19-6983

No. [redacted]

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kwasi McKinney pro se — PETITIONER
(Your Name)

vs.

State of Arkansas
Court of Appeal — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Arkansas Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kwasi McKinney # 137065
(Your Name)

P.O. Box 970
(Address)

Marianna, AR 72360
(City, State, Zip Code)

(Phone Number)

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I. INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL (*Identify*) **CR-17-264**

II. BASIS OF SUPREME COURT JURISDICTION (see Rule 1-2(a))

(_X_) Check here if **no** basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) ___ Construction of Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) X Extraordinary writs
(4) ___ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) ___ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL
(1) ___ Administrative or regulatory action
(2) ___ Rule 37
(3) ___ Rule on Clerk
(4) ___ Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights
(8) ___ Torts
(9) ___ Construction of deed or will
(10) ____ Contract
(11) X Criminal

The Appellant stood in Jury trial on November 29, 2016, in the Fifth Division of Columbia County Circuit Court. Judge David W. Talley, Jr. presided. Appellant was charged with a Delivery of a Controlled Substance (>2 grams <10 grams), Delivery of a Controlled Substance (2 < grams) , Maintaining a drug Premises within 1000 feet of a church, Endangering the Welfare of a Minor in the First Degree, Simultaneous Possession of Drugs and a Firearm, Possession of Firearms by a Certain Person, and Possession of a Controlled

Substance with Intent to Deliver. The Appellant was found guilty on all counts and sentenced to an aggregate term of 154 years in the Arkansas Department of Corrections. An appeal was filed and this Court affirmed in part, reversed and remanded in part and this appeal follows.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? **NO**

V. EXTRAORDINARY ISSUES. (***Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.***)

(____) appeal presents issue of first impression,
(X___) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
(____) appeal involves federal constitutional interpretation,
(____) appeal is of substantial public interest,
(X___) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
(X___) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION.

(1) Does the appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?

_____Yes __X__ No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

_____ Yes _____ No

II. JURISDICTIONAL STATEMENT

1. Appellant, Kwasi Andrade McKinney, raises two issues on appeal in this matter. The first issue on appeal is whether the trial court erred by not holding a hearing on Appellant's motion requesting the trial judge to recuse. The second issue on appeal is whether, even without holding the hearing, the Judicial Rules of Professional Conduct required the trial judge to recuse from not only the Motion to Suppress hearing ordered by this Court but the entire proceedings related to this matter.

2. [redacted]

Respectfully Submitted,

Kwasi McKinney #137065
P.O. Box 970
Marianna, AR 72360
11-29-19

Questions

III. POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

1. Whether the trial court was required to hold a hearing on McKinney's Motion to Recuse. *Ferren v. USAA Ins. Co.*, 2015 Ark. App. 477, 4, 469 S.W.3d 805, 807 (2015) (holding that a hearing is required on a recusal motion where the movant (1) asks for a hearing and (2) makes more than conclusory allegations of grounds for recusal); *Westbrook v. State,* 265 Ark. 736, 742, 580 S.W.2d 702, 705 (1979) (holding that, a circuit court should hold a hearing if a "motion contain[s] reasons which, if true, would require the judge to recuse him-self.)

2. Whether the trial court Judge was required to recuse even without a hearing on McKinney's Motion to Recuse. *Jacksonville v. Venhause*, 302 Ark. 204, 208, 788 S.W.2d 478, 480 (1990) (ordering a trial judge to recuse from a proceeding in spite of the fact the trial judge failed to hold an evidentiary hearing on the movant's motion for recusal.)

IV. TABLE OF AUTHORITIES

Cases

Rules

Other

VI. STATEMENT OF THE CASE

On March 21, 2016, the State filed a felony information alleging that the Appellant committed the offenses of Delivery of a Controlled Substance (two counts), Maintaining a Drug Premises, Endangering the Welfare of a Minor in the First Degree, Simultaneous Possession of Drugs and Firearms, Possession of a Controlled Substance with the Intent to Deliver, and Possession of a Firearm by Certain Persons. On August 30, 2016, the State filed an amended felony information alleging the same previous criminal offenses but now including enhancements for proximity to certain facilities and habitual offender status. All parties appeared in court on October 6, 2016 and announced ready for trial with a date set for November 29, 2016. Appellant filed a series of motions (Motion to Suppress Statement, Motion to Suppress Search, and Motion for Scientific Testing). **(Add. 12-17)** On November 8, 2016, Appellant requested a hearing on the pending motions and was subsequently denied for timeliness on November 14, 2016. **(Add. 17)**. The Case proceeded to a jury trial on November 29, 2016, in Columbia County Circuit Court on the above listed charges. Judge David W. Talley, Jr. presided.

