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**Jun 29 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Chester County

Honorable Brian M. Gibbons, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JAMES B. CURRY,

APPELLANT

APPELLATE CASE NO. 2022-001104

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INITIAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

**I.**

Did the circuit court erred in ordering that pursuant to S.C. Code Ann. § 24-27-200 Appellant forfeited any earned work, education, and good conduct credits he had accumulated due to his allegedly frivolous filings, where S.C. Code Ann. § 24-27-100 to -500 only applies to civil actions filed by inmates and not to collateral criminal proceedings in which an inmate challenges his conviction?

**II.**

Did the circuit court err in denying Appellant's motion to recuse where the court's factual findings are not supported by the record?

## STATEMENT OF THE CASE

Appellant was indicted during the July 2007 term of the Chester County grand jury for one count each of first-degree burglary, armed robbery, kidnapping, and assault and battery of a high and aggravated nature. R. (Indictments). In February of 2008, the State called Appellant's case to trial before the Honorable Brooks P. Goldsmith and a jury. Appellant represented himself *pro se*. Appellant was convicted as indicted and sentenced to concurrent terms of twenty-five years imprisonment on the burglary, armed robbery, and kidnapping charges, and ten years imprisonment on the assault and battery charge. R. (sentencing sheets). Following his conviction, Appellant timely filed a notice of appeal before voluntarily withdrawing his appeal to pursue post-trial motions.

Appellant filed a motion for a new trial based on after discovered evidence on July 29, 2008. He asserted that a juror committed a voir dire violation that the State and police chief were aware of, and that Appellant suffered from an undiagnosed mental disorder which prevented him from making a knowing and intelligent waiver of his right to counsel. The motion was denied by Judge Goldsmith orally during a hearing in February 2009, and later in an order filed on March 18, 2010. R. (Goldsmith March 2010 order). Appellant filed a second motion for a new trial based on after discovered evidence on April 7, 2009, asserting that the discovery of misconduct in office by the Great Falls Police Chief warranted a new trial, that evidence of similar offense being committed by a third party after his conviction warranted a new trial, and that the State made false and misleading statements regarding DNA evidence at trial which warranted a new trial. The Honorable Howard P. King heard arguments on the motion on October 5, 2009. By written order Judge King denied the motion finding that none of the three grounds raised met the test for after-discovered evidence. R. (King October 2009 Order).

Appellant next filed his first PCR action on May 14, 2010, alleging various grounds for relief including juror misconduct by Juror 38 in failing to reveal her social relationship with Police Chief Mike Revels and Mayor H.C. Starnes. He also alleged that Juror 38 had failed to disclose past employment with the Great Falls Sheriff's Department. A hearing was held on February 23, 2011, before the Honorable J. Earnest Kinard, Jr., and an order of dismissal was filed on April 20, 2011, finding that Appellant had not established any grounds for relief. R. (OOD 2010-CP-12-0228).

Appellant filed his second PCR action on March 28, 2012, alleging newly discovered evidence. Appellant claimed that another person had confessed to committing the crimes that he was incarcerated for by placing a letter in the mail that he has only recently discovered in the prison mailroom. Judge Goldsmith issued a conditional order of dismissal finding the application barred as untimely and successive on October 1, 2012. R. (Conditional OOD 2012-CP-12-0184). Based on Appellant's response to the conditional order of dismissal, a hearing was scheduled before the Honorable Clifton Newman on August 6, 2013. An order of dismissal was filed on December 23, 2013, finding Appellant's testimony regarding the confession was not credible and that the evidence could not be authenticated because the person who had written the allegedly confession had been murdered two months after placing the letter in the mail. R. (OOD 2012-CP-12-0184). Appellant subsequently filed a motion for relief from judgement pursuant to Rule 60(b), SCRCF. He argued he was entitled to relief from his conviction and sentences based upon fraud upon the court by the victim, the Solicitor, and the former Great Falls Police Chief. The Honorable Brian M. Gibbons denied the motion by written order dated July 21, 2014, finding the motion was an attempted successive PCR application and finding the motion untimely. R. (Gibbons July 2014 order).

