

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**

NOV - 4 2021

COURT OF THE JUDICIARY  
Rebecca C. Oates  
Secretary

JUDICIAL INQUIRY COMMISSION'S SECOND OBJECTION TO  
NOTICE OF EXPERT TESTIMONY AND MOTION TO EXCLUDE

COMES NOW, the Judicial Inquiry Commission (hereinafter "the Commission") and hereby objects to Judge Todd's notice of witness Leroy Maxwell, a purported expert in death penalty litigation, which was at the conclusion of her Motion to Strike Commission Objection to Expert Testimony, and a separate Notice of Expert filed today, November 4, 2021. The Commission further objects to Judge Todd calling Mr. Maxwell as an expert witness and moves to exclude his testimony from the trial scheduled before this Honorable Court to begin on November 15, 2021, for two reasons: (1) the testimony is improper, unnecessary, and wholly irrelevant; and (2) the late notice violates this Court's scheduling order and prejudices the Commission. As grounds for its opposition and motion to exclude, the Commission states as follows:

1. First, Mr. Maxwell could offer no relevant testimony.

Regarding the death penalty, Judge Todd was not charged because she got a particular decision legally wrong. Rather, the charges against her include: failing to know and/or disregarding controlling decisions of the Alabama Supreme Court and Alabama Court of Criminal Appeals; ignoring the clear provision of a newly-passed act declaring that act should not apply retroactively; disregarding case law clearly prohibiting judicial interference with prosecutorial discretion; injecting irrelevant issues, extraneous facts, and issues not raised by the parties in hearings and orders; failing to disqualify when her impartiality might reasonably be questioned; displaying inappropriate judicial temperament and demeanor; continuing to defend her decisions despite contrary findings from the Court of Criminal Appeals; and ignoring orders from the appellate courts to recuse.

2. Testimony about the propriety of the death penalty, the law concerning particular aspects of the death penalty, specifics about the process of litigating a death penalty case, or opinions about Judge Todd's rulings in death penalty cases would not be relevant in any way. It would serve only to dramatically increase the issues in this case, distracting from the actual issues presented in the Commission's Complaint.

3. Moreover, even if relevant, allowing a lawyer experienced in death penalty litigation to testify as to his legal conclusions and the application of legal definitions to the facts of this case is entirely improper.

4. The Alabama Supreme Court has consistently said that it is improper for a party to offer witnesses who are experts in a particular area of the law: “Generally, a witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition.” DISA Indus., Inc. v. Bell, 272 So. 3d 142, 153 (Ala. 2018) (quoting Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 852 (Ala. 2002)).

5. Presumably, that is precisely what Mr. Maxwell would testify about. He would offer legal conclusions or express his opinion about how legal definitions in the area of death penalty litigation apply to the facts of this case.

6. Second, this notice should be rejected by this Court because it comes too late.

7. On September 10, 2021, this Court entered its Amended Scheduling Order requiring parties to submit potential witness lists by

September 17, 2021, requiring depositions to be completed by October 22, 2021, and requiring completion of all discovery by October 30, 2021.

8. Judge Todd's list of potential witnesses named 60 individuals but failed to include Mr. Maxwell.

9. We are past the deadline for depositions and, indeed, past the deadline for all discovery to be complete.

10. The Commission would suffer prejudice if Mr. Maxwell were permitted to testify—especially at this late stage—because he was noticed only five business days before trial.

11. Furthermore, even if Mr. Maxwell were available to sit for a deposition at this late stage, the Commission is engaged in other trial preparations and has no opportunity to prepare for or take his deposition or to obtain its own expert at this point.

12. Briefly, regarding Judge Todd's answer to the Commission's objections to Professor Abbe Smith's testimony, the Commission notes that Judge Todd's Motion to Strike includes only a single conclusory sentence arguing why Professor Abbe Smith's testimony should be admissible, claiming that the "testimony will not be proffered to invade the province of the Court." She does not address legal authorities offered

by the Commission, nor does she provide any competing authorities.

13. Instead, she primarily discusses her lack of funding, the delay between the initial complaint and trial, and the fact that two state agencies are “prosecuting” her.<sup>1</sup> She does not explain how any of those considerations have anything to do with the admissibility of expert testimony regarding the law or why they would excuse the gross tardiness of her notices of these experts.

14. Finally, regarding the six additional motions attached to the Motion to Strike that were filed on August 31, 2021, the Commission assumes that they have been attached for informational purposes only and are not an attempt to renew those motions. Aside from the Motion for Leave to File Additional Motions, all of these were previously denied by this Court by order on September 10, 2021.

**WHEREFORE**, premises considered, because the testimony would be improper, irrelevant, and unnecessary and because Judge Todd’s late notice violates this Court’s scheduling order and prejudices the

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<sup>1</sup> Judge Todd is incorrect. The Commission is the sole entity bringing this case before the Court of the Judiciary. There is no “combined investigation” or “prosecution” by the Commission and Jefferson County District Attorney’s Office. See Ala. Const. 1901, Art. VI, § 156.

Commission, the Commission respectfully requests that this Honorable Court disallow testimony from Judge Todd's expert Leroy Maxwell.

Respectfully submitted this the 4th day November, 2021.

/s/ Elizabeth C. Bern

Elizabeth C. Bern

/s/ John A. Selden

John A. Selden

/s/ Jacob D. Jackson

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 4th day of November, 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 and/or via email as follows:

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