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THE ALABAMA COURT OF THE JUDICIARY

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Case No. 58

**FILED**

APR 30 2021

COURT OF THE JUDICIARY  
Rebecca C. Oates  
Secretary

THE ALABAMA JUDICIAL INQUIRY COMMISSION, PLAINTIFF

- v. -

THE HONORABLE TRACIE A. TODD, DEFENDANT

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**DEFENDANT'S BRIEF IN SUPPORT OF  
THE PETITION TO DISMISS**

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**TABLE OF CONTENTS**

**INTRODUCTION.....1**  
**STATEMENT OF LAW AND ARGUMENT .....2**  
**I. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE IT IMPERMISSIBLY  
SEEKS TO PUNISH JUDICIAL RULINGS AS ETHICAL VIOLATIONS .....2**  
**II. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE  
PROCEEDINGS WERE IMPROPERLY INITIATED BY A DISTRICT  
ATTORNEY.....4**  
**III. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE  
PROCEEDINGS WERE INITIATED WITHOUT A VERIFIED COMPLAINT IN  
VIOLATION OF RPJC RULE 19 .....9**  
**IV. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE  
PROCEEDINGS VIOLATES THE LAWS OF EQUITY AND/OR THE DUE  
PROCESS CLAUSE.....12**  
**V. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE  
PROCEEDINGS ARE BARRED BY THE DOCTRINE OF CONDONATION.....14**  
**VI. CONCLUSION .....18**

## INTRODUCTION

Comes now Judge Tracie A. Todd, and moves the Alabama Court of the Judiciary (“the Court”) to dismiss the Complaint filed by the Judicial Inquiry Commission (“the Commission”). As set forth below, this cause is due to be dismissed with prejudice in the interest of justice.

On November 5, 2013, Judge Todd was elected to her first term of office as the Democratic nominee for circuit judge in the State of Alabama Tenth Judicial Circuit, Criminal Division. On or about December 22, 2017, the interim District Attorney, a Republican appointee for the Tenth Judicial Circuit, filed a complaint on behalf of the State of Alabama (“the State”) initiating an investigation against Judge Todd. The complaint was filed before the Commission alleging various violations of the Canons of Judicial Ethics.<sup>1</sup> The allegations are based in part on legal decisions dating back over seven years. These decisions were appealed to the appellate courts or accepted by the preceding district attorneys in office at the time that the decisions were rendered. However, the complainant District Attorney, without personal knowledge of the allegations, filed the complaint in advance of Judge Todd’s campaign for reelection. Nonetheless, Judge Todd was reelected to a second term, without opposition, on November 6, 2018. On or about April 6, 2021, the Commission filed this Complaint before the Court nearly four years after the District Attorney’s complaint, and over seven years after the oldest allegations.

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<sup>1</sup> The allegations span a four-year period from 2014 to 2018, and involved the administrations of four District Attorneys. After the 2016 General Election, the incumbent was defeated. The successor was indicted on felony charges. In accordance with Alabama law, two interim district attorneys were appointed based on the party affiliations of the appointing authorities. After the conviction of the succeeding district attorney. The interim appointee appointed by an authority affiliated with the Democratic party was replaced when the appointing authority shifted to an appointing authority affiliated with the Republican party.

## STATEMENT OF LAW AND ARGUMENT

### I. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE IT IMPERMISSIBLY SEEKS TO PUNISH JUDICIAL RULINGS AS ETHICAL VIOLATIONS

“Dissatisfaction with the ruling of a judge or justice shall not be a ground upon which impeachment...may proceed.” *Ala.Const. Art. VI, § 158*. “To allow disciplinary proceedings to evaluate judicial decisions could force judges to walk an ill-defined and standardless line between propriety and impropriety. Clearly, such a sword over a judge's head would have a tendency to chill [her] independence. A judge would have to be as concerned with what is proper in the eyes of the disciplinary commission as with what is the just decision.” Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 *Chi.-Kent L. Rev.* 59, 66 (1977). Furthermore, courts have consistently held:

To invoke the disciplinary power of this court against a judge as a substitute for appellate review would establish a practice dangerous to the independence of the judiciary and equally dangerous to the public's constitutional right to an independent judiciary. Moreover, permitting such a procedure could encourage individuals or groups of individuals to take action primarily for the purpose of intimidation. We take notice that in recent years, in this Commonwealth and in other jurisdictions, those few judges who have come under substantial public criticism, by reason of their exercise of judgment and discretion have in most instances been criticized for alleged leniency and alleged excessive regard for the interests of the accused. If such a judge was intimidated, by fear that disciplinary action would be lightly undertaken by this court, it is possible that [she] would henceforth treat some accuseds with undue harshness and severity.

*In re: Troy*, 364 Mass. 15, 306 N.E.2d 203, 217 (1973).

