

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**

SEP - 3 2021

COURT OF THE JUDICIARY  
Rebecca C. Oates  
Secretary

JUDICIAL INQUIRY COMMISSION’S RESPONSE IN  
OPPOSITION TO JUDGE TODD’S MOTION TO RECONSIDER,  
MOTIONS FOR FUNDS, AND MOTION FOR LEAVE TO FILE  
ADDITIONAL MOTIONS

COMES NOW, the Judicial Inquiry Commission (“the Commission”) and hereby responds in opposition to Judge Tracie A. Todd’s (“Judge Todd”) Motion to Reconsider and other motions as follows:

1. This Court denied Judge Todd’s “Request for Continuance” on August 25, 2021.
2. An express goal of the Rules of Procedure for the Alabama Court of Judiciary is “prompt disposition of the proceedings.” Rule 7, Ala. R. P. Ct. Jud. Accordingly, “Dilatory motions will be treated with disfavor.” Id.
3. In support of her Motion to Reconsider, Judge Todd asserts her attorney is scheduled to four felony criminal trials that conflict with

the trial of this Complaint. As legal support, she relies on Rule 8, Ala. R. Crim. P., which states, “Insofar as is practicable, trials of criminal cases shall have priority over trials of civil cases.”

4. Judicial disciplinary proceedings before this Court are not the type of ordinary “civil proceedings” contemplated by Rule 8. Rather, proceedings before this Court are of utmost importance and should take priority, even over criminal cases.

5. Additionally, criminal cases across the Criminal Division of the 10<sup>th</sup> Judicial Circuit have been delayed, as other judges have been and will continue to cover Judge Todd’s docket since her interim disqualification from acting as a judge on April 6, 2021, i.e., the date this Complaint was filed. See Ala. Const. Art. VI, § 159.

6. Given the Alabama Supreme Court’s insistence of “prompt disposition” of disciplinary proceedings against a judge and the fact that any further delay of this matter will ultimately lead to further delay in criminal cases filed in the Criminal Division of the 10<sup>th</sup> Judicial Circuit, any additional delay in this matter is completely unwarranted.

7. Prior to filing Judge Todd’s Motion to Reconsider, however, Judge Todd’s counsel does not appear to have exercised all relief available

under the “conflict rule,” which is set forth in Attorney Calendar Conflict Resolution Order, Ala. Sup. Ct. (eff. Oct. 22, 1990).

8. Proceeding to trial in this matter as scheduled will not deny Judge Todd a fair trial. Judge Todd states that she must be given more time to engage in discovery because she was not afforded the opportunity to confront and cross-examine witnesses during the presentment of testimony before the Commission. However, she had no such right, as the Commission’s role was similar to that of a grand jury in the criminal process. Billingslea v. State, 5 So. 137 (Ala. 1888); see also Charles Gardner Geyh, et. al., Judicial Conduct and Ethics §11.10[4] (6th ed. 2020).

9. Pursuant to Rule 6C, Ala. R. P. Jud. Inq. Comm’n, the Commission timely served Judge Todd with the complaint and all attachments, which initiated the Commission’s investigation, and a letter advising her of the allegations in the complaint that it had decided to investigate. See Exhibit A, Investigation Letters. (Accordingly, she was advised of specific, clear allegations under investigation.)

10. Pursuant to Rule 6D, Ala. R. P. Jud. Inq. Comm’n, the Commission timely served Judge Todd, every forty-two (42) days, with

“copies of all materials . . . that tend[ed] to establish that the alleged conduct either did or did not occur or that the investigation [was] or [was] not still appropriate.” Those materials included “summaries” of witness interviews conducted by the Commission’s investigator and the ordered certified transcripts of testimonies before the Commission. Judge Todd was also contemporaneously served with a copy of all subpoenas issued by the Commission.

11. This Court denied Judge Todd’s Motion to Dismiss more than two (2) months ago, and the Commission filed its Motion to Issue a Scheduling Order and Set a Trial Date on August 11, 2021, which this Court granted on August 25, 2021. In the more than 60-day period that has passed since this Court denied Judge Todd’s Motion to Dismiss, Judge Todd has not conducted nor initiated any method of discovery.

12. Moreover, in the 14-day period between the filing of the Commission’s Motion and this Court’s August 25, 2021 Order, Judge Todd did not file any response that would have put the Commission or this Court on notice that her attorneys still needed to conduct substantial discovery.

