

IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:

TRACIE TODD
CIRCUIT JUDGE,
BIRMINGHAM DIVISION
CRIMINAL DIVISION
JEFFERSON COUNTY, AL

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CASE NO. 58

FILED

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COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

COMPLAINT

The Judicial Inquiry Commission (hereinafter "the Commission") files this Complaint against Judge Tracie Todd (hereinafter "Judge Todd"), Circuit Judge in the Tenth Judicial Circuit, Birmingham Division, Criminal Division, Jefferson County, Alabama.

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Attachment A: Chronology of the Facts

Attachment B. March 3, 2016 Order

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The Commission alleges and charges as follows:

I. Introduction

1. Judge Todd took office as Circuit Court Judge in Jefferson County, Alabama, in January 2013. She was re-elected, without opposition, to a second term in November 2018.

2. This Complaint charges Judge Todd with multiple incidents of abuse of judicial power and abandonment of the judicial role of detachment and neutrality, primarily from 2014 through 2018 and in the context of embroilment regarding the issue of the death penalty, prosecutors and the prosecutorial discretion of the executive branch, and personal vindication of her prior rulings and actions.¹ She was enmeshed

¹ Embroilment is the process by which a judge surrenders the role of the impersonal authority of the law and impartial factfinder or decision-maker and joins the fray. See David Rothman, *Embroilment*, Jud. Conduct Rep., Spring 2008. It is the judge's failure to maintain the necessary professional distance between herself, attorneys, the parties, or the causes before them. It can manifest itself when the judge attempts to see to it that a certain result prevails out of a misguided perception of the judicial role or abuses the power to impose sanctions out of a perception by the judge that her power is being challenged. Cf. Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984) (a judge is disqualified from hearing a contempt proceeding where it might appear that the judge "cannot 'hold the balance nice, clear and true between [the parties]"; the

in other legal matters involving the district attorney. This conduct diminishes the public's confidence in the integrity, independence, and impartiality of the judiciary.

3. Many of the facts alleged herein include instances of Judge Todd's erroneous rulings. The State's assertion of its right to contest those rulings by petitions for writs of mandamus does not foreclose the imposition of judicial discipline here. Rather, this complaint is about a judge who continued to fail to respect and follow clear directives and rulings of the appellate courts—even after the law was set forth in pleadings submitted to her, was explicitly set forth by the Court of Criminal Appeals in cases assigned to her, and/or it was legal precedent of fundamental importance issued by the Court of Criminal Appeals or the Alabama Supreme Court.

4. Because of the circumstances under which they occurred, these errors were not mere legal error that could be sufficiently remedied or addressed by legal review (appeal or petition for mandamus). Rather, they constitute a continuing pattern of legal error that has the capacity

question is whether it might appear to a reasonable person that a judge does not have the ability to “hold the balance”) (citation omitted).

to detrimentally affect public confidence in the judicial process, particularly here, regarding fundamental death-penalty issues, disqualification, and interference with prosecutorial discretion.

5. Despite her arguable intent to accomplish what she perceived as noble purposes, e.g., elimination of the death penalty (at least in its current form), of selective prosecution, of racial discrimination in imprisonment, etc., her intent to achieve a noble purpose does not excuse apparent disregard of the law² or her failure to maintain competence in the law.

6. Unless specifically delineated herein, Judge Todd's erroneous legal rulings are not charged herein as violations of Canons 2A (failure to respect and comply with the law, which undermines "the public confidence in the integrity and impartiality of the judiciary") and 2B ("conduct prejudicial to the administration of justice which brings the judicial office into disrepute").³ The charges fall rather under Canon 3 and 3A(1).

² In re Duckman, 699 N.E.2d 872 (1998) (judge claimed to have used "guise of facial insufficiency" to dismiss cases, thinking "it was right to do it").

³ See Matter of Sheffield, 465 So. 2d 350, 357 (Ala. 1984).

7. In specific regard to Judge Todd's failures to disqualify, there is no requirement of a showing of bad faith, even if she denied a motion to recuse, because a judge has an affirmative duty to disqualify under the Canons without a motion to recuse.⁴ Furthermore, where the law is clear on its face, a judge who repeatedly violates the law is subject to discipline by the Court of the Judiciary.⁵ In addition, this Court may consider "the content of a judicial order as it speaks to the conduct or motivations leading to the entry of the order or to whether that conduct or motivation constituted a violation of a Canon."⁶

II. Facts

A. Death-Penalty Cases and March 3, 2016 Order

Creation of Appearance of Partiality and Disqualification, but Failure to Disqualify

Appearance of Basing Ruling on Personal Opinion, i.e., not Law

Independent Investigation

⁴ See, e.g., Sheffield, 465 So. 2d at 355-57 (the Court, in affirming the finding that failure to disqualify was sanctionable, did not consider any "bad faith" even though the judge had denied a motion to recuse).

⁵ See id. at 358.

⁶ Moore v. Alabama Judicial Inquiry Comm'n, 234 So. 3d 458, 469-70 (Ala. 2017).

**Inappropriate Comments Regarding the Judiciary and
Attorneys**

Appellate Court's Order to Recuse in McMullin I

Comments to the Media

**Disregard of Appellate Court Decisions Billups and Bohannon
OR Failure to Maintain Professional Competence in the Law**

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Judicial Action after Disqualification

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8. Four defendants in capital-murder cases assigned to Judge Todd ("State v. Billups")⁷ filed pre-trial motions arguing that Alabama's capital-murder statutes were unconstitutional pursuant to the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), which declared Florida's death-penalty sentencing scheme unconstitutional.⁸

⁷ State v. Kenneth Eugene Billups, CC-2005-1755; State v. Stanley Chatman, CC-2014-3011 and -3012; State v. Terrell Corey McMullin, CC-2014-3015 and -3016; and State v. Benjamin Acton, CC-2012-1194 and -1195.

⁸ The United States Supreme Court ruled that Florida's statutory scheme is unconstitutional because, pursuant to that scheme, the judge could override the jury's recommendation of life imprisonment without

9. Judge Todd set the cases for a consolidated hearing. At the hearing on the motions on March 3, 2016, less than two months after Hurst was issued, the parties did not present any evidence or submit briefs.

10. At the hearing, Judge Todd denied a representative of the Office of the Alabama Attorney General his request to be heard on behalf of the State. Despite Judge Todd's refusing the Attorney General an opportunity to present argument, her final order addressed an argument the Attorney General had asserted in a brief to the Supreme Court, stating, "However, the Attorney General fell short of wholly explicating the Supreme Court's holding in its unadulterated context." See March 3, 2016 Order (Attachment A, fully incorporated herein) at 24.

11. After hearing argument, Judge Todd read her previously prepared 28-page order in open court, declaring Alabama's capital-murder-sentencing scheme unconstitutional under Hurst and ordering

parole and impose a sentence of death without the jury's determination of "death eligible" factors.

the State not seek the death penalty in capital-murder cases. See March 3, 2016 Order (Attachment A).

12. Judge Todd's order prohibiting the State from exercising its prosecutorial discretion in seeking the death penalty in all death-eligible cases denied the State its right to exercise its discretion to seek the death penalty in those cases. In so ordering, she exceeded her legal finding that Alabama's sentencing scheme was unconstitutional under Hurst because her application of Hurst would not affect any case in which the jury recommended death, even by a non-unanimous sentence. Thus, her ruling denied the jury the statutory responsibility of recommending either a sentence of life imprisonment without parole or the death penalty.

13. Judge Todd referenced in her order 17 secondary sources she had gathered through independent investigation, including the Equal Justice Initiative whose attorneys were representing one or more of the defendants.⁹ In the first paragraph of her order, Judge Todd explained:

⁹ Those secondary sources include:

Burnside, Fred, *Dying to Get Elected: A Challenge to the Jury Override*, Wisconsin Law Review (1999).

The influence of partisan politics on the Alabama judiciary indeed has never ending, interlaced talons that reach into every aspect of its criminal justice system. Legal scholars, journalist[s] and community advocates around the world have noted in numerous fashions the statistical realities in Alabama's death penalty statute. In most instances these views are articulated in a data driven, broad context – a bird's eye view. However, clearly comprehending the urgency of the circumstance in Alabama requires an immersion at the rudimentary level of this life-to-death override epidemic – a view from ground zero.

March 3, 2016 Order (Attachment A), at 1.

Williams, Paige, *Double Jeopardy: In Alabama, a judge can override a jury that spares a murderer from the death penalty*. The New Yorker (November 17, 2014).

The Death Penalty in Alabama: Judge Override, Equal Justice Initiative, July 2011. Print.

Project Hope to Abolish the Death Penalty.

Velaso, Eric, *More Jefferson County Judges Issue Death Sentences Despite Jury*, Birmingham News (July 17, 2011).

Buckwalter-Poza, Rebecca, *With Judges Overriding Death Penalty Cases, Alabama Is An Outlier*, National Public Radio.org. July 27, 2014. Online.

Heery, Shannon, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*. Washington University Journal of Law and Policy. 2010. Print.

Abramson, J., *Death-is-Different Jurisprudence and the Role of the Capital Jury*, Ohio State Journal of Criminal Law [Vol 2:117], 2004. Print.

14. In addressing the “life-to-death override epidemic” in her order, Judge Todd went far beyond the question of law before her—and far beyond the question of law the parties had notice would be addressed at the hearing, i.e., whether the Hurst ruling applied to Alabama’s statutory death-sentencing scheme. In so doing, she exhibited an apparent predisposition against the death penalty generally.

15. Judge Todd injected factual issues that had not been raised by any defendant or that were not even pertinent to the application of Hurst. Rather, she used the application of Hurst to address wide-ranging concerns about the death penalty, which she supported solely by the conclusions, facts, and statistical data asserted in the secondary sources she had independently collected. Those extraneous issues included:

a. “1. Tough on Crime,” addressing her finding of a statistical correlation between judges imposing life-to-death overrides and their election cycle, i.e., judges are more likely to impose the death penalty during an election cycle. (Attachment A, at 3.)

b. “2. Appointment of Counsel and Campaign Contributions,” finding that “the appointment process in capital

cases falls prey to the hazards of political partisanship and bias in the judiciary”; judges’ requests for campaign contributions are close to “legalized extortion”; and “[l]ocally, it is an open secret” that local judges’ appointment of attorneys is based on attorneys’ campaign contributions, not on legal expertise. (Attachment A, at 5, 6.)

c. “3. Inadequate legal representation,” finding, “An attorney appointed without the necessary skill to adequately represent a capital defendant may charge absorbent amounts of money for subpar representation. This tradition not only exists in this county, but has been remarkably ratified.” and “The appointment of unqualified and/or unconcerned attorneys to represent capital defendants based on grossly unacceptable political motivation[, e.g., campaign contributions,] coupled with an appellate review without the right to appellate counsel,^[10] before a politically compromised appellate court, wrongly leaves a capital defendant to climb an uphill battle for preservation of life, while

¹⁰ To the contrary, as Judge Todd correctly noted in a subsequent order, the Fourteenth Amendment establishes a right to counsel on a defendant’s first “appeal as of right.” See State v. Steven Petric, CC-2007-3052.60, Order at 71 (Feb. 9, 2018).

lodged between a rock and hard place.” (Attachment A, at 5, 6, 6-7.)

d. “4. Manipulation of Case Assignment,” finding that “[t]here is evidence that certain high profile cases are assigned to certain judges during elections seasons” and that “the death penalty in Alabama [is imposed] by biased judges, improperly assigning criminal cases, and appointing counsel based on political motivation.” (Attachment A, at 7-8.)

e. “5. Inadequate Funding of the Judicial Branch,” finding that, “due to the inadequate funding of the judicial branch, the constitutional rights of citizens in Alabama are being violated routinely and/or the proper administration of the law is affected daily,” e.g., loss of evidence in capital cases because of inadequate evidence storage and inefficient retention policies and lengthy detention of defendants without hearings because the judge has not received notice of detention. (Attachment A, at 8-9.)

f. “6. Lack of Security” in the courtroom, finding that lack of security “directly affects the imposition of justice, especially in capital cases.” (Attachment A, at 9.)

g. “7. Inadequate Administrative Support.” (Attachment A, at 10.)

16. Judge Todd’s injection of extraneous issues and her independent investigation and consideration of facts and conclusions gathered from that investigation violate a judge’s duty of detachment and neutrality.¹¹ Accordingly, she was disqualified under Canon 3C(1) from issuing a final ruling on the defendants’ motions.

17. Furthermore, by injecting issues not raised or even known to the parties and by considering facts and conclusions not in evidence, Judge Todd in effect denied the parties their full right to be heard

¹¹ A prohibition against independent investigation ensures that the cases and issues are tried in the courtroom and that judicial decisions are based solely on the evidence presented and any facts that may properly be judicially noticed where the parties can contest the relevancy, accuracy, reliability, and credibility of the evidence and appellate courts can review it. In addition, an independent factual inquiry raises questions about a judge’s impartiality, for he or she is undertaking to fill gaps in the evidence with information that may benefit one party over another. See Cynthia Gray, *Independent Investigations*, Jud. Conduct Rep., Summer 2012 at 4-5. See also *Matter of Sheffield*, 465 So. 2d at 357 (rulings on issues of law or attitudes concerning legal issues do not establish bias or prejudice requiring recusal unless those rulings or attitudes are the product of bias and prejudice of an extrajudicial source).

according to law on the relevancy, accuracy, reliability, and credibility of such issues, facts, and conclusions.

18. In her order, Judge Todd abused her judicial authority and office by declaring—without any evidence whatsoever and without the issues being raised—the Alabama appellate courts are “politically compromised” (Attachment A, at 7), and asserting, “An appeal to the higher courts in Alabama on behalf of a capital defendant sentenced to death by judicial override is ceremonial at best.” (Attachment A, at 3.)

19. Further, Judge Todd made similar remarks about her fellow circuit judges by such factual assertions as “Alabama’s judiciary has unequivocally been hijacked by partisan interests”; it is an “open secret” that judges’ appointment of attorneys is based on attorneys’ campaign contributions, not on legal expertise; it is a tradition in Jefferson County, which is “remarkably ratified,” that appointed attorneys charge absorbent amounts of money for subpar representation; “[t]here is evidence that certain high profile cases are assigned to certain judges during elections seasons”; and “the death penalty in Alabama [is imposed] by biased judges improperly assigning criminal cases and

appointing counsel based on political motivation.” (Attachment A, at 1, 5, 6, 7.)¹²

20. In addition, Judge Todd made remarks against attorneys who had been appointed in capital-murder cases. See, “An attorney appointed without the necessary skill to adequately represent a capital defendant

¹² It is improper for a judge to make intemperate remarks about other judges, particularly when they are neither a party nor a witness before the court. See, e.g., In re: Honorable Phillip E. Prewitt, Order (Missouri Supreme Court Nov. 24, 2015) (judge was reprimanded for, among other violations, stating on Facebook, “Unlike many judges, I am very open about decisions I made in cases because I am proud of the work I do.”; the Commission concluded that this public comment was unfairly critical of the integrity of other judges in the circuit). Impugning the integrity of judges and undermining their role in the eyes of defendants and the public is inconsistent with established ethical standards requiring judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to treat fellow judges with courtesy, dignity and patience.

Canon 3B(3) set out the established ethical standard for a judge’s consideration of potential wrongdoing by a fellow judge or an attorney: a judge has a duty to take or initiate appropriate disciplinary measures against a judge for unprofessional conduct of which a judge has personal knowledge. Upon a valid complaint upon a judge’s personal knowledge, the Judicial Inquiry Commission protects the integrity and independence of the judiciary while confidentially investigating legitimate allegations of professional misconduct. Any judge should be accused of professional misconduct only upon investigation and reasonable basis established by the law and the facts—not by a blindsided accusation in a forum in which the accused judges have no notice or opportunity to respond—particularly gratuitous accusations in a fellow judge’s order.

may charge absorbent amounts of money for subpar representation. This tradition not only exists in this county, but has been remarkably ratified.”

(Attachment A, at 6.)

21. After the hearing, Judge Todd’s order was immediately filed with the clerk and released to the media. In two media interviews that same afternoon, Judge Todd’s comments included:

[As the way Alabama chooses its judges, i.e., by election] relates specifically to capital punishment in this state, I had to look at the law as it relates to protecting a defendant’s constitutional rights. And the constitution of . . . our country requires that people are given a fair process implemented by fair and impartial judges. And currently the way that we select judges in this state does not comport with the constitution requirements of the United States.

Todd, Judge Tracie. Interview with Kent Faulk, al.com Reporter at 3. 3 March 2016.

[T]he death penalty . . . [is] being imposed far more than states five times the size of Alabama. So that in itself should - - should shock everyone’s conscience, and it is in violation of our constitution.

Id. at 4.

[E]specially in light of the fact that Alabama’s the only state that has partisan elections for choosing its judges, that allows for a judge to override a jury’s decision to give a person life instead to give them death, it is obvious that - there is - arbitrary and capricious implementation of - - of the death statute here in Alabama.

Id. at 5-6.

In Alabama it is very arbitrary to apply the capital sentencing scheme in one way in one case and another in another case. And that occurs when you have different judges making a decision based on information that may or may not have been considered by a jury of one's peers.

Todd, Judge Tracie. Interview with Ashley Cleeg, NPR Reporter at 3. 3 March 2016.

[T]he question of death . . . should be left with the jury per the 6th Amendment, your right to trial by jury. And to take a portion of that from the jury and give it to a judge . . . who may have an incentive to impose the death penalty because of pressures from the community is unconstitutional.

Id. at 5.

22. On or before November 9, 2016, Judge Todd stated, to a reporter with Weld: Birmingham's Newspaper, the following: "People know that unfortunately there is in some cases a 'quid pro quo,' [i.e., attorneys receive case appointments based on campaign contributions and not squarely on legal expertise]."

23. Judge Todd's comments in the media interviews were made in the pretrial stage of the four cases. They too rested in large part on her independent research.

24. Judge Todd's comments in her order and to the media, gave the appearance that she had a preconceived bias against the death penalty—far beyond any application of Hurst, and that she abandoned the judicial role to become an advocate for the interests of the defendants and/or for what she apparently thought the law should be.¹³

25. Based on the totality of Judge Todd's conduct regarding State v. Billups, she was thereafter disqualified pursuant to Canon 3C(1), from presiding in any death-eligible case.

26. Pursuant to the State's petition, the Court of Criminal Appeals, on June 17, 2016, reversed Judge Todd's holding in State v. Billups by holding Alabama's statute is constitutional despite Hurst¹⁴

¹³ Judge Todd's comments to the media are not included here for any possible violation of Canon 3A(6). (The version of that provision then in effect—to “abstain from public comment about a pending or impending proceeding in any court”—has since been deemed unconstitutional.) Rather, her comments are included for relevance to her disqualification and embroilment. A judge's comments to the press may, at a minimum, create the impression that he or she is defending his or her statements and rulings and/or create the appearance that he or she is embroiled in the case, a party, or an issue in the case.

¹⁴ The Court of Criminal Appeals reiterated Alabama's solid appellate precedent, in Ex parte State (In re: Billups), 223 So. 3d 954, 963-68 (2016), finding that Alabama's death-sentencing scheme is materially different from Florida's. In Alabama, the jury must find an aggravating (“death eligible”) factor for the jury to recommend or for the

and directed her to set aside her order and “to allow the State to seek the death penalty in capital-murder prosecutions if it chooses to do so.” Ex parte State (In re: Billups), 223 So. 3d 954, 970 (Ala. Crim. App. 2016).¹⁵ In so holding, the Court noted that Hurst does not hold that a jury’s advisory verdict recommending a sentence of death must be unanimous. Id. at 967-68 and n.14.