“Therefore, the court has further held that, “absent bad faith (*i.e.*, absent proof of malice, ill will, or improper motive), a judge may not be disciplined under Canons 2 A and 2 B of the Alabama Canons of Judicial Ethics for erroneous legal rulings.” *Cf. Hayes v. Alabama Court of*

*the Judiciary*, 437 So.2d 1276 (Ala.1983) (clear and convincing evidence of bad faith abuse of judicial power). *Matter of Sheffield*, 465 So. 2d 350, 357 (Ala. 1984).

Many of the allegations of wrongdoing in the Commission’s Complaint are issues that the State could have, and in some instances raised on appeal. In other instances, the State waived its right for appellate review. This pattern continues throughout the Complaint. For example, with respect to the appearance of the Attorney General at the scheduled March 3, 2016 hearing on the unconstitutionality of the judicial override provision. A review of the record will show that the Attorney General attempted to appear without filing the proper notice of appearance. Defense counsel objected, and the objections were sustained. In this and other instances raised in the Complaint, the State failed to follow the prescribed procedures or pursue the proper remedies. Based on the issues raised in the Complaint, the adverse legal rulings at issue here do not invoke questions of ethics, but of legality. The State had an appropriate remedy – appellate review.

Furthermore, the Commission has been cautioned with regard to exercising judicial discipline when it “proscribe[s] certain categories of speech, and [...] this application necessarily chills, or threatens to chill, rights protected by the First Amendment.” *Parker v. Jud. Inquiry Comm’n of Alabama*, 295 F. Supp. 3d 1292, 1308 (M.D. Ala. 2018). “An injury is irreparable “if it cannot be undone through monetary remedies.” *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). The Eleventh Circuit has “repeatedly held that harms to speech rights[,] for even minimal periods of time, unquestionably constitute[ ] irreparable injury supporting preliminary relief.” *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010).” In an analysis of free speech for judges, the U.S. District Court opined:

At the trial on this case, the court would be interested to know if any party seriously contends that a judicial candidate in Alabama or elsewhere is precluded from publicly giving his or her opinion on the death penalty generally, even though doing so necessarily implies giving an opinion as to the constitutionality of the

procedure. *Compare, e.g.,* Ala. Judicial Inquiry Comm'n, Ala. Judicial Ethics Op. 94-537, 1994 WL 16851946, at \*1 (1994) (“[A] candidate should not respond to questions concerning *issues* that are likely to come before them in their judicial capacity.” (emphasis added), *with* *Bauer v. Shepard*, 634 F.Supp.2d 912, 926 (N.D. Ind. 2009) (“Candidates have a constitutional right to state their views on, for example, abortion or the death penalty ....” (quoting Ind. Comm'n on Judicial Qualifications, Preliminary Advisory Op. #1-02) ).

*Parker v. Jud. Inquiry Comm'n of Alabama*, 295 F. Supp. 3d 1292, 1308 (M.D. Ala. 2018).

The Commission now brings this Complaint before the court seven-years after certain legal rulings. Judge Todd has presided over nearly five thousand cases. The Commission’s Complaint has chosen a handful of those cases and presented them as both indicative of her judicial posture and an abuse of her judicial power. Additionally, the Commission arguably seeks to punish Judge Todd based on protected speech. Punishment for legal rulings or as a prescription on freedom of speech are not the intended uses of judicial disciplinary powers. Therefore, this Complaint is due to be dismissed with prejudice.

## **II. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE PROCEEDINGS WERE IMPROPERLY INITIATED BY A DISTRICT ATTORNEY**

“The veritable laundry list of mandatory, investigation-related duties cast upon the [Commission] by the Rules of the Judicial Inquiry Commission (“RJIC”) Rule 6 follows upon, and results from, the filing of a verified complaint ‘by a member of the public or by a member of the [Commission] or the [Commission’s] staff.’ RJIC Rule 6.A. The statutory provision authorizing “a member of the public” to file a complaint was intended to provide, “an accessible forum for citizens’ complaints against judges.”<sup>2</sup> This proposition is supported by the fundamental principle

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<sup>2</sup> See the Commission website: <https://judicial.alabama.gov/appellate/jic>.

that, “A statute must be considered as a whole and every word in it made effective if possible.” *Custer v. Homeside Lending, Inc.*, 858 So.2d 233, 245 (Ala. 2003), quoting *Alabama State Bd. of Health v. Chambers County*, 335 So.2d 653, 654-55 (Ala.1976); see also *McCausland v. Tide-Mayflower Moving & Storage*, 499 So.2d 1378, 1382 (Ala.1986).