13. As this Court noted in its August 25, 2021 Order Setting Trial and Discovery Deadlines, “the parties have had ample time to engage in discovery” since the May 4, 2021 conference. Her failure to engage in discovery sooner negates any allegation or argument that Judge Todd may suffer prejudice. See, for example, Ala. R. Civ. P. 30, 33, 34, and 36, which authorize discovery after the commencement of the action, which in this case was on April 6, 2021—five (5) months ago. Since the filing of the Complaint, Judge Todd has not conducted nor initiated any method of discovery.

14. Judge Todd also states, as grounds for her Motion to Reconsider and for several of her various Motions for Funds, that she should be allotted necessary funds commensurate to those of the Commission and the Jefferson County District Attorney’s Office, both of whom she mistakenly asserts are prosecuting this Complaint.

15. The Commission alone is responsible for the prosecution of charges it files with this Court. See Ala. Const. Art. VI, §§ 156(b) and 157(a); Rule 15, Ala. R. P. Jud. Inq. Comm’n. It is the Commission who investigates, charges, and prosecutes—not the original complainant(s). The sole function of the complainant(s) is to invoke the Commission’s

jurisdiction over any allegations that the Commission subsequently determines warrant investigation.

16. Regarding Judge Todd's specific requests for funds for legal counsel, investigators, assistants, and various other expenses allegedly necessary to provide her with an adequate defense, Judge Todd has not cited any authority or precedent that would entitle her to such funds. Further, she has not argued that she should be an exception to the universal requirement for provision of State funds for legal services and necessary expenses—a showing, under oath, of indigency. See, for example, Ala. Code 1975 §§ 15-12-20 and -21, the requirement of indigency even for criminal defendants—of which Judge Todd, as a criminal judge, is well aware.

17. Additionally, in her Motions for Funds to Retain Experts, Judge Todd has failed to show how any expert testimony would be helpful to the trier of fact in the determination of the charges of the Complaint. See Slaton v. State, 902 So. 2d 102 (Ala. Crim. App. 2003). Moreover, the members of this Court, consisting of four judges, two attorneys, and three public members, are qualified and capable of interpreting and applying the Alabama Canons of Judicial Ethics without the additional aid of

expert testimony. See Marla N. Greenstein & Steven Sheckman, *The Judicial Ethics Expert*, JUDICIAL CONDUCT REPORTER, Spring 2011, at 10, JCR\_Spring\_2011\_v12\_JCR\_Spring\_2011 (ncsc.org).

18. In response to Judge Todd's requests in her several Motions for Funds for a predetermination that the funds, if granted, will not be taxed against her, Rule 54(d), Ala. R. Civ. P., provides, "Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." Again, Judge Todd has not cited any statute or other authority that would preclude the costs of this proceeding from being taxed against her. Nor has she made a showing that she is indigent and will be unable to pay these expenses in the event that the Commission is the "prevailing party."

19. Lastly, in response to Judge Todd's Motion for Leave to File Additional Motions, the Commission again directs this Court's attention to Rule 7, Ala. R. P. Ct. Jud., which states in full, "Dilatory motions will be treated with disfavor. Any action which, in the opinion of the Court, would interfere with the prompt disposition of the proceedings pending

before the Court shall be discouraged, and may be avoided by proper order of the Court.”

**WHEREFORE**, premises considered, the Commission respectfully requests that this Honorable Court deny Judge Todd’s Motion to Reconsider and other motions requesting funds and leave to file other motions.

**RESPECTFULLY** submitted this 3rd day of September, 2021.

/s/ Elizabeth C. Bern  
Elizabeth C. Bern  
Attorney for the Commission  
Alabama Judicial Inquiry Commission  
P.O. Box 303400  
Montgomery, AL 36130-3400  
(334) 242-4089  
[elizabeth.bern@jic.alabama.gov](mailto:elizabeth.bern@jic.alabama.gov)



CERTIFICATE OF SERVICE

I hereby certify that I have, on this 3rd day of September, 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, postageprepaid and properly addressed and/or via email as follows:

Emory Anthony, Jr., Esq.  
1117 22<sup>nd</sup> Street South  
Birmingham, AL 35205-2813  
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/s/ Elizabeth C. Bern  
OF COUNSEL



## Judicial Inquiry Commission

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401 ADAMS AVENUE, SUITE 720  
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February 9, 2018

CERTIFIED MAIL

Personal & Confidential

Honorable Tracie Todd  
Circuit Judge  
Courtroom 605, CJC  
801 Richard Arrington Jr. Blvd. N.  
Birmingham, AL 35203

**Re: District Attorney T. Michael Anderton**

Dear Judge Todd:

As required by Rule 6C, Rules of Procedure of the Judicial Inquiry Commission, adopted by the Alabama Supreme Court, you will find enclosed a copy of the complaint filed against you by District Attorney T. Michael Anderton. A copy of all material accompanying the complaint and accumulated or received by the Commission as of this date is also enclosed.

