

IN THE ALABAMA COURT OF THE JUDICIARY



IN THE MATTER OF:)	
)	
DOUGLAS L. PATTERSON)	
DISTRICT JUDGE,)	CASE NO: 55
LIMESTONE COUNTY, AL)	

AMENDED BRIEF IN SUPPORT OF MOTION TO STAY

Comes now the Defendant in the above-styled cause and files this, his Amended Brief in Support of Motion to Stay as instructed by the Pre-Trial Order of this Court dated February 24, 2020, and would show unto the Court the following:

STATEMENT OF FACTS

This case arose from a Judicial Inquiry Commission Staff Complaint filed against the Defendant, Douglas Lee Patterson, District Judge of Limestone County, by the Judicial Inquiry Commission’s Executive Director, Jennifer Garrett, which was filed on January 14, 2020. The next day, January 15, 2020, the Judicial Inquiry Commission filed a formal complaint against Judge Patterson through Judicial Inquiry Commission Chairman Billy C. Bedsole and Judicial Inquiry Commission Counsel Elizabeth C. Bern.

Ms. Garrett’s initial complaint recited the criminal offenses for which Judge Patterson was indicted on December 11, 2019, in Limestone County Circuit Court and related that Judge Patterson was arrested on the indictment on December 12, 2019. Ms. Garrett’s initial complaint further noted that Limestone County Presiding Circuit Court Judge Robert Baker forwarded a document to the Judicial Inquiry Commission staff purporting to be a letter from Judge Patterson to Judge Baker, dated December 17, 2019, and copied to the other District and Circuit Court Judges in Limestone County, as well as to the president of the Limestone County Bar Association. The letter has been widely circulated in the media as a “confession” letter. Ms. Garrett’s complaint stated that the State (Alabama Attorney General’s Office) filed a motion to set an arraignment date and enter a scheduling order in the criminal proceedings. The final paragraph of Ms. Garrett’s complaint states “The media reports that Judge Patterson has been relieved of his judicial duties since at least September, but is continuing to be paid a monthly salary in the amount of \$10,808.84.”

The formal complaint essentially restated Ms. Garrett's complaint, except: 1) No mention was made of Judge Baker's involvement; and 2) no mention was made of the media accounts and about Judge Patterson's suspension and salary. In Charge 1, the complaint alleges that Judge Patterson "... **committed at least one of the crimes charged in the indictment.**" On that basis, the complaint contends, Judge Patterson violated Cannon 1, Cannon 2, Cannon 2(A) and Cannon 5C (1) of the Alabama Canons of Judicial Ethics.

Charge 2 of the formal complaint alleges that Judge Patterson "**created the appearance that he committed one or more of the crimes charged in the indictment**" and, on that basis, alleged violations of Cannon 1, Cannon 2, Cannon 2A, and Cannon 2B of the Alabama Canons of Judicial Ethics.

On February 11, 2020, in Limestone County Circuit Court Case Number CC 2019 – 729, Judge Patterson entered "Not Guilty" pleas as to all three counts of the indictment, and Special Circuit Judge Steven E. Haddock orally issued a scheduling order, which he reduced to writing and issued the next day, as follows: The prosecution and defense have until April 1, 2020, to file any additional motions. The prosecution and defense have until April 22, 2020, to file written responses to any additional motions filed by the adverse party. The prosecution and defense have until May 21, 2020 to file any motions *in limine*. The trial is scheduled for June 15, 2020.

ARGUMENT

Alabama law defines a "crime" as "A misdemeanor or a felony." Ala. Code 13A-1-2(4) (1975), as last amended. Alabama law also provides that "The circuit court shall have exclusive original jurisdiction of all felony prosecutions..." Ala. Code Section 12-11-30 (1975), as last amended. Rule 10 of the *Rules of Procedure for the Alabama Court of the Judiciary* plainly states that "Except where inappropriate, or otherwise provided for by these rules, the provisions of the Alabama Rules of Civil Procedure and the rules of evidence used in civil cases in Alabama shall govern proceedings before the court; but the allegations of misconduct must be proved by clear and convincing evidence..."

Charge 1 of the complaint asserts that Judge Patterson "...**committed at least one of the crimes alleged in the indictment...**" Because Judge Patterson's criminal case in Limestone County is pending and is not scheduled to commence until June 15, 2020, the Court of the Judiciary simply has no jurisdiction to determine whether or not he has committed any "crime." **The sole and exclusive trial court of competent jurisdiction to adjudicate whether or not a "crime" has been committed by Judge Patterson is the circuit court.**

The Court of the Judiciary is strictly a civil trial court for Alabama judges and it is both a factual and legal impossibility for it to determine whether or not a "crime" has been committed. By definition such a determination is in the exclusive province of the circuit court, which is the only trial court vested with the power to adjudicate felony offenses.