Following the conclusion of all testimony, the jury returned with a verdict of guilty of Delivery of a Controlled Substance, Possession of a Controlled Substance, Simultaneous Possession of Drugs and Firearms, Maintaining a Drug Premises within 1000 feet of a church, Possession of a Controlled Substance with Intent to

Deliver, and Possession of a Firearm by a Certain Person. The Appellant was also sentenced under the proximity enhancement and as a habitual offender. The Appellant was sentenced to an aggregate term of one hundred and fifty-four (154) years in the Arkansas Department of Corrections (sentences running consecutively). On December 8, 2016, the trail court entered a Sentencing Order to this effect against the Appellant. **(Add. 38)** The Appellant filed his Notice of Appeal on January 5, 2017 and an appeal followed. **(Add. 61)** On January 10, 2018, the Arkansas Court of Appeals issued an opinion affirming in part and reversing and remanding in part. **(Add. 45).**

The Court's opinion required the trial court to hold a hearing on the Appellant's Motion to Suppress Statement and his rule on his Motion to Suppress Search. *Id.* The trial court held the remanded hearing on April 16, 2018. At the remand hearing, the Appellant made an oral motion for recusal and then immediately following the hearing filed his written motion. **(Add. 57)**. The court proceeded to hold the hearing on the motion to suppress statement and search and issued orders on April 25, 2018. **(Add. 62)**. The Appellant filed his notice of appeal on May 1, 2018. [redacted] Arkansas Appeal court Affirmed August 28, 2019 and Petition for Review (Add. 70) was denied October 17, 2019.

V. ABSTRACT

REMAND HEARING ON MOTION TO SUPRESS
COLUMBIA COUNTY CIRCUIT COURT, FIFTH DIVISION
HONORABLE DAVID W. TALLEY, JR., CIRCUIT JUDGE
APRIL 16, 2018

ON BEHALF OF PLAINTIFF: **RYAN P. PHILLIPS**

ON BEHALF OF DEFENDANT: **LOTT ROLFE**

[**Abstractor's Note: Record ("R") pages 90-94** are not necessary for consideration of the issues on appeal and, therefore, are not abstracted.]

MR. PHILLIPS: Your Honor, the remaining case for Mr. Rolfe today is The State versus McKinney, 14CR-2016-35. This has to do with a Motion for Suppression that's been filed and sent back down on appeal for resolution.

DEFENDANT: Your Honor, may I address The Court, please?

THE COURT: You do have an attorney and you understand that?

DEFENDANT: Yes.

THE COURT: I just want to make sure that you understand if you address The Court, you may be saying things that you should have cleared with your attorney first.

DEFENDANT: I just want to put some things on record.

THE COURT: Well, I think we're here for a hearing.

DEFENDANT: I still want to put some things on the record, though.

THE COURT: Relating to these motions? **(R 60).**

DEFENANT: Relating to my case, period.

THE COURT: Well, today we're dealing with the Motion concerning suppression.

DEFENANT: I have Motions I need to file, too.

THE COURT: Well, if they aren't filed, I can't address them.

DEFENANT: Well, then can I ask you to recuse yourself then, on the grounds of conflict of interest?

THE COURT: Well, if you can file a Motion and point those out.

DEFENANT: I already got the Motion wrote up.

THE COURT: Well, if it's not before me, I can't deal with it.

DEFENDANT: I can file a Motion at a hearing, right?

THE COURT: Have you got your Motion?

DEFENDANT: Yes, sir.

THE COURT: Okay. You've got to get it filed. The State's got to have an opportunity to respond to it and then **(R 61)** I can rule on it. **(R 62).**

[Abstractor's Note: Record ("R") pages 63 through 68 are not necessary for consideration of the issues on appeal and, therefore, are not abstracted.]

DEFENDANT: Your Honor, what about the Motions I intend to file?

THE COURT: If they aren't filed, I can't deal with them.

DEFENDANT: Okay. When can I file it? I really want a continuance on this hearing.

THE COURT: Are you filing anything that has to do with the suppression?

DEFENDANT: I'm filing something that has to do with my rights.

THE COURT: That's a whole different issue. Today we're dealing with the suppression issue. **(R 69).**

[Abstractor's Note: Record ("R") pages 70 through 74 are not necessary for consideration of the issues on appeal and, therefore, are not abstracted.]

DEFENDANT: So everything I say don't even matter, right?

THE COURT: That's incorrect.

DEFENDANT: That's what it sounds like to me.

THE COURT: Well, you're incorrect.

DEFENDANT: I can't file no Motions and you won't recuse and I know you ain't going to rule in my favor, so I'm just here for nothing.

THE COURT: Number one: You can file all the Motions you want to file. Number two: When we have the hearings on those Motions, you can subpoena all the witnesses you want to Subpoena. We are here dealing with **(R 75)** the issue about the suppression of statements and concerning the search warrant. That is all we are here for today. At the direction of the Court of Appeals, that is what we're here for. Now, you may afterwards file all the Motions you want to file --

DEFENDANT: But that would be afterward.