In addition, as required by Rule 6C, this is to advise you that the Commission has decided to investigate the following allegations asserted in District Attorney Anderton's complaint:

1. You, sua sponte, consolidated State v. Billups with five unrelated cases for decision on the constitutionality of a state statute.
2. In violation of § 6-6-227, Code of Alabama, you refused to allow the Attorney General, represented by the chief of the Attorney General's Capital Litigation Division Assistant Attorney General Clay Crenshaw, the opportunity to be heard on the constitutionality of the state statute at issue in State v. Billups and the five consolidated unrelated cases during a court appearance.
3. You prepared your order in advance of the hearing in State v. Billups and five consolidated unrelated cases, and declared a state statute to be unconstitutional without notice to the attorney general or allowing him an opportunity to be heard.



4. There was no evidence presented in the hearing of State v Billups, et al., yet you freely cited external “evidence,” gathered by you during your own ex parte investigation before the hearing, in determining the statute was unconstitutional.
5. Immediately after the hearing in State v. Billups, et al., you gave several interviews to the media in which you discussed your ruling and some of the extrajudicial facts on which the ruling was based.
6. In your Order in State v. Billups et al. and in your comments to the media immediately after issuing your order, you criticized fellow judges for “playing politics,” misconduct, and unethical conduct in handling death penalty cases, without evidence to that effect being introduced in your hearing. See Complaint, Note 2.
7. In your Order in Billups et al., you abused your judicial authority with your gratuitous comments on external issues not raised in the pleadings.
8. In State v. Benn, on November 1, 2016, four months after the Court of Criminal Appeals, a court with supervisory jurisdiction over you, told you that the Alabama statute was constitutional in Billups et al., you refused to consider sentencing under the statute, again stating the same statute was “unconstitutional.”
9. You were disqualified to proceed in the resentencing in State v. Benn because there was reasonable cause to question your impartiality in the sentencing in death eligible cases, yet you proceeded in that case knowing or appearing to know you could not act impartially. See Exhibit F to the Complaint.
10. In State v. Chatman, another death penalty case, after Billups and Benn, you refused to recuse yourself when your impartiality was reasonably questioned based on your comments in Benn and your statements to the press after entering your initial order in Billups et al., knowing or appearing to know you could not act impartially in that matter. See Notes 5-10 of the Complaint.
11. In Chatman, you found the State’s challenge to your impartiality to be moot because the State Legislature had amended the statute in question. In doing so, you ignored the amendment’s provision that the amendment applies only prospectively to crimes committed after the effective date of the amendment.
12. After a motion to suppress was denied in on June 8, 2010 by your predecessor on uncontested evidence, with a finding of fact and conclusions of law, in State v. Breeding, you granted a renewed motion to suppress filed in November, 2014. In granting the renewed motion to suppress, you did not mention the that this was a