Appellant filed a third<sup>1</sup> motion for a new trial based on after discovered evidence in which he alleged that a portion of the transcript from his trial demonstrated that a witness for the State had lied, and that the Solicitor had colluded with the witness to present false testimony. Judge Gibbons denied the motion by order dated December 4, 2014, finding that the claim was not after-discovered evidence. Additionally, Judge Gibbons proceeded to restrict Appellant's filing ability "[b]ased upon the repetitive and frivolous nature of Defendant's motions, and in reliance on In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996)." Judge Gibbons also referenced an order from Judge King<sup>2</sup> which cited to S.C. Code Ann. §24-27-200 and admonished Appellant against the continued filing of frivolous lawsuits. R. (Gibbons December 2014 Order).

Roughly seven years later, in 2021, Appellant filed a fourth motion for a new trial based on after discovered evidence in which he alleged that Juror 38 had failed to disclose that she was employed within the walls of the Chester County courthouse during Appellant's trial. The Honorable Eugene C. Griffith, Jr., heard the motion. Judge Griffith denied the motion in a written order dated November 5, 2021. Judge Griffith found that Appellant had not complied with the procedural steps put in place by the December 4, 2014, order by Judge Gibbons because he had failed to provide an accompanying affidavit certifying that the matter raised was not frivolous. He further found that Appellant's claim was without merit because there was no

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<sup>1</sup> The order denying the motion states that this is Appellant's fourth motion for a new trial based on after discovered evidence, not including his successive PCR applications or other dismissed lawsuits. However, the procedural history of the order only identifies two prior Rule 29(b), SCRCrimP, which aligns with the orders that have been issued in Appellant's various challenges to his convictions and sentences.

<sup>2</sup> This order is from the dismissal of one of five civil cases Appellant filed between 2008-2009. Per the Chester County public index, four of the cases were dismissed for failure to comply with Rule 4 and Rule 5, SCRCP. The final case was dismissed by the written order of Judge King.

record of Juror 38 ever working in the Chester County courthouse. R. (Griffith November 2021 Order).<sup>3</sup>

On April 5, 2022, Appellant filed a motion to be heard regarding a juror voir dire violation. R. (*Pro Se* motion dated April 5, 2022). An order denying that motion without a hearing was signed by Judge Gibbons and filed on April 15, 2022. R. (Order denying *pro se* motion dated April 15, 2022). Appellant, on May 3, 2022, filed a motion for rehearing before the Chief Administrative Judge and a motion for Judge Gibbons to recuse himself from hearing further matters involving Appellant's convictions. R. (*Pro Se* motion for rehearing and recusal dated April 16, 2022) By written order filed May 16, 2022, the motion for rehearing was denied and a hearing was scheduled to address Appellant's motion to recuse Judge Gibbons. R. (Order denying rehearing dated May 16, 2022).

On July 20, 2022, a hearing was held before Judge Gibbons on Appellant's motion to recuse. Megan Jameson appeared on behalf of the Attorney General's office and Candice Lively appeared on behalf of the Sixth Circuit Solicitor's office. Appellant appeared *pro se*. Tr. 1. Judge Gibbons denied the motion for recusal. Tr. 14, ll. 4-7. Thereafter, Judge Gibbons, on the court's own motion, found Appellant in violation of S.C. Code Ann § 24-27-200 and ordered that any work, education, or good conduct credits that Appellant had earned be forfeited for filing frivolous actions and willfully violating court orders. Tr. 19, l. 15-Tr. 20, l. 8 A written order containing Judge Gibbons rulings was filed on August 10, 2022. (Gibbons August 2022 Order).

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<sup>3</sup> Appellant also filed various motions to reconsider or rehearing his various claims as well as various appellate actions. The motions to reconsider were all denied on the grounds stated in the original orders and the appeals were dismissed for failure to comply with the appellate court rules.

## ARGUMENT

### **I.**

The circuit court erred in ordering that pursuant to S.C. Code Ann. § 24-27-200 Appellant forfeited any earned work, education, and good conduct credits he had accumulated due to his allegedly frivolous filings, where S.C. Code Ann. § 24-27-100 to -500 only applies to civil actions filed by inmates and not to collateral criminal proceedings in which an inmate challenges his conviction.

#### **Standard of Review**

The issue of interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). “This Court is free to decide questions of law with no particular deference to the lower court.” Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

#### **Relevant Facts**

At the beginning of the hearing, Judge Gibbons informed the parties that in addition to the motion for recusal he would determine “the application of Section 24-27-200 and 210 of [the] South Carolina Code of Laws with regards to this [sic] excessive filings made by Mr. Curry and what’s going to happen because of all that.” Tr. 3, ll. 13-24. After denying Appellant’s motion for recusal, Judge Gibbons stated that Appellant had been placed on notice that he should not file frivolous, non-legitimate lawsuits, and if he persisted in his filings, he could be subjected to the penalties in S.C. Code Ann. §§ 24-27-200 and 27-27-300. Tr. 14, l. 8-Tr. 15, l. 25. Judge

Gibbons continued that despite that warning Appellant had continued to file motions for a new trial, various papers, and “inundated the clerk’s office and have tormented our Clerk of Court” with his filings. Tr. 18, ll. 4-17.