The District Attorney is by statute “a public officer representing the sovereign power of the people and has been defined as ‘the foremost representative of the executive branch of government in the enforcement of the criminal law in his county.’” 27 C.J.S. *District and Prosecuting Attorneys* § 1(a) (1959). See also, *Cook v. Lloyd Noland Found., Inc.*, 825 So. 2d 83, 88–89 (Ala. 2001) (distinguishing the district attorney from members of the public, “the right of district attorneys and members of the general public to dissolve a corporation pursuant to the Quo Warranto Act has coexisted historically...” ) See also, *Hooks v. Hitt*, 539 So. 2d 157, 159 (Ala. 1988) (for the proposition that a district attorney is a state employee). “Generally speaking, official proceedings conducted by [the] district attorney are in the name of state.” *Stone v. State ex rel. Courtney*, 233 Ala. 239, 171 So. 362 (Ala.1936). *Ala. Code* Title 12. Chapter 17. “All district attorneys and all full-time assistant district attorneys shall devote their entire time to the discharge of the duties of their respective offices, and each and every one of the officers are prohibited from practicing law, directly or indirectly, in any court of this state or of the United States, or in any other manner or form whatsoever, except in the discharge of the official duties of their offices.” *Ala. Code* § 12-17-184.

The Alabama Constitution narrowly and strictly vests authority in the executive branch to prosecute judicial officers as follows:

It shall be the duty of the Attorney General to institute proceedings under this chapter and prosecute the same against any officer included in Section 174, Article 7, of the constitution, when the Supreme Court shall so order or when the Governor shall, in writing, direct the same or when it appears from the report of any grand

jury that any such officer ought to be removed from office, for any cause mentioned in this chapter.

It shall be the duty of the district attorney to institute proceedings under this chapter and prosecute the same against any officer included in Section 175, Article 7, of the constitution when the circuit court of the county shall so order or when the Governor, in writing, shall direct the same or whenever it appears from the report of the grand jury that any such officer ought to be removed from office for any cause mentioned in this chapter.

*Ala.Code 1975 § 36-11-4.*

Section 174 includes, “Judges of the district and circuit courts, judges of the probate courts, judges of courts from which appeal may be taken directly to supreme court, district attorneys, and sheriffs.” *Ala. Const.*, § 174. Section 175 includes, “County officers, and officers of an incorporated city or town.” *Ala. Const.*, § 175. The Alabama Constitution further delineates with specificity the venue for said prosecutions. It is “the duty of every district attorney and assistant district attorney, within the circuit, county, or other territory for which he or she is elected or appointed...[t]o, when requested to do so by the Attorney General, assist the Attorney General in the prosecution of all impeachment proceedings which it is his or her duty to institute before the Supreme Court of Alabama involving any official or officials in their respective judicial circuits. *Ala. Code* § 12-17-184. Additionally, “It shall be the duty of the Attorney General to institute proceedings... and prosecute the same against [a judge] when the circuit court of the county shall so order or when the Governor, in writing, shall direct the same or whenever it appears from the report of the grand jury that any such officer ought to be removed from office for any cause mentioned in this chapter.” *Ala.Code 1975 § 36-11-4.* “Although district attorneys are charged with instituting and prosecuting criminal [ ] on behalf of the State, the district attorney cannot disregard the direction, control, and instruction of the attorney general.” *Ex parte King*, 59



So.3d 21 (Ala.2010). Therefore, “It would seem that an order of the supreme court, a written direction by the Governor or a report by a grand jury is necessary to give the Attorney General [or a District Attorney] the authority to act, and if he does so without said authority the proceeding could probably be abated upon a proper plea.” *State v. Hast*y, 184 Ala. 121, 63 So. 559, *Am. Ann. Cas.* 1916B, 703 (Ala.1913).

The Alabama Constitution strictly prescribes the process to be followed by an attorney general or district attorney in prosecuting a judge. Proceedings involving judges, “shall be instituted in the name of the State of Alabama in the nature of an information by the Attorney General or upon the information of such other persons as are by this chapter allowed to institute the same.”<sup>3</sup> “All such proceedings shall be conducted and all process shall issue in the name of the State of Alabama.” *Ala. Code* 1975 § 36-11-5. An impeachment proceeding must be styled in the name of the State of Alabama, prosecuted by its authority, and concluded “against the peace and dignity of the state.” *State ex rel. Mullis v. Mathews*, 259 Ala. 125, 66 So.2d 105 (Ala.1953). “Impeachment proceedings are highly penal in their nature and are governed by the rules of law applicable to criminal cases. Before a defendant can be convicted, it is incumbent on the prosecution to prove his guilt to the satisfaction of the court beyond reasonable doubt.” *State ex rel. Mullis v. Mathews*, 259 Ala. 125, 66 So.2d 105 (Ala.1953). “In determining legislative intent, statutes are, where possible, construed in harmony with statutes existing at the time of enactment, so that each is afforded a field of operation.” *Waters v. City of Birmingham*, 282 Ala. 104, 209

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<sup>3</sup> Any five resident taxpayers of the division, circuit, district, county, city or town for which the officer sought to be impeached was elected or appointed may institute proceedings of impeachment under Sections 174 and 175 of Article 7 of the constitution upon giving bond, with sufficient sureties, payable to the officer sought to be impeached, conditioned to prosecute the impeachment to effect and, failing therein, to pay all costs that may be incurred, which bond shall be taken and approved by the clerk of the court before which the proceedings are proposed to be instituted. *Ala. Code* 1975 § 36-11-6.