27. On September 30, 2016, the Alabama Supreme Court ruled, in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), a case unrelated to the litigation before Judge Todd, that Hurst does not affect the imposition of the death penalty in Alabama.

28. On November 1, 2016, Judge Todd did not follow the directive to her by the Court of Criminal Appeals in Billups or the Supreme Court’s holding in Bohannon when she refused to allow the State to seek the

judge to impose a sentence of death. If the jury does not find any such factor, the jury must recommend, and the judge must impose a sentence of life imprisonment without parole. In Florida, however, the judge alone may find that factor and sentence to death, i.e., without a jury’s finding a “death eligible” factor. It was upon this missing step that the United States Supreme Court, in Hurst, found Florida’s scheme to be unconstitutional.

¹⁵ The Alabama Supreme Court denied the defendants’ petition for a writ of certiorari on November 18, 2016.

death penalty in State v. Marcus Benn, CC-2011-2044, -2045, and -2046.

Instead, she “overrode” the jury’s non-unanimous (ten for death and two for life without parole) recommendation of death and sentenced Benn to life imprisonment without parole.

29. In sentencing Benn to life without parole, Judge Todd invoked her personal bias and application of Hurst on two points: (a) a judge’s imposition of the death penalty is unconstitutional where the judge has evidence that the jury did not have, but needed when it recommended the death penalty, and (b) the jury’s recommendation of death must be unanimous. However, under clear law, Hurst had absolutely no application to Benn’s sentence: Hurst does not apply to Alabama’s statute per Billups and Bohannon; even if it did apply, it has no application where the jury recommends death; and, as the Court in Billups noted, Hurst does not hold that a jury’s advisory verdict recommending a sentence of death must be unanimous.¹⁶

¹⁶ In sentencing Benn, Judge Todd stated, “[P]ursuant to this Court’s holding in the cases pending before the appellate courts relating to the death penalty, it is my opinion that this sentence, therefore, based on [Hurst] that Mr. Benn is due to be sentenced to life without parole until the state of Alabama corrects the flaws that are imbedded within its death penalty statute.” However,

30. Because of her actions regarding the State v. Billups consolidated hearing, Judge Todd was disqualified under Canon 3C(1) from presiding in the resentencing of Benn.

31. Because of her actions in State v. Billups and State v. Benn, Judge Todd was disqualified under Canon 3C(1) in the subsequent capital-murder trials in State v. Stanley Chatman, CC-14-3011 and -3012, and State v. Terrell Corey McMullin, CC-2014-3015 and -3016 (both included in the State v. Billups consolidated hearing cases).¹⁷

“It is the imperative duty of inferior courts to be governed and guided by the decisions of the appellate courts of this state.” Brewer v. State, 23 Ala. App. 116, 117, 121 So. 689, 690 (1929). Regarding decisions of this Court in which a petition for a writ of certiorari has been filed with the Alabama Supreme Court, that Court has held: “While Rule 41 stays the issuance of the certificate of judgment, and postpones the final judgment between the parties, it does not prevent a decision of the Court of Criminal Appeals from having precedential value while the case is pending for review in this Court.” Grantham v. State, 540 So. 2d 779, 780 (Ala. 1988).

Ex parte State (In re: State v. Stanley Chatman), No. CR-16-0722, slip op. at 5 (Ala. Crim. App. Dec. 6, 2017) (unpublished memorandum opinion).

¹⁷ The Court of Criminal Appeals subsequently so ruled in Chatman, (Dec. 6, 2017), and McMullin, (Jan. 29, 2018), where in both unpublished memoranda opinions, the Court of Criminal Appeals ordered Judge Todd to recuse.

32. Judge Todd denied the State's motions for her to recuse from any further proceedings in State v. Chatman (filed March 31, 2017; denied April 12, 2017) and any further proceedings in State v. McMullin (filed August 17, 2017; denied August 31, 2017), including the trials, despite (as the Court of Criminal Appeals subsequently ruled) the State having met its heavy burden of supporting by substantial fact, i.e., her actions, that she was disqualified from presiding in the trials.

33. The State's recusal motions, citing the Canons of Judicial Ethics and law applying the Canons, relied on the following: her State v. Billups order, based extensively on matters outside the scope of the underlying motions, including independent investigation and issues not before her; her media interviews concerning that order; and her failure to follow the appellate courts' opinions in Billups and Bohannon when she sentenced Benn. The State also cited cases wherein the Court of Criminal Appeals had applied the Alabama Supreme Court's holding of Bohannon.¹⁸ The State emphasized that Judge Todd should recuse from

¹⁸ See Motion at 12, n.30, State v. Chatman, and Motion at 12, n.28, State v. McMullin, Doc. 129, both citing the following cases: Henderson v. State, 248 So. 3d 992, 1044-48 (Ala. Crim. App. Feb. 10, 2017); Wimbley v. State, 238 So. 3d 1268 (Ala. Crim. App. Dec. 16, 2016) (on remand from the United States Supreme Court for consideration of Hurst), cert.

any further proceedings in State v. Chatman and State v. McMullin, including the trials, to avoid the strong appearance of impropriety and that the question was not actual bias, but whether a reasonable person would perceive potential bias or a lack of impartiality, i.e., whether there was an appearance of partiality. The State further stated that an ordinary person would have a reasonable basis for questioning whether Judge Todd could follow the law in a capital case.

34. Rather than address the allegations presented in the motions to recuse, Judge Todd denied the motions as moot. She reasoned that the State's underlying concerns had been resolved by Act No. 2017-131, which eliminated the judicial-override provision in Alabama's death-sentencing scheme and had become effective the day before her order in State v. Chatman, i.e., April 11, 2017.¹⁹

denied, No. 1160546 (Ala. May 19, 2017), cert. denied, 138 S. Ct. 385 (Mem.) (U.S. Oct. 30, 2017); Russell v. State, 261 So. 2d 454 (Ala. Crim. App. Dec. 16, 2016) (same), cert. denied, No. 1160647 (Ala. Nov. 17, 2017), cert. denied, 138 S. Ct. 1449 (Mem.) (U.S. Apr. 2, 2018); Kirksey v. State, 243 So. 3d 849 (Ala. Crim. App. Dec. 16, 2016) (same), cert. denied, 243 So. 3d 854 (Mem.) (Ala. June 23, 2017), cert. denied, 138 S. Ct. 430 (Mem.) (U.S. Nov. 6, 2017).

¹⁹ That amendment provides in part: "This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has

35. Judge Todd's April 12, 2017 State v. Chatman order and her August 31, 2017 State v. McMullin order state²⁰:

Contrary to the State's position, the Court has made no declarations pertaining to a personal opinion regarding the Death Penalty. More importantly, there is no instance in which the Court has refused to follow the law. The State is unable to present any evidence that the Court has ruled contrary to the law, or entered findings that fall outside of its legal authority. For these reasons, there is no basis for the Court to recuse itself. Most importantly, the current Alabama law has been enacted to resolve the underlying concerns raised by the State.

36. Judge Todd made these proclamations despite the controlling appellate holdings in Billups and Bohannon, cited by the State, and despite citations of opinions in which the Court of Criminal Appeals had followed Bohannon and, in some instances, the Alabama Supreme Court had denied certiorari.

37. In asserting she had not made any declarations or personal opinions regarding the death penalty and that she had not ruled outside her legal authority, Judge Todd failed to comprehend, based on established and clear law, that her ruling was patently biased by her

previously been convicted of capital murder and sentenced to death prior to the effective date of this act." (Emphasis added.)

²⁰ The two orders contain inconsequential differences not noted here.

independent investigation and consideration of evidence not before the court and by her injection of irrelevant issues not raised by the parties nor of which they had notice, i.e., issues that far exceeded the boundaries of the pure legal question of Hurst's application to Alabama's statute.

38. In asserting that the State had not presented any evidence that she had refused to follow the law, Judge Todd failed to comprehend her disregard for the clear precedent of Billups and Bohannon when she refused to allow the State to present and argue the jury's recommendation of death as the appropriate sentence in State v. Benn.

39. In sentencing Benn and asserting that Act No. 2017-131 resolved the concerns of the State, Judge Todd failed to comprehend that that she was disqualified for an appearance of bias against the death penalty—relevant to any death-eligible case.

40. As further evidence of Judge Todd's embroilment as an advocate on death-penalty issues, she relied on the new statute—despite its application only to sentencing, more specifically, the judicial-override provision. Nothing in the amendment prohibits the State from seeking the death penalty in death-eligible capital cases. It is inapplicable to any pre-trial stage of such a case.

41. In addition, Judge Todd declared the motion to recuse in State v. McMullin moot despite the Court of Criminal Appeals having indicated that Act No. 2017-131 does not apply retroactively. See Floyd v. State, 289 So. 3d 337, 358 n.1 (Ala. Crim. App. July 7, 2017).

42. The Court of Criminal Appeals, on review of Judge Todd's refusal to recuse from State v. Chatman and State v. McMullin, found that Judge Todd was disqualified from presiding in any further proceedings, pursuant to Canon 3C(1). Ex parte State (In re: State v. Stanley Chatman), No. CR-16-0722, slip op. at 5 (Ala. Crim. App. Dec. 6, 2017) (unpublished memorandum opinion), and Ex parte State (In re: State v. Terrell Corey McMullin), No. CR-16-1242, slip op. at 5 (Ala. Crim. App. Jan. 29, 2018) (unpublished memorandum) ("McMullin I").²¹ It based its conclusions on her actions, more specifically: she had engaged in conduct that appeared to be in violation of the Alabama Canons of Judicial Ethics by giving radio interview(s) about her rulings in the State v. Billups cases while they were pending before her; she had entered

²¹ For further discussion of its January 19, 2018 memorandum opinion, see also Ex parte State of Alabama (In re: State v. Terrell Corey McMullin), CR-16-1242, slip op. at 1-2 (Ala. Crim. App. Oct. 12, 2018) (memorandum opinion) ("McMullin II").

multiple orders in direct conflict with binding authority on issues in capital-murder cases; and she had erroneously applied Act No. 2017-131, despite the Act's express language stating that it did not apply retroactively.

43. In reversing Judge Todd's refusal to recuse in State v. Chatman and State v. McMullin, the Court of Criminal Appeals concluded:

Judge Todd has elected to disregard those controlling precedents [Billups and Bohannon] and rule in a manner in which she apparently thinks the law should be. Such actions make it reasonable for counsel and members of the public to question the impartiality of Judge Todd as it relates to the imposition of the death penalty.

Chatman, slip op. at 5, and McMullin I, slip op. at 5.

44. Judge Todd did not timely recuse from State v. McMullin as directed by the Court on January 29, 2018, in McMullin I. (The Alabama Supreme Court issued its certificate of judgment on April 20, 2018. Ex parte Terrell Corey McMullin, 285 So. 3d 214 (Ala. April 20, 2018) (table)).

45. Instead, on September 21, 2018, Judge Todd entered an order setting McMullin for "a status conference" for October 10, 2018, to discuss

the parties' readiness for trial; the prosecution's ability to prosecute, including knowledge of necessary witness locations and availability, continued communication and cooperation by the alleged victim, and possession of necessary evidence; all existing circumstances that were precluding defense counsel from rendering effective assistance of counsel to the defendant; and possible remedies for any violations of federal and state law pending the order on the petition.²²

46. Judge Todd recused from State v. McMullin on September 24, 2018.

47. Judge Todd subsequently asserted to the Court of Criminal Appeals that she had not received notice of the Supreme Court's certificate of judgment in McMullin I. In response, the Court stated that

²²

Alabama law is clear: But for limited exceptions not applicable here, if a circuit judge is required to recuse herself from a proceeding, she can take no further action in that proceeding other than to enter an order recusing herself. See, e.g., Ex parte Jim Walter Homes, Inc., 776 So. 2d 76, 80 (Ala. 2000) ("Therefore, in order to avoid the appearance of impropriety, we hold that after a judge presiding in a particular case had been disqualified from hearing that case, under the Canons of Judicial Ethics, either voluntarily or by objection, he or she can take no further action in that case, not even the action of reassigning the case . . .").

McMullin II, slip op. at 4 (emphasis in original).

it was “troubled by Judge Todd’s repeated failure to abide by controlling law and her seemingly cavalier disregard for the orders of this Court and the Supreme Court.” Ex parte State of Alabama (In re: State v. Terrell Corey McMullin), No. CR-16-1242, slip op. at 4 (Ala. Crim. App. Oct. 12, 2018) (unpublished memorandum opinion) (“McMullin II”). It further stated that her actions presented “questions of grave concern to this Court,” particularly, “her apparent failure to check on the status of the finality of a mandate from this Court for her to recuse herself is inexplicable under the circumstances.” Id. at 5.

48. At a minimum, Judge Todd failed to ascertain the status of McMullin I in the appellate courts before she issued her status-hearing order on September 21, 2018. Such failure manifests indifference involving more than an error of judgment or lack of diligence and further manifests disrespect and disregard for appellate courts and the rule of law, particularly when her failure is considered against the following circumstances: her insistence in State v. McMullin of her compliance with the directives and precedent of appellate courts; the caution to her by the Court of Criminal Appeals, in Chatman on December 6, 2017, that it is her “imperative duty” to be governed by the decisions of the appellate

courts; and that Court's finding, in McMullin I, that she had elected to disregard the appellate courts and rule in a manner in which she apparently thinks the law should be.²³

49. Despite the Court of Criminal Appeals opinions in Billups, Chatman, and McMullin and the Alabama Supreme Court's opinion in Bohannon, Judge Todd continued to defend her death-sentence rulings.

* * * *

B. State v. Derrick Breeding

Unresponsive Reply to Appellate Court Directives

* * * *

50. Before Judge Todd was assigned State v. Derrick Breeding, CC-2010-903, her predecessor held a consolidated evidentiary hearing on motions to suppress filed by Breeding and his codefendant, and that judge issued a detailed order addressing the uncontested facts denying each motion with specific findings of fact. Prior to Breeding's trial, his co-defendant was convicted, and the Court of Criminal Appeals upheld the trial court's denial of that co-defendant's motion to suppress. See

²³ Judge Todd further ignored the orders of the Court of Criminal Appeals by issuing her September 21, 2018 order in cases that had been stayed by the Court of Criminal Appeals.

Hernandez v. State, 161 So. 3d 1233 (Ala. Crim. App. 2013), cert. denied, 141 So. 3d 1029 (Ala. 2013).

51. After Judge Todd was assigned Breeding's case, Breeding filed a renewed motion to suppress. Judge Todd held a hearing, where no additional evidence or testimony was presented. Nevertheless, on November 20, 2014, Judge Todd granted Breeding's renewed motion, finding that the State's evidence was insufficient to establish a legal search. Despite the prosecutor's noting the history of the cases, Judge Todd did not acknowledge the uncontested evidence of the prior consolidated hearing, her predecessor's denial of the motions, or the affirmance by the Court of Criminal Appeals of her predecessor's denial of the co-defendant's motion.

52. Neither party provided and Judge Todd did not request a transcript of the consolidated hearing on the original motion to suppress.

53. On the State's pre-trial appeal, the Court of Criminal Appeals remanded Breeding because Judge Todd's findings conflicted with Breeding's written admissions and the uncontested evidence presented at the only evidentiary hearing, i.e., the consolidated hearing held by her

predecessor. State v. Breeding, No. CR-14-0256 (Ala. Crim. App. April 6, 2015) (unpublished memorandum opinion). The Court directed:

--- [T]his case is remanded to the circuit court with instructions for it to clarify whether it considered the evidence presented at the hearing on August 31, 2010. If the circuit court did not consider this evidence, it is instructed to give it due consideration and to issue an amended order either granting or denying Breeding's renewed motion to suppress that includes specific findings of fact.

The return to remand shall include the circuit court's clarification of the basis of its findings in its November 20, 2014 order and, if necessary, the circuit court's amended order granting or denying Breeding's renewed motion to suppress.

Id. at 1-2.

54. Judge Todd abused her judicial authority by in effect dismissing the Court's instruction in her April 29, 2015 return-to-remand order in State v. Breeding.

55. In her return-to-remand order, Judge Todd indicated she still had not read the transcript or considered the evidence, explaining that she had obeyed the Court's instruction by giving the original hearing's evidence only the consideration it was "due," i.e., "minimal, given that the State has still not pointed the Court to any part of that [67-page] transcript or evidence that the State relies on." She further stated:

This Court does not construe the appellate court's order as telling this Court to read the transcript itself, and to figure out the parts (if credited) would be helpful to the State. This Court does not so construe the appellate court's order, because such a construction would be so unusual in light of the settled principle that it is not a court's job to scour the record for materials that supports a party.

If this Court has misunderstood the Order of the Court of Criminal Appeals, and if that Court does instruct this Court to scour the record for itself (even portions of the record that were not available to the Court at the time of the November 20, 2014 Order), then of course this Court will comply. At this juncture, this Court is convinced that it has given the evidence all "due" consideration; and the Court reaffirms its prior factual and legal conclusions in the November 20, 2014 Order, and continues to grant the motion to suppress.^[24]

* * * *

C. State v. Charles Salvagio

Appearance of Impropriety

**Creation of Disqualification, but Failure to Disqualify from
Post-Conviction Proceeding and Contempt Proceeding**

Injection of Irrelevant Political Considerations

Injection of Allegations not Alleged by Any Party

* * * *

²⁴ On December 18, 2015, rather than remand again, the Court of Criminal Appeals reversed Judge Todd's ruling granting Breeding's renewed motion to suppress. State v. Breeding, 200 So. 3d 1193 (Ala. Crim. App. 2015).

56. Judge Todd was assigned Steven Petric's post-conviction petition contesting his conviction and sentence of death. State v. Stephen Petric, CC-2007-003052.60. He alleged that his trial attorneys, including Mr. Charles Salvagio, did not render effective assistance of counsel.

57. Judge Todd abused her judicial authority by injecting irrelevant political considerations into her questioning of Mr. Salvagio, thereby creating an appearance of impropriety and causing her disqualification. Judge Todd asked Mr. Salvagio the following questions when Petric's counsel asked to pause his examination of Mr. Salvagio in the August 29, 2017 hearing on Petric's petition:

THE COURT [Judge Todd]: While they're doing that, Mr. Salvagio, did Ms. Ladner^[25] come to you as a donor for her campaign or to be on her campaign committee?

[Salvagio:] Judge, I think she basically wanted to know if she could use my name, I believe.

THE COURT: On her campaign?

[Salvagio:] I don't know, Judge.

THE COURT: Did you contribute to her campaign?

²⁵ Ms. Ladner was one of Salvagio's co-counsel during Petric's capital-murder trial and an unsuccessful judicial candidate.

[Salvagio:] I don't think I gave her any money. I'm not sure. I give money to everybody.

THE COURT: Were you on Judge Cole's^[26] committee or contribute to his campaign?

[Salvagio:] I did.

THE COURT: Okay. Do you know how much you gave to Judge Cole's campaign?

[Salvagio:] I gave him \$500.

THE COURT: Okay. Was that both times he ran or --

[Salvagio:] I don't know, Judge. He was running against you --

THE COURT: No, seriously, not because I ran against him, but --

[Salvagio:] No, I probably did, Judge. I don't remember. I know the last time I did."

58. Judge Todd's questions were wholly improper, particularly given that Mr. Salvagio is an attorney who practices before her; his quality of assistance of counsel was the subject of the proceeding; and he was under oath on the witness stand. Judge Todd's questioning created the appearance of bias, i.e., that an attorney's political allegiances could affect judicial decisions.