THE COURT: I'll deal with them. I've got to deal with this first. This is what the Court of Appeals said to deal with, okay? **(R 76)**

DEFENDANT: Well, one of my Motions is a Motion for Continuance on this hearing. **(R 77).**

THE COURT: We are here today ready to go forward on two issues. That's all we're dealing with today. **(R 78).**

[Abstractor's Note: Record ("R") pages 79 through 125 are not necessary for consideration of the issues on appeal and, therefore, are not abstracted.]

THE COURT: Mr. McKinney, I told you that at the conclusion of this hearing, if you've got whatever Motions you were talking about and they're in a form that you're ready to file them, gather them together and give them to the Bailiff. The Clerk can file them. How many total Motions do you have for today?

DEFENDANT: I'm just filing one right there. **(R 126).**

THE COURT: Before he goes back, I want to make sure he's given a copy of his file-marked Motion. **(R 127).**

VII. ARGUMENT

Kwasi Andrade McKinney ("McKinney") appeared before Judge David W. Talley, Jr. ("Judge Talley") of the Circuit Court of Columbia County and moved the court to recuse from the matter due to a prior existing attorney-client relationship between Judge Talley and McKinney. The Court declined both McKinney's request for a hearing on the matter and his recusal motion. The Court abused its discretion in both denials.

This appeal comes before this Court setting out McKinney's compliance with the law and Judge Talley's abuse of discretion in denying McKinney's motion and his request for a hearing on his motion. However, before we can set out the merits of this appeal in Parts C and D, we must first review the conflicting case law on the standard governing judicial disqualification in Part A, and the conflict between the standard of review for judicial disqualification and the standard governing judicial disqualification in Part B.

A. For an appropriate consideration to occur, the conflict in judicial disqualification law needs clarification.

A conflict exists between the rules of judicial disqualification and the case-law espousing the review and application of those rules. Elizabeth James, Note, *Confusion, Clarification and Continued Considerations: A Closer Look at Arkansas's Judicial Disqualification Rules in Light of Ferguson v. State*, 40 U. Ark.

Little Rock L. Rev. 2, 283 (2018) (hereinafter James, *Judicial Disqualification*) (arguing that such a conflict exists and setting forth, in great detail, the arguments incorporated into Parts A and B of this brief). As such, before the Appellant's specific issues regarding the trial court's denial of his motion to recuse can be addressed by this Court, an analysis of the state's disqualification law is necessary.

1. Disqualification under the "First Code" was discretionary and subjective.

Before the Arkansas Code of Judicial Conduct was adopted, the state Constitution and statutory law governed judicial disqualification. *Narisi v. Narisi*, 229 Ark. 1059, 1064, 320 S.W.2d. 757, 761 (1959). Matters of disqualification were "left largely to the discretion of the [trial] judge himself." *Id.* In 1998, the "Arkansas Code of Judicial Conduct" was published (the "First Code"), *In re Arkansas Code of Judicial Conduct*, 295 Ark. 707 (June 6, 1988) (*per curiam*), and Canon 3C(1), titled "Disqualification," stated that a judge "***should*** disqualify himself in a proceeding in which his impartiality might reasonably be questioned". Ark. Code Jud. Conduct Canon 3(C)(1) (1988) (*emphasis added*). Given the permissive nature of the canon, the First Code left the test for determining whether there was an appearance of impropriety to the individual judge's own conscience. *Id.* Canon 2(A) cmt. ¶ 2.

The combined use of the word "should" as the governing guidance for recusal with the subjective "judge's own conscience" test resulted in the impartation of

broad discretionary authority upon judges when deciding disqualification issues. Naturally, this discretionary rule resulted in precedent supporting a broad discretionary authority in judges themselves. *E.g., Roe v. Dietrick*, 310 Ark. 54, 59, 835 S.W.2d 289, 292 (1992) ("The decision to disqualify from a case is, again, discretionary with the trial court."); *Sheridan v. State*, 313 Ark. 23, 48, 852 S.W.2d 772, 785 (1993) ("The decision to disqualify . . . is discretionary with a judge."); *Matthews v. State*, 313 Ark. 327, 330, 854 S.W.2d 339, 341 (1993) ("The matter of whether to disqualify is to be determined in the sound discretion of the judge in question."); *Korolko v. Korolko*, 33 Ark. App. 194, 197, 803 S.W.2d 948, 950 (1991) ("[D]isqualification of a judge is a discretionary with the judge himself."); *Duty v. State*, 45 Ark. App. 1, 6, 871 S.W.2d 400, 403 (1994) ("[W]hether recusal is required lies within the judge's conscience.")