So.2d 388 (1968). Therefore, the laws relating to the creation of the Commission and the Court are not in conflict with the strict limitations placed on the executive in prosecuting a judge such that “these remedies cannot operate harmoniously and independently.”

“When a judge is once inducted into office, and is competent to hold it when elected, [she] can only be ousted or removed in the manner prescribed by the constitution of the State.” *Alabama State Bar ex rel. Steiner v. Moore*, 213 So.2d 404 (1968). “To the end that the government of the State of Alabama may be a government of laws and not of individuals, and except as expressly directed or permitted in this constitution, the legislative branch may not exercise the executive or judicial power, the executive branch may not exercise the legislative or judicial power, and the judicial branch may not exercise the legislative or executive power.” *Ala. Const.*, § 42.

It is undisputed that the District Attorney’s complaint was filed in the “name of the state.” The complaint bears numerous indications of this fact in identifying the complaining party name as “District Attorney, 10<sup>th</sup> Judicial Circuit;” and being signed “T. Michael Anderton, District Attorney.” (See *Exhibit 1: Qualified Verification Page of District Attorney’s Complaint*). By definition and statutory provision, a district attorney is not a member of the public, a member of the Commission nor a member of the Commission’s staff, and therefore not authorized to initiate a prosecution against a judge in this Court. The Alabama Constitution provides narrow and specific authority for the District Attorney to prosecute a judge. A District Attorney, is not permitted to file a complaint in prosecution of a judge outside of the constitutionally mandated provisions. Here, the District Attorney is unlawfully “practicing law” before the Commission and the Court in a “manner or form” that is inconsistent with “the discharge of the official duties” of the office.

In furthering the executive's action, the Commission, a member of the judicial branch, impermissibly exercised the legislature by amending the Alabama Constitution, vesting expanded authority in the District Attorney to prosecute judges before the Court. In doing so, the Commission exceeded its authority by initiating proceedings against a judge based on an action brought in the name of the State. For these and other reasons as set forth, the Commission's action is not permitted and the Complaint is due to be stricken and dismissed with prejudice.

### **III. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE PROCEEDINGS WERE INITIATED WITHOUT A VERIFIED COMPLAINT IN VIOLATION OF RPJC RULE 19**

“Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff.” Ala. Rules of Procedure of Judicial Inquiry Commission 6(a). Black's Law Dictionary defines “verification” as “a formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document.” “It is settled that a verification wherein affiant affirms merely that certain facts are, ‘true to the best of his knowledge, information and belief,’ means nothing ‘more than the affiant *believes* the allegations of the bill to be true, though he has neither knowledge nor information of their truth,’ and, ‘an affidavit of belief in their truth simply amounts to nothing.’ *Burgess & Co. v. Martin*, 111 Ala. 656, 20 So. 506; *Brooks v. Everett*, 271 Ala. 380, 124 So.2d 100. *Bd. of Water & Sewer Comm'rs of City of Mobile v. Spriggs*, 274 Ala. 155, 157, 146 So. 2d 872, 873 (1962). “But every such claim so presented must be verified by the oath of the claimant or some other person having knowledge of the correctness of the claim.” *Peevey v. Farmers' & Merchants' Nat. Bank*, 132 Ala. 82, 84, 31 So. 466, 466 (1902). “A verification which is improperly based on information and belief is

insufficient to entitle the verifying party to relief because the verification is qualified in nature.” *Ballinger v. Bay Gulf Credit Union*, 51 So.3d 528, 529; *see also Muss v. Lennar Fla. Partners I, L.P.*, 673 So. 2d 84, 85 (Fla. 4th DCA 1996); *Barton v. Circuit Court of the Nineteenth Judicial Circuit*, 659 So. 2d 1262, 1263 (Fla. 4th DCA 1995); *Thompson v. Citizens Nat’l Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983). “Rule 65 permits verification of the complaint where a temporary injunction is sought; the verified complaint then can be regarded as an affidavit. Where verification is required, it should be by the party, rather than by the attorney, unless the attorney has personal knowledge of the facts alleged.” *Ala. R. Civ. P. 11*, Committee Comments on 1973 Adoption; *accord Kessler v. Gillis*, 911 So.2d 1072, (2004) (“An affidavit premised on ‘information and belief’ does not meet the personal-knowledge requirement of Rule 56 (e), Ala. R. Civ. P. *Ex parte Head*, 572 So.2d 1276, 1279 (Ala. 1990)”). “Every action shall be prosecuted in the name of the real party in interest.” Ala. R. Civ. P. 17(a). “Any district attorney who commences a prosecution for any criminal offense by his own affidavit, except for an offense against his person or property or for a violation of the revenue laws or the prohibition laws, or unless the affidavit is upon his personal knowledge of the commission of the offense, shall, on conviction, be fined not less than \$50.00.” *Ala. Code* § 12-17-194.