On his own motion, Judge Gibbons found that Appellant had intentionally and willfully violated orders of the court by “continuing to file frivolous actions, frivolous documentation, frivolous lawsuits, letters, whatever you want to call it; they’re frivolous.” Pursuant to S.C. Code Ann. § 24-27-200 he ordered that all the good conduct, work, and education credits Appellant may have earned since 2008 be forfeited. Tr. 19, l. 15-Tr. 20, l. 15. Judge Gibbons made on the record conclusions that Appellant had submitted malicious or frivolous claims, that the claims were intended to harass the party he filed them against, that Appellant had testified falsely or otherwise presented false evidence to the court, and that he unreasonably expanded or delayed a proceeding. Tr. 20, l. 17-Tr. 21, l. 10.

Appellant informed Judge Gibbons that he did not receive good time credits because his sentence was 85%. Tr. 24, ll. 23-24. He also stated that he had not filed anything in his case in eleven years until he filed the motion regarding the juror voir dire violation, which he asserted had never been litigated. Tr. 29, ll. 15-23; Tr. 6, ll. 10-22. He maintained that he had abided by Judge Gibbons 2014 order and 2021 was the first time he filed anything after the order. Tr. 9, ll. 4-16.

A written order reflecting Judge Gibbons oral rulings was filed on August 10, 2022. In the order, Appellant was found to be in violation of three separate orders that had admonished him to cease filing repetitive and frivolous claims. Judge Gibbons recommended and ordered that Appellant forfeit any earned worked, education, or good conduct credits that he had accumulated. R. (Gibbons Order Forfeiting Credits dated August 10, 2022)

## Discussion

The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

Additionally, statutes are not intended to be read in a piecemeal fashion, taking only those parts which best serve a particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, should not concentrate on isolated phrases within the statute; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id. “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.” State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (internal

citation omitted). “Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.” Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct.App.1993).

In 1996, the South Carolina General Assembly passed the Inmate Litigation Act (ILA). See S.C. Code Ann. §§ 24-27-100 to -500. The language of the ILA makes apparent that the intent of the Legislature was to limit the application of the ILA to civil cases filed by inmates challenging prison conditions. See S.C. Code Ann. §§24-27-100-110, -130,-150, -300; See also Wade v. State 348 S.C. 255, 263, 559 S.E.2d 843, 846 (2002). The first two sections of the ILA address the payment of filing fees and court costs by inmates filing civil actions. S.C. Code Ann. §§ 24-27-100-110. Section 24-27-130 allows a court to dismiss, without prejudice, a civil action filed by an inmate when the inmate has failed to pay the requisite filing fees and court costs in previously filed suits. However, the ILA also carves out exceptions when the inmate’s trust account lacks sufficient funds to cover the filing (§ 24-27-150) or where the case is of the nature that the United States Constitution or South Carolina Constitution requires that an indigent person be allowed access to the courts (§ 24-27-400).

The plain meaning and purpose of the five sections of the ILA cited above is to limit inmate filing of civil actions that challenge conditions surrounding their incarceration and/or apprehension. These provisions do not apply to matters initiated in the Court of General Sessions as criminal matters do not require filing fees and both the United States and South Carolina Constitutions require that indigent individuals have access to the criminal courts. Since these provisions clearly do not apply to actions filed in criminal court, it logically follows that the penalty provisions in S.C. Code Ann. §§ 24-27-200 and -300 also do not apply to inmate litigation filed in the criminal courts of this State.

The first penalty section of the ILA, section 24-27-200, allows a court to recommend the removal of earned work, education, and good conduct credits if the court finds that the inmate has, in a case pertaining to his incarceration or apprehension, 1) submitted a malicious or frivolous claim, or one that is intended solely to harass the party filed against; 2) testified falsely or otherwise presented false evidence or information to the court; 3) unreasonably expanded or delayed a proceeding; or 4) abused the discovery process. The second penalty provision, section 24-27-300, allows a court to hold an inmate in contempt of court and sentence them to a “term of imprisonment not exceeding one year that must be served consecutively to any terms of imprisonment previously imposed.” The court must find “that the inmate has, on three or more prior occasions, while incarcerated, brought in a court of this State a civil action or appeal pertaining to his incarceration or apprehension that was dismissed prior to a hearing on the merits on the grounds that the action or appeal was frivolous, malicious, or meritless.” Notably, this section carves out an exception where an inmate shall not be held in contempt if the court finds the inmate was under imminent danger of great bodily injury at the time of the filing.