No case is more illustrative of the yielding nature of this broad discretionary standard than the case of *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994). In *Trimble*, a trial judge presided over a criminal matter while the judge's son was employed at the prosecuting attorney's office. *Id.* at 170–72, 871 S.W.2d at 566–67. The trial judge's refusal to recuse was affirmed even though the appellate court agreed that "the appearance generated by the employment of a judge's son at the prosecutor's office is none too good." *Id.* But, as the *Trimble* court indicated, the trial judge's conduct had not violated the First Code because the code merely

suggested that the judge disqualify himself only after the judge subjectively determined whether he had become biased and was unable to continue presiding over the trial. *Id.* Since the judge in *Trimble* did not agree that his son's employment at the prosecuting attorney's office affected his ability to preside impartially over the criminal prosecution, his refusal to recuse was not a violation of the First Code. *Id.*

2. *Disqualification under the "Second Code" was purposefully changed to be mandatory and objective.*

In 1993, with the adoption of a revised Arkansas Code of Judicial Conduct (the "Second Code"), *In re Arkansas Code of Judicial Conduct*, 313 Ark. Appx. 737 (July 5, 1993) (*per curiam*), a significant change was made. Canon 3(E)(1) of the Second Code, still titled "Disqualification," mandated that a judge "***shall*** disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Ark. Code Jud. Conduct Canon 3(E)(1) (1993) (*emphasis added*). Also significant was the change made to the test for determining the appearance of impropriety. The Second Code replaced the subjective "judge's own conscience" test with an objective "reasonable minds" test for purposes of determining whether there was an appearance of impropriety. *Id.* Canon 2(A) cmt. ¶ 2.

The purpose of these significant change—moving from the discretionary, subjective rule to the mandatory, objective rule—is made clear in the Preamble to the Second Code:

When the text uses "shall" or "shall not," it is intended to impose

> binding obligations . . . When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as binding rule . . .

Id. Preamble ¶ 2.

And further clarified in Comment 1 to Cannon 3(E)(1), stating, "[u]nder this rule, a judge ***is*** disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in [the section] apply." *Id.* Canon3(E)(1) cmt.1 (*emphasis added*).

3. The case law did not follow the change to the Arkansas Code of Judicial Conduct.

The changes incorporated into the Second Code should have rendered the former "discretionary" standard of the First Code inapplicable to judicial disqualification decisions being decided under the Second Code. However, the then-existing case law was still applied without consideration of the intentional change made to the Second Code. This resulted in a conflict between the mandatory call of the Second Code and case adopted after the First Code.

One of the first cases addressing the issue of judicial disqualification under the Second Code was *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994). In *Reel*, the defendant moved to disqualify the presiding judge because the judge had been the victim of a similar crime for which the defendant was being charged. *Id.* at 569, 886 S.W.2d at 617. In affirming the trial judge's refusal to recuse, the Supreme Court of Arkansas acknowledged the "shall" disqualify language of the Second Code by

and through the amended language comprising Canon 3(E)(1). *Id.* However, that is the extent to which the Second Code received consideration. In support of the proposition that the decision to disqualify was discretionary with the trial judge, the court went on to cite two cases that were decided under the First Code as the authority for its holding. *Id.* (*citing Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993) which discussed disqualification pursuant to Canon 3(C) of the First Code and *Trimble*, 316 Ark. 161, 871 S.W.2d 562 which is discussed above).

The effect of the amendments to the Second Code were further eroded when the *Reel* court applied the First Code's test for determining whether there was an appearance of impropriety when it held that the judge was "in the better position to determine if his recent experience would compromise his impartiality." *Reel*, 318 Ark. at 567, 886 S.W.2d at 618. The appropriate and modified test of the Second Code should have been applied to impose an objective "reasonable minds" standard to the facts rather than allowing the presiding judge's own conscience to prevail in the determination of recusal. By failing to apply an analysis consistent with the substantial changes of the Second Code, the decision in *Reel* critically undercut the purpose of the changes made by and through the Second Code.

This misapplication of the former legal analysis was also evident in *Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000). In *Walls*, the Supreme Court of Arkansas acknowledged the mandatory language of the Second Code, stating that the rule

"does provide that a judge shall disqualify" but then the court when on to state, "however, we have held that recusal is a matter that is discretionary with the trial judge." *Id.* at 792, 20 S.W.3d at 325. Based on an errant application of prior precedent inapposite to the mandate of the Second Code, the court in *Walls* affirmed the trial judge's decision not to recuse in spite of the fact the court believed the judge made "inappropriate and ethically suspect" comments to the defendant during the course of his case. *Id.* This holding wholly defeated the purpose of the Second Code's changes.