²⁶ Then-Circuit Judge J. William Cole was the trial judge in Petric's capital-murder case and was the incumbent in Judge Todd's successful judicial campaign in 2012.

59. In addition, Judge Todd injected issues not raised by either party, including whether the trial judge had appointed allegedly incompetent counsel and/or tolerated incompetent counsel because he had received campaign contributions from that counsel.

60. Judge Todd subsequently explained that her questions “had to do with the outrageousness of the information that [she] was hearing about the way the trial was conducted,” and she was concerned “about the Court who heard the case and why that Court would leave Mr. Salvagio on the case” because she did not know “any judge [who] would reasonably leave a person on a case that was operating in the manner that Mr. Salvagio was operating in.” CC-2007-3052.43, Sept. 21, 2017 Hearing, R. 12-13. She also stated in a subsequent order:

[T]his line of questioning by the Court was not based solely nor in part on Mr. Salvagio’s rightful choice to contribute to the Court’s opponent in the 2012 General Election. Instead, Mr. Salvagio’s political involvement with Judge Cole became relevant to the Rule 32 proceedings. The Petitioner, Mr. Petric, has asserted that his trial counsel ineffectively represented him in trial on the charge of Capital Murder. During the Rule 32 hearing, Mr. Salvagio’s testimony revealed several remarkably questionable occurrences involving the trial counselor, the prosecution and the trial court. Such that the Court became interested in all possible circumstances that would explain what seemed to be nonsensical happenings in the trial of Mr. Petric. The Court’s questions regarding Mr. Salvagio’s campaign contributions were based wholly on the

possibility of irregular allowances afforded to Mr. Salvagio as lead trial counsel in Mr. Petric's capital murder case.

Order at 3-4, CC-2007-3052.43 (Sept. 25, 2017).²⁷ The petitioner had not raised any question of political entanglement.

61. Judge Todd was also disqualified, but failed to disqualify herself in her September 1, 2017 contempt citation against Mr. Salvagio for his willful violation of her order not to have contact during the trial with anyone involved in the case. State v. Charles Salvagio, CC-2007-3052.43. (On September 20, 2017, Mr. Salvagio had filed "Motion for Disqualification and Recusal," in which he asserted that her questions regarding his political allegiances presented an appearance of impropriety under Canon 2 and a question of her impartiality under Canon 3C(1).) She held the contempt hearing on September 21, 2017.

62. In her September 25, 2017 order finding Mr. Salvagio in contempt, Judge Todd declared his allegations were "undignified and without merit."

²⁷ See also Judge Todd's declaration, in her March 3, 2016 State v. Billups Order, that "[t]he appointment of unqualified and/or unconcerned attorneys to represent capital defendants [is] based on grossly unacceptable political motivation," e.g., campaign contributions. See Paragraph 15, at "3."

63. The Court of Criminal Appeals reversed Mr. Salvagio's contempt conviction on its holding that Judge Todd should have recused.

The Court explained:

Salvagio presented facts of an apparent prejudice or bias that would make it reasonable for members of the public and a person of ordinary prudence to question [Judge Todd's] impartiality. The potential perceived bias – i.e., Salvagio's contribution and support of Judge Todd's opponent in a judicial election – was of a personal nature. Judge Todd stated that her questions were relevant to the Rule 32 proceedings because she became interested in all possible circumstances to explain the happenings of the trial. Judge Todd also stated that her questions were based on the possibility of irregular allowances afforded to Salvagio, presumably by the trial judge, during the trial. Our review of the Rule 32 evidentiary hearing indicates that these allegations were not alleged by either party during the Rule 32 proceeding and were not relevant. Judge Todd's line of questioning to Salvagio raises the appearance of impropriety or impartiality under Canon 3.C(1), Alabama Canons of Judicial Ethics.

We recognize that Judge Todd may not have actual bias or lack impartiality in this case. However, we find that a reasonable person would perceive potential bias or a lack of impartiality on the part of the Judge Todd, based on her failure to recuse after questioning Salvagio regarding his support of her political opponent. This is especially so because Salvagio was under oath and on the witness stand in Judge Todd's courtroom when she asked those questions. Judge Todd had a clear duty to recuse herself from the contempt proceedings and to allow another judge to handle the contempt hearing.

Salvagio v. State, 274 So. 3d 310, 316 (Ala. Crim. App. 2018) (emphasis added).

* * * *

D. Friction with Office of District Attorney

1. Introduction

64. Friction between the Office of the District Attorney and Judge Todd, which affected her judicial conduct, manifested itself primarily in the following ways: interference in prosecutorial discretion; injection of issues, including a predisposition to assume and inject prosecutorial selective prosecution based on race and gender due to perceived personal knowledge of that office's policies and procedures; banishment of a particular DDA from practicing before her; lack of proper judicial temperament and demeanor toward the office and its attorneys; and her personal affront based, at least in part, on that office's questioning her rulings by seeking review.

65. The district attorney, as an agency in the executive branch of state government, is protected from judicial oversight by the doctrine of separation of powers. Piggly Wiggly No. 208, Inc. v. Dutton, 601 So. 2d 907, 910 (Ala. 1992). See Art. III, § 43, Ala. Const. 1901. A judge should exercise great care not to ever usurp the functions of the district attorney.

See generally Birmingham-Jefferson Civic Ctr. Auth. v. City of

Birmingham, 912 So. 2d 204, 212 (Ala. 2005). In fact, no branch of government is so responsible for the autonomy of the district attorney as the judiciary. Id. Accordingly, a judge is prohibited from interfering with the decisions of the executive branch, by and through its district attorney. See also State v. Sharp, 893 So. 2d 566, 570 (Ala. Crim. App. 2003) (the judicial branch does not have any power, authority, or control over the office of district attorney).

66. Judge Todd abused her judicial power by interfering with prosecutorial decisions. She abandoned the judicial role of detachment and neutrality in the context of embroilment regarding functioning of the Office of District Attorney and that office's policies and decisions.

* * * *

2. State v. Anita Hill Kemp

Interference with Prosecutorial Discretion

**Disqualification: Reasonable Question as to Impartiality and
Personal Knowledge of Material Fact**

Order to Court Reporter not to Release Transcript to State

Injection of Issue not Raised by Parties

Independent Investigation

Denial of Right to be Heard

* * * *

67. On Friday, June 24, 2016, the defendant in State of Alabama v. Anita Hill Kemp, CC-2015-2863 and -2864, filed a motion to declare a conflict of interest with the Office of District Attorney. The alleged conflict was based on the following factual sequence: a police officer filed a criminal complaint against Ms. Kemp's ex-husband on Ms. Kemp's domestic-violence accusation; the ex-husband filed a criminal complaint against Ms. Kemp; the ex-husband was indicted on the officer's testimony; Ms. Kemp was indicted for attempted murder of her ex-husband and discharging a firearm into a vehicle; and the district attorney ultimately dismissed the indictment against the ex-husband.

68. Judge Todd issued an order that same afternoon setting a hearing. Although Ms. Kemp's attorney did not request the attendance of any witness, Judge Todd ordered two deputy district attorneys (DDA's) to be present: the one whose only involvement was filing the one-sentence motion to dismiss the case against Ms. Kemp's ex-husband (on the ground there was insufficient evidence to support the charge), and the prosecutor whom the district attorney had assigned to Ms. Kemp's case.

69. At the June 29, 2016 hearing, the district attorney argued that the State has prosecutorial discretion to decide whether to dismiss a case; when the prosecution determines a witness-victim is not credible, it must dismiss the case; and a court does not have the authority to question the prosecutorial discretion of the Office of District Attorney.²⁸ In arguing its objection, the prosecutor presented Judge Todd with a copy of Doster v. State, 72 So. 3d 50 (Ala. Crim. App. 2010), cert. denied, 565 U.S. 1063 (2011).²⁹

²⁸ When responding to the district attorney's objection to the deputy district attorneys' testifying, defense counsel declared he was not trying to find out why the case against the ex-husband had been dismissed; instead, he was trying to determine which prosecutor possessed the evidence indicating Ms. Kemp was not credible and what that evidence was, i.e., he was conducting discovery in preparation for the trial against Ms. Kemp.

²⁹ In Doster, the Court of Criminal Appeals stated:

"A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive. Heckler v. Chaney, 470 U.S. 821, 832 . . . (1985). The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. Wayte v. United States, 470 U.S. 598, 607 . . . (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380, n.11 . . . (1982)). . . . As a result, '[t]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' United States v. Chemical Foundation, Inc.,

272 U.S. 1, 14–15 . . . (1926). In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’ Bordenkircher v. Hayes, 434 U.S. 357, 364 . . . (1978).”

United States v. Armstrong, 517 U.S. 456, 464 . . . (1996).

“Our analysis begins with the premise that the district attorney has ‘wide discretion in determining whether to prosecute an individual.’ Commonwealth v. Clint C., 430 Mass. 219, 228, 715 N.E.2d 1032 (1999). Prosecutorial decisions enjoy a presumption of good faith. See Commonwealth v. Franklin, 376 Mass. 885, 894, 385 N.E.2d 227 (1978). The presumption of prosecutorial regularity is broad enough to encompass some selectivity in prosecutorial targets. Id. Deference to prosecutorial decision-making is borne of the recognition that decisions whether and how to prosecute entail policy considerations, such as deterrence value and prosecuting priorities, that are ill suited to judicial review.”

Commonwealth v. Bernardo B., 453 Mass. 158, 167, 900 N.E.2d 834, 842 (2009). See also Salaiscooper v. Eighth Judicial Dist. Court, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001) (“In exercising [discretion to prosecute] the district attorney is clothed with the presumption that he acted in good faith and properly discharged his duty to enforce the laws.”); In re Smith, 301 B.R. 96, 102 (M.D. Ga. 2003) (“[t]he district attorney's motives in this case have not been drawn into question at all. Thus, there are no facts from which to conclude that the prosecution against Debtor is being pursued in bad faith.”); see State v. Anderson, 8 So. 3d 1033 (Ala. Crim. App. 2008) (we presume that prosecutor acted in good faith and without malice).

....

70. Despite the law, Judge Todd scrutinized the use of prosecutorial discretion, including decisions whether to prosecute and even whether to contact the victim before dismissing a case.

Moreover,

“ [A]s a general rule, if a prosecutor has possible cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, rests entirely in his discretion. In other words, the duty to prosecute is not absolute, but qualified, requiring of the prosecuting attorney only the exercise of a sound discretion, which permits him to refrain from prosecuting whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof.

“A prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings; he is protected from judicial oversight by the doctrine of separation of powers. Thus, it has been held that mandamus will not lie to compel a prosecuting attorney to institute a criminal prosecution, since the acts of a prosecuting attorney are not purely ministerial acts, but involve in a large measure learning and the exercise of discretion.”

Piggly-Wiggly No. 208, Inc. v. Dutton, 601 So. 2d 907, 910 (Ala. 1992), quoting 63 Am. Jur. 2d Prosecuting Attorneys § 24 (1984).

72 So. 3d at 94-95.

71. In doing so, Judge Todd injected the prosecution's practice of following its policy to contact the victim before dismissing the charge. Adherence to that policy became a material issue in the proceeding and central to her ultimate holding. However, because as a former DDA, she had personal knowledge of that material fact, she was disqualified from presiding in the case. See Canon 3C(1)(a).

72. During the hearing, the following occurred:

Judge Todd: . . . I've never seen an instance where the District Attorney's Office has dismissed a DV [domestic-violence] case without speaking to the victims. . . .

So especially in DV cases, it's been your policy, as I understand it, that you won't do anything until you talk to the victim.

* * * *

Judge Todd: Is it your office policy that your DA's are to contact the victim before they dismiss a case?

[District Attorney]: Your Honor, the office policies have no bearing in the prosecution --

Judge Todd: Yes, sir.

[District Attorney]: -- or the defense of this case.

Judge Todd: But is that your office policy; that they are to contact the victim before dismissing a case?

[District Attorney]: Your Honor, generally, we try to contact any victim and apprise them of any action that we're going to take in a case. But whether that was done or not done in this case has no bearing on the prosecution.

* * * *

[District Attorney]: I think [defense counsel] has the burden of showing that there is some type of conflict. He's not allowed to just call witnesses and ask questions.

Judge Todd: Right. In my mind, he has met that burden. . . .

[District Attorney]: If I may, Your Honor. What is the basis of that moving forward?

Judge Todd: Well, the basis is that I worked in the DA's office and . . . I've dealt with cases that you-all had with domestic violence, and I've never known a case where you dismiss a case without speaking to the victim. That is problematic.

So either there is some great anomaly here or there's something going on. . . .

. . . .

[District Attorney]: So the failure to contact the victim before making the decision and dismissing a case, that is the basis of our conflict in this case?

Judge Todd: And the timing that it was done. All of the -- the totality of everything that has taken place --.

* * * *

Judge Todd: I just cannot participate or condone in this instance what I feel is a conflict because of the way that the circumstances kind of developed.

Ms. Kemp has not been a model defendant. . . . But I do know that she was not contacted. There's been no evidence that anybody talked to anyone to find out whether or not -- whether she was credible or not, other than you saying that.

(R. 23, 28, 38-39, 68) (emphasis added).

73. Judge Todd allowed, over objection, defense counsel to question under oath, three DDA's, two of whom she had ordered to appear, about the prosecutorial decision to dismiss the indictment against Ms. Kemp's ex-husband.

74. Judge Todd required the prosecution to detail its reasoning for dismissing the indictment against Ms. Kemp's ex-husband.³⁰

³⁰ The prosecution explained: in preparing for trial, i.e., talking to Ms. Kemp at least four times (but not about dismissal), having numerous conversations with the officer, investigating Ms. Kemp's background and record, interviewing the ex-husband, considering Ms. Kemp's erratic behavior in court, and having discussions with the district-court prosecutor—the office determined that Ms. Kemp was not a credible witness; she had fabricated evidence (months after the incident, she produced photographs of her alleged injuries but, according to the responding officer, they were not consistent with his observations immediately after the alleged assault); and, aside from her accusations, there was insufficient evidence to proceed with the prosecution.

75. At the conclusion of the hearing, Judge Todd announced she was granting Ms. Kemp's motion because Ms. Kemp had not been contacted when the State decided to dismiss the indictment against her ex-husband.

76. Judge Todd abused her judicial authority by questioning the exercise of the district attorney's discretion and by allowing defense counsel to question the DDA's whom she had called as witnesses.

77. Then, defense counsel asked Judge Todd to release Ms. Kemp on bond. Judge Todd asked the district attorney, "What says the State to bond?" The district attorney objected to the bond, but when asked the basis for his objection, the following occurred:

District Attorney: Well, Your Honor, first of all, are you asking me to continue being the prosecutor for purposes of this –

Judge Todd: Oh, well, never mind. It's granted. Thank you.

(R. 70.)

78. In ruling on Ms. Kemp's motion without representation by the State, Judge Todd denied the State full right to be heard on the issue of bond.

79. That same day, June 29, 2016, Judge Todd issued a one-sentence order granting Ms. Kemp's motion to declare a conflict. However, the following day, Judge Todd issued an order stating her June 29 ruling was in error and therefore set aside.

80. After she withdrew her order, Judge Todd instructed the court reporter not to release the transcript to the prosecution until she completed her order.

81. Four months later, on November 1, 2016, Judge Todd issued an eight-page order granting Ms. Kemp's motion to declare a conflict and ordering appointment of a special prosecutor. She based her ruling on an issue and facts that had not been presented by Ms. Kemp, i.e., the prosecution had engaged in selective prosecution of black females.³¹ She concluded her order with the following:

³¹ The Court of Criminal Appeals subsequently found in its opinion granting the State's petition:

Here, Kemp made no allegation of purposeful discrimination based on the practice of invidiously prosecuting black females in comparison to other groups of similarly situated defendants. The trial judge inserted the allegation into the case. In doing so, and in her subsequent removal of the District Attorney's office from prosecution of the case, the trial judge is attempting to oversee the District Attorney's official duties in violation of the doctrine of separation of powers.

Based upon the State's selective deviation from its Domestic Violence Victim Policy, and its practice of invidiously prosecuting black females in comparison to other groups of similarly situated defendants based, this Court finds that the District Attorney's office has violated the Defendant's due process rights, thereby denying her a fair prosecution and trial based on her race and gender prohibited by the Fifth Amendment

Order at 8-9 (Nov. 1, 2016).

82. In repeating her findings regarding the prosecution's deviation from its policy regarding notification to domestic-violence victims of dismissal, Judge Todd quoted from the district attorney's website, which had not been mentioned or introduced at the hearing.³²

Ex parte State (In re: State v. Kemp), No. CR-16-0142, slip op. at 3 (Ala. Crim. App. Sept. 20, 2017) (unpublished memorandum opinion).

³² In addition, in a subsequent pleading filed in the Court of Criminal Appeals, Judge Todd explained the following, which included facts that had not been introduced in the hearing:

The issue in *Kemp* related to alleged prosecutorial misconduct by Deputy District Attorney Holly Clemente, the lead deputy district attorney in this case. In *Kemp*, Ms. Clemente developed a personal dislike for the defendant. . . . Because of Ms. Clemente's personal dislike for Kemp, she took extraordinary and what the Trial Court believed to be improper measures to involve other deputy district attorneys and persuade a supervising deputy district attorney to authorize dismissal of Kemp's charge against Brown. Prior to this occurrence, Ms. Clemente had been accused in at least one other court, and called as a witness in a trial for questionable prosecutorial conduct. Ms. Clemente experienced personal

83. Judge Todd concluded that the Office of District Attorney did not properly investigate or properly prepare for trial, was “unable to give information related to the investigation of [the ex-husband’s] case, and was unable to deny the Defendant’s assertions that [the ex-husband’s] case had not been investigated prior to the dismissal.” Order at 2 (Nov. 1, 2016).

84. In her order, Judge Todd applied the following test:

To show selective prosecution, the petitioner must overcome a “heavy burden” by establishing two requirements. First, the petitioner must establish that [she] has been singled out for prosecution when others, similarly situated, have committed the same acts and have not been prosecuted. Second, the petitioner must show that [she] was invidiously selected for prosecution.

Order at 5 (Nov. 1, 2016).

85. In support of her finding of selective prosecution, Judge Todd included a chart she had compiled, addressing 81 domestic-violence cases (against 68 defendants), over which she had presided. By categories

challenges that became public when she was charged with domestic violence against her spouse. Interim District Attorney Anderton, for reasons unknown to the Trial Court, terminated Ms. Clemente. Nevertheless, the Court [of Criminal Appeals] granted the State’s Petition and ordered the Trial Court’s recusal.

“Responses to Motion to Show Cause and Motion for Clarification,” at 15-16 (Sept. 25, 2018).

based on sex and race, Judge Todd noted “case data” on each case, e.g., the existence of each defendant’s prior record; the State’s offer or chance of offer of a jail sentence; the State’s reduction of charges or chance of reduction; etc.

86. Pursuant to this “case data,” Judge Todd made numerous conclusions in her order, including that the three Black females “appear to be unduly singled out for prosecution when others, similarly situated, have committed the same acts and have not been prosecuted in the same manner nor invidiously selected for prosecution.” She further commented: “[I]n Jefferson County, cases are randomly assigned to judges. If said practice truly exists, data disparities such as these may be indicative of broader issues relating to criminal prosecutions in this county.” Order at 6, 7 (Nov. 1, 2016).

87. Judge Todd abused her judicial authority by injecting the issue of selective prosecution on race and gender. She further abused her judicial authority by relying on “case data” she had gathered by her own independent investigation in her attempt to meet the “heavy burden” required for a finding of selective prosecution.