- renewed motion which had initially been denied on uncontroverted facts, the order entered by your predecessor, or the decision of the Court of Criminal Appeals in Hernandez v. State affirming that order from the joint motion to suppress hearing, as it related to co-defendant Hernandez.
13. After your ruling in Breeding, the State took a pre-trial appeal in which the Court of Criminal Appeals Ordered a transcript of the evidence of the original Motion to Suppress hearing, and remanded the case to you for you to give “due” consideration to the original hearing. You did not follow the instructions of the Court of Criminal Appeals. Rather than consider the transcript submitted to you by your supervisory court, you informed the court that, because the State did not cite to you specific portions of that record (which contained only the motion to suppress hearing) and, in your opinion, “due” consideration only required you to consider what the State pointed out as relevant, there nothing further for you to consider. You instructed the appellate court if the court disagreed and felt you should have to read the whole transcript to let you know and you would then do so. The Court of Criminal Appeal reversed your ruling and ordered you to deny the renewed motion to suppress.
  14. In the cases of State v. Kemp, CC-2015-2863 and CC-2015-2864, you again decided an issue based on matters not pled and evidence not introduced and subject to cross-examination in granting a defense motion to disqualify the DA based on an alleged conflict of interest where the defense did not carry its burden to establish the violation of a constitutional right.
  15. In Kemp, decided by you on November 1, 2016, by considering evidence derived from your own independent investigation, you again failed to heed earlier advice of the Court of Criminal Appeals in Billups, concerning deciding matters based on your opinion or on external evidence rather than strictly relying on matters introduced in evidence.
  16. In Kemp, after the DA advised you of the extent of prosecutorial discretion in dismissing cases, you continued to allow the defense to call assistant or deputy DA’s as witnesses to testify as to the extent of the investigation by each, even though the defense had not met its burden of establishing the violation of a constitutional right.
  17. In your order disqualifying the DA in Kemp, you found the DA’s Office guilty of racial discrimination based on facts that were not a part of the case and which the DA had no opportunity defend or cross examine.

18. You have repeatedly asserted in open court that the DA's Office acts in a racially discriminatory manner without allowing the DA to defend against your prejudicial assumptions formed outside the matter on trial.
19. You have repeatedly asserted that DDA Rigs Walker acts in a racially discriminatory manner.
20. You used race as a determining factor in rejecting the State's recommendation of probation for Defendant Jon Norris, a mentally ill white man with essentially no prior record because, without your considering the prior history of each, the state recommended prison for a black woman, Defendant, Alyshia Boone, who was arrested on a probation violation and threatened to find someone to kill the arresting officer. See n. 22 et seq. of the complaint.
21. In State v. Alyshia Boone, you sua sponte injected racial discrimination regarding the State's proposed sentence into the matter, and relied on facts outside the record of that case.
22. Political motivation was behind your determination in the Riggs Walker matters as evidenced by your campaign contribution to his opponent. See n. 22 of the complaint.
23. Political motivation was behind your continued refusal to acknowledge Alabama appellate authority on the constitutionality of the death penalty statute in Benn in the days leading to a partisan election. See n. 22 of the complaint.
24. You have ordered certain Deputy District Attorneys not to return to your court room although there are numerous cases assigned to you in which the specific Deputy DA represents the state.
25. You have made public attacks against attorneys including but not limited to charging them with racial discrimination or motivation in the handling of cases.
26. You have used race as a determining factor in some of your decisions.
27. You banned DDA Gonzalez from your courtroom after a disagreement over a jury argument in a death penalty case.
28. When DDA Gonzalez inquired as to whether he could appear in your courtroom on his upcoming cases, you notified the sheriff that he was mentally unstable and his authority to carry a gun in the courthouse should be revoked and that you needed additional security.

29. You charged DDA Gonzalez with contempt for matters occurring in your court, and set the hearing for a later date but did not recuse yourself from that hearing, even when requested to do so.
30. After charging DDA Gonzalez with contempt, you berated him to a member of your staff.
31. You cleared the courtroom, instructed your court reporter to go off the record, and then banished and berated DDA Gonzalez.
32. You charged Defense attorney Derrick Collins with contempt for, among other matters, being rude and argumentative with the court and leaving the courtroom during a proceeding when in fact you had ruled and the proceeding was over by the time Mr. Collins left.
33. While you failed to recuse in the contempt concerning Mr. Gonzalez, you did recuse in the matter concerning Mr. Collins in which Judge Nail, who was assigned to hear the contempt, found there was no contempt and that the recordings of the case did not support your findings of fact.
34. You failed to appear before Judge Nail in the contempt hearing for Mr. Collins although you were the prosecuting party and ordered to appear.
35. You took a six-month paid leave of absence rather than the traditional six or eight weeks of paid leave on the birth of your child and refused to work with other judges to have your case load covered.
36. You took paid leave for a sabbatical (six weeks) to study at an out-of-state university and refused to work with your fellow judges to cover your dockets and work load.
37. You excluded the public from your courtroom because security was not provided according to your specifications despite a defendant's constitutional right to a public trial.

If you would like to respond to these allegations, the Commission requests you provide a written response by March 9, 2018. If you wish to respond and any material allegation is true, it would be helpful if you would include a statement of the surrounding facts, an explanation of your conduct, and your argument as to why the conduct, if true, does not violate the Canons, as well as any other comments you wish the Commission to consider.