The misapplication of former precedent decided under the First Code to the cases involving the amended rules of the Second Code continued for decades, entrenching in Arkansas law the repeated holding that trial judges still had substantive discretion[1] in deciding matters of recusal, contrary to the very code that governs their conduct. *E.g., Gates v. State*, 338 Ark. 530, 544, 2 S.W.3d 40, 48 (1999) ("The decision to recuse is within the trial court's discretion."); *Porter v. Ark. Dept. of Health & Human Serv.*, 374 Ark. 177, 191, 286 S.W.3d 686, 697 (2008) ("The question of bias is generally confined to the conscience of the judge."); *Searcy v. Davenport*, 352 Ark. 307, 313, 100 S.W.3d 711, 715 (2003) ("Whether a judge

[1] The phrase "substantive discretion" is used to refer to a judge's discretion in deciding the substance of a recusal motion, *i.e.* choosing whether to recuse. Substantive discretion should not be confused with the abuse-of-discretion standard of review which is discussed in Part II below. James, *Judicial Disqualification*, 40 U. Ark. Little Rock L. Rev. 2, 284 n.12.

has become biased to the point that he should disqualify himself from a matter to be confined to the conscience of the judge."). The plain language of the Second Code neither stated nor implied that a trial judge had discretion in deciding whether to recuse once the judge's impartiality had reasonably been questioned yet codified the exact opposite. The two are irreconcilable.

4. Subsequent changes reaffirmed the mandatory recusal of judges.

The Code was amended a third time in 2009 and again in 2016, leaving unchanged the mandatory qualification provisions adopted by the Second Code. The current Rule 2.11 still requires that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Ark. Code Jud. Conduct R. 2.11 (2009). The reasonable person standard still applies when determining what conduct constitutes a violation of the Code. *Id.* R. 1.2 cmt. n.5.

Unfortunately, the cases decided under the current version of the Code have been decided with the same inherent quandaries as those that had been decided before. *E.g., Ahmad v. Horizon Pain, Inc.*, 2014 Ark. App. 531, * 5, 444 S.W.3d 412, 416 (2014) (holding that at trial judge is presumed to be impartial and the burden is on the party seeking disqualification to prove a showing of bias or prejudice before a reversal can be achieved); *Smith v. Hudgins*, 2014 Ark. App. 150, * 7, 433 S.W.3d 265, 269 (2014) (holding that the decision to recuse is within the discretion of the judge and that in order to reverse that decision, the moving party

must show bias or prejudice on the part of the judge).

5. *In* Ferguson v. State, *the Supreme Court of Arkansas impliedly overruled the discretionary standard in support of a mandatory, objective standard.*

This conflict was highlighted in the dissenting opinion of *Ferguson v. State*, 2015 Ark. App. 722, *13, 479 S.W.3d 25, 32 (2015) (Harrison, J., dissenting), *rev'd* 2016 Ark. 319, 498 S.W.3d 733 (2016). In *Ferguson*, the trial judge was presiding over a juvenile dependency-neglect proceeding against Ferguson while also presiding over a criminal proceeding involving the same allegations against Ferguson. *Id.* at *2, 498 S.W.3d at 735. During the course of the juvenile proceeding, the trial judge made statements that gave the appearance that the judge had developed a bias against Ferguson. *Id.* at *5, 498 S.W.3d at 736. Thereafter, Ferguson moved for the recusal of the trial judge in the criminal proceeding. *Id.* at 4–6, 498 S.W.3d at 736. In a 4-2 decision, this Court affirmed the trial court's denial of the motion for recusal. *Id.* at *6, 479 S.W.3d at 28. The dissent emphasized the conflict between the case law cited by the majority as authority for affirming the trial judge's denial of the recusal motion and the plain language of the Code which mandated recusal. *Id.* at 12–13, 479 S.W.3d at 31 (Harrison, J., dissenting).

The Arkansas Supreme Court granted review and reversed the trial judge's decision not to recuse, remanding the case for a new trial before a different judge. *Ferguson v. State*, 2016 Ark. 319 *1, 498 S.W.3d 733, 734 (2016). In reaching its

determination, the court explained that the word "shall" found in Rule 2.11(A) had mandatory rather than discretionary implications and that once a judge's impartiality had been reasonably questioned, "the mandatory portion of Rule 2.11(A) is invoked and the judge is required to disqualify." *Id.* at *7, 498 S.W.3d at 737. The court went on to state that, when determining the reasonableness of a litigant's questioning of the judge's impartiality, the judge is required to "be mindful of the perception of bias from the litigant's perspective." *Id.* Finally, the court did not require Ferguson to make a showing of actual bias to trigger the necessity of recusal. *Id.*

In reversing and remanding before a new judge for the reasons set out in the preceding paragraph, the Supreme Court of Arkansas in *Ferguson* impliedly overruled the decades of conflicting precedent that were plaguing this area of law. The holding in *Ferguson* that "circuit courts are to be mindful of the perception of bias from the litigant's perspective" impliedly overrules cases such as *Reel v. State* which held that judges were in a better position to determine whether their impartiality had been compromised. *Ferguson*, 2016 Ark. at *7, 498 S.W.3d at 737; *Reel v. State*, 318 Ark. 565, 567, 86 S.W.2d 615, 618 (1994). Cases like *Lofton v. State*, wherein the court affirmed a judge's refusal to recuse finding that the movant's allegations of an appearance of bias were "subjective" to the movant, are now impliedly overruled because the court must now review the allegations from the litigant's perspective. 57 Ark. App. 226, 234, 944 S.W.2d 131, 135 (1997). Under

the *Ferguson* analysis and the rules of disqualification, the opinion and conscience of the judge are irrelevant; it is the objective standard of a reasonable person that is determinative on this issue. Any established case law to the contrary has been rendered inapplicable.