88. On November 8, 2016, the Office of District Attorney filed a 12-page motion to reconsider Ms. Kemp's conditions of bond and to set case for status or trial. He pointed out that the State had been foreclosed from being heard on June 29, 2016, and that, during the four-month period from Judge Todd's oral declaration of conflict until her final order, it was unclear who represented the State. The motion set out Ms. Kemp's extensive domestic-violence history and requested a no-contact order between the parties, a maximum cash bond, and electronic monitoring. Exhibits to the motion consisted of over 70 pages of various law-enforcement and court records.

89. In response, Ms. Kemp filed a motion to deny reconsideration, arguing that the Office of District Attorney had not argued any grounds of objection at the June 29, 2016 hearing and that, pursuant to Judge Todd's finding of a conflict, the district attorney was disqualified from filing the motion.

90. Without a hearing, Judge Todd granted Ms. Kemp's motion to deny reconsideration of bond on November 28, 2016.

91. The Court of Criminal Appeals reiterated the following law in subsequently ordering Judge Todd to set aside her ruling:

With regard to the trial court's order disqualifying the Jefferson County District Attorney's Office from prosecuting Kemp, it is well established that "[a] prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings; he is protected from judicial oversight by the doctrine of separation of powers." Piggly Wiggly No. 2018, Inc. v. Dutton, 601 So. 2d 907, 910 (Ala. 1992).

As pointed out by the Alabama Supreme Court in State v. \$223,405.86, 203 So. 3d 816 (Ala. 2016):

"The United States Supreme Court has explained why close judicial oversight of prosecutorial decision-making is inappropriate: '[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.' Wayte v. United States, 470 U.S. 598, 607 . . . (1985)."

State v. \$223,405.86, 203 So. 3d at 828.

" '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.' Bordenkircher v. Hayes, 434 U.S. 357, 364 . . . (1978). A 'presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 . . . (1926)."

State v. \$223,405.86, 203 So. 3d at 826-27 (Ala. 2016).

Ex parte State (In re: State v. Kemp), No. CR-16-0142, slip op. at 2-3 (Ala. Crim. App. Sept. 20, 2017) (unpublished memorandum opinion).

92. On November 9, 2017, Judge Todd set the case for a jury trial for April 2, 2018.

93. On March 28, 2018, Judge Todd set aside that order.

94. On April 9, 2018, Judge Todd on her own initiative recused from State v. Kemp.

95. In a May 10, 2018 pleading she filed in the Court of Criminal Appeals in unrelated cases, Judge Todd defended her stance in State v. Kemp, by arguing that she had properly taken judicial notice of adjudicative facts and that the purposeful-discrimination issue had been injected by the defendant, not by her—as the Court had ruled:

Kemp argued that the matter involved gravely inappropriate disparities, and raised troubling questions about the DDA's bias in disposing of one case to make another prosecution more viable—without presenting any suggestion that their decision was based on responsible, good faith effort to find the truth, which Kemp argues would result in an unfair trial.

Judge's Motion to Dismiss Mandamus Petitions at 16 (May 10, 2018).

96. Judge Todd, in that May 10, 2018 pleading, did not acknowledge the holding by the Court of Criminal Appeals that she had

improperly engaged in judicial oversight over the prosecutor's decisions in State v. Kemp. Rather, she stated:

In reaching a conclusion in the *Kemp* proceeding, I was generally aware that Alabama law permitted me to take judicial notice of adjudicative facts. . . . [Despite my failing to give] “. . . prior notification,” the District Attorney's Office could have requested a rehearing after judicial notice was taken. . . . I erred in good faith by not giving notice of the adjudicative facts that served as the basis for the judicial notice. While my legal decision to take judicial notice of the adjudicative facts compiled in AlaCourt was permissible under Alabama law, I erred by not setting the matter for a rehearing to allow a response from the parties. While it is plain to me now that my methodology was not ideal, I maintain that my conduct was based upon my understanding of the role of the court, and the evidence presented.

Judge's Motion to Dismiss Mandamus Petitions at 16-17 (May 10, 2018).

* * * *

3. State v. Dominic Keeth

**Interference with Prosecutorial Discretion:
Banishing DDA from Court**

Disregard of Appellate Court Decision in Kemp

**Lack of Proper Judicial Temperament and Demeanor Toward
DDA and Office of District Attorney**

Order to Court Reporter to “Go off the Record”

Denial of Right to be Heard

Failure to Disqualify

* * * *

97. Pursuant to the district attorney's discretionary policy of periodically rotating deputy district attorneys assigned to each judge, Deputy District Attorney (DDA) Carlos Gonzales had been assigned exclusively to Judge Todd's courtroom from May 2016 through December 2017 or January 2018.

98. On November 30, 2017, approximately two months after the Court of Criminal Appeals cautioned Judge Todd in Kemp to refrain from overseeing the Office of District Attorney, Judge Todd instructed DDA Carlos Gonzales, "You may tell Mr. Anderton [the district attorney] you don't need to come back to this court." She issued this directive after ordering the court reporter to "go off the record." State v. Dominic Keeth, CC-2016-1954.

99. In addition to having to comply with the separation-of-powers doctrine, a judge does not have authority to prohibit any attorney from practicing law before her. In Graham v. State, 427 So. 2d 998 (Ala. Crim. App. 1983), the Court of Criminal Appeals, in reviewing the trial judge's finding an attorney in contempt and barring that attorney from practicing law before that judge for 180 days, explained:

As stated in A.R.D.E. 1(a), “Any attorney admitted to practice law in this state and any attorney specially admitted . . . is subject to the exclusive disciplinary jurisdiction of the Supreme Court of Alabama and the disciplinary board of the Alabama state bar”

In section (b) of A.R.D.E. 1, it is expressly noted that the rules of disciplinary enforcement shall not be “construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt.”

Thus, the circuit courts of this state have the power to punish for criminal contempt, and, through the exercise of their discretion, punish for such to the extent established by § 12–11–30(5)[, i.e., fines not exceeding \$100 and imprisonment not exceeding five days]. [Ex parte] Hill, [229 Ala. 501, 158 So. 531 (1935)]. They do not have the inherent power to prohibit an attorney from practicing law before it. Such is vested in the Supreme Court and the state bar disciplinary board. A.R.D.E. 1; see Taylor v. Hayes, 494 S.W.2d 737 (Ky. 1973), rev'd on other grounds, 418 U.S. 488 (1974).

100. Although judges are empowered to require or prohibit certain conduct in their courtrooms and they must sometimes admonish and punish attorneys who disrupt their courtrooms, a judge’s act of banning an attorney from her courtroom constitutes an extreme and unwarranted abuse of judicial authority.³³

101. The same day Judge Todd banished DDA Gonzalez, Judge Todd cited him for contempt and set a hearing for January 4, 2018, for

³³ In re Jefferson, 753 So. 2d 181, 192 (La. 2000).

DDA Gonzalez to show cause why he should not be held in contempt.³⁴

This was her first citation for contempt against him.³⁵

102. The following Monday, December 4, 2017, DDA Gonzalez appeared in Judge Todd's court for a lengthy docket. Judge Todd enforced her banishment. Per her instruction, her assistant told him that Judge Todd wanted him to leave before she entered the courtroom. DDA Gonzalez complied, taking his case files with him.

103. At 10:15 a.m. the following day, December 5, 2017, DDA Gonzalez sent Judge Todd's judicial assistant the following email:

We have a large docket next week. The majority of cases are mine, including a capital murder. I plan on being in court unless judge does an order that I am not allowed to come to her courtroom. Let me know what to do. Otherwise, I will see you next week. Thanks.

104. Judge Todd did not issue an order or respond in any way to DDA Gonzalez. However, on December 6, 2017, she sent the following email, referenced "Safety Concern," to the Jefferson County sheriff:

³⁴ Judge Todd's order was precipitated by DDA Gonzalez's violation of her instruction that he refrain from making certain comments in his closing argument.

³⁵ Judge Todd, however, had requested the district attorney to rotate DDA Gonzalez out of her courtroom. She abused her authority in making that request and created an appearance of impropriety.

[DDA] Gonzalez has demonstrated with either willful disregard for court instructions or displays of mental instability. He consistently displays unpredictable mood swings. Last Thursday Mr. Gonzalez was cited for contempt. He was admonished in open court for his behavior and instructed not to return to this courtroom. Despite this instruction, Mr. Gonzalez came to court on Monday as if nothing happened. He was reminded by courtroom staff of my instruction, and asked to leave. On yesterday, Mr. Gonzalez sent the following email:

[Email quoted in Paragraph 103.]

This email clearly demonstrated Mr. Gonzalez's failure to appreciate the circumstances that led to my instruction prohibiting him from coming to this court. This astonishing insistence on coming here, coupled with Mr. Gonzalez's behavior demonstrates willful disregard or mental instability. I now have concerns for the personal safety of our staff, attorneys and the visiting public. Therefore, I am requesting that warrant detail send additional security next week in the event Mr. Gonzalez makes any attempts to visit this court, and I am requesting that Mr. Gonzalez not be permitted to enter the building with a firearm or weapon of any kind. . . .^[36]

105. In addition, Judge Todd sent a lengthy email to the district attorney on December 6, 2017, detailing her perceived actions by DDA Gonzalez. She acknowledged in that email that she had asked the previous district attorney to rotate Mr. Gonzalez out of her courtroom, to no avail. She then delineated her "numerous concerns," i.e., his

³⁶ All DDA's are provided a handgun and firearms training. While the DDA's are in the courthouse, their weapons must be locked in lockboxes in the district attorney's office.

unpredictable mood swings; his lack of concern for preparation for trial; his presentation of apathy and dispassion to the juries; and the post-trial notations of juries who had returned not-guilty verdicts of his lackluster performance and ill preparedness. She cited two “astonishing examples,” noting that the accusers were African American females: two first-degree-rape prosecutions, one allegedly of a fourteen-year-old by her stepfather and the other of a woman by her boyfriend’s cousin. Regarding the first, which concluded August 29, 2017, Judge Todd stated, “Mr. Gonzalez’s prosecution . . . was a tragic representation of justice.” She described the second, which concluded October 10, 2017, as “equally tragic.” She cited post-verdict observations by jurors of the State’s “lack of concern” and the prosecutor’s failure to do his job. She also cited a citizen’s conclusion, after observing one of Mr. Gonzalez’s “conniptions,” that DDA Gonzalez’s behavior toward Judge Todd was due to her being a Black female and that attorneys have expressed the same sentiment and believe that DDA Gonzalez is perhaps biased against Black females, including Judge Todd.

106. Judge Todd then stated in her email to the district attorney:

[DDA Gonzalez's] insistence on coming [to her courtroom], coupled with Mr. Gonzalez's targeted disrespect causes me to surmise that Mr. Gonzalez is determined to continue his disrespectful and disdainful behavior and/or he is suffering with mental instability. I now have concerns for the personal safety of our staff, attorneys and the visiting public.

Judge Todd concluded her email, as follows:

I am well aware that there are perceptions and attitudes in your office and in this courthouse that have created a tolerance and permissiveness for attorneys and judges alike to treat this Court with impudence and discourtesy. This is not a dramatic summation. Notwithstanding the reasons for this atmosphere (race, gender, age) I am not willing to succumb to this convention sacrificing the dignity due to the court. Before retiring, Judge Nail disdainfully told me to stop "whining about ill treatment – "respect is not given, it is earned." I have been unable as a young, African American woman to earn respect from many practicing in this county. Therefore, I have been unduly forced to demand it. In this instance, I am demanding that your office exercise its due diligence and ensure that Mr. Gonzalez respect this Court, its instructions and the administration of justice.

107. Judge Todd was disqualified, under Canon 3C(1), from presiding in the contempt proceeding against DDA Gonzalez, i.e., a party to the proceeding rather than an attorney to the proceeding. A reasonable person might have a question as to her impartiality because of her conduct indicating embroilment with DDA Gonzalez, e.g., her

extreme directive of banishment and her taking personal offense to his attempts for clarification of her directive.³⁷

108. Rather than recuse from the contempt proceeding, Judge Todd set aside her contempt citation ex mero motu on December 29, 2017, the week before the January 4, 2018 trial.

109. Judge Todd never issued a written order banning DDA Gonzalez from practicing before her.

* * * *

4. Sixteen Motions to Recuse and Petitions for Mandamus

Interference with Prosecutorial Discretion: Banishing DDA from Court

Disregard of Appellate Court Decisions in Kemp, Billups, Bohannon, and Chatman

Lack of Proper Judicial Temperament and Demeanor Against Office of District Attorney and DDA

³⁷ In Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971), the United States Supreme Court held that the fair administration of justice disqualifies a judge from sitting in judgment on a contempt charge if she has become so personally embroiled with a contemnor that it is unlikely for her “to maintain that calm detachment necessary for fair adjudication.” See also Matter of Sheffield, 465 So. 2d at 356 (a judge is disqualified from hearing a contempt proceeding where it might appear that the judge “cannot ‘hold the balance nice, clear and true between [the parties]’”; the question is whether it might appear to a reasonable person that a judge does not have the ability to “hold the balance”) (citation omitted).

Injection of Concern for Political Ramifications of Judicial Decisions

Advocate for Defendants, Judicial Rulings, and Personal Positions

Distorted Expression of Judicial Impartiality

* * * *

110. After Judge Todd banished DDA Gonzalez from practicing before her, DDA Gonzalez filed motions to recuse in State v. Keeth and fifteen other cases from all his cases on Judge Todd's docket, i.e., sixteen cases that the district attorney intended for DDA Gonzalez to continue prosecuting as lead counsel—sixteen cases out of half of Judge Todd's caseload assigned to him. See, e.g., State v. Keeth and State v. Vershawn Edwards, CC-2016-641 and 2017-436, all filed on December 13, 2017. He relied, in some, on the ground that, although he had become “intrinsically involved” with particularly those sixteen cases assigned to him to prosecute, Judge Todd had banned him from practicing before her and thus prevented him from performing his statutory duties. The cases included capital-murder offenses and other significant offenses with victims.

111. Judge Todd promptly denied all motions.

112. In some of the cases, see e.g., State v. Vershawn Edwards (January 5, 2018) and State v. Nicholson (March 5, 2018), DDA Gonzalez filed a second recusal motion, adding the allegation that, when he sought clarification of her banishment order via the email to her judicial assistant, Judge Todd indicated to the sheriff that DDA Gonzalez was possibly mentally ill.

113. After Judge Todd promptly denied the second recusal motions, she filed other orders denying the State's motions to recuse. See, e.g., State v. Vershawn Edwards (January 5 and 9, 2018).

114. In those orders, Judge Todd defended her stance on the unconstitutionality of Alabama's death-sentencing scheme, on some points contrary to the pronouncements of the Court of Criminal Appeals. She declared that Act No. 2017-131, the amendment prohibiting judicial override, was consistent with her State v. Billups ruling pronouncing the death-penalty provision unconstitutional based on Hurst; that she had not made any declarations equating to a personal opinion regarding the death penalty³⁸; that her statements regarding the statute's

³⁸ This assertion was contrary to the finding of the Court of Criminal Appeals one month earlier in Chatman, slip op. at 5 (Dec. 6, 2017) (unpublished memorandum opinion). In discussing State v. Benn

unconstitutionality were found to be consistent with the ruling in Hurst and current Alabama law³⁹; and that there was no evidence that she had refused to follow the law in State v. Benn.

115. Judge Todd's orders further stated:

When two or more Deputy District Attorneys . . . are assigned to a circuit court, the Court's docket is divided respectively based on seniority or some other interoffice system of allocation. . . . When a Deputy District Attorney . . . is reassigned or rotated to another court, the cases remain with the Court as originally designated, and the succeeding Deputy District Attorney . . . inherits her predecessor's caseload. . . . [T]here is no precedent for a Court to recuse or otherwise transfer cases to another court in order to follow a Deputy District Attorney . . . from courtroom to courtroom. The establishment of such a precedent would most certainly infringe upon the constitutional rights of the accuser and the accused, create uncertainty in the process, burden the judicial economy, encourage prohibited forum shopping and unduly delay the administration of justice.

Order at 2-3, State v. Vershawn Edwards, CC-2017-436 (Jan. 9, 2018).

116. In fact, however, when the district attorney reassigns a DDA to another judge's courtroom, the DDA returns to his former assigned

and State v. Chatman, the Court stated, "Judge Todd has elected to disregard those controlling precedents [Billups and Bohannon] and rule in a manner in which she apparently thinks the law should be."

³⁹ This assertion was contrary to the findings of the Court of Criminal Appeals in Billups, reversing her declaration of unconstitutionality, and in Chatman. See also Bohannon.

judge to continue prosecuting the significant cases, e.g., capital-murder cases, sex-offense cases, cases for retrial.

117. The State filed sixteen mandamus petitions in the Court of Criminal Appeals requesting that Judge Todd's refusals to recuse be set aside. Most were filed by February 10, 2018. See, e.g., State v. Keeth (filed on December 22, 2017); State v. Vershawn Edwards (filed on January 12, 2018); State v. Nicholson (filed on March 12, 2018).

118. Pursuant to Judge Todd's March 22, 2018 request, the Court granted her an extension, to April 10, 2018, to answer the petitions. On April 10, she filed "Motion to Stay Proceedings and Appointment of Counsel" (21 pages). After the Court denied those requests, she requested a 30-day extension on April 12, 2018, and the Court granted her an extension to May 10, 2018. On May 10, 2018, Judge Todd filed her answer to the petitions: a letter and "Motion to Dismiss" (totaling 32 pages).

119. Judge Todd, in her filings to the Court, exhibited further embroilment with the issues of Alabama's death-sentencing scheme and DDA Gonzalez. Rather than remain a "nominal party" to the mandamus

proceedings,⁴⁰ she “joined the fray” and, at a minimum, gave the appearance she was advocating for the defendants; for her declaration of the unconstitutionality of Alabama’s death-sentencing scheme; and for her personal reasons, i.e., she considered the petitions a personal attack.

... Judge Todd stated she was being “persecuted” and “bullied.” She did not construe the petitions as proper legal remedies for the prosecution to ensure that the law is correctly interpreted and applied, i.e., to contest her failure to recuse for bias regarding Alabama’s death-penalty scheme and for banishing DDA Gonzalez from practicing before her. Rather, she considered them as a highly offensive personal affront to her and as motivated by the State’s alleged retaliation for her declaration of the unconstitutionality of Alabama’s death-penalty sentencing scheme.

⁴⁰ As the Committee Comments to Rule 21, Ala. R. App. P., recognize, “[M]andamus proceedings are adversary proceedings between the parties to the litigation below, and . . . the judge is really a nominal party rather than an active party.” (There are exceptions not applicable here.) The rule even provides the option for the judge to not appear. See also Enslen v. Ala. Dept. of Transportation, 211 So. 3d 841 (Ala. Civ. App. 2016).

b. Judge Todd repeatedly, adamantly defended her striking down the death-sentencing scheme despite the appellate-court decisions reversing her ruling.

c. Judge Todd injected her concerns for political ramifications of the petitions, e.g., “judges are to be concerned with the political consequence of making adverse rulings against powerful parties.”

120. In her 21-page April 10, 2018 pleading “Motion to Stay Proceedings and Appointment of Counsel,” Judge Todd asserted, among other things:

[T]he District Attorney’s Office in unprecedented fashion uses the ruling in *Billups et al* to have the Trial Court pretextually, arbitrarily and capriciously removed in potentially every unrelated case assigned to the Trial Court.

* * * *

The District Attorney’s Office . . . seeks to deprive the Trial Court of certain inalienable rights and cause injury to the Trial Court’s reputation.

* * * *

A Trial Court’s legal viewpoint is due constitutional protections and should not be discriminated against by the State.