Furthermore, the Alabama Rules of Civil Procedure (“ARCP”) Rule 11 requires the attester to read the pleading:

Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated...The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion, or other paper...is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading, motion, or other paper had not been served. For a willful violation of this rule an attorney may be

subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

*ARCP* Rule 11.

“It is the filing of a complaint with the [Commission] that invokes the [Commission’s] jurisdiction.” *Steensland v. Alabama Judicial Inquiry Com’n*, 87 So.3d 535, 542-43 (Ala. 2012).

“It is clear to this court that, by reading the statute as a whole and giving effect to the language of the section in its entirety, the legislature intended the filing of a verified complaint with the Commission to be a jurisdictional matter without which the Commission has no authority to institute proceedings.” *Alabama Surface Min. Reclamation Commission v. Jolly*, 373 So.2d 855, 857-58 (1979).

The district attorney attempted to qualify the verification of the underlying complaint by stating only that the facts alleged are based on a “knowledge, information and belief.” The attempted qualified verification of the charges is deficient. The State attested that the included allegations and statements of fact were “true and correct to the best of my knowledge, information and belief.” Such a verification is insufficient under Alabama law. The basic principle that a qualified verification is improper for failing to include a statement that the attester has personal knowledge of the facts alleged is not unique to the Florida cases cited above or to Black’s Law Dictionary’s basic definition of the term. Support can also be found in the *Committee Comments* to Rule 11 of the Rules of Civil Procedure equating a verification to an affidavit.

The Commission violated its own rules by knowingly initiating proceedings based on an unverified complaint. The State’s complaint to the Commission should have, by the Commission’s own rules, been rejected at the time of filing. As a result, there was no complaint properly presented to the Commission to invoke proceedings or jurisdiction. By initiating proceedings in the absence

of a complaint, the Commission has violated its own rules and other state laws. In accordance with RPJC Rule 19, the Commission's complaint is due to be stricken and dismissed with prejudice.

#### **IV. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE PROCEEDINGS VIOLATE THE LAWS OF EQUITY AND/OR THE DUE PROCESS**

An unjustified delay in asserting certain claims violates the Doctrine of Laches. Laches is defined as "neglect to assert a right or a claim that, taken together with a lapse of time and other circumstances causing disadvantage or prejudice to the adverse party, operates as a bar." See *Black's Law Dictionary* 787 (5th ed.1979). "Laches is an equitable doctrine designed to prevent unfairness to a defendant ...due to a plaintiff's...delay in filing suit, in the absence of an appropriate statute of limitations." *Equal Employment Opportunity Commission v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir.1982). "Classic elements of undue prejudice, for purposes of determining the applicability of the doctrine of laches, include the unavailability of witnesses, changed personnel, and the loss of pertinent records." *Grubbs*, 542 So.2d at 929 (citing *Equal Employment Opportunity Commission v. Dresser Indus., Inc.*, 668 F.2d 1199 (11th Cir.1982)).<sup>4</sup> "To bring the doctrine of laches into operation, it is not necessary that the court should be convinced that the original claim was unjust or had been satisfied, but it is sufficient if the court believes that, under the circumstances, it is too late to ascertain the merits of the controversy." *Meeks v. Meeks*, 251 Ala. 435, 37 So.2d 914 (1948). *Ex parte Grubbs*, 542 So. 2d 927, 929 (Ala. 1989). "For the doctrine of laches to bar a claim it must be said that, 'from delay,

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<sup>4</sup> "The courts seem now to agree that limitations and laches may indeed be raised on an A.R.C.P., Rule 12(b)(6), motion where the face of the complaint shows that the claim is barred by the statute of limitations, and/or laches." *Williams v. Nash*, 428 So.2d 96 (Ala.Civ.App.1983). "While the defenses of laches or limitations should be presented in a pleading responding to a preceding pleading, both may be properly raised via the A.R.C.P., Rule 12(b)(6), motion where the face of the complaint shows that the claim is barred by limitations or laches." *Sims v. Lewis*, 374 So.2d 298 (Ala.1979). *Ala. Rules Civ. Proc., Rule 8, AL ST RCP Rule 8.*

any conclusion the court may arrive at must at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties as to render it difficult if not impossible to do justice.” *Ussery v. Darrow*, 238 Ala. 67, 71, 188 So. 885, 888 (1939). *Salter v. Hamiter*, 887 So. 2d 230, 241 (Ala. 2004). Alabama courts seek to avoid stale claims and the injustice such claims can engender.” *Travis v. Ziter*, 681 So.2d 1348, 1355 (Ala.1996).

The Commission has neglected to assert its claims in a timely manner. The four-year investigation into the State’s arguably untimely complaint has resulted in claims that are over seven years old. These delayed filings, “Taken together with a lapse of time and other circumstances” has caused a “disadvantage [and] prejudice” that now “operates as a bar” to these proceedings. Because of the delay, “[A]ny conclusion the [C]ourt may arrive at must at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties as to render it difficult if not impossible to do justice.”