B. In light of *Ferguson*, a decision by a judge not to disqualify should be reviewed under a *de novo* standard of review.

This Court reviews a trial judge's denial of a motion for recusal under an abuse-of-discretion standard of review. *Ferguson v. State*, 2016 Ark. 319, *6, 498 S.W.3d 733, 737 (2016). "A clearly erroneous interpretation or application of a law or rule will constitute a manifest abuse-of-discretion." *Id.*

Disqualification decisions have been reviewed under the highly deferential abuse-of-discretion standard for decades. *See Narisi*, 229 Ark. at 1064, 320 S.W.2d. at 761. However, the abuse-of-discretion standard is incongruent with the current disqualification analysis and it should be abandoned in favor of the more appropriate *de novo* standard of review.

Appellate review of trial court decisions are traditionally divided into three basic categories: (1) "*de novo*" review of questions of law; (2) "clear error" review of questions of fact; and (3) "abuse-of-discretion" review of matters within the trial judge's discretion. *See Highmark Inc. v. Allcare Heath Mgmt. Sys. Inc.*, 134 S.Ct. 1744, 1748 (2014). *De novo* review is an expansive form of review where the appellate court gives no deference to the lower court's decisions and, instead,

considers the case as if it had been brought before the appellate court for the first time. Because cases reviewed under this standard involve the application of law to facts, courts are primarily concerned with determining how the law applies to the case. A "clear error" or "clearly erroneous" review deals largely with questions of fact. Because the trial judge had the opportunity to hear the testimony and consider the evidence, trial judges are given deference regarding those factual findings. The clear error standard requires the appellate court to have a "definite and firm conviction that a mistake has been committed" by the trial court before reversing the trial court's deferential decision regarding those factual findings. *See Concrete Pipe and Prod. of Cal. Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). The most deferential standard, however, is the abuse-of-discretion standard which is a "high threshold" that requires the trial court to act "improvidently, thoughtlessly, or without due consideration" before a trial judge's decision will be reversed. *See Lone v. Koch*, 2015 Ark. App. 373, 4, 467 S.W.3d 152, 155 (2015). Decisions reviewed under the abuse-of-discretion standard usually involve judgement calls that are difficult to re-evaluate on appeal.

The abuse-of-discretion standard is incongruent with the post-*Ferguson* disqualification analysis and the rules for disqualification. It should be abandoned in favor of the more appropriate *de novo* standard of review. Judges do not have subjective discretion in deciding recusal motions and the appellate court is not

required to give the judge any deference when reviewing recusal decisions. It would serve a grave injustice to the disqualification doctrine if the appellate courts continued to review disqualification decisions under the abuse-of-discretion standard absent any discretionary authority vested in the trial judge. If a judge refuses to recuse, an appeal of that denial should be reviewed objectively to ensure the mandatory call of the Code was appropriately applied. This type of review will require the courts to abandon the abuse-of-discretion standard.

The issue presented in the appeal of a recusal decision involves both a question of fact and a question of law because the court must first determine if the judge's impartiality has been reasonably questioned and, second, determine if the mandate of the Code applies. It can be difficult to determine the appropriate standard of review for mixed questions of law and fact. The Ninth Circuit established a functional test that is helpful in making this determination. If applying the rule of law to the facts of the case requires an "essentially factual" inquiry, then the clearly erroneous standard applies. *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984). If the issue requires consideration of legal concepts and the "values that animate legal principles," then the *de novo* standard applies. *Id.*

The review of a disqualification decision requires an application of the law to the facts to determine whether or not the judge was required to recuse. Therefore, the more appropriate standard of review would be a *de novo* review standard. This

Court should apply the *de novo* standard of review when deciding appeals based on disqualification under the Code of Judicial Conduct.

C. The trial court was required to hold a hearing on McKinney's recusal motion.

Having set out the mandatory nature of judicial disqualification where a judge's impartiality might reasonably be questioned, (See Parts A and B, *supra*), we now turn to the McKinney's Motion for Recusal. **(Add. 57)**. While there is no requirement that a hearing be held every time a litigant files a recusal motion. *See Stilley v. Fort Smith School District*, 367 Ark. 193, 238 S.W.3d 902 (2006) (no hearing was required where the moving party's motion was "devoid of any facts supporting his assertion[s]"), a hearing is required on a recusal motion where the movant (1) asks for a hearing and (2) makes more than conclusory allegations of grounds for recusal. *Ferren v. USAA Ins. Co.*, 2015 Ark. App. 477, 4, 469 S.W.3d 805, 807 (2015).[2]

1. McKinney Asked for a Hearing.

McKinney was incarcerated at the time his remand hearing was held. At the outset of the hearing, McKinney asked to address the Court directly. **(AB 1).**

[2] Whether McKinney filed a motion for recusal or not, it was still incumbent upon Judge Talley to note his disqualification and to refrain from hearing a case in which his disqualification is required. Rule 2.11, cmt.2. In this this instance, Judge Talley should have recused not just from the remand hearing, but from the original trial as well. See Part IV, *infra*.