“Motion to Stay Proceedings and Appointment of Counsel” at 12, 14, 16 (April 10, 2018)..

121. In her May 10, 2018 letter and “Motion to Dismiss” the petitions for mandamus—after the Court of Criminal Appeals had issued its opinions in Chatman and McMullin I, explicitly finding that Judge Todd had entered multiple orders in direct conflict with binding authority on issues in capital-murder cases, that she had ruled “in a manner in which she apparently thinks the law should be,” that she had erroneously applied Act No. 2017-131, and that her actions make it reasonable for counsel and members of the public to question her impartiality as it relates to the imposition of the death penalty—Judge Todd alleged:

I have been made subject of unfettered reprisal by certain members of the District Attorney’s Office. . . .

The claims stated in the petition purport concern for ineptitudes in my intellectual and professional abilities. . . . [T]he petitions through personal condemnations advance a narrative describing me as incompatible with my professional in-group, bias against the interests of the District Attorney’s Office, and unreasonably concerned with racial disparities in the criminal justice system. In some of the earlier petitions, I am explicitly

branded as “ignorant,”^[41] “shadowed,”^[42] and “problematic.”^[43] The latter two descriptions collectively raise deep concerns and encapsulate the intended effect of these petitions. Although the diminutions of my personal character are extremely regrettable and unfortunate, the broader assail on the independence of the judiciary is a much more urgent concern.

The apparent trigger for this cascade of petitions center squarely on my findings related to the Alabama death penalty sentencing law. . . . As it has been well documented, I was the only judge in the state to grant a Hurst motion. Consequently, I have

⁴¹ In providing the history of Benn, the mandamus petitions state:

When Judge Todd made her third attempt to sentence convicted capital murderer Marcus Benn – her previous two attempts having failed due to Judge Todd’s apparent ignorance of (1) the necessity of pronouncing sentence in open court and (2) the importance of waiting for a certificate of judgment to issue – she sentenced him to life without parole

⁴² “Conclusion” of the State’s mandamus petitions state in its entirety:

Judge Todd should recuse herself from this case. She has demonstrated a likelihood of impartiality [sic], she has denied the State access to the courts, and she has overstepped her authority as a member of the judicial branch. Her position over this case is shadowed by her past actions and personal interaction with the prosecutor. Therefore, her disqualification is required to maintain the integrity of the Court.

⁴³ In “Introduction” to the petitions, the State stated:

This Court is well aware that Judge Todd’s actions have been problematic. Earlier this month, this Court held that her conduct created an appearance of a fixed bias regarding the death penalty case.

been the only judge in modern times subjected to unremitting retaliation for a ruling adverse to the District Attorney's position.

The timing of these petitions reveals the motivations for these accusations. But, most unfortunately it signals that judges are to be concerned with the political consequence of making adverse rulings against powerful parties. The relief sought in those petitions would permit calculated use of a judge's entire judicial record for strategic political and legal intimidation. Such a threat would undoubtedly instigate or intensify dual judicial personalities in advance of an election year. Moreover, such an environment would effectually paralyze forward thinking by replacing it with inducted paranoia over past legal decisions. This strategy exploits the judiciary's vulnerability to political intimidation, and establishes a mechanism for recusal of a judge for an unimaginable array of impermissible motivations.

.... The deliberate use of the word "shadowed" instinctively arouses images of dark, sinister, villainous acts and mysterious happenings. The characterization unfairly and inaccurately impugns my character. ... [T]here is no legal basis to describe me as "shadowed" other than to plant an image that has more prejudicial intent than any possible probative value. The intended consequence of this word is to create a caricature in the minds of the Court. This veiled maneuver regrettably undermines the dignity of the District Attorney's Office, and discredits the decency of the Court.

The petitions further stereotype me as "problematic." My entire record has been scrutinized and virtually each of my findings that were reversed by the Court have been presented as a basis for establishing a pattern of problematic judicial conduct. ... The reversal of my findings cited in these petitions amount to less than 1% of the cases that I have adjudicated. There is no quantifiable measure that would depend on a grouping of less than 1% to establish a pattern of any sort. ... [I]s reversal of a judge's findings by a higher court necessarily problematic? Should a judge be

required to recuse from all pending and future matters because past findings have been reversed? Should the higher court grant extraordinary relief because of past reversals of a judge's findings in other unrelated cases? Should litigants have the authority to weaponize reversals of a judge's findings in past unrelated cases for removal of a judge in an election year? The very foundation of our justice system would be upended and chaos would take root if any of these propositions were answered in the affirmative. Branding me as problematic clearly has shrewder intentions. The purposeful portrayal of me as a provocateur aside, these petitions essentially request that the Court authorize devastating precedent.

....

Historically, judges in Alabama who made unfavorable rulings against the interests of the power structure were threatened, ostracized, and made subject of personal and political retaliation. I am hopeful that we have moved past times of physical threat. However, the methods employed in these petitions amount to tactical relics of dark days past. The relief sought in these petitions sets a dangerous precedent for all judges in the state. We would return to a time when politically superior and well-resourced parties like the District Attorney across this state would have unbridled permission to retaliate against judges for political, religious, gender, race, sexual orientation, unfavorable legal decisions and other improper motives. All judges should be unconcerned with possibilities of political and personal retribution and retaliation when endeavoring to impartially administer justice. Otherwise, judicial independence becomes nothing more than an unattainable theoretical ideal instead of an indispensable practice.

[T]he authors of these petitions and the interim administration have demonstrated a bias against me. . . . These petitions are in fact problematic and dangerous. Granting the relief sought in these petitions would threaten independent judicial thought, circumvent the vote of the people, advance a political agenda and establish dangerous precedent for the judiciary.

Judge's Letter at 1-3, 6-7 (May 10, 2018).

122. Judge Todd, in her conclusion to her May 10, 2018 "Motion to Dismiss" the petitions for mandamus, stated, among other things:

These petitions have been filed in cascading fashion during an election year. The appointed interim District Attorney is using the courts to advance an impermissible strategic goal. This is ***dangerous*** precedent for the judiciary that cannot be overstated. It is equally important to consider the interim District Attorney's approach in filing these petitions. The sheer number of petitions lodged in a "kitchen sink" or "see what sticks" tactic was clearly intended to create an insurmountable presumption of guilt in the mind of the Court. In as much, all District Attorney's Offices across the state would have authority to "exercise an arbitrary discretion in this regard not subject to be controlled or reviewed" for political, religious, gender, race, sexual orientation, and other improper motives. Again, this is a ***dangerous*** precedent for the judiciary with unimaginable implications.

Judge's Motion to Dismiss Mandamus Petitions at 18 (May 10, 2018) (emphasis in original).

123. Judge Todd declared in her May 10, 2018 letter: "[A]s a neutral arbiter of the law, impartiality requires that I make inquiries into all things that may adversely affect substantive and procedural due process in the cases presented to me." and "Justice cannot be blind and methodically produce disparate outcomes for certain groups of people in

the criminal justice system.” Judge’s Letter at 4-5, 6 (May 10, 2018) (emphasis added).

124. Despite the previous pleadings and appellate decisions reiterating that the standard of disqualification is objective rather than subjective, i.e., whether there is a reasonable question of the judge’s impartiality rather than whether the judge is actually biased—Judge Todd continued to be unconcerned with any appearance of bias or impropriety. She missed or ignored the essential point that, as a judge, her conduct had to both be and appear to be impartial.

125. In addition, when a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge’s impartiality or appearance of impartiality may become compromised. Judge Todd abandoned the judicial role to become an advocate for her own rulings.⁴⁴

⁴⁴ Such behavior “discloses an unhealthy and wholly improper concern with the protection of [her] own rulings from appellate reversal.” In re Complaint Against White, 264 Neb. 740, 751, 651 N.W.2d 551, 562 (2002) (citation omitted).

The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or . . . materially assist one party at the expense of the other. Such advocacy creates the appearance, and

* * * *

**5. Issuance of Status-Hearing Orders and
State's Motions to Show Cause**

Disregard for Stays Pursuant to Mandamus Petitions

Injection of Issue not Raised by Parties

**Injection of Concern for Political Ramifications of Judicial
Decisions**

**Advocate for Defendants, Judicial Rulings, and
Personal Positions**

* * * *

126. While the petitions for mandamus were pending, the Court of Criminal Appeals stayed some of the cases.⁴⁵

perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

Id.

⁴⁵ State v. Khalief Marquise Spencer, CC-2016-1955 (a capital case; stay issued on May 10, 2018); State v. Horayshio J. Fletcher, CC-2017-437 (a capital case; stay issued on May 2, 2018); State v. Anthony Fairley, Jr., CC-2017-2381 (a capital case; stay issued on January 1, 2019); State v. Dominic Keeth, CC-16-1954 (a capital case; stay issued on January 5, 2018).

127. Judge Todd, however, issued an order on her own initiative in each of the sixteen cases on or around September 19-21, 2018, setting each case for “a status conference” for 1:30 p.m. on October 10, 2018, “in accordance with the United States and Alabama Constitutions, the Rules of Criminal and Appellate Procedure, and the Code of Alabama Title 15 Crime Victim’s Rights Act.”

128. In her orders, plainly violating her duty of detachment and neutrality—and the prior directives of the Court of Criminal Appeals to avoid overseeing the duties of the Office of District Attorney (as evidenced in part by her injection of an issue that was within that office’s domain) and to avoid ruling pursuant to “her own personal view of what the law should be,” Judge Todd discussed the law pertaining to a defendant’s right to a speedy trial and concluded that the parties and the victims had been prejudiced by the delays caused by the stays granted by the Court of Criminal Appeals. She continued:

Undoubtedly, the parties, including the victims, have been prejudiced by the granted delay. Nevertheless, the District Attorney has not withdrawn the Petitions or the Motions to Stay. Defense counsel has not challenged what appears to be an “immoderate” stay [under the law she set forth]. Furthermore, there is no guidance or apparent remedy for the trial court’s adherence to due process and equal protections laws where these

Petitions have been stayed for nearly a year[, i.e., a little over four months after her answer, which she had filed approximately four months after the petitions were filed].

129. Judge Todd also noted that the Court of Criminal Appeals had granted the motions to stay despite the motions' failure to cite any supporting law or precedent, and she discussed whether the Court's stays were immoderate under the law.

130. In those orders, Judge Todd also injected the political implications of the prospective rulings of the Court of Criminal Appeals on the mandamus petitions, as follows:

The Court has been placed in a quandary and presented with a politically charged set of circumstances in an election year. By granting said Petitions in favor of the District Attorney, the Court will set precedent for the entire Alabama judiciary wherein judges may be subjected to forced recusal for an adverse ruling against a party. Equally, the trial court's voluntary recusal would affirm this unprecedented and dangerous strategy. Voluntary acquiescence by the trial court to the District Attorney's impermissible assail, equally subjects the trial court to future acts of retaliation for adverse rulings. Denial of the Petitions in favor of the trial court may arguably be used for political purposes with an election approaching.

131. In those orders, Judge Todd mandated the following persons appear at the 1:30 p.m. hearing: the district attorney; two DDA's who were not counsel of record (DDA Gonzalez was); at least sixteen defense

attorneys; sixteen defendants; numerous “accusers”; and “all other interested parties.”

132. In her orders, Judge Todd specified the purposes for all designated persons to be present at that 1:30 p.m. hearing, including two DDA’s who would have thirteen business days to adhere to her instructions despite not being assigned to the sixteen cases, which included capital-murder cases:

Because these cases were commenced almost a year ago, the trial court schedules this conference in an effort to comply with all overarching tenets of law. The parties must be prepared to address the following:

1. Parties’ readiness for trial, and whether the parties are in possession of all necessary material to proceed expeditiously to settlement or trial following the Court’s decision;
2. Ascertain the prosecution’s ability to prosecute following the Court’s decision including, but not limited to:
 - a. Knowledge of necessary witness location and availability for trial;
 - b. Continued communication and cooperation by the alleged victim; and
 - c. Possession of necessary evidence
3. Address any and all existing circumstances that is [sic] precluding defense counsel from rendering effective assistance; and

4. Entertain all possible remedies temporary and long-term for any existing violations of federal and state law pending the Court's decision.

133. Despite her order that the parties must be able to discuss the numerated topics, Judge Todd stated in a subsequent pleading she filed in the Court of Criminal Appeals:

The Trial Court did not intend to make any rulings or issue any orders at the Status Conference. Therefore, the three requested attorneys for the State would have been able to provide information related to the cases, as they routinely are called upon as a proxy on cases not assigned to them specifically:

“Reponses to Motion to Show Cause and Motion for Clarification” at 14 (Sept. 25, 2018).

134. Later on September 21, 2018, DDA Gonzalez filed “Motion[s] to Clarify,” requesting that the district attorney and the two specified DDA’s be excused from attending, i.e., the district attorney because he was not personally prosecuting the cases, and the two DDA’s because neither was attorney of record. He further requested that all others except defense counsel be excused because, he asserted, a status conference deals solely with docket-management issues. He also stated:

As a matter of clarification, the State requests that the Trial Court amend its Order to require Deputy District Attorney Carlos Gonzalez to be present for this status-conference because he is the

prosecutor of record for the State in these matters. Deputy District Attorney Gonzalez has the most knowledge of the status of these cases and will prosecute these cases should they go to trial.

“Motion to Clarify” at 3, State v. Vershawn Edwards (Sept. 21, 2018).

135. DDA Gonzalez also alleged that Judge Todd did not have the authority to conduct the status conferences because the State had requested a stay from the Court of Criminal Appeals in each case.

136. Pursuant to Judge Todd’s issuance of the status-hearing order in violation of the stays granted by the Court of Criminal Appeals, the State filed a motion in the Court of Criminal Appeals requesting an order for Judge Todd to show cause. In that motion, the State argued,

Judge Todd also seeks to expropriate the executive power in each of these sixteen cases by dictating which prosecutors will appear in cases before her. . . .

Further, as Judge Todd should be aware, it is improper for a trial court to dictate which attorneys will represent the State in a criminal proceeding. In the fifteen other cases, Judge Todd failed to order Deputy District Attorney Carlos Gonzalez to be present for the status hearing. While this case is brought in the name of the District Attorney for the Tenth Judicial Circuit, he has designated his Deputy District Attorney, Carlos Gonzalez, as the prosecutor for this case.

137. On September 25, 2018, Judge Todd filed “Responses to Motion to Show Cause and Motion for Clarification” (18 pages). She also adopted

this as her order to DDA Gonzalez's motion to clarify. In that pleading/order, she stated among other things:

[T]he State vigorously asserts its interpretation of the State's authority to assign prosecutors to a courtroom of its choice. This interpretation is not supported by law or practice. . . . [P]ending cases remain with the assigned court. The State's request here would upend the entire case assignment and docket management process in the Criminal Division by requiring judges to transfer cases with every deputy district attorney rotation.

* * * *

Here, a deputy district attorney was personally disallowed because of ongoing exchanges that the Trial Court perceived to be disruptive. While the District Attorney has the authority to assign his subordinates to designated courtrooms, there is no legal authority for him to forcibly subject the Trial Court to disruptive behavior or controlling the court's docket by insisting that cases be transferred from court to court whenever he elects to rotate his subordinate attorneys. To the contrary, "A trial court has the authority to manage and control its docket." *Ex parte Watters*, 220 So. 2d 1093 (Ala. 2016.)

"Reponses to Motion to Show Cause and Motion for Clarification" at 13, 16 (Sept. 25, 2018).

* * * *

III. Charges

CHARGE I

Lack of Faithfulness to the Law or Failure to Maintain Professional Competence in the Law

153. Judge Todd exhibited a pattern of repeated failure to be faithful to the law and/or failure to maintain professional competence in the law, most particularly in her rulings in death-penalty issues, in her attempts to vindicate her prior rulings, and in exercising judicial authority over prosecutorial discretion and functions, by the following, jointly and severally:

a. Failing to know, when she sentenced Marcus Benn contrary to the clear ruling of the Court of Criminal Appeals in Ex parte State (In re: Billups), 223 So. 3d 954 (Ala. Crim. App. 2016), that a decision by the Court of Criminal Appeals (in a case over which she presided) has precedential value while it is pending for review on certiorari to the Alabama Supreme Court and thereby failing to follow the ruling of Billups;

b. Failing to know, before sentencing in State v. Marcus Benn, that the Alabama Supreme Court held, in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), that Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), does not apply to Alabama's death-penalty sentencing scheme and thereby failing to follow the ruling of Bohannon;

c. As alternative to (a) and (b), disregarding the controlling opinions of Ex parte State (In re: Billups), 223 So. 3d 954 (Ala. Crim. App. 2016), and Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), in relying, in Benn's sentencing order, on her prior declaration in State v. Kenneth Eugene Billups of the unconstitutionality of Alabama's death-penalty sentencing scheme;

d. As alternative to (a), disregarding the controlling opinion of Ex parte State (In re: Billups), 223 So. 3d 954 (Ala. Crim. App. 2016), in ruling in State v. Marcus Benn that, to be constitutional, the jury's recommendation of death must be unanimous;

e. Disregarding, in denying the State's motions for her to recuse from the trials in State v. Stanley Chatman and State v.

Terrell Corey McMullin, that Act. No. 2017–131 does not apply to the trial stage of a capital case and therefore her reliance on it did not “resolve the underlying concerns raised by the State”;

f. Insisting, in denying the State’s motions to recuse in State v. Stanley Chatman and State v. Terrell Corey McMullin, that “the State is unable to present any evidence that the Court has ruled contrary to the law,” although the State had presented to her the appellate courts’ opinions in Ex parte State (In re: Billups), 223 So. 3d 954 (Ala. Crim. App. 2016), Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and other cited case law and her contrary opinion in State v. Marcus Benn;

g. Disregarding the law prohibiting judicial interference with prosecutorial discretion and functions:

i. In State v. Kenneth Eugene Billups, by ordering that the State could not seek the death penalty in capital-murder cases and by following that order in State v. Marcus Benn;

ii. In State v. Anita Hill Kemp, by interfering in the prosecutorial decisions regarding the extent of investigation,

witness credibility, whether to charge or dismiss, whether to contact the alleged victim prior to dismissing the charge, etc.—after the State provided, on June 29, 2016, her the law prohibiting judicial interference;

iii. By requesting the district attorney to rotate DDA Gonzalez out of her courtroom and by banishing DDA Gonzalez from practicing before her on November 30, 2017;

iv. By ordering, on September 21, 2018, the district attorney and two named DDA's to represent the Office of District Attorney at a status hearing on October 10, 2018, in sixteen cases (including six capital-murder cases), all assigned solely to DDA Gonzalez;

h. Disregarding the law, in her responses to the State's mandamus petitions filed in the sixteen cases assigned to DDA Gonzalez, when she argued that her decision in State v. Anita Hill Kemp to “take judicial notice of the adjudicative facts compiled in Alacourt [i.e., her “case data”] was permissible under Alabama law”;

i. Failing to know, in State v. Dominic Keeth and the contempt citation against DDA Gonzalez, the law declaring that a judge's prohibiting an attorney from practicing law before her is illegal and an extreme and unwarranted abuse of judicial authority;

j. As alternative to (i), disregarding, in State v. Dominic Keeth and the contempt citation against DDA Gonzalez, the law declaring that a judge's prohibiting an attorney from practicing law before her is illegal and an extreme and unwarranted abuse of judicial authority;

k. Disregarding the law that a judge has to both be and appear to be impartial, i.e., that the standard of disqualification is objective rather than subjective, as set forth in many pleadings filed with her, appellate opinions reversing her rulings, and the provisions of the Alabama Canons of Judicial Ethics;

l. Disregarding the law and the Canon provisions defining the impartial and neutral role of a judge, i.e., by expressing her distorted perception that, "as a neutral arbiter of the law, impartiality requires that [she] make inquiries into all things that may adversely affect substantive and procedural due process in the

cases presented to [her]” and “Justice cannot be blind and methodically produce disparate outcomes for certain groups of people in the criminal justice system.”;

m. Failing to abide by Canon 3A(1)’s duty for a judge to be unswayed by partisan interests, public clamor, and fear of criticism, by urging the Court of Criminal Appeals to consider the political implications of its ruling on the mandamus petitions filed in the sixteen cases assigned to DDA Gonzalez and in her September 21, 2018 order setting a status conference in the sixteen cases assigned to DDA Gonzalez;

n. As alternative to (m), disregarding Canon 3A(1)’s duty for a judge to be unswayed by partisan interests, public clamor, and fear of criticism, by urging the Court of Criminal Appeals to consider the political implications of its ruling on the mandamus petitions filed in the sixteen cases assigned to DDA Gonzalez and in her September 21, 2018 order setting a status conference in the sixteen cases assigned to DDA Gonzalez;

o. Disputing the findings of the Court of Criminal Appeals, which include its findings that she disregarded controlling

authority and ruled in a manner in which she apparently thinks the law should be, and continuing to defend her legal rulings, including those entered in death-penalty cases, e.g., her orders denying recusal motions in some of the sixteen cases assigned to DDA Gonzalez;

p. Disregarding the express provision of Act. No. 2017–131 that it applies only to a defendant who is charged with capital murder after the effective date of the act, in denying the State’s motions to recuse, as “moot,” in State v. Stanley Chatman, and State v. Terrell Corey McMullin;

q. Failing to know that Act. No. 2017–131 does not apply retroactively, when she ruled that the State’s motion to recuse in State v. Terrell Corey McMullin was moot;

r. As alternative to (q), disregarding the case law indicating that Act. No. 2017–131 does not apply retroactively, when she ruled that the State’s motion to recuse in State v. Terrell Corey McMullin was moot; and/or

s. Disregarding the law of disqualification in her orders denying the State’s motions to recuse, by insisting that there is no

precedent for a judge to recuse or otherwise transfer cases to another court in order to follow a Deputy District Attorney” and/or, in her order denying DDA Gonzalez’ September 21, 2018 “Motion to Clarify,” by insisting the State’s authority to assign prosecutors to a courtroom of its choice is not supported by law or practice.