The doctrine of laches is applicable here. Since 2014, at least two eye-witnesses have become unavailable due to death. The testimony of these two witnesses involved critical testimony related to substantive and procedural matters. With the passage of years, other witnesses may be difficult to locate, and it is highly likely that the memories of many of the witnesses have irreparably faded. Over the past seven years there have been changes in personnel across a number of agencies that were directly or indirectly involved in the events at issue. Critical evidence and recordings have been lost over the past seven years.

Because the District Attorney purported to file a complaint with the Commission in his official capacity, rather than as a member of the public as required, his acts should be governed by the Rules of Criminal Procedure. The complainant District Attorney was unsuccessful in his 2018

election bid. Therefore, he is no longer available in his capacity as the interim District Attorney for purposes of the Confrontation Clause of the U.S. Constitution. Because the complainant District Attorney is no longer authorized to act on behalf of the Jefferson County District Attorney's Office, it is now unclear who, if anyone, with the requisite standing is pursuing this prosecution and has the authority to speak, or wishes to speak, for the Jefferson County District Attorney's Office as the accuser. The Commission's complaint is due to be dismissed with prejudice, and Judge Todd immediately reinstated to her duties.

**V. THE COMPLAINT IS DUE TO BE DISMISSED BECAUSE THESE PROCEEDINGS ARE BARRED BY THE DOCTRINE OF CONDONATION**

In *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559 (1913), the court held that acts of a previous term cannot be made the basis of charges for impeachment. The court adopted as one of the bases for its holding the so-called 'condonation theory.' Simply stated, the 'condonation theory' is that re-election to an office operates as a condonation of the officer's conduct during the prior term." *Parker v. State*, 333 So.2d 806, 808 (Ala.1976). "It seems to be the policy of our Constitution to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term." *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559 (1913)." "Simply stated, the 'condonation theory' is that re-election to an office operates as a condonation of the officer's conduct during the prior term." *Parker v. State*, 333 So. 2d 806, 808 (Ala. 1976). In *Steensland v. Alabama Judicial Inquiry Com'n* 87 So.3d 535 (2012), there was a "prolonged discussion between the parties" regarding the application of the Condonation doctrine on appeal of the Court's public censure. In response to the judge's argument, the Commission argued with specificity the permissible use of alleged conduct in a previous term as a basis for punishment in a new term:



[When we talk about these acts prior to [2009], we're also talking about the same conduct that occurred after the date that he was sworn into this term.... And we have alleged in these following counts a pattern and practice account where we're going through these things...We are showing pattern and practice. The pattern and practice did not start after his term here. It started long before his term here, and it continued into his term.

*Steenland v. Alabama Judicial Inquiry Com'n* 87 So.3d 535 (2012).

“While we have eliminated the acts of the previous term, as grounds of impeachment, we have considered some of them as evidential facts, in so far as they are connected with or bear upon the respondent's general course of conduct during the second term, for the limited purpose of inquiring into the motive and intent of the respondent as to the acts and omissions charged to him during the second term.” *Reeves v. State*, 95 Ala. 31, 11 South. 158; *Jones on Evidence*, §§ 143–145. Equally, the Alabama Constitution places limitations on impeachment penalties such that, “The penalties in cases arising under this article [do] not extend beyond removal from office, and disqualifications from holding office, under the authority of this state, for the term for which the officer was elected or appointed...” *Ala. Const. Art. VII*, § 176.

It must be observed that, while the law affords ample means for the indictment and punishment of unfaithful officers and for the removal of same for certain causes, the maximum penalty, under an impeachment proceeding, is the removal and disqualification to hold office under the state for the term only for which he was elected...a re-election to the office would operate as a condonation under the Constitution of the officer's conduct during the previous term, to the extent of cutting off the right to remove him from the subsequent term for said conduct during the previous term.

In other words, if this respondent had been impeached and removed from his first term, that fact could not affect his right to hold the subsequent term to which he was elected in 1910, and, as he was re-elected in 1910, this fact alone forecloses the state from impeaching and removing him from the second term for acts done during the previous term. We therefore sustain the motion of respondent to strike from the information all grounds of impeachment based upon his conduct during the previous term of office.

*State v. Hasty*, 184 Ala. 121, 125, 63 So. 559, 561 (1913).

The Commission cannot claim that the allegations from the first term are being offered as evidence of “pattern and practice” after election to a second term. The Commission has conveniently provided a timeline of the alleged misconduct. (*See Exhibit 2: Commission’s Timeline with last date entry of October 12, 2018*). For nearly three years the investigation seemed to be inactive. However, the Commission held the case open without filing a Complaint before the Court in the first term before the 2018 General Election or making additional allegations in the second term after the 2018 General Election.

The allegations raised in the State and Commission’s complaints relate to events that occurred at a minimum nearly four years ago, with the oldest allegation relating to a widely publicized ruling that was rendered seven years ago. With regard to the oldest allegations, a member of the public, the Commission and Commission’s staff had nearly seven years to bring a Complaint in the first term. Even after the State filed its complaint in 2017, the Commission had nearly 11 months to file this Complaint during the first term of office. See also, *Farmer v. Farmer*, 86 Ala. 322, 5 So. 434 (1889) (holding that adultery is condoned where no separation occurs for three months after knowledge of it). The Commission inexplicably delayed this Complaint for nearly 48 months after the State filed a complaint, and nearly 24 months after the second term began.