Therefore, as to this civil "charge," the Court of the Judiciary is impotent to consider adjudication until the criminal trial has concluded. Clearly as to Charge 1, the Court of the Judiciary has no choice but to wait until the criminal case is resolved to adjudicate this charge.

The footnote on page 4 of the complaint explaining that Charge 1 is for the purpose of judicial discipline only does not circumvent the law of Alabama as to the exclusive jurisdiction of a circuit court to determine whether a felony crime has been committed. The Court of the Judiciary is simply without jurisdiction to determine whether or not a "crime" has been committed and certainly does not have the power to determine such pursuant to the civil standard of "clear and convincing evidence."

In sum, **"the determination of whether a "crime" has been committed cannot be adjudicated by the COJ unless and until the circuit court criminal proceedings, with exclusive jurisdiction vested in it over felonies, has determined that a felony crime has been committed by employing the criminal standard of "beyond a reasonable doubt."**

Charge 2 of the complaint asserts that Judge Patterson **"...created the appearance that he committed one or more of the crimes charged in the indictment..."** This assertion is based on a widely circulated document which has come to be known as the "confession" letter. Unless the Court of the Judiciary proceedings are stayed, it is obvious that counsel for the Judicial Inquiry Commission intends to employ this letter as evidence against Judge Patterson. This would prejudice Judge Patterson's criminal trial, in which he would have the opportunity to challenge its admissibility on constitutional grounds, particularly, the circumstances surrounding the letter, who authored it, and whether or not it was done knowingly, intelligently, and voluntarily, or whether it was procured by coercion and improper undue influence. By forcing the Court of the Judiciary proceedings to commence prior to the conclusion of the criminal trial, the prosecution will gain an unfair strategic advantage in the criminal trial by observing strategic decisions concerning such material, which will irreparably prejudice the presumption of innocence of Judge Patterson in the criminal trial, the bedrock principle of American criminal jurisprudence.

In order to show that the "confession" letter was the ultimate result of inappropriate coercion and duress, it will be necessary to subpoena Presiding Limestone County Circuit Court Judge Robert Baker to testify truthfully as to whether or not he sent a pre-indictment text to Judge Patterson approximately 30 days prior to Judge Patterson's indictment. That text threatened to have the Special Grand Jury indict Judge Patterson, unless Judge Patterson took a pre-indictment plea offer. Judge Baker is a fact witness and therefore, should not have even known of the existence of a pre-indictment plea offer. However, given Rule 10 of the *Rules of Procedure for the Alabama Court of the Judiciary*, **"...no judge may be compelled to give evidence against himself..."** (Emphasis added.) This rule, on its face, applies to any judge, not merely a defendant judge.

This remains true despite Rule 15 of the *Rules of Procedure for the Alabama Court of the Judiciary*, which imposes an obligation on all judges to testify in order to assist the Court of the Judiciary. Therefore, Judge Baker's testimony as to any undue influence exerted on Judge Patterson cannot be gleaned until the proceedings in the criminal trial. The issue of this text was presented in the criminal case in a pre-trial hearing, and, to date, the undersigned is unaware of any denial by Judge Baker. Therefore, it would be fundamentally unfair to allow the Court of the Judiciary proceedings to commence, when the circumstances of the "confession" letter cannot be properly challenged until the criminal trial given Judge Baker's Rule 10 protection in the Court of the Judiciary proceedings.

On February 10, 2020, Honorable Judge Steven E. Haddock granted discovery to Judge Patterson pursuant to Rule 16 of the *Alabama Rules of Criminal Procedure*. This discovery is vital to Judge Patterson's defense in both the Court of the Judiciary and the criminal proceedings and it would be manifestly unfair to proceed with the Court of the Judiciary proceedings and/or the criminal trial without it. The Attorney General's Office has indicated that it expects to produce the discovery shortly, but the undersigned has not yet received it.