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Canon 3 A judge should perform the duties of her office impartially and diligently.

Canon 3A(1) A judge should be faithful to the law and maintain professional competence in it.

CHARGE 2

Failure to Timely Cooperate with Other Courts and/or To Respect Their Orders in the Administration of Court Business

162. Judge Todd failed to obey and/or respect other courts' orders

by the following actions or inactions, jointly and severally:

a. Ordering, on September 21, 2018, a status conference in State v. Terrell Corey McMullin, without determining that the January 29, 2018 mandate from the Court of Criminal Appeals for her to recuse was final on April 20, 2018, and thereby violating the prohibition against taking any further action in that proceeding other than to enter an order recusing herself;

b. Failing to timely recuse from State v. Terrell Corey McMullin, pursuant to the order by the Court of Criminal Appeals to recuse (certificate of judgment was issued on April 20, 2018, and she recused on September 24, 2018);

c. Issuing orders for a status conference in the following cases although the Court of Criminal Appeals had stayed those cases (all capital-murder): State v. Terrell Corey McMullin, State v.

Khalief Marquise Spencer, State v. Horayshio J. Fletcher, State v. Anthony Fairley, Jr., and State v. Dominic Keeth;

d. In her filings regarding the petitions for mandamus in the sixteen cases assigned to DDA Gonzalez, repeatedly defending her legal rulings after the Court of Criminal Appeals had reversed them and disputing the findings of that Court, including those entered in death-penalty cases;

e. Arguing, in her pleadings regarding the State's mandamus petitions in the sixteen cases assigned to DDA Gonzalez, that the defendant in State v. Anita Hill Kemp had raised the issue of selective prosecution, defending her finding of selective prosecution, and arguing against the findings of the Court of Criminal Appeals when it reversed her Kemp ruling in State v. Kemp, CR-16-0142 (Sept. 20, 2017) (unpublished memorandum opinion);

f. Commenting, in her September 21, 2018 order setting a status conference in the sixteen cases assigned to DDA Gonzalez, that the Court of Criminal Appeals had granted the stays despite the lack of any supporting law or precedent in the motions to stay

and, pursuant to her analysis under the law she cited, concluding that that Court's stays in fact appeared to be "immoderate" (despite that half of the delay was attributable to her); and/or

g. Trivializing and in effect disregarding the remand instructions of the Court of Criminal Appeals in its order in State v. Breeding, No. CR-14-0256 (Ala. Crim. App. April 6, 2015) (unpublished memorandum opinion).

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

- Canon 3 A judge should perform the duties of her office impartially and diligently.
- Canon 3A(1) A judge should be faithful to the law and maintain professional competence in it.
- Canon 3B(1) A judge should facilitate the performance of the administrative responsibilities of other judges and court officials.

CHARGE 3

Advocate for Defendants, Issues, and/or Own Rulings

158. Judge Todd abused the power of the court by abandoning the judicial role to become an advocate for defendants, issues, and her own rulings, thereby failing to promote public confidence that judges are to be neutral and impartial, by the following, jointly and severally:

a. Injecting irrelevant, extraneous facts and issues not raised by the parties, but gained through her independent investigation in her March 3, 2016 order in State v. Kenneth Eugene Billups;

b. In State v. Steven Petric, injecting the irrelevant issue, in furtherance of her finding in State v. Kenneth Eugene Billups, that an attorney's campaign contribution motivates the trial judge

to appoint that attorney and/or tolerate that attorney's alleged incompetence;

c. In State v. Anita Hill Kemp, on her own initiative ordering a DDA not assigned the case to be present, requiring the DDA's to testify under oath about matters of prosecutorial discretion despite the defendant's failure to overcome the presumption the prosecution acted in good faith, using her personal knowledge (which conflicted with the prosecution's assertions) to grant the defendant relief on her finding that the defendant had not been contacted when the case against the defendant's ex-husband was dismissed, post-hearing injecting the issue of selective prosecution, and conducting an independent investigation to gather extraneous facts, including "case data," which she used to support her finding of selective prosecution by race and gender;

d. In her filings in the Court of Criminal Appeals regarding the State's mandamus petitions in the sixteen cases assigned to DDA Gonzalez, arguing facts that had not been introduced into evidence i.e., information from the district attorney's website and

information regarding DDA Clemente, to vindicate her ruling in State v. Anita Hill Kemp;

e. In her September 21, 2018 order, setting a status conference in the sixteen cases assigned to DDA Gonzalez, injecting the issue of the denial of the defendants' right to a speedy trial and concluding, without notice or a hearing, that the parties and the victims had been prejudiced by the delay of the stays granted by the Court of Criminal Appeals; and/or

f. In her responses to the State's mandamus petitions in the sixteen cases assigned to DDA Gonzalez, injecting her personal concerns and affronts rather than simply defending the rulings.

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

~~A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.~~

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Canon 3 A judge should perform the duties of her office impartially and diligently.

Canon 3A(1) A judge should be faithful to the law and maintain professional competence in it.

CHARGE 4

Denial of Full Right to be Heard, Including by Way of Independent Investigations

159. Judge Todd exhibited a pattern of denying the State its full right to be heard according to law, by the following, jointly and severally:

a. Conducting an independent investigation and relying on the extraneous facts she collected to rule on issues to which the parties did not have notice in the following cases:

i. State v. Kenneth Eugene Billups;

ii. State v. Anita Hill Kemp;

b. Granting the defendant's release on bond on June 29, 2016, in State v. Anita Hill Kemp, even though the State did not

have representation by virtue of her finding that the district attorney had a conflict of interest;

c. Ordering the court reporter not to release the June 29, 2016 hearing transcript in State v. Anita Hill Kemp to the prosecution until after her ruling; which she issued two months later on November 1, 2016, resulting in lack of representation for the State for four months, from her oral and written order finding a conflict of interest (which she set aside the following day) until her written order again finding a conflict;

d. Arguing facts to the Court of Criminal Appeals, in her attempts to vindicate her ruling in State v. Anita Hill Kemp, even though those facts had not been introduced into evidence;

e. [Inadvertently omitted.]

f. Denying DDA Gonzalez and the district attorney the opportunity to timely contest her banishing DDA Gonzalez from practicing before her in State v. Dominic Keeth by:

i. Issuing her oral order “off the record,” i.e., ordering the court reporter to “go off the record”;

ii. Failing to issue a timely written order;

iii. Dismissing her contempt charge against DDA Gonzalez without a hearing, thereby denying him and the Office of District Attorney a final judgment from which to appeal the banishment; and/or

g. Injecting the issue of the defendants' right to a speedy trial, in her September 21, 2018 order setting a status conference for the sixteen cases assigned to DDA Gonzalez, and summarily concluding, without notice or a hearing, that the parties and the victims had been prejudiced by the delay of the stays granted by the Court of Criminal Appeals.

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

- Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.
- Canon 3 A judge should perform the duties of her office impartially and diligently.
- Canon 3A(1) A judge should be faithful to the law and maintain professional competence in it.
- Canon 3A(4) A judge should accord to every person who is legally interested in a proceeding, or his/her lawyer, full right to be heard according to law.

CHARGE 5

Failure to Disqualify

160. Judge Todd engaged in a pattern of failing to disqualify from presiding in the following cases where her impartiality might reasonably have been questioned, jointly and severally:

a. Capital-murder cases, i.e., her impartiality regarding Alabama's death penalty and application of pertinent law might reasonably have been questioned, including:

- i. State v. Kenneth Eugene Billups;
- ii. State v. Marcus Benn (sentencing);
- iii. State v. Stanley Chatman;

iv. State v. Terrell Corey McMullin;

b. The following cases, where her impartiality might reasonably have been questioned:

i. State v. Charles Salvagio;

ii. Her contempt proceeding against DDA Gonzalez;

iii. The sixteen cases that remained assigned to DDA Gonzalez by the district attorney after she banished DDA Gonzalez from practicing before her; and/or

c. State v. Anita Hill Kemp, where her impartiality might reasonably have been questioned and/or, disqualification pursuant to her personal knowledge of a disputed evidentiary fact concerning the proceeding, i.e., the district attorney's policy to notify the alleged domestic-violence victim prior to the dismissal of the charge (this latter charge, a violation of Canon 3C(1)(a)).

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Canon 3 A judge should perform the duties of her office impartially and diligently.

Canon 3A(1) A judge should be faithful to the law and maintain professional competence in it.

Canon 3C(1) A judge should disqualify herself in a proceeding in which her impartiality might reasonably be questioned.

Canon 3C(1)(a) A judge should disqualify herself in a proceeding in which she has personal knowledge of disputed evidentiary facts concerning the proceeding.

CHARGE 6

Lack of Proper Judicial Temperament and Demeanor

161. Judge Todd exhibited inappropriate judicial temperament and demeanor and thereby failed to promote the public's confidence in the judiciary, by the following, jointly and severally:

a. Her disparaging and inappropriate comments against the integrity of the Alabama judiciary and appellate courts and/or her fellow judges, as follows:

i. In her March 3, 2016 order in State v. Kenneth Eugene Billups, as set out in Paragraphs 18-20;

ii. Her comments to the media on March 3, 2016, e.g., "there is arbitrary and capricious implementation of -- of the death statute here in Alabama" and the sentencing judge "may have an incentive to impose the death penalty because of pressures from the community [which] is unconstitutional.";

iii. Her comment to the media sometime before November 9, 2016, "People know that unfortunately there is in some cases a 'quid pro quo,'" i.e., judges base their

appointment of attorneys to indigent defendants on campaign contributions and not squarely on legal expertise;

iv. Her comments in State v. Steven Petric, to the effect that she did not know any judge who would reasonably allow to remain on a case an attorney who was operating in the manner Attorney Salvagio was and that she explored Attorney Salvagio's political contributions and support to the prior trial judge as explanation of that judge's irregular allowances afforded Attorney Salvagio;

v. Her assertion, in her responses to the State's sixteen mandamus petitions in cases assigned to DDA Gonzalez, of "the judiciary's vulnerability to political intimidation";

b. Her comments to the media on March 3, 2016, expressing her predisposition and personal bias against the death penalty, e.g., "[T]he death penalty . . . [is] being imposed far more than states five times the size of Alabama. So that in itself should -- should shock everyone's conscience, and it is in violation of our constitution.";

c. Her misleading comment to the media on March 3, 2016, “[As the way Alabama chooses its judges, i.e., by election] relates specifically to capital punishment in this state, I had to look at the law as it relates to protecting a defendant’s constitutional rights.”;

d. ~~Banishing DDA Gonzalez from practicing before her;~~
and/or

e. Construing the prosecution’s motions to recuse and mandamus petitions in the sixteen cases assigned to DDA Gonzalez as politically motivated, highly offensive, retaliatory affronts against her personally rather than as proper remedies of right for the prosecution to contest her failure to disqualify.

By said actions or inactions, Judge Todd violated the following provisions of the Alabama Canons of Judicial Ethics, jointly and severally:

Canon 1 A judge should uphold the integrity and independence of the judiciary.

~~A judge should herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.~~

Canon 2 A judge should avoid impropriety and the appearance of impropriety.

- Canon 2A A judge should conduct herself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- Canon 2B A judge should maintain the decorum and temperance befitting her office.
- Canon 2B A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.
- Canon 3 A judge should perform the duties of her office impartially and diligently.
- Canon 3A(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom she deals in her official capacity.

Done this the sixth day of April, 2021.

THE JUDICIAL INQUIRY COMMISSION



Billy C. Bedsole
Chairman

BY ORDER OF THE COMMISSION

/s/ Rosa H. Davis
Rosa Hamlett Davis
Commission Counsel

ATTACHMENT A

COJ # 58 IN THE MATTER OF: TRACIE TODD CHRONOLOGY

Jan. 2013 Judge Todd took office.

2014

- Nov. 20 Judge Todd granted renewed motion to suppress in State v. Breeding despite predecessor's prior ruling (affirmed on appeal) and despite having no new evidence to consider.
- Apr. 6 Court of Criminal Appeals remanded Breeding with instructions, including to give evidence from prior hearing "due consideration."

2015

- Apr. 6 Court of Criminal Appeals remanded State v. Breeding, with instructions, including to give evidence from prior hearing "due consideration."
- Apr. 29 Judge Todd, in her return-to-remand in State v. Breeding, declared she had not read the transcript, for it "was not the court's job to scour the record for materials that supports a party."
- Dec. 18 Court of Criminal Appeals reversed Judge Todd's ruling in State v. Breeding.

2016

- Jan. 12 U.S. Supreme Court issued Hurst v. Florida.
- Mar. 3 Judge Todd held hearing in State v. Billups (no evidence/briefs); read her 28-page ruling, and held media interviews.
- Mar. 10 State filed mandamus petitions in four State v. Billups cases.
- June 17 Court of Criminal Appeals granted mandamus in Billups and ordered Judge Todd to set aside her order and allow the State to seek the death penalty if chooses to do so.
- June 20 Judge Todd imposed death penalty in State v. Benn.

2016 (cont.)

- June 24 Ms. Kemp (who was being prosecuted, but indictment against ex-husband had been dismissed) filed motion to declare conflict of interest with District Attorney (“DA”).
- Judge Todd issued order setting hearing in State v. Kemp and on her own initiative ordering 2 deputy district attorneys (“DDA’s”) to appear at hearing.
- June 29 Judge Todd held hearing in State v. Kemp; injected and made material State’s policy to notify victims of dismissals; questioned DA and Chief DA; and allowed defense counsel to question three DDA’s. She granted Ms. Kemp’s motion and ex parte granted Ms. Kemp’s request for release on bond. (The following day, Judge Todd set aside her order on the motion.)
- July 12 /16 Benn moved for Judge Todd to rely on her State v. Billups Order to set aside his death sentences.
- Sept. 23 Benn moved for Judge Todd to sentence him to life without parole pursuant to Hurst.
- Sept. 30 Ala. Supreme Court issued opinion in Bohannon, holding that Hurst does not affect imposition of death penalty in Alabama.
- Nov. 1 Despite Billups and Bohannon, Judge Todd “overrode” the jury’s recommendation of death and sentenced Benn to life without parole, pursuant to Hurst, relying in part on fact jury’s recommendation was not unanimous.
- Judge Todd issued order in State v. Kemp granting motion to declare conflict with DA on finding that State had engaged in selective prosecution, an issue never raised, on facts she had gathered through independent investigation.
- Nov. 9 State filed petition for writ of prohibition/mandamus in State v. Kemp in the Court of Criminal Appeals and filed motion to stay before Judge Todd.

2016 (cont.)

- Nov. 9 Court of Criminal Appeals granted State a stay in State v. Kemp.
- Nov. 18 Ala. Supreme Court denied certiorari petition in Billups.
- Nov. 28 Judge Todd denied State's motion to stay in State v. Kemp and granted Ms. Kemp's motion to deny reconsideration of bond.
- Dec. 16 Court of Criminal Appeals issued three decisions following Bohannon.

2017

- Mar. 31 State filed recusal motion in State v. Chatman, asserting reasonable basis to question Judge Todd's impartiality and allegiance to adhere to the law in a capital case; discussed Bohannon, etc.
- Apr. 11 Act 2017-131, eliminating the judicial-override provision in Alabama's death-sentencing scheme, became effective.
- Apr. 12 Judge Todd ruled that Chatman's recusal motion was moot pursuant to Act 2017-131 and specifically found that she had made no declarations pertaining to a personal opinion regarding the death penalty and that the State was unable to show she had ruled contrary to the law.
- Apr. 19 State filed mandamus petition in State v. Chatman.
- July 7 Court of Criminal Appeals indicated Act 2017-131 does not apply retroactively. Floyd v. State, 289 So. 3d 337, 358 n.1 (Ala. Crim. App. 2017).
- Aug. 17 State filed for recusal in State v. McMullin, asserting reasonable basis to question Judge Todd's impartiality and allegiance to adhere to the law in a capital case; discussed Bohannon, etc.
- Aug 28 State filed mandamus petition in State v. McMullin.

2017 (cont.)

- Aug. 29 Todd questioned Attorney Salvagio about his political support for her campaign opponent, including financial support, in State v. Petric hearing.
- Aug. 31 Judge Todd denied McMullin's recusal motion as moot pursuant to Act 2017-131 and specifically found that she had made no declarations pertaining to a personal opinion regarding the death penalty and that the State was unable to show she had ruled contrary to the law.
- Sept. 1 Judge Todd cited Attorney Salvagio for contempt.
- Sept. 20 Attorney Salvagio filed a motion for Judge Todd's disqualification and recusal from his contempt case.
- Court of Criminal Appeals reversed Judge Todd's ruling in State v. Kemp, finding that, by her injecting purposeful-discrimination issue and by her removing the DA's office from prosecuting, she was attempting to oversee the DA's official duties in violation of separation-of-powers doctrine.
- Sept. 21 Judge Todd denied motion to recuse in Attorney Salvagio's contempt citation and conducted hearing.
- Sept. 25 Judge Todd issued order finding Attorney Salvagio in contempt.
- Nov. 30 Judge Todd told DDA Gonzalez "off the record": "You may tell [the DA] you don't need to come back to this court." She also cited him for contempt and set the show-cause hearing for Jan. 4, 2018.
- Dec. 4 Judge Todd enforced her banishment of DDA Gonzalez from practicing before her.
- Dec. 5 DDA Gonzalez emailed Judge Todd's assistant, stating he planned to appear for the large docket the following week unless Judge Todd issued order that he is not allowed to come into her courtroom.