“A judge shall be disqualified from acting as a judge, without loss of salary, while there is pending...a complaint against him filed by the judicial inquiry commission with the court of the judiciary.” *Ala. Const.* Art. VI, § 159. In the explaining the legislative intent and purpose of this article, the court explained as follows:

The legislature that drafted § 159, and the people of Alabama, who ratified § 159, were justified in so doing to protect the orderly administration of justice. The people of Alabama, subject to the jurisdiction of a duly elected judge, must be free to lodge complaints against a judge who they believe may be in violation of the Canons of

Judicial Ethics. If that complaint is deemed to have merit and formal charges are brought, the complaining individuals, who may still have matters pending before that judge, must be protected from retaliation—real or imagined. Furthermore, the government has a vested interest in protecting the integrity of the administration of justice so that immediately removing the charged judge who may indeed be violating the Canons of Judicial Ethics is desirable and necessary.

*Moore v. Alabama Jud. Inquiry Comm'n*, 234 So. 3d 458, 487 (Ala. 2017).

The rationale behind the disqualification appears to be twofold: 1) to protect complaining parties from retaliation; and 2) to immediately remove a judge who may be violating the Canons of Judicial Ethics. Neither rationale applies here and only emphasizes the curiously problematic nature of the Commission's failure to bring charges during the first term. Obviously, the Commission was not concerned about any real or perceived retaliation against the State during the eleven months between the filing of the State's complaint and the end of the first term, as they did not take the necessary actions for removal. With respect to the second rationale, allegedly violating the Canons of Judicial ethics, the Commission not only failed to act to remove within the first term, but they also failed to bring charges for nearly four years with the knowledge that the judge actively adjudicated cases. Admittedly, the Commission does not claim alleged violations during the second term.

The Doctrine of Condonation places a reasonable limit on the Commission's authority to retrospectively prosecute judges. It serves as an applicable statute of limitations that restrains the ability of the Commission to prosecute past allegations of ethical misconduct that it knew or should have known about. Without rendering such an interpretation, this Court authorizes the Commission to investigate or initiate present-day complaints against any judge for any conduct during an entire career on the bench. The absence of a reasonable limitation, considering a judicial career in Alabama can span twenty to thirty years, invites unfettered excavation of a judge's record and the imposition of punishment for past conduct. There is no rational basis for any government entity to

have such unrestrained authority. Under the Doctrine of Condonation, the Commission is foreclosed from punishing a judge for alleged acts that occurred in a previous term.

Nonetheless, Judge Todd has been improperly removed from the bench, barred from all courthouses, banned from use of all court related electronic communication and prohibited from initiating communication with court staff. (*See Exhibit 3: Letter prohibiting action as a judge*). Thus, the Commission's Complaint is due to be dismissed with prejudice with an Order immediately reinstating Judge Todd to perform her duties as a judge.

## VI. CONCLUSION

WHEREFORE, PREMESIS CONSIDRED, Judge Tracie Todd, Circuit Judge, Tenth Judicial Circuit of Alabama moves the Court to strike and dismiss the Commission's complaint, direct the Commission to issue a public apology and order such other relief as the Court deems appropriate.

Respectfully Submitted,

Emory Anthony, Jr.

1117 22<sup>nd</sup> street south

Birmingham, Alabama 35205

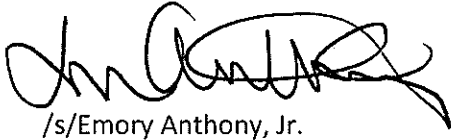
[bgemorye@aol.com](mailto:bgemorye@aol.com)

205-902-6422

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30<sup>th</sup> day of April 2021, electronically filed the foregoing with the court of the Judiciary and that I have further served a copy upon the following by placing same in the United States mail, postage prepaid and properly addressed as follows:

Rosa H. Davis  
Attorney for the Commission  
Alabama Judicial Inquiry Commission  
P.O. Box 303400  
Montgomery, Alabama 36130-3400



/s/Emory Anthony, Jr.

BEFORE THE JUDICIAL INQUIRY COMMISSION OF ALABAMA

Inquiry Concerning a Judge, No. \_\_\_\_\_.