Alabama law has long recognized the right of a defendant facing parallel civil and criminal cases based on the same conduct to stay the civil proceedings until the conclusion of the criminal proceedings. For example, in *Ex parte White*, 551 So. 2d 923 (Ala. 1989), parallel civil and criminal cases were brought against White for driving a motor vehicle into the home of Daniel and Vivian Patterson, each of whom filed a civil suit against White on September 2, 1988, along with civil discovery consisting of interrogatories and request(s) for production. An indictment was also returned against White on August 5, 1988, charging him criminally for the same conduct. After failing to comply with the discovery requests, even after a motion to compel, White filed a motion to stay the civil proceedings on Fifth Amendment grounds. The Court granted White's writ of mandamus, stating that:

When state concerns for judicial economy conflict with federal constitutional rights, the state concerns must give way. Otherwise, individuals would be forced to choose between a constitutional right and a potential loss in a state matter. Such a choice turns a right into an option. Constitutional rights are an individual's property and they do not come with chains or baggage. Therefore, an individual may not be forced into the untenable position of having to pay a price in order to assert what is constitutionally guaranteed. (Emphasis added.) Id. at 924-25.

The Court pointedly held that: "Weighing White's interest in postponing the civil actions against the prejudice that might result for the Pattersons because of the delay, we are compelled to postpone them."

A subsequent case addressing the same issue was *Ex parte Coastal Training Institute*, 583 So. 2d 979 (Ala. 1991). Justice Maddox succinctly summarized the issue as: "[W]hether, given the principles of the Fifth Amendment privilege against self-incrimination, the trial court abused its discretion in denying the petitioner's motion for a stay of civil proceedings arising out of an ongoing investigation."

The civil suit alleged "outrageous conduct, trespass, false imprisonment, and defamation, all rising out of an incident that allegedly occurred on the premises of Coastal in 1989." The defendants "...maintained they were the target of an FBI investigation..." In this case, the Court also granted mandamus, reasoning that:

Weighing the petitioners' interest in postponing the civil action against the prejudice that might result to Sawyer because of the delay, we are compelled to postpone it. From the facts presented in this petition, there is no doubt that

most of the material facts in this civil action would also be material and potentially incriminating in the criminal action. (Emphasis added.) Id. at 980.

Another case in this line of cases arose after the financial scandal involving WorldCom, Inc. The Retirement Systems of Alabama sued Bernard Ebbers, who was the former president and chief executive officer of WorldCom, as well as Scott D. Sullivan, the former chief financial officer at World Com, in addition to a host of other defendants. Sullivan and Ebbers each filed a motion to stay with Judge Charles Price of the Montgomery County Circuit Court, which Judge Price granted as to Sullivan but denied as to Ebbers. Ebbers and other defendants separately petitioned the Alabama Supreme Court for mandamus. However, for purposes of the principles at issue, the Court's decision as to Ebbers is the most relevant.

The decision, Ex parte Ebbers, 871 So. 2d 776 (Ala.2003), contains an excellent recitation of prior Alabama case law considering the issue of staying a civil case pending a parallel criminal proceeding, a total of 13 cases at that time. Ebbers, at 789. Ultimately, the Ebbers Court formulated factors to properly consider in such cases, which are listed below, with internal citations omitted:

1. **The interest of the plaintiff in proceeding expeditiously with the civil litigation, or any particular aspect of it, and the potential prejudice to the plaintiff of a delay in the progress of that litigation.**
2. **The private interest of the defendant and any burden that any particular aspect of the proceedings may impose on the defendant.**
3. **The extent to which the defendant's Fifth Amendment rights are implicated/the extent to which the issues in the criminal case overlap those in the civil case.**
4. **The convenience of the court in the management of its cases, and the efficient use of judicial resources.**
5. **The interest of persons not parties to the civil litigation.**
6. **The interest to the public in the pending civil and criminal litigation.**
7. **The status of the criminal case, including whether the party moving for the stay has been indicted.**
8. **The timing of the motion to stay. (Emphasis added.) Id. at 789-90.**

Weighing these factors, the Alabama Supreme Court granted Ebbers' his stay. Ebbers at 802.

Given the Ebbers factors, it is appropriate to analyze the facts in this case in the context of the Ebbers balancing test.

1. The State of Alabama, as plaintiff, does, of course, have an interest in proceeding expeditiously with the civil litigation, or a potential aspect of it, in that Judge Patterson does continue to draw his salary during his suspension. However, as previously noted, Judge Patterson's interest much prevail as a criminal defendant: Ex parte White, at 924-925 plainly held that:

When state concerns for judicial economy conflict with federal constitutional rights, the state concerns must give way. Otherwise, individuals would be forced to choose between a constitutional right and a potential loss in a state matter. Such a choice turns a right into an option.