The language of the penalty sections further evinces the Legislature’s intent that passing the ILA was to curb abusive, frivolous, and malicious civil litigation filed by inmates. For the revocation of credits to be proper the inmate must be challenging his incarceration or apprehension, not his underlying conviction. As our Supreme Court stated in Wade v. State, *supra*, the exception in section 24-27-300 “is logical only if one reads the statute as creating an exception for prisoners filing suit challenging dangerous prison living conditions causing an imminent danger to them.” Wade at 261-262, 559 S.E.2d at 846. When the ILA is read as a whole, it is apparent that it does not apply to criminal matters filed by inmates challenging their convictions but only to civil cases challenging prison conditions.

In Wade, our Supreme Court addressed whether the ILA applied to post-conviction relief actions. Wade had pled guilty pursuant to a plea bargain and did not appeal but filed a timely PCR application. At the PCR hearing, Wade asserted that he was coerced into pleading guilty by counsel. Both of his attorneys offered testimony contradictory to Wade's assertion of a coerced guilty plea. The State moved to have Wade's inmate credits revoke pursuant to S.C. Code Ann. § 24-27-200 alleging he had testified falsely at the PCR hearing. The lower court granted the State's motion to revoke Wade's credits and denied his application for PCR. Wade at 257, 559 S.E.2d at 844.

Our Supreme Court held that applying the ILA to PCR actions resulted in absurd and disparate results not intended by the Legislature. Id. at 259, 559 S.E.2d at 845. The Court held that the main problem with applying the ILA to PCR actions was that it created a disparity in the treatment between incarcerated and non-incarcerated individuals. The ILA only applies to incarcerated individuals by virtue of S.C. Code Ann. § 24-27-140, but an individual does not have to be incarcerated to file a PCR action if they can demonstrate prejudice from the persistent results of their conviction. "Applying the ILA to PCR proceedings gives the State the power to punish prisoners for asserting constitutional rights while non-incarcerated applicants can assert those rights without fear of retribution." Id. at 261, 559 S.E.2d at 845.

The Court wrote that the "disparity increases when applying other provisions of the ILA to PCR actions." If a court held an inmate in contempt pursuant to section 24-27-300, they could suffer not only the loss of inmate credits but serve additional prison time while a non-incarcerated individual would not face such consequences. Additionally, the court wrote that the complex fee structure in the ILA evidenced the Legislature's intent to curtail the abuses of

inmate litigation dealing with prison conditions and would not apply to PCR as there are not filing fees associated with PCR actions. Id. at 261-262, 559 S.E.2d at 845-846.

The rationale of the Wade Court applies with equal force to Appellant's case. Appellant filed what is most properly construed as a fifth motion for a new trial based upon after discovered evidence of juror misconduct during voir dire. He filed that motion and the subsequent motion for rehearing and recusal of Judge Gibbons in the Court of General Sessions of Chester County. Notably, except for the five civil cases he filed between 2008-2009, Appellant has only filed PCR actions or motions in the Court of General Sessions. There are no fees<sup>4</sup> associated with filing a motion for a new trial pursuant to Rule 29(b) SCRCrimP. Additionally, there is not a requirement that a person filing for a new trial based on after discovered evidence be incarcerated at the time of the filing. The only requirement contained in Rule 29(b) is that the motion must be made within one year of the discovery of the evidence.