Judge Todd  
February 9, 2018  
Page 6

The Commission appreciates your cooperation in this matter. Please be reminded these allegations are those of District Attorney Anderton. The Commission has not yet made any finding or determination regarding his allegations.

If you have any questions, please contact the Commission's executive director, Ms. Jenny Garrett.

Sincerely,

JUDICIAL INQUIRY COMMISSION

A handwritten signature in black ink, appearing to read "Billy C. Bedsole". The signature is fluid and cursive, with a long horizontal stroke at the end.

Billy C. Bedsole  
Chairman

Enclosed:      Complaint  
                    Accumulated Material



## Judicial Inquiry Commission

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October 31, 2018

CERTIFIED MAIL

### Personal & Confidential

Honorable Tracie Todd  
Circuit Judge  
Courtroom 605, CJC  
801 Richard Arrington Jr. Blvd. N.  
Birmingham, AL 35203

### **Re: Complaint by Mr. Michael Anderton, as Supplemented**

Dear Judge Todd:

As required by Rule 6C, Rules of Procedure of Judicial Inquiry Commission, adopted by the Alabama Supreme Court, you will find enclosed a copy of the supplement to the complaint filed against you by Mr. Michael Anderton. A copy of all material accompanying the complaint and accumulated or received by the Commission as of this date is also enclosed.

In addition, as required by Rule 6C and 6D, this is to advise you that the Commission has decided to expand its investigation, see the Commission's February 9, 2018 letter to you, by investigating the following additional allegations asserted in or derived from Mr. Anderton's supplemental complaint:

1. You continued to preside and act in State v. McMullen, in which the Court of Criminal Appeals had declared you to be disqualified and had ordered your recusal—contrary to clear law that a judge may not take any action in a case in which he/she is disqualified.
2. You expropriated executive-branch authority by determining which assistant district attorney may practice in your court.
3. You filed a Bar complaint against Mr. Anderton in retaliation for his filing a JIC complaint against you.
4. You presided in several cases in which, as noted by the Court of Criminal Appeals, your impartiality could reasonably be questioned. These cases include, but may not be limited to:



- a. State v. Chapman, CR-16-0722
  - b. State v. Benn, CR-16-0137 (dismissed, but raised by the Court in Chapman)
  - c. State v. McMullen, CR-16-1242
  - d. State v. Salvagio, CR-17-0095
5. You did not check the status of the appeal of State v. McMullen, before you issued an order in that case.
  6. You disqualified an attorney from practicing in your courtroom without issuing a clear order to that effect and stating the reasons for that action.
  7. You allow your personal feelings to influence your judicial conduct and demeanor: you feel that you are disrespected and you have to demand respect.
  8. You disqualified the Office of the District Attorney in State v. Kemp, without considering the law pertaining to specific grounds for which a judge may disqualify the office of district attorney from the case.
  9. You have failed to maintain professional competence in the law, including the law pertaining to the death penalty, judicial administration, appellate procedure, effect of appellate orders or the trial court's jurisdiction while a case is on appeal, and judicial disqualification.
  10. In a number of instances, you went "off the record" when discussing issues before you.
  11. You were disqualified from Petric v. State, a Rule 32 proceeding, for questioning Mr. Salvagio regarding his political contributions to your opponent during your election campaign.

If you would like to respond to these allegations, the Commission requests you provide a written response by November 28, 2018. If you wish to respond and any material allegation is true, it would be helpful if you would include a statement of the surrounding facts, an explanation of your conduct, and your argument as to why the conduct, if true, does not violate the Canons, as well as any other comments you wish the Commission to consider.

A "Notice of Appearance of Counsel" is attached for you to confirm that you intend for the Commission to be available to your counsel in regard to these additional allegations.

Judge Todd  
October 31, 2018  
Page 3

The Commission appreciates your cooperation in this matter. If you have any questions, please contact the Commission's executive director, Ms. Jenny Garrett.

Sincerely,

JUDICIAL INQUIRY COMMISSION

A handwritten signature in black ink, appearing to read "Billy C. Bedsole". The signature is fluid and cursive, with the first name "Billy" and last name "Bedsole" clearly distinguishable.

Billy C. Bedsole  
Chairman

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Enclosed: Supplemental Complaint  
Notice of Appearance form