2017 (cont.)

- Dec. 6 Court of Criminal Appeals granted mandamus in Chatman, finding that Judge Todd was disqualified from State v. Chatman (and Benn) and had elected to disregard controlling precedents and rule according to her personal view of what the law should be. Court noted judge's duty to be governed and guided by appellate courts' decisions.
- Judge Todd sent email to sheriff regarding her safety concerns about DDA Gonzalez's "willful disregard for court instructions or displays of mental instability." She also sent email to DA regarding her "numerous concerns" about DDA Gonzalez.
- Dec. 13 DDA Gonzalez started filing motions to recuse in the 16 cases, grounded on Judge Todd's banishment of him.
- Dec. 22 After Judge Todd promptly denied the 16 recusal motions, the State started filing mandamus petitions in the 16 cases.
- Dec. 29 Judge Todd set aside her citation of contempt against DDA. Gonzalez.

2018

- Jan. 3-5 Judge Todd issued denial-of-recusal orders in which she defended her holding unconstitutional Alabama's death-sentencing scheme, on some points contrary to the pronouncements of the Court of Criminal Appeals.
- Jan. 5 State started filing additional recusal motions in some of 16 cases on allegation that Judge Todd had indicated DDA. Gonzalez was possibly mentally ill. Judge Todd promptly denied them.
- Jan. 29 Court of Criminal Appeals granted mandamus in McMullin I, finding that Judge Todd was disqualified from State v. McMullin (and Benn) and had elected to disregard controlling precedents and rule according to her personal view of what the law should be. It directed her to recuse.

2018 (cont.)

- Mar. 22 Judge Todd requested extension to answer mandamus petitions and was granted to Apr. 10.
- Mar. 28 Judge Todd set aside her order setting State v. Kemp for a jury trial for April 2, 2018.
- Apr. 9 Judge Todd on her own initiative recused from State v. Kemp.
- Apr. 10 Judge Todd filed “Motion to Stay Proceedings and Appointment of Counsel” in the mandamus petitions.
- Apr. 12 Judge Todd requested 30-day extension to answer mandamus petitions and was granted to May 10.
- Apr. 20 Ala. Supreme Court issued its certificate of judgment in McMullin I.
- May 10 Todd filed answer to the 16 mandamus petitions re Gonzalez.
- Sept. 19-21 Judge Todd on her own initiative set State v. McMullin and 15 other cases for status conference despite some cases having been stayed by Court of Criminal Appeals. She on her own initiative raised the issue of speedy trial and declared parties and victims been prejudiced.
- Sept. 21 DDA Gonzalez filed “Motion to Clarify,” requesting he attend because he was prosecutor of record.
- Sept. 23 State filed motion to show cause in 16 cases for Judge Todd’s violation of the stays.
- Sept. 24 Judge Todd recused from State v. McMullin.
- Sept. 25 Judge Todd filed “Reponses to Motion to Show Cause and Motion for Clarification” and adopted it as her order to Gonzalez’s motion to clarify.

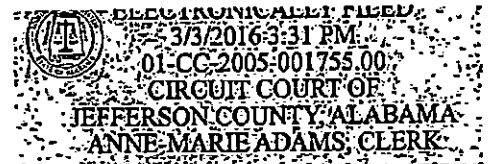
2018 (cont.)

Oct. 12 Court of Criminal Appeals reversed Judge Todd's denial of recusal motion in Attorney Salvagio's contempt citation. Court noted that she addressed allegations that were not alleged by either party and were not relevant.

Court of Criminal Appeals issued its opinion in McMullin II, denied State's motion to show cause for Judge Todd's failure to obey Court's stays in McMullin and some of other 15 cases. Court stated that it was "troubled by Judge Todd's repeated failure to abide by controlling law and her seemingly cavalier disregard for the orders of this Court and the Supreme Court."

Nov. Judge Todd was re-elected.

Attachment B



IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA BIRMINGHAM DIVISION

STATE OF ALABAMA)	
)	
V.)	Case Nos.: CC-2005-001755.00
)	
BILUPS KENNETH EUGENE)	CC-2012-001194.00
Defendant.)	CC-2012-001195.00
)	CC-2014-003011.00
CHATMAN, STANLEY)	CC-2014-003012.00
Defendant.)	CC-2014-003015.00
)	CC-2014-003016.00
MCMULLIN, TERRELL)	
Defendant.)	
)	
ACTON, BENJAMIN)	
Defendant)	

ORDER

I.

The influence of partisan politics on the Alabama judiciary indeed has never ending, interlaced talons that reach into every aspect of its criminal justice system. Legal scholars, journalist and community advocates around the world have noted in numerous fashions the statistical realities in Alabama's death penalty statute. In most instances these views are articulated in a data driven, broad context – a bird's eye view. However, clearly comprehending the urgency of the circumstance in Alabama requires an immersion at the rudimentary level of this life-to-death override epidemic – a view from ground zero. There is a time and place for diplomacy and subtlety. That time and place has been expunged by the dire state of the justice system in Alabama. It is clear, from here on the front line, that Alabama's judiciary has unequivocally been hijacked by partisan interests and unlawful legislative neglect.

A. Independent Judiciary

The Alabama Canons of Judicial Ethics proclaims that “an independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.” Alabama Canons of Judicial Ethics Canon 1. Canon 3 advises that “[a] judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.” Alabama Canons of Judicial Ethics Canon 3.

The framers of our Constitution held high the importance of an independent judiciary. “The complete independence of the courts of justice is peculiarly essential in a limited constitution...Without this, all the reservations of particular rights or privileges would amount to nothing.” See, Burnside, Fred, *Dying to Get Elected*, Wisconsin Law Review (1999). “The process of choosing judges in this country was historically that of an appointment system. In modern times, state courts in this country are globally solitary in selecting judges by way of election to such a degree. “[T]he switch from appointment to election has created tension between majoritarian ideas of democracy and constitutionalism.” Today, twenty states use partisan elections to select their trial court judges. Of these twenty states, eight states select judges through partisan elections at all trial court levels, Alabama included.¹ Alabama is expressly unique as the only such state that allows judicial override.

In *Harris v. State*, 513 U.S. 504 (1995) Justice Stevens concludes:

¹ See, Burnside, Fred, *Dying to Get Elected*, Wisconsin Law Review (1999).

The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office – or merely wish to remain judges – must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. Ala. Code § 17-2 – 7 (1987). The danger that they will bend to political pressures when pronouncing sentence in highly publicized cases is the same danger confronted by judges beholden to King George III.

Id. at 519. (Stevens, J. dissenting).

1. Tough on Crime

There is evidence to support the conclusion that there is a “significant correlation between judicial override and election years in most of the counties where overrides take place...[I]t is one of the clearest examples of the precise dynamic of politics in the administration of the death penalty.” Judges in Jefferson County have imposed a life-to-death override more than any other county in the state. Many of these overrides occurred during or near an election year.² An appeal to the higher courts in Alabama on behalf of a capital defendant sentenced to death by judicial override is ceremonial at best. “State supreme courts with judges elected [] in contested voter elections affirmed death penalty sentences in more than 62% of the cases. In contrast, state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3% of case.”

² See, Burnside, Fred, *Dying to Get Elected*, Wisconsin Law Review (1999).

Much of the general electorate is greatly unacquainted with the judges who they select to represent them. Most voters "learn about judicial candidates and their decisions through the media."³ This spurs some judges to obnoxiously announce a "tough on crime" election platform. Local television, radio, web and print ads are replete with such rhetoric. A decree of this nature is in fact a violation of the canons governing Alabama judges and judicial candidates. When an attempt was made to abandon partisan judicial races, it is reported that a republican legislator threatened members of his own party if they supported such a notion.⁴

In order to fulfill the constitutional obligations imposed upon the states, Alabama judges must be unbiased and impartial. A judge who announces a promise to impose the death penalty and a toughness for crime cannot sit as constitutionally required. More succinctly expressed by Justice Stevens, "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases."

2. Appointment of Counsel and Campaign Contributions

It is intrinsic that every person charged with a crime in this country has a right to receive competent counsel. The Sixth Amendment of the Constitution states,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

³ Weiss, Joanna, *Tough on Crime: How Campaigns For State Judiciary Violate Criminal Defendants' Due Process Rights*. New York University Law Review. (June 2006.)

⁴ Cobb, Sue Bell, *I Was Alabama's Top Judge. I'm Ashamed of What I had to do to Get There*. Politico Magazine. (March/April 2015).

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The old adage, "you get what you pay for" should not be of consequence when an indigent defendant is in need of effective legal representation. For those who stand accused of a capital crime, Alabama law provides that "if it appears to the trial court that an indigent defendant is entitled to counsel...the court shall appoint counsel to represent and assist the defendant." Ala. Crim. Code § Section 15-12-22. Competent representation is paramount in all criminal cases, especially those of a capital nature. It is a fact that most capital defendants are indigent, and cannot afford to retain counsel. As a result, the vast majority are appointed an attorney by the court. The practice in this county is for a trial judge to appoint an attorney theoretically with the requisite experience to represent a capital defendant. Unfortunately, like other facets of the capital law in Alabama, the appointment process in capital cases falls prey to the hazards of political partisanship and bias in the judiciary.

In an article for Politico Magazine, retired Alabama Supreme Court Justice Sue Bell Cobb explained with open promising candor the political pressure placed on judicial candidates when seeking election. She describes the process as "pitching yourself to the public just as if you were running for dogcatcher." Locally, it is an "open secret" that an attorney all too often receives case appointments in the criminal division based on his campaign contribution, and not squarely on his legal expertise. Much of this astounding reality has been curbed by the establishment of the Jefferson County Public Defender's Office. Nevertheless, the practice remains in effect. This is

especially disturbing when considering capital cases. Looking at this issue through a different lens, Chief Justice Cobb explains,

When a judge asks a lawyer who appears in his or her court for a campaign check, it's about as close as you can get to legalized extortion. Lawyers who appear in your court, whose cases are in your hands, are the ones most interested in giving. It's human nature: Who would want to risk offending the judge presiding over your case by refusing to donate to her campaign."

3. Inadequate legal representation

There is plenty of incentive for local attorneys to contribute to judicial campaigns in Alabama. There is no limit on the amount of money that an attorney can charge the tax payers of this county when representing a capital defendant. The law provides, "[i]n cases where the original charge is a capital offense or a charge which carries a possible sentence of life without parole, there shall be no limit on the total fee." An attorney appointed without the necessary skill to adequately represent a capital defendant may charge absorbent amounts of money for subpar representation. This tradition not only exists in this county, but has been remarkably ratified. Additionally, "Alabama is the only state in the country without a state-funded program to provide legal assistance" for those convicted of a capital crime.⁵ On appeal, convicted capital defendants have no right to counsel in this state.

The idea that an attorney is appointed to represent a capital defendant facing the death penalty based on the amount or frequency of a campaign contribution, and not on his or her legal prowess

⁵ (2016). Retrieved from <http://www.eji.org/deathpenalty/counsel>

is repugnant to the Sixth Amendment, and should shock any sound conscious. The appointment of unqualified and/or unconcerned attorneys to represent capital defendants based on grossly unacceptable political motivation, coupled with an appellate review without the right to appellate counsel, before a politically compromised appellate court, wrongly leaves a capital defendant to climb an uphill battle for preservation of life, while lodged between a rock and hard place.

4. Manipulation of Case Assignment

A process as basic as capital case assignment is not immune to the cancer of politics in Alabama's judicial system. In practice, there is no uniform system for the assignment of capital cases in Alabama.⁶ Such a practice on its face reeks of arbitrariness. There is evidence that certain high profile cases are assigned to certain judges during election seasons. When this practice is viewed in the light of judicial overrides, it highlights the constitutionally offensive nature of the Alabama capital sentencing scheme. For example, "[c]ertain Alabama judges have exercised override repeatedly. [A Mobile County judge] used the provision six times. [He] was one of nine local circuit judges but 'presided over thirty percent of the capital cases because he assigned a large number to himself...'"⁷

The Fifth Amendment directs that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, called the Due Process Clause, requires federal and state governments to provide fair procedures. Consequently, the imposition of the death penalty in Alabama by biased judges, improperly assigning criminal cases, and appointing counsel based

⁶ . In one county the elected District Attorney assigned criminal cases to the judge of her choice until the local rule was changed in 2014.

⁷ Williams, Paige, *Double Jeopardy: In Alabama, a judge can override a jury that spares a murderer from the death penalty*. The New Yorker (November 17, 2014).

on political motivation is in direct violation of the Fifth, Sixth and Fourteenth Amendments to our Constitution.

5. Inadequate funding of the Judicial Branch

The Alabama Constitution of 1901 Article VI mandates adequate funding for the judicial branch of government. It states in part, "Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the Legislature for the entire unified judicial system. Amendment 328, Alabama Constitution 1901. Each year, the judicial branch of government in Alabama suffers from inadequate funding. The increasing deficits judicial budget in Alabama has surpassed critical status. Judges across the state are required to administer justice on less than a skeleton budget. This detrimentally affects the ability of any judge to adequately comport with the theoretical or practical application of the law. Because of inadequate funding the very underpinnings of judicial administration are severely undermined. Basic judicial functions are compromised on a daily basis. Specifically, due to inadequate funding of the judicial branch, the constitutional rights of citizens in Alabama are being violated routinely and/or the proper administration of the law is affected daily in the Alabama. The following is a non-exhaustive summary of the crippling effect of judicial underfunding:

- Critical departments have been gutted and left with loyal and dedicated staff who are over worked, over whelmed and humanely unable to keep pace with the demands of the judicial system;
- Citizens are unlawfully arrested and detained because orders are not processed properly and/or in a timely manner;

- Evidence in capital cases has been lost due to inadequate evidence storage and inefficient retention policies;
- Subpoenas are not executed properly if an attempt to execute was made at all;
- Inmates are not awarded accurate jail credit; and
- Detained defendants are all too often held for long periods of time without hearings because notice of detention is not communicated to the judge;

6. Lack of Security

The disposition of capital cases is exceptional to say the least. The emotions of the victim's family, the defendant's family and all other interested parties runs high. At present, the Jefferson County Criminal Justice building is not properly equipped to ensure the security of any courtroom in the building when hearing highly charged cases like, death eligible offenses.

The Alabama Rules of Judicial Administration Rule 11, stipulates that each courtroom is authorized to employ a bailiff when funds allow. Several years ago, the budget for bailiff employment was dramatically reduced. Jefferson County, saw a reduction from two courtroom bailiffs to one in the county's criminal courthouse. In other divisions in the county the position of bailiff was eradicated all together. The provisions of ARJA Rule 11 specifically state "[e]ach bailiff and court attendant shall perform such duties as may be required...; provided, however, that any duties relating to courtroom security shall remain the responsibility of the sheriff." ARJA Rule 11. This county does not adhere to this provision in the law. This directly affects the imposition of justice, especially in capital cases.

In capital case, multiple co-defendants were originally charged. A preliminary hearing was scheduled for all co-defendants. On the day of the hearing more than forty relatives and friends of

the defendants and victims sought entrance to the courtroom to observe the case. This was in addition to the people present for other non-related docketed cases. The courtroom has a capacity in the gallery for approximately 60 people. Emotions were visibly high. For security purposes, the court denied access to all of the capital case observers, asking each party to choose representatives from this large group to remain. Those not chosen by the parties were asked to exit the floor. A crowd made up of these observers in support of the defendants' and victims' families gathered in front of the courthouse, and a brawl ensued.

In Jefferson County, there is no active protocol for securing the safety of the jury, attorneys, or any other observers present in the courtroom in the event of a courtroom security breach. Courtroom bailiffs have been instructed to secure the safety of the judge only. This effectually leaves unsuspecting jurors, members of the community and others at risk when court is in session.

During another capital case, a juror inquired into the safety of the courtroom. She was concerned with the fact that there was only one bailiff, and the defendant who was facing the death penalty was not restrained in any manner. While this point may be regarded as inconsequential, it is of grave concern when considering a juror's ability to fairly and impartially adjudicate a capital case while in a state of unease about the adequacy of courtroom security.

7. Inadequate Administrative Support

Judges of varying legal pedigree are expected to interpret the law and make judicial findings relating to cases affecting life itself, without invaluable assistance with legal research and other key components of administering the law. To make this point clear, expecting a judge charged with administering justice in capital cases without sufficient staffing equates to requiring a surgeon to perform open heart surgery without the aid of a nurse.

To summarize the inadequacies in the Alabama capital sentencing scheme on points locally germane, the state allocates funds to extinguish a life, but fails to provide the constitutionally mandated funding necessary to ensure that the very process by which a person's life is condemned to eternity is legally sound, with all requisite safeguards and procedures. Alabama's unlawful defunding of the judicial branch is in itself a violation of the Alabama Constitution of 1901. More importantly, the effects of this underfunding cause violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution in one form or another.

II. Judicial Override

Logically, it is the innate structure of our justice system which permits lawyers to argue perspective points of the law. Consequently, lawyers may argue into eternity the similar or dissimilar nature of any question of law. In light of the Supreme Court's decision in *Hurst*, there is agreement on both sides that there are similarities in the Florida and Alabama capital sentencing schemes. The argument, nevertheless, is framed squarely on the method by which judges are allowed to override a jury's advisory verdict. Again, to adequately address this question, it must be considered in the proper framework.

The concept of judicial override was first adopted by the Florida State Legislature. The argued purpose of this statutory provision was "specifically to provide the constitutional procedural protections required by *Furman v. State*, thus providing capital defendants with more, rather than less, judicial protections."⁸ In *Harris v. State*, Justice O'Connor, quoting *Dobbert v. Florida*, 432 U.S. 282 (1977), further expounds on the legitimate function of the judicial override stating, "[w]e have observed in the Florida context that permitting a trial judge to reject the jury's verdict may

⁸ Burnside, Fred, *Dying to Get Elected: A Challenge to the Jury Override*". Wisconsin Law Review. 1999. Print.

afford capital defendants ‘a second chance for life with the trial judge.’” *Harris v. State* at 513. This paradigm is based in part if not wholly on the premise that “[...] a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.” *Proffitt v. Florida*, 428 U.S. 242 (1976). In spite of this practical intention, the practice of overriding a jury’s advisory verdict of life without the possibility of parole for the imposition of capital punishment in Alabama has become questionably prevalent and suspiciously routine.

Thirty-one states in the United States authorize the imposition of capital punishment for those convicted in accordance with capital offenses.⁹ Judicial override of a jury’s advisory verdict is allowed by law in three states: Alabama, Florida and Delaware.¹⁰ According to the Equal Justice Initiative (EJI) Executive Summary and Major Findings in “*The Death Penalty in Alabama: Judge Override*” “[o]f the [31] states with the death penalty Alabama is the only jurisdiction where judges routinely override jury verdicts of life to impose capital punishment.¹¹ Since 1976, Alabama judges have overridden jury verdicts 107 times.”¹² In 2011, it is reported that in this county alone thirteen judges were known to have exercised judicial override of a jury advisory verdict of a life sentence for the imposition of the death penalty.¹³

⁹ Death Penalty Information Center. 2016. Online.

¹⁰ *The Death Penalty in Alabama: Judge Override*, Equal Justice Initiative, July 2011. Print.

¹¹ In 27 of these 31 states and the federal system, the jury’s decision to impose life imprisonment is final and may not be disturbed by the trial judge under any circumstances. “Alabama’s capital sentencing statute is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death – even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.