Applying the ILA to actions in the Court of General Sessions, such as the motions filed by Appellant, creates a disparity between incarcerated and non-incarcerated individuals who are challenging their conviction. An individual on probation or parole, or even one who has finished serving their sentence, could challenge the validity of their conviction on after discovered evidence grounds without fear of being subjected to additional penalties in the ILA. The incarcerated individual challenging the conviction on after discovered evidence grounds must contemplate the loss of inmate credits and potential contempt findings that would increase the amount of time that they spend in prison for filing the same motion. Much like in a PCR action,

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<sup>4</sup> Appellant requests this Court take judicial notice pursuant to Rule 201, SCRE, of an administrative order issued by the South Carolina Supreme Court on September 28, 2016, titled Re: Revised Motion Fees List which specifically states on the attached fee list that no fees shall be charge for any motions in the Court of General Sessions. A copy of the order can be found at <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2016-09-29-01>

the various provisions of the ILA cannot be applied to Appellant's case, or to any matter in the Court of General Sessions, without reaching an absurd and disparate result that Legislature could not have intended. This Court should find that the ILA, specifically the revocation provision of 24-27-200, does not apply to matters filed in the Court of General Sessions, including Appellant's case and should reverse the order of the circuit court ordering that Appellant forfeit any credits that he has earned.

## II.

The circuit court erred in denying Appellant's motion to recuse where the court's factual findings are not supported by the record.

### **Standard of Review**

Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) citing Roche v. Young Bros., Inc., 332 S.C. 75, 504 S.E.2d 311 (1998). See also Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2d 856 (1993). "It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice." Mallett v. Mallett, 323 S.C. 141, 145-146, 473 S.E.2d 804, 807 (Ct.App.1996).

### **Relevant Facts**

On April 5, 2022, Appellant filed a motion requesting a hearing to address a potential voir dire violation that occurred during his 2008 trial. In the motion he alleged that he had recently discovered that Juror 38 was employed by law enforcement during his trial and failed to disclose her employment during questioning. R. (Motion dated 4.5.22). The circuit court denied Appellant's motion without a hearing. In the order denying the motion, the circuit court found that a hearing was not necessary as "[t]his issue has been litigated numerous times, and no new evidence has been alleged or submitted by the Defendant." R. (Order denying motion dated 4.15.22). Appellant filed a motion for rehearing and additionally requested that Judge Gibbons recuse himself. R. (Motion for rehearing dated 4.16.22). The court set a hearing for the recusal motion but summarily denied the motion for rehearing again finding that "[t]his issue has been litigated numerous times, and no new evidence has been alleged or submitted by the Defendant." R. (Order denying Motion and setting hearing dated 5.16.22).

At the hearing on the motion for recusal, Appellant recounted that he had litigated the issue of Juror 38 failing to disclose her former employment with the Great Falls Police Department in 2011 before Judge Kinard. He stated that in 2022 he discovered that Juror 38 had been employed with the City Police Department during his trial, which was not an issue that had been previously litigated by the courts. Tr. 4, l. 15-Tr. 5, l. 1; Tr. 6, ll. 7-22. The State asserted that the “issue regarding Juror 38 was addressed in his initial PCR action” and a full hearing was held before Judge Kinard. The State maintained “issues regarding Juror 38 was [sic] litigated fully in the 2010 initial PCR action.” Tr. 7, ll. 4-12. Appellant reasserted that at the PCR the only issue raised regarding Juror 38 dealt with her former employment with Great Falls Police Department. Tr. 7, ll. 14-20.

Appellant stated that he did have a hearing in 2021 before Judge Griffith regarding Juror 38 where he had mistakenly asserted that Juror 38 had worked in the courthouse during his trial. Despite failing to provide the necessary affidavit with that 2021 motion, the court held a hearing on the matter during which the Clerk of Court informed the court that Juror 38 had never been employed in the courthouse. As a result of the failure to provide an affidavit and the statements of the Clerk of Court, Judge Griffith had denied the motion. Appellant again asserted that the question of Juror 38 being employed with the City Police Department during his trial had not been addressed. Appellant stated he was requesting Judge Gibbons recuse himself because the orders that he issued on April 15, 2022, and May 16, 2022, finding the issue had been litigated numerous times constituted “perjury.” Tr. 10, l. 1-Tr. 11, l. 24.

The State maintained that the issues surrounding Juror 38 had been litigated. Tr. 12, l. 7-Tr. 13, l. 11. Judge Gibbons then again questioned Appellant as to why he should recuse himself. As appellant began to reply Judge Gibbons interjected and asked if it was because he

ruled against Appellant. Appellant then stated that Judge Gibbons should recuse him because his rulings were in error because the allegations of Juror 38 working in law enforcement had not been vetted. Judge Gibbons denied the motion for recusal. Tr. 13, l. 10-Tr. 14, l. 7. Judge Gibbons then began to briefly review the case history before recommending that Appellant forfeit any credits that he had earned pursuant to S.C. Code Ann. § 24-27-200.<sup>5</sup> Tr. 14, l. 6-Tr. 20, l. 8. At the conclusion of the hearing, Appellant asked that the State be compelled to produce orders documenting that the issue of Juror 38 being employed by law enforcement during his trial had been litigated. Judge Gibbons denied that requests and stated “[t]here’s plenty of orders in this case and the record speaks for itself.” Tr. 25, l. 3-Tr. 26, l. 19. When Appellant again requested the orders as proof to support Judge Gibbons ruling, the court again stated that “the record speaks for themselves. They’re all in the record of the case” and that “the orders are contained in this record that are right here in front of me.” Appellant’s request to review the orders was denied. Tr. 28, l. 1-Tr. 29, l. 14.