McKinney proceeded to request that Judge Talley recuse himself from the proceeding based upon a "conflict of interest." **(AB 2).** Judge Tally informed McKinney that he would have to first file a motion for that request to be considered. **(AB 2).** McKinney had already prepared his written Motion for Recusal and asked for permission to file it at the hearing. **(AB 2).** Judge Talley denied his request, stating that the State would need an opportunity to respond before the motion could be ruled on. **(AB 2).** Thereafter, McKinney asked for a continuance. **(AB 2).** That request, too, was denied. **(AB 3).**

Judge Talley instructed McKinney that he could "file all the Motions [he] want[ed] to file" after the hearing and that subsequent hearings would be held on those motions. **(AB 3).** When McKinney asked, again, for permission to file his Motion, Judge Talley confirmed that no additional motions would be filed until after the conclusion of the remand hearing. **(AB 3-4).** McKinney tried for a second time to get a continuance of the hearing, but his request was again denied. **(AB 4).**

At the conclusion of the remand hearing, Judge Talley allowed McKinney to provide his Motion for Recusal to the Bailiff so that the Clerk could file it and so that he would receive a file-marked copy prior to being transported back to the Arkansas Department of Corrections. **(AB 4).** McKinney's Motion to Recuse was file marked April 16, 2018, after the conclusion of the remand hearing. **(Add. 57).**

McKinney implored the trial court to address his Motion for Recusal prior to holding the final hearing in his criminal proceeding. **(AB 2-4).** Although Judge Talley would not agree to address the motion without it first being filed with the Clerk, he did suggest that a subsequent hearing would be held on McKinney's Motion. **(AB 3).** No such hearing was held. Instead, the Court, acting *sua sponte*, denied McKinney's Motion to Recuse by Order filed April 25, 2018; the same day the Order denying McKinney's Motion to Suppress was entered. **(Add. 62).**

McKinney availed himself of the only opportunity that he had to request a hearing on his *pro se* Motion for Recusal. When he was informed by Judge Talley that he would receive a subsequent hearing on any motion that he filed, McKinney did not have any reason to believe additional requests for a hearing would be necessary. McKinney satisfied the requirement that he request a hearing on his Motion to Recuse.

2. *McKinney's Motion Contained More than Conclusory Allegations.*

In addition to requesting a hearing, the movant must also make more than conclusory allegations for grounds of recusal. *Ferren*, at 4, 807. "Conclusory allegations" are those allegations which focus on ultimate legal conclusions rather than fact-based assertions, or those allegations which simply recite the elements of a cause of action couched as factual assertions. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 14 (1st Cir. 2011) (discussing the Supreme Court's concerns

about conclusory allegations as expressed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

The crux of McKinney's request for Judge Talley's recusal stems from a former attorney/client relationship between McKinney and Judge Talley. **(Add. 57).** Specifically, McKinney alleged that Judge Talley had previously represented him in multiple criminal cases occurring over the course of seven years—allegations which Judge Talley confirmed pursuant to his Order denying the Motion for Recusal. ***(Id.* ¶¶ 4–8; Add. 62 ¶ 4).** McKinney characterized that longstanding relationship as creating a "conflict of interest" which warranted Judge Talley's recusal. **(Add. 57 ¶ 1).** While the technical, legal terminology "conflict of interest" has different implications, it is nonetheless clear that McKinney's overarching concern was that his former and substantial personal dealings with Judge Talley might reasonably affect Judge Talley's impartiality.

There is a significant interest in the preservation of the integrity and confidentiality of the attorney-client relationship. Indeed, the State's licensing and disciplinary authority, and our State laws in the matter, each fiercely protect the special nature the attorney-client relationship creates. For example, the attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). This privilege is intended to encourage "full and frank communication between attorneys

and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* (*citing Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). It is for this very reason the attorney-client privilege extends even beyond the death of the client. *Id.*

Given the significance of the law protecting the attorney-client bond, a client is likely to disclose to his attorney a substantial amount of confidential information. In fact, such open and honest communication is encouraged by attorneys and is necessary for an attorney to adequately represent his or her client. With Judge Talley having a long-standing attorney-client relationship with McKinney, spanning the course of seven years and relating to multiple criminal cases, it is nearly unquestionable that Judge Talley became intimately familiar with certain aspects of McKinney's lifestyle, his habits, his trial strategies, his character, his propensity for truthfulness, etc. In a situation where Judge Talley is required to make decisions based solely upon credibility determinations—a situation that was actually presented at the remand hearing—Judge Talley's impartiality would reasonably be questioned.