¹² AL.com reports 95 judicial overrides of a jury sentence of life for the imposition of death. Stephens, Challen, *U.S. Supreme Court: Alabama judges can continue to override juries and impose death sentences*. November 19, 2013. Online.

¹³ Project Hope to Abolish the Death Penalty.

At present Alabama is solitary in its unbridled system of allowing judges to deviate from jury advisory verdicts in order to effect life-to-death sentence overrides.¹⁴ Jefferson County leads the state in total death sentences resulting from judicial overrides, with 17, according to the study, which looked at sentencing since the U.S. Supreme Court allowed capital punishment to resume in 1976 after a four-year nationwide ban.¹⁵

Florida and Delaware statutorily allow for judicial override. However, among the eighteen death row inmates in Delaware, none were sentenced to death by fashion of judicial override. Correspondingly, Florida judges have not utilized this feature of its law to override advisory verdicts of life for that of death in over fifteen years.¹⁶ Dissenting from denial of certiorari in Woodward v. Alabama, 134 S.Ct. 405 (2013), Justice Sotomayor notes

[...] where juries have voted to impose the death penalty, Alabama judges have overridden that verdict in favor of a life sentence only nine times.” In the nearly two decades since we decided *Harris*, the practice of judicial overrides has become increasingly rare. In the 1980's, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by

¹⁴ Justice Stevens dissenting in *Harris v. State* “Alabama’s capital sentencing statute is unique. In Alabama, unlike any other State in the Union, the trial judge has unbridled discretion to sentence the defendant to death – even though a jury has determined that death is an inappropriate penalty, and even though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence.

¹⁵ Velaso, Eric, *More Jefferson County Judges Issue Death Sentences Despite Jury*, Birmingham News (July 17, 2011).

¹⁶ Buckwalter-Poza, Rebecca, *With Judges Overriding Death Penalty Cases, Alabama Is An Outlier*, National Public Radio.org. July 27, 2014. Online.

Alabama judges. As these statistics demonstrate, Alabama has become a clear outlier. Among the four States that permitted judicial overrides at the time of *Harris*, Alabama now stands as the only one in which judges continue to override jury verdicts of life without parole.

Woodward v. State, 134 S.Ct. 405 (2013).

III. The Constitution

The consequence of the judicial override has raised flags among legal circles for several decades. Detractors of Alabama's capital sentencing scheme allowing for judicial override point to Constitutional violations inherent in the administration of such a structure. The Supreme Court's held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "[t]he Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 466.

Challenges have been lodged to undo the Alabama scheme of sentencing in capital cases allowing judicial override. One such challenge raised violation of the Fifth Amendment. The Fifth Amendment reads in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

Some of the arguments presented revolved around the "Double Jeopardy" clause contained in the Fifth Amendment. It has been contended that the practice of the judicial override in Alabama places a capital defendant in the circumstance of fending off death twice – first with a jury, then with a judge. Dissenting in *Harris v. State*, 513 U.S. 504 (1995) Justice Stevens writes:

If Alabama's statute expressly provided for a death sentence upon a verdict of either the jury or the judge, [there is] no doubt it would violate the Constitution's command that no defendant 'be twice put in jeopardy of life or limb...[The] Alabama scheme has the same practical effect...Alabama trial judges almost always adopt jury verdicts recommending death; a prosecutor wins before the jury can be confident that the defendant will receive a death sentence. A prosecutor who loses before the jury gets a second, fresh opportunity to secure a death sentence. She may present the judge with exactly the same evidence and the repeat performance before a different, and likely less sympathetic, decision maker. A scheme that we assumed would 'provide capital defendant with more, rather than less, judicial protection,' has perversely devolved into a procedure that requires the defendant to stave off a death sentence at each of two de novo sentencing hearings.

Id. at 521. (Stevens, J. dissenting).

In fact, a prosecutor who fails to convince ten jurors to return a verdict of death may present to the judge the same information along with additional information that was not presented to the jury. In overruling its holding in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court held “[c]apital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. This holding also implicates the fundamental underpinnings of the Fourteenth Amendment right to due process. Additionally, a capital defendant is entitled to a jury trial guarantee accorded in the Sixth Amendment, which reads. *Ring v. Arizona*, 536 U.S. 584 (2002). “Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Founding fathers of this country set out to prohibit against tortuous and cruel punishments.

IV. Death Penalty and Judicial Override in Alabama Statistics

The controversy surrounding the discharge of capital punishment is ubiquitously linked to the Alabama capital sentencing scheme. Despite one’s intimate opinion of capital punishment, it is in fact a tenet of our law, and its effectuation was originally intended to reflect society’s moral prudence. More exactly put, “[a] capital sentence expresses the community’s judgment that no lesser sanction will provide an adequate response to the defendant’s outrageous affront to humanity. *Gregg v. Georgia*, 428 U.S. 153 (1976). For this reason, the number of capital sentences in Alabama has been the topic of impassioned discussion worldwide.

There are a total of 185 inmates on death row in Alabama. Approximately twenty-one percent of the 199 people¹⁷ on death row were sentenced to death through judicial override. It is documented

¹⁷ Currently there are 185 people on death row in Alabama according to the Alabama Department of Corrections.

that “Alabama has the highest per capita death sentencing and execution rate in the U.S.”¹⁸ In 2011, Alabama executed more death row inmates than Texas. Texas has a population of 29.96 million, while Alabama’s population stands at 4.894 million. Simply put, Alabama is the only state currently carrying out judicial override life-to-death sentences and executes more people than states five times its size. This phenomena is a curious one, as there is no “evidence that criminal activity in Alabama is more heinous than in other states or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances.” (Sotomayor, J., dissenting *Woodard v. Alabama*, 571 U. S. ____ (2013)).

A. Alabama

The Alabama capital sentencing scheme was enacted and has remained in its current form since the nine-teen seventies. In accordance with the Alabama capital offense statute, after a defendant is unanimously convicted of a capital offense by a jury of her peers, the court conducts a sentencing hearing before a jury that decides whether a defendant should be sentenced to life imprisonment without the possibility of parole or death. The jury then presents an advisory verdict to the court. A sentence of life imprisonment without the possibility of parole requires a majority vote by the jury. A sentence of death requires no less than ten votes. Once the jury has rendered its advisory verdict, the statute requires the judge to conduct a separate sentencing hearing without a jury. At this hearing, the State is allowed by law to present additional evidence not presented to the jury. The judge is also obligated to review a pre-sentence report prepared by the State Board of Pardons and Paroles. This report is not made available to the jury. The judge then is given statutory authority to override a jury verdict of life or death. Essentially, the Alabama capital sentencing

¹⁸ EIJ cite

law allows a judge to overturn a jury recommendation without statutory guidelines to steer the final decision.¹⁹

B. Hurst Application

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), Timothy Lee Hurst (Hurst) was convicted by a jury of first-degree murder, a capital offense, in Escambia County Florida. The jury recommended a sentence of death. The trial court sentenced Hurst to death. Hurst appealed the trial court's sentence to the Florida Supreme Court, and was granted a new sentencing hearing. At the conclusion of the resentencing hearing the jury again recommended death, and the trial court again at the close of the separate sentencing hearing articulated facts as required by Florida law to sentence Hurst to death. The Florida Supreme Court affirmed the trial court's sentence, rejecting Hurst's argument pursuant to the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), in which the United States Supreme Court (The Supreme Court) found "unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than a jury to find the facts necessary to sentence a defendant to death. Hurst appealed, and was granted certiorari.²⁰ In the opinion delivered by Justice Sotomayor, the Supreme Court cited its ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) "[a]ny fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's verdict is an 'element' that must be submitted to a jury." *Id.* at 494. Specifically, the Supreme Court held

The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death

¹⁹ Heery, Shannon, *If It's Constitutional, Then What's the Problem?: The Use of Judicial Override in Alabama Death Sentencing*. Washington University Journal of Law and Policy. 2010. Print.

²⁰ Arguments were heard before the Supreme Court on October 13, 2015. The Supreme Court rendered an opinion on January 12, 2016.

sentence on a jury's verdict, not a judge's factfinding [sp]. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst v. Florida, 136 S.Ct. 616 (2016).

In light of the ruling in *Hurst*, this Defendant, by and through his attorney of record, comes before the court today on a motion requesting the Court to declare the Alabama Capital Murder Statute Unconstitutional and to bar the death penalty.²¹ The Jefferson County District Attorney's Office representing the State of Alabama (the State) filed a response requesting that the court to deny the defendant's motion.²²

The quotation "[w]hat's past is prologue"²³ is precisely applicable when examining the evolution of the law relating to capital punishment in the United States. The changing mores of this country's citizenry has led to distinct trends in the attitudes toward capital punishment and its application throughout the years. Considering such a concept as the imposition of capital punishment requires the application of context. The first recorded imposition of capital punishment occurred in colonial Virginia in 1608.²⁴ The purpose of punishment can be divided into four groupings: retribution, incapacitation, rehabilitation and deterrence. As it relates to capital punishment, retribution is the only relevant purpose for which this form of punishment would be affected. Precisely, retribution

²¹ Defendant's motion was filed with the Jefferson County Circuit Clerk on January 1, 2016.

²² The State's response was filed on February 1, 2016.

²³ Shakespeare, William, *The Tempest*, Act 2, Scene I

²⁴ Bridges, F.D., Eaton, O.H., Elwyn, T., Emas, K., Jones, C.D., Kent-Stevens, C., Maag-Kline, M., Piasecki, M., Sage, M., Sinclair, V.L., & White, P., *Presiding Over A Capital Case. A Benchbook for Judges*. The National Judicial College, 2009. Print.

has been historically correlated with the “eye for an eye” theory of justice, or *lex talionis* the “law of retaliation.”²⁵

Death as a retributive punishment during the 17th century was not uncommon, nor were other punishments such as whipping, hanging or ear cropping.²⁶ It is in this context that capital punishment must be firstly considered. For three centuries since the first recorded state ratified execution, capital punishment statutes varied tremendously. The chronicles of history undoubtedly reflect the grossly indiscriminate application of capital punishment upon black Americans, the poor, and the mentally impaired. In response to this unseemly chasm between the theoretical and actual application of the law, the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) pronounced the modern era “Death is Different Jurisprudence.” As a result of the ruling in *Furman*, several state death penalty statutes were held unconstitutional.

In *Furman*, the Supreme Court granted certiorari limited to the question “whether the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” In response to this question, The Supreme Court held that

[I]mposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments...It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. [However],

²⁵ Fieser, James, *Moral Issues that Divide Us and Applied Ethics: A Sourcebook*, 2008. Print

²⁶ Cox, J., *Bilboes, Brands, and Branks Colonial Crimes and Punishments*, *CW Journal*. Winter 2002-2003.

[a]ny law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.”

Id. at 238, 241 and 257.

As a result of this holding, several state death penalty statutes were deemed unconstitutional.

Justice Stewart, concurring in *Furman*, opined:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306.

From this proposition the “Death is Different Jurisprudence” was settled. This application of the law links the exceptionality of the death penalty to the exceptionality of the process requisite to keep death sentences from being imposed in a cruel and unusual manner.²⁷

There are been several cases relating to the constitutionality of capital punishment in this country since the ruling in *Furman*. This multitude of opinions address varying aspects of the law relating to capital punishments. These opinions were considered at varying instances in history and were

²⁷ Abramson, J., *Death-is-Different Jurisprudence and the Role of the Capital Jury*, Ohio State Journal of Criminal Law [Vol 2:117], 2004. Print.

considered in the framework of varying fact patterns. Even so, all of these opinions by the Supreme Court offer critical peripheral context to the question at bar. As Justice Marshall so aptly surmised, “[s]everal principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant case[].” *Id.* at 328.

The Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016), reviewed the application of capital punishment pursuant to the Florida capital sentencing scheme. Under Florida law, felonies are grouped into five categories.²⁸ Relevant for discussion in this determination is the category of Capital felony. Pursuant to Florida law, “the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment.” *Id.* at 617. The statute further provides that if a person is convicted of a capital felony, he or she may be sentenced to death, but only if an additional sentencing proceeding “results in findings by the court that such a person shall be punished by death.”²⁹ This proceeding requires the judge to conduct an evidentiary hearing before a jury. The jury then, by a majority vote “renders an ‘advisory sentence.’” *Id.* at 617. The court is then required to “independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.” *Id.* at 617.³⁰ The aggravating and mitigating circumstances available for judicial consideration are itemized in Florida Statute 921.141. In citing its holding in *Apprendi v. New Jersey*, 530 US 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428, the Supreme Court held that the Florida capital sentencing scheme “violates the Sixth Amendment.” *Hurst v. Florida* at 618.³¹

²⁸ Fla. Stat. § 775.081.

²⁹ Fla. Stat. § 775.082(1).

³⁰ Fla. Stat. § 921.141 (2) and (3).

³¹ In *Ring v. Arizona*, the Supreme Court held “[a]n Arizona judge’s independent factfinding exposed Ring to a punishment greater than the jury’s guilty verdict authorized. *Id.* at 2428.

C. Harris Argument

In delivering the opinion of the Supreme Court in *Harris v. State*, 513 U.S. 504 (1995), Justice O'Connor provides an adequate explanation of the similarities and differences in the Florida and Alabama statutory capital sentencing schemes. In her opinion Justice O'Connor opined,

Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge. A sentence of death in both States is subject to automatic appellate review. In Florida, as in Alabama, the reviewing courts must independently weigh aggravating and mitigating circumstances to determine the propriety of the death sentence, and must decide whether the penalty is excessive or disproportionate to similar cases. The two States differ in one important respect. The Florida Supreme Court has opined that the trial judge must give "great weight" to the jury's recommendation and may not override the advisory verdict of lifeunless [sic] "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." The Alabama capital sentencing statute, by contrast, requires only that the judge "consider" the jury's recommendation, and Alabama courts have refused to read the *Tedder* standard³² into

³² In *Tedder V. State*, 322 So.2d 908 (1975), the defendant was convicted of first degree murder and the jury, after a second trial for sentencing, returned a recommended sentence of life imprisonment. Based upon a finding of three aggravating circumstances, and none in mitigation, the trial judge overrode the jury's recommendation of life imprisonment and imposed a sentence of death. Upon immediate appeal, the Florida Supreme Court reversed the trial court's decision and announced the *Tedder* standard, wherein, the trial judge must afford "great weight" to a jury's

the statute. This distinction between the Alabama and Florida schemes forms the controversy in this case – whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury.

Harris v. State at 508.

Alabama Attorney General Office argued in a recent brief to the Supreme Court, “[t]his Court upheld the constitutionality of Alabama’s current capital sentencing statute in *Harris v. Alabama*, 513 U.S. 504 (1995), and that decision remains good law.”³³ This statement is in fact legally correct. However, the Attorney General fell short of wholly explicating the Supreme Court’s holding in its unadulterated context. Specifically, Justice O’Connor distinctly identifies the question submitted by the Petitioner in *Harris*. Justice O’Connor stated,

Consistent with established constitutional law, Alabama has chosen to guide the sentencing decision by requiring the jury and judge to weigh aggravating and mitigating circumstances. Harris does not challenge this legislative choice. And she objects to neither the vesting of sentencing authority in the judge nor the requirement that the advisory verdict be considered in the process. What she seeks instead is a constitutional mandate as to how that verdict should be

recommendation and cannot override a jury’s recommendation of life unless “the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.”

³³State of Alabama, *BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI AND TO THE MOTION FOR STAY OF EXECUTION* Woodard v. State, 571 U.S. ____ (2013).

considered, she suggests that the judge must give "great weigh" to the jury's advice

Id. at 511.

In accordance with Federal Law, the Supreme Court grants certiorari:

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 1254.

Inherently the Supreme Court delivers opinions relating to certified questions exclusively. Consequently, the question relating to judicial override of a jury's sentence recommendation in capital cases was not presented to the Supreme Court in *Harris v. State*. The State argues in the present case that Alabama's statute "varies significantly from Florida's." The Alabama Court of Criminal Appeals in its affirmation of Harris' conviction noted "Alabama's death penalty statute is based on Florida's sentencing scheme, which we have held to be constitutional." *Id.* at 508.

Alabama Code 1975 §13A-1-2 defines a felony offense as "[a]n offense for which a sentence to a term of imprisonment in excess of one year is authorized by this title." Ala.Code 1975 § 13A-1-2.

This definition mirrors that enumerated in the Florida Criminal Code.³⁴ Alabama Code 1975 §13A-5-40 further provides a register of capital offenses. Here, the Alabama Code deviates slightly from the Florida Code, wherein the Alabama Criminal Code intertwines the capital offense and the aggravating circumstances. In essence, as argued by the State in its response to the motion before this court, “Florida, unlike Alabama, did not require that a jury find the existence of a death eligible aggravating factor beyond a reasonable doubt in order to make a guilty verdict death eligible.”³⁵ However, as argued by the defendant, the court is permitted to consider information that was not privy to the jury.

A jury’s recommendation of a life sentence based on a finding that the requisite aggravating factors have been proven beyond a reasonable doubt, and that the mitigating circumstances outweigh these factors, should remain undisturbed. Allowing a judge to consider information not known to the jury and override the jury’s determination in effect voids the jury’s finding of guilt beyond a reasonable doubt. Alabama law intertwines the finding of aggravating factors with the offense itself. In order to find a defendant guilty of a capital offense, the jury must find that the state has proven the aggravating factor as an element of the charge beyond a reasonable doubt. If the law does not consider the jury’s finding sufficient for a sentencing verdict, then it cannot rationally find it sufficient for a finding of guilt.

More importantly, capital defendants in Alabama are subject to having the “maximum authorized punishment...increased by a judge’s own factfinding.” *Hurst v. Florida*, 136 S.Ct. 616 (2016). In light of the ruling in *Hurst*, Alabama’s capital sentencing scheme, “under which an advisory jury

³⁴ “(1) The term ‘felony’ shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary....A person shall be imprisoned in the state penitentiary for each sentence which...exceeds 1 year. Fla. Stat. §775.08.

³⁵ Fla. Stat. §921.141.

makes a recommendation to a judge, and the judge makes critical findings needed for the imposition of a death sentence, violates the Sixth Amendment right to trial by jury.” *Id.* at 616.

V. CONCLUSION

In this nation’s infancy, it was forecasted that [if] the power of making [periodic judicial appointments] was committed either to...the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws. Furthermore, “creating an elected judiciary was akin to an assault on the ‘the democratic republic itself,’ and that ‘sooner or later these innovations will have dire results. Alabama judges have become “too responsive to a higher power” and have “succumbed to electoral pressures.” (Sotomayor, J. Dissenting, *Woodward v. State* 571 U.S. _____ (2013) at 7).

As it relates to capital punishment, it is settled law that death is different. Therefore, our Constitution requires states to apply “special procedural safeguards to ‘minimize the risk of wholly arbitrary and capricious action’ in imposing the death penalty. (Sotomayor, J. Dissenting, *Woodward v. State* 571 U.S. _____ (2013) at 3). The Alabama capital sentencing scheme fails to provide special procedural safeguards to minimize the obvious influence of partisan politics or the potential for unlawful bias in the judiciary. As a result, the death penalty in Alabama is being imposed in a “wholly arbitrary and capricious” manner.

The call for justice has been resounding. The answer to this call has been unjustifiably belated. In the words of Dr. Martin Luther King, Jr. “[w]e are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there ‘is’ such a thing as being too late. This is no time for apathy or complacency. This is a time

for vigorous and positive action.”³⁶ It is hereby, **ORDERED, ADJUDGED AND DECREED** that the capital sentencing scheme as provided by the Alabama Criminal Code is unconstitutional and is this day barred from enactment.

³⁶ Cite speech