and the trial judge was disclosed during the Applicant's trial. Not only was the communication disclosed, but the substance of the communication was also disclosed. Both trial and appellate counsel for the Applicant testified at the evidentiary hearing that they were aware of a communication between Mr. Nelson and the trial judge during the trial. (PCR Tran. 17:13-19, 18:10-14, 19:4-8, 19:13-23, 22:5-11, 23:19-23, 31:14-21, 39:13-18, 42:10-11). The record also reflects the trial judge disclosed to the parties on the record during the Applicant's trial that "he generally told Nelson to leave the courtroom." (Trial Tran. 876). The communication between Mr. Nelson and the trial judge was discovered during the Applicant's trial.

This Court does not find persuasive the Applicant'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 the Applicant'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. Mr. Nelson confirmed the trial judge's

disclosure at the evidentiary hearing. Mr. Nelson testified the trial judge sent him one message telling him to get out of the court room. (PCR Tran. 57:23-25, 59:22-25). Because the trial judge disclosed the communication with Mr. Nelson during the Applicant's trial, the Applicant has failed to show that the evidence has been discovered since trial. This Court finds the Applicant's inability to prove this prong of the Caskey test is also a sufficient basis for the denial of post-conviction relief.

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Finally, this Court finds the Applicant has failed to carry his burden of proving the alleged newly discovered evidence is not merely cumulative of impeaching. The Applicant's alleged newly discovered evidence is the communication between the trial judge and Mr. Nelson. As noted above, the trial judge disclosed this communication and its substance to the both parties on the record during the Applicant's trial. This Court finds the "new evidence" regarding this disclosure is merely cumulative to the trial judge's disclosure.

This Court finds the Applicant has failed to carry his burden of proving all five prongs of the newly discovered evidence standard outlined in Caskey. This Court finds the Applicant has failed to show how the trial judge's communication with Mr. Nelson affected the jury's verdict or the constitutionality of his criminal conviction. Therefore, this Court denies and dismissing this application for post-conviction relief.

CONCLUSION

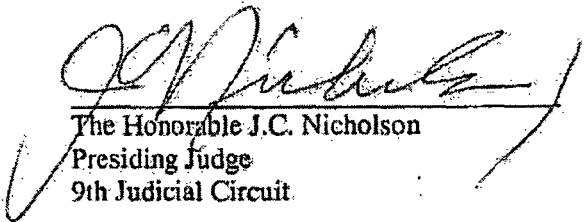
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of MAY, 2015


The Honorable J.C. Nicholson
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

DBD-2005-08-04177

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

STANLEY, CCSO

OCA# 2005-019560-B

ARREST WARRANT NUMBER
H-976851

AUGUST 15, 2005

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

DEC / 5 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-10- 8602

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

DECEMBER TERM 2005

THE STATE

vs.

DAVID MICHAEL ROCQUEMORE

Indictment for

MURDER

05-444161

FILED

2005 DEC - 8 PM 1:09

BY Julie J. Armstrong
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

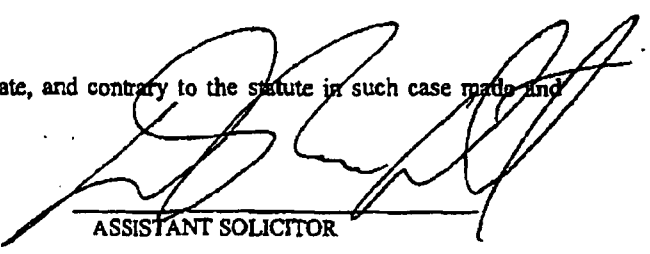
INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on December 5, 2005 the Grand Jurors of Charleston County present upon their oath:

That David Michael Rocquemoire did in Charleston County on or about August 14, 2005 at [REDACTED]

[REDACTED] Drive feloniously and with malice aforethought, express or implied, kill one Hershall Demar Denson by shooting him with a pistol and that Hershall Demar Denson did die in Charleston County as a proximate result thereof on or about August 14, 2005 in violation of Section 16-3-10 of the South Carolina Code of Laws, 1976, as amended.

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


ASSISTANT SOLICITOR

DBD-2005-08-04177

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

STANLEY, CCSO

OCA# 2005-019560-B

ARREST WARRANT NUMBER

H-976852

AUGUST 15, 2005

ACTION OF GRAND JURY

Foreperson of Grand Jury

08 / 5 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-10-8601

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

DECEMBER TERM 2005

THE STATE

vs.

DAVID MICHAEL ROCQUEMORE

Indictment for

POSSESSION OF FIREARM DURING
COMMISSION OF VIOLENT CRIME

05-4441(2)

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

2005 DEC -8 PM 1:09

FILED

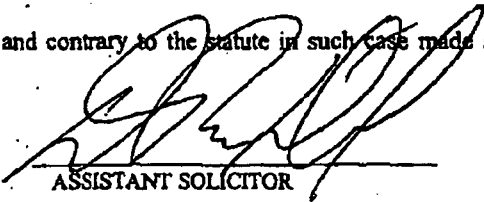
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
POSSESSION OF FIREARM DURING
COMMISSION OF VIOLENT CRIME

At a Court of General Sessions, convened on December 5, 2005 the Grand Jurors of Charleston County present upon their oath:

That David Michael Rocquemoire did in Charleston County on or about August 14, 2005 at [REDACTED] possess a firearm or visibly display what appeared to be a firearm, during the commission of the violent crime of murder, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended.

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


ASSISTANT SOLICITOR