STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Alan Nix,	)	Civil Action No. 2018-CP-10-03315
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
Churchill Park, *et. al.*,	)	
	)	
Defendants.	)	

This matter is before the Court on two motions to quash filed on behalf of the Honorable Roger M. Young, Circuit Court Judge, and his law clerk, Ms. Lindsay Luthringer ("Subpoenaed Parties"). Plaintiff Mr. Alan Nix, proceeding *pro se*, issued two subpoenas attempting to (1) compel production of documents relating to issuance of an order to substitute Defendant's counsel (subpoena issued on December 7, 2018); and (2) to compel the Subpoenaed Parties attendance and testimony at a June 4, 2019 motions roster (subpoena issued in May 2019). Because these subpoenas are procedurally defective and seek privileged information, I will grant the Subpoenaed Parties' motions and these two subpoenas will be quashed.

LEGAL STANDARD

Under Rule 45, "[o]n timely motion, the court by which a subpoena was issued . . . shall quash or modify the subpoena if it" meets at least one of four criteria:

> (i) fails to allow reasonable time for compliance; or
> (ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
> (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

Rule 45(c)(3)(A), SCRCP.

ANALYSIS

In short, the issued subpoenas are procedurally defective. Namely, the subpoenas were not properly served. Under Rule 45(b)(1), a subpoena must be served in "the same manner prescribed for service of a summons and complaint in Rule 4(d) . . . ." Rule 45(b)(1), SCRCP. Judge Young, and potentially Ms. Luthringer, are to be considered officials of the State of South Carolina, and must be served "by [plaintiff] delivering a copy of the summons and complaint to such officer . . . *and* by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia." Rule 4(d)(5), SCRCP (emphasis added). No copy was ever sent to the Attorney General's Office for either of the Subpoenaed Parties. This is clearly deficient in light of the rules.

Additionally, the subpoenas seek to compel production of documents and testimony on dates and at hearings that have since passed on issues that have been finally adjudicated. For instance, the order to substitute counsel is beyond the window to file a motion to reconsider and is considered final. Further, the June 4, 2019 hearing Plaintiff sought to compel Judge Young and his law clerk to testify at has long since passed. Thus, these subpoenas do not address any live controversy and are now moot. *See, e.g., In re Grand Jury Subpoena (T-112)*, 597 F.3d 189, 195 (4th Cir. 2010) (recognizing that to sustain a subpoena requires a persisting or extant "live controversy").

Even if they were not moot, the underlying action is an appeal from small claims court, wherein the Court is only permitted to review matters from a "cold" record. *See* S.C. Code § 18-7-130 ("The appeal *shall* be heard by the court upon all *the papers* of the case . . . .") (emphasis

added). This limitation placed upon the Court does not permit new evidence to be introduced on Plaintiff's instant appeal. Accordingly, the subpoenas are procedurally improper.

Further, the subpoenas are substantively improper. The subpoenas "require[] disclosure of privileged or otherwise protected matter and no exception or waiver applies" and should be quashed in their entirety. Rule 45(c)(3)(A)(iii), SCRCP. Simply stated, Judge Young cannot be compelled to produce documents or testify regarding any aspect of this case, one where he himself has previously issued orders. Indeed, the South Carolina Supreme Court has already recognized the "presumption [that] judges should not be called to testify regarding matters from a case over which they previously presided." *In re Whetstone*, 354 S.C. 213, 217, 580 S.E.2d 447, 449 (2003). "The overwhelming authority concludes that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that motivated him in the performance of his official duties." *United States v. Roebuck*, 271 F. Supp. 2d 712, 718 (D.V.I. 2003) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Fayerweather v. Ritch*, 195 U.S. 276, 306–07 (1904); *Grant v. Shalala*, 989 F.2d 1332, 1344–45 (3d Cir. 1993)). "[J]udges are under no obligation to divulge the reasons that motivated them in their official acts; the mental processes employed in formulating the decision may not be probed." *Id.* (quotations omitted) (quoting *United States v. Cross*, 516 F. Supp. 700, 707 M.D.Ga. 1981), *aff'd*, 742 F.2d 1279 (11th Cir. 1984)). Accordingly, both subpoenas addressed to Judge Young will be quashed in their entirety.

Likewise, Ms. Luthringer, although a law clerk and not a judge, is also shielded from Plaintiff's subpoenas by virtue of her role in the South Carolina Judiciary. Ms. Luthringer cannot be compelled to produce documents or testify regarding her confidential communications with, or work product for, Judge Young.

> "Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties." *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1519 (11th Cir. 1986) ("*Hastings*"), *quoted in In re Grand Jury*, 821 F.2d 946, 957 (3rd Cir. 1987). "[T]here exists a [qualified] privilege . . . protecting confidential communications among judges and their staffs in the performance of their judicial duties." *Hastings*, 783 F.2d at 1520, *cited in Smith v. U.S. Dist. Court for S. Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992). "The judicial privilege is grounded in the need for confidentiality in the effective discharge of the federal judge's duties. In the main, the privilege can extend only to communications among judges and others relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings." *Hastings*, 783 F.2d at 1520.

In re U.S., 463 F.3d 1328, 1332 n.4 (Fed. Cir. 2006). *See also Turner v. Murphy Oil USA, Inc.*, No. CIV.A. 05-4206, 2008 WL 2178087, at *1 (E.D. La. May 21, 2008) ("By way of example, the Court sees this situation the same as if an applicant sought to subpoena the Court's law clerk to testify, which courts have routinely held should generally not be allowed."); *Doe v. Cabrera*, 134 F. Supp. 3d 439, 456 (D.D.C. 2015) (collecting cases noting that discovery directed at law clerks is prohibited). *Cf.* S.C. Code Ann.§ 15-78-60(1), (5). In sum, Plaintiff's attempts to subpoena Ms. Luthringer as a means of probing the inner workings of Judge Young's chambers are impermissible, inappropriate, and prevented by judicial privilege. Accordingly, the subpoenas addressed to Ms. Luthringer will also be quashed in their entirety.

Accordingly, the Subpoenaed Parties motions to quash, filed on December 17, 2018 and May 24, 2019, are hereby GRANTED and the respective subpoenas QUASHED in their entirety.

IT IS SO ORDERED.

THE HONORABLE MAITE MURPHY
CIRCUIT COURT JUDGE

SEPTEMBER ___, 2019
CHARLESTON, SOUTH CAROLINA.