These allegations are more than conclusory and that, combined with his request for a hearing, was all that McKinney was required to do to be entitled to a hearing on his motion. While McKinney admits that it is incumbent upon him to demonstrate the necessity of Judge Talley's recusal, "he could hardly do so without the opportunity to be heard on his motion." *Jacksonville v. Venhause*, 302 Ark. 204,

208, 788 S.W.2d 478, 480 (1990) (*Westbrook v. State,* 265 Ark. 736, 742, 580 S.W.2d 702, 705 (1979)).

Because the trial court did not hold a hearing on the Motion for Recusal, McKinney was improperly denied an opportunity to address the issues raised in his motion, to introduce evidence in support of his motion, or to otherwise present a substantive argument in support of his motion. This Court should, at a minimum, reverse, remand, and order the trial court to hold a hearing on the recusal motion. *See e.g., Westbrook,* 265 Ark. at 742, 580 S.W.2d at 705 (holding that, because the "motion contained reasons which, if true, would require the judge to recuse himself," the circuit court should have held a hearing).

D. The trial court was required to recuse from presiding over the case.

Even without the benefit of a hearing, McKinney asserts that there is sufficient evidence to show that Judge Talley abused his discretion in not recusing. *See Venhause*, 302 Ark. at 208-09, 788 S.W.2d at 480-81 (ordering a trial judge to recuse from a proceeding in spite of the fact the trial judge failed to hold an evidentiary hearing on the movant's motion for recusal).

Rule 2.11(A) of the Arkansas Code of Judicial Conduct states that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The word "shall" has mandatory rather than discretionary implications. *Ferguson,* 2016 Ark. 319 *7, 498 S.W.3d at 737. Once a

judge's impartiality has been reasonably questioned, "the mandatory portion of Rule 2.11(A) is invoked and the judge is required to disqualify." *Id.*

The enumerated subsections of Rule 2.11(A) propose six circumstances wherein a judge's impartiality is reasonably questioned, thus requiring disqualification. Ark. Code Jud. Conduct R. 2.11(A)(1)–(6). However, this is not an exhaustive list of the only ways in which a judge's impartiality might reasonably be called into question. Ark. Code Jud. Conduct R 2.11(A) (introducing the subsections with the caveat "including *but not limited to*") (emphasis added). The official comments to Rule 2.11 clarify that, "[u]nder this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply." *Id.* cmt, n.1.

The test for determining what conduct constitutes a violation of the Code is the objective "reasonable minds" test. Ark. Code Jud. Conduct R 1.2, cmt. n.5. When determining whether the litigant has reasonably questioned the judge's impartiality, the judge is required to "be mindful of the perception of bias from the litigant's perspective." *Ferguson,* 2016 Ark. 319 *7, 498 S.W.3d at 737.

In the trial court's Order denying McKinney's Motion for Recusal, Judge Talley admitted that, prior to taking the bench on January 1, 2015, he had represented McKinney in various cases between 2003 and 2010. **(Add. 62 ¶ 4).** However, Judge

Talley opined that his past representation had "not caused any bias or impartiality of the Court for or against [McKinney]." (***Id.***). This statement runs afoul of the plain language of the disqualification rules. (See Part I, *supra.*) It was not Judge Talley's subjective opinion regarding the existence or nonexistence of an actual bias that is determinative of the issue; rather, the issue is to be resolved objectively, considering McKinney's perspective.

Judge Talley further held that "[n]othing averred by [McKinney] in his Motion would reasonably call into question this Court's impartiality." (***Id.* ¶ 6**). This too contradicts the mandate of Code of Judicial Conduct and it is not supported by the facts. Viewing the "conflict" from McKinney's perspective, it was reasonable for McKinney to question Judge Talley's impartiality given the degree of familiarity Judge Talley's would have had with McKinney. Rule 2.11 is clear: where a judge's impartiality has reasonably been called into question, the judge must recuse.

VIII. CONCLUSION.

McKinney asked for a hearing and made more than conclusory allegations in his Motion for Recusal, the trial court abused its discretion in not holding a hearing on McKinney's recusal motion. This Court should reverse and remand for a hearing on the motion so that McKinney can further address the allegations.

This Court, however, can and should rule that a hearing isn't even necessary. The factual basis for McKinney's motion is undisputed. In viewing these underlying facts from McKinney's perspective, it is reasonable that McKinney would question Judge Talley's impartiality. Because Judge Talley's impartiality was reasonably called into question, Rule 2.11(A) of the Arkansas Code of Judicial Conduct mandates that Judge McKinney recuse from presiding over the matter the remand hearing as well as the original trial. The failure of Judge Talley to recuse warrants a reversal of his denial of the motion to recuse. The petition for a writ of certiorary should be granted.

Respectfully submitted,

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11-29-19