2. Judge Patterson has a private interest as a defendant in his presumption of innocence in the criminal trial, which will be irreparably prejudiced if the Court of the Judiciary is allowed to proceed under the civil "clear and convincing" evidence, which falls short of the criminal standard of "beyond a reasonable doubt." This would unfairly allow the Alabama Attorney General's Office to glean information and testimony of which it would not otherwise have knowledge. Furthermore, Judge Patterson's presumption of innocence would be severely impaired if he were to already be removed from the bench permanently before his criminal trial, thus affording him less of a presumption of innocence than similarly situated defendants who are not in such positions of authority. Judge Patterson should not enjoy less of a presumption of innocence than other criminal defendants.
3. Judge Patterson's right to remain silent is implicated through Rule 10 of the *Rules of Procedure for the Alabama Court of the Judiciary*, which is a procedural right based on the Fifth Amendment, but at the same time not cast in the rules as a "privilege." It is obvious from the complaint that the Court of the Judiciary proceedings and the criminal proceedings not only have overlapping issues, but are based on essentially identical allegations and are obviously parallel. Nothing in the Court of the Judiciary procedural rules, however; make any provision for Judge Patterson to be deemed to have "waived" his Rule 10 procedural protection, as it is a procedural right, not a "privilege."
4. While the Court of the Judiciary certainly wishes to expedite the use of judicial resources and manage its cases efficiently, "when state concerns for judicial economy conflict with federal constitutional rights [in this case an analogous procedural right to silence], the state concerns must give way. Ex parte White, at 924 – 925.
5. The interest of persons not subject to the civil litigation would essentially involve those individuals maintaining the administration of the Limestone County judicial system. While an important consideration, the interests of those individuals cannot and do not outweigh the protections afforded to Judge Patterson in both the Court of the Judiciary proceedings, which touch on a property right, as well as the criminal proceedings, which must recognize and honor Judge Patterson's presumption of innocence.
6. While the public obviously has an interest in the outcome of the civil and criminal litigation, this interest does not usurp Judge Patterson's interest in due process and the presumption of innocence, and is analogous to the Retirement Systems of Alabama's interest in the Ebbers case.
7. The status of the criminal case is that Judge Patterson has now been indicted and entered "not guilty" pleas as to all counts of the indictment. Therefore, the

criminal case is at a critical juncture and should not be prejudiced by information which becomes public in a Court of the Judiciary proceeding.

8. The motion to stay's timing was entirely appropriate, given that Judge Patterson had already been indicted and is entitled to participate in the criminal trial without his case being prejudiced by the Court of the Judiciary proceedings, which clearly have the potential to unfairly compromise Judge Patterson's presumption of innocence.

Rule 512A of the *Alabama Rules of Evidence* explicitly states that "In a civil action or proceeding, a party's claim of a privilege ... is a proper subject of comment by judge or counsel. An appropriate inference may be drawn from the claim." While an adverse inference could be drawn from assertion of the federal constitutional privilege against self-incrimination, Rule 10 of the *Rules of Procedure for the Alabama Court of the Judiciary* expressly provides the right be free from self-incrimination as a COJ procedural right. Although this rule obviously has its origin in the Fifth Amendment privilege against self-incrimination, invoking Rule 10 as a procedural right as opposed to an assertion of the Fifth Amendment constitutional provision against compelled self-incrimination takes the assertion outside the province of Rule 512A which, on its face, requires the assertion of a "privilege."

Succinctly stated, nothing in Rule 10 of the Rules of Procedure for the Alabama Court of the Judiciary casts this procedural right as a "privilege." Furthermore, there is no provision in the Rules of Procedure for the Alabama Court of the Judiciary stating that its Rule 10 protection against self-incrimination can actually be waived.

Finally, permitting the Court of the Judiciary case to commence prior to the conclusion of the parallel criminal case, would unfairly allow the same sovereign, the State of Alabama, to have "two bites at the apple". One, by trying the same facts under the "clear and convincing" civil standard before being required to prove the case "beyond a reasonable doubt" in the criminal trial court forum; two, this would hand the prosecution in the criminal case an unfair advantage and irreparably prejudice the criminal proceeding against Judge Patterson.

For the reasons set out above, the Court of the Judiciary, in order to ensure a fair and transparent process, and protect the constitutional due process of Judge Patterson, is obligated to stay their proceedings as requested herein.

Respectfully submitted, this, the 4th day of March, 2020.

/s/ Chuck Warren

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CERTIFICATE OF SERVICE

I, Chuck Warren, do hereby certify that I have, this, the 4th day of March, 2020, electronically sent a copy of the foregoing brief to the Alabama Judicial Inquiry Commission through its counsel, the Honorable Elizabeth C. Bern.

/s/ Chuck Warren

Attorney for Douglas L. Patterson,
District Judge, Limestone County

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