---

RE: HON. TRACIE TODD  
CIRCUIT JUDGE  
TENTH JUDICIAL CIRCUIT OF ALABAMA  
Birmingham Criminal Division

---

COMPLAINT

T. MICHAEL ANDERTON  
DISTRICT ATTORNEY

STATE OF ALABAMA  
10<sup>TH</sup> JUDICIAL CIRCUIT OF ALABAMA  
JEFFERSON COUNTY COURTHOUSE  
801 RICHARD ARRINGTON JR. BLVD N  
BIRMINGHAM, ALABAMA 35203  
PHONE: (205) 325-5252  
FACSIMILE: (205) 325-5780


 COPY

Exhibit I

**COMPLAINT ABOUT AN ALABAMA STATE COURT JUDGE**

Today's Date: December 22, 2017 Your Name: District Attorney, 10th Judicial Circuit

Your Telephone Number: 205-325-5252 Your Address: 801 Richard Arrington Jr. Blvd North, Birmingham, 35203

Your Attorney's Name: T. Michael Anderton Your Attorney's Telephone Number: 205-325-5252

Judge's Name: Tracie Todd Court: Circuit Court, Birmingham Criminal Division

Case Number: multiple; see attached County: Jefferson County

Name of Case: multiple; see attached

**STATEMENT OF FACTS AND ALLEGATIONS**  
(See instructions on reverse)

See attached complaint.

The allegations and statements of fact set forth above and in any additional attached pages are true and correct to the best of my knowledge, information and belief, and I understand that a copy of this complaint and all supporting materials will be provided by the Commission to the judge against whom the complaint is made.

*T. Michael Anderton*  
(Complainant's Signature)

SUBSCRIBED AND SWORN to or affirmed before me this 22nd day of December, 2017.

My Commission expires: 2/10/2020

*E. Watkins*  
Notary Public

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.





## Judicial Inquiry Commission

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MONTGOMERY, AL 36130-3400

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MONTGOMERY, AL 36104

April 6, 2021

CERTIFIED MAIL

Personal & Confidential

Emory Anthony, Jr., Esq.  
1117 22<sup>nd</sup> Street South  
Birmingham, AL 35205-2813

*Via Email at [hgemorye@aol.com](mailto:hgemorye@aol.com)*

**Re: COJ Complaint # 58 Against Jefferson County Circuit Judge  
Tracie Todd and Executed Rule 10 Resolution**

Dear Mr. Anthony:

The Commission is filing this Complaint along with the written resolution reached during its alternate-dispute-resolution hearing pursuant to Rule 10 of the Rules of Procedure of the Judicial Inquiry Commission that was signed by both Circuit Judge Tracie Todd and all members of the Judicial Inquiry Commission. Pursuant to Rule 10, such a resolution signed by Judge Todd and a majority of the Commission binds Judge Todd and the Commission, "unless and until the proposed resolution is rejected by the Court of the Judiciary."

The Commission requests that you convey the following information to Judge Todd:

- a. Pursuant to Art. VI, sec. 159, Constitution of Alabama, "A judge shall be disqualified from acting as a judge, without loss of salary, while there is pending . . . a complaint against [her] filed by the judicial inquiry commission with the court of the judiciary."
- b. Rule 14, Ala. R. P. Jud. Inq. Comm'n, provides:

**Judge acting as such while disqualified.**

If any judge shall continue to act as such while there is pending . . . a complaint against him or her filed by the commission with the Court of the Judiciary, such conduct shall constitute misconduct in office, and the commission may apply to the Supreme Court of Alabama for such writ or writs as may be appropriate to enforce § 156, Constitution of Alabama of 1901 (Off. Recomp.) (derived from § 6.17, Amendment No. 328, Constitution of Alabama 1901).

*Exhibit 3*

Mr. Emory Anthony  
April 6, 2021  
Page 2

- c. The Commission considers the phrase “acting as a judge” to encompass all duties of the judge. As the Reporter’s Notes to the 1972 Model Code, upon which Alabama’s Canons are based, explain:

[E]ach duty “prescribed by law” should be considered a judicial activity, whether the duty is provided by constitution, statute, rule, regulation, or common law. If the activity is one that is prescribed in a judge’s jurisdiction as a duty of the judicial office, it is a judicial duty for the purposes of the *Code*.

E. Wayne Thode, Reporter’s Notes to Code of Judicial Conduct, p. 50 (ABA 1973).

- d. As in past cases, the Commission interprets the prohibition of acting as a judge to include even participating in the administration of the court during his or her suspension. At the very least, violation of this prohibition could create the appearance that the judge is not complying with the law and, thus, would be in violation of the Canons.
- e. Accordingly, to dispel any ambiguity in the application of the constitutional prohibition, the Commission advises that, while a Complaint is pending in the Court of the Judiciary, the judge is prohibited from entering any courthouse or court offices in the jurisdiction where the judge holds office or from initiating any communication with the staff of any courthouse in that jurisdiction. The only exception to this prohibition is when the judge has a personal matter pending in any of those courts, and then his/her contact should be only to the extent that any other member of the public would have access to the court or the court staff.
- f. Although Judge Todd is prohibited from acting as a judge while disqualified, she continues to be bound by the Alabama Canons of Judicial Ethics.

If you have any questions, please contact the Commission’s counsel in this matter, Ms. Rosa Davis, or its executive director, Ms. Jenny Garrett.

Sincerely,



Billy C. Bedsole  
Chairman