### **Discussion**

A review of the record of this case shows that Appellant was correct in his assertion that while issues surrounding Juror 38 withholding information about past employment in law enforcement had been litigated, the issue of whether Juror 38 was employed with the City Police Department *at the time of Appellant’s trial*, has never been addressed. Judge Gibbons dismissal of the voir dire violation motion without a full hearing was improper because the issue has never been raised to or ruled upon by a court. Appellant was justified in requesting Judge Gibbons recuse himself from hearing the matter based on the factually unsupported ruling.

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<sup>5</sup> During this the court twice instructed deputies to stand near or behind Appellant to ensure he did not interrupt the court, even ordering a Deputy “restrain him [Appellant] if necessary.” Tr. 15, ll. 15-16; Tr. 18, ll. 1-3

“It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.” Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) citing In re Murchison, 349 U.S. 133 (1955). “[A]s a general rule the judge, in determining whether to proceed, must accept as true the factual allegations of a motion to disqualify. However, this does not prevent the judge from exercising his right to consider the legal sufficiency of those facts. Shaw v. State, 276 S.C. 190, 192–93, 277 S.E.2d 140, 141 (1981). “[A] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Roche v. Young Bros., of Florence, 332 S.C. 75, 84–85, 504 S.E.2d 311, 316 (1998); see also Section 3E, Code of Judicial Conduct, Rule 501, SCACR. “[A] judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.” Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

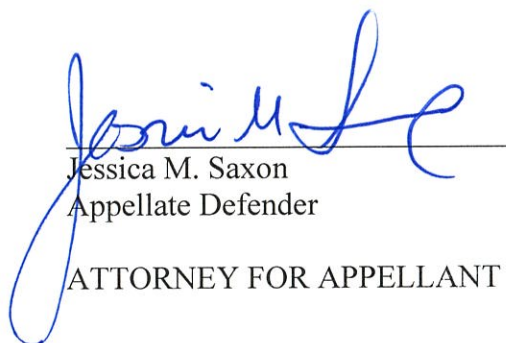
Not only did Judge Gibbons fail to abide by the rule set forth in Shaw, supra, when he denied Appellant’s motion for recusal, but his factual findings were not supported by the record. Both the judge and the State repeatedly asserted that the matter Appellant raised regarding Juror 38 had been resolved, yet neither party offered any such proof that the issue had been litigated. Most importantly, a review of the orders that have been issued throughout Appellant’s many challenges to his conviction plainly show that the issue of Juror 38 being employed with a police department at the time of Appellant’s trial has not been litigated. Admittedly, there have been at least two issues regarding Juror 38 that the circuit courts have ruled upon: Juror 38’s former employment with the Great Falls Police Department and the mistaken claim that Juror 38 had

worked within the walls of the courthouse. However, neither of those issues can be construed as addressing whether Juror 38 was employed with law enforcement at the time of Appellant's trial.

Appellant, as an indigent criminal defendant, has a right to access the courts, to challenge his convictions and sentences, and to appear before an impartial tribunal. Instead of providing that for Appellant, Judge Gibbons summarily denied his motions and even when presented with facts that his ruling was wrong, refused to hear the motion or to recuse himself from Appellant's cases. Here, the record does not support Judge Gibbons ruling that the issue raised by Appellant in his April 5, 2022, motion was ever litigated, much less litigated numerous times. This court should find evidence of judicial prejudice in the case and remand the matter back to the circuit court for a hearing on the allegation raised in the April 5, 2022, motion before an impartial tribunal.

**CONCLUSION**

Based on the foregoing arguments, Appellant requests that this Court reverse the rulings of the circuit court, restore any potential earned credits he has received during his incarceration and remand the matter back to the Court of General Sessions of Chester County for a hearing on the merits of his April 5, 2022, juror voir dire violation motion.



Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 29th day of June, 2023.