

BEFORE THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:

STATE OF ALABAMA JUDICIAL INQUIRY  
COMMISSION

V.

THE HONORABLE TRACIE A. TODD  
CIRCUIT JUDGE, BIRMINGHAM DIVISION,  
CRIMINAL DIVISION, JEFFERSON COUNTY, ALABAMA

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**FILED**

DEC 10 2021

COURT OF THE JUDICIARY  
Rebecca C. Oates  
Secretary

Case # 58

**MOTION TO RECONSIDER AND REQUEST FOR CLARIFICATION**

Comes now, Judge Tracie A. Todd (Defendant), by and through counsel, and requests this honorable Court to reconsider the December 3, 2021 order holding Judge Todd in violation of the Alabama Judicial Canons of Ethics. The allegations in the Complaint as presented by the Alabama Judicial Inquiry Commission (Commission) reflected a fundamental lack of understanding and respect for the independence expected of trial judges, and failed to prove that Judge Todd violated the Alabama Canons of Judicial Ethics. Alabama Courts are bound by and subordinate to the United States Supreme Court. Supported by the United States Supreme Court and Constitution, the Alabama Constitution, including but not limited to the Doctrine of Condonation, Laws of Equity, and Due Process, we petition this Court to reconsider based on the following:

**PROCEDURAL BACKGROUND**

On or about December 22, 2017, the Jefferson County District Attorney's Office, by and through interim District Attorney T. Michael Anderton, filed an ethics complaint against Judge Todd with the Commission. Anderton's complaint was filed within three weeks of Judge Todd requesting that a "problematic" Deputy District Attorney not return to her courtroom, and ahead of Judge Todd's 2018 reelection bid. Despite the heavy publicity and scrutiny in the media and legal community,

Judge Todd was reelected to a second term without opposition from a challenger. The Commission investigated Judge Todd for nearly three years before filing this Complaint with the Court in April, 2021. During the investigation, Judge Todd remained in office, executing her duties as a twice elected Alabama trial judge.

On April 30, 2021, Judge Todd petitioned the Court to dismiss the Complaint in part because the Court lacked jurisdiction. (*See Exhibit 1: Defendant's Brief in Support of The Petition to Dismiss*). On June 22, 2021 the Court denied Judge Todd's petition in part because the allegations of subject matter jurisdiction were not clear and that there was no evidence that the issue of jurisdiction was raised with the Commission during its investigation. On July 2, 2021, Judge Todd petitioned the Court to reconsider the denial and presented evidence that the allegations related to subject matter jurisdiction were raised during the Commission's Investigation. (*See Exhibit 2: Petition for Relief and Motion to Reconsider*). Judge Todd also presented evidence that the events alleged in the Complaint occurred nearly seven years ago, and were widely publicized.

The Commission had several years to bring a lawful complaint, but did not. Instead, the Commission improperly commenced an investigation based on an unverified, fatally deficient complaint in violation of Alabama law. On July 9, 2021, this honorable Court denied Judge Todd's petition and motion to reconsider. Trial commenced in this cause on November 15, 2021 through November 16, 2021. The Court went into recess and resumed on December 1, 2021 and December 2, 2021. At trial, Deputy District Attorney (DDA) Gonzalez testified that interim DA Danny Carr, Chief DDA Joe Roberts, DDA Patrick Lamb, and DDA Drew Herring were responsible for assisting him with drafting the complaint. The complaint drafted by interim DA Danny Carr, Chief DDA Joe Roberts, DDA Lamb, DDA Herring and DDA Gonzalez, in turn, became the foundation of the Commission's Complaint. Judge Todd preserved the record by petitioning the Court for a directed verdict at the close of the Commission's case-in-chief and at the close of Judge Todd's case-in-chief.

## EMBROILMENT WITH THE DISTRICT ATTORNEY'S OFFICE

The Complaint centers on allegations of “embroilment,” by which it means that Judge Todd failed to serve as a neutral and detached judicial officer but “join[ed] the fray.” Complaint ¶ 1 & n.1. This is the theme that runs through the Complaint. The concept of embroilment originated in contempt-of-court cases such as *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), in which a state court judge who was denounced, insulted and slandered by a trial lawyer became, in the Supreme Court’s view, too “embroiled in a running, bitter controversy” to impartially adjudicate contempt of court charges against that lawyer and should have referred the case to a different judge. *Id.* at 465. Importantly, the Court did not blame the trial judge for being “embroiled” in the controversy but observed that any judge who was so vilified “necessarily becomes embroiled.” *Id.* Further, the Court emphasized that not every attack on a judge disqualifies him from sitting,” and distinguished an earlier casewhere a judge properly adjudicated summary contempt charges against a disruptive and recalcitrant lawyer because the lawyer did not insult the judge’s integrity in a manner that “carr[ied] such a potential for bias as to require disqualification.” *Id.* at 465-66. The decision made clear that it is the rare case where a judge is so personally victimized by the contemptuous conduct in question that the judge may not hold the offender summarily in contempt. A review of the Complaint would persuade a reasonable person that the allegations that attempts to cast Judge Todd as unethically over-involved or “embroiled” in the cases she oversaw rests on a misunderstanding of judicial ethics and an unfair characterization of the described conduct.

Although the Complaint does not elaborate on the factual background, it discloses that Judge Todd held a DDA Gonzalez, in contempt of court for willfully disregarding the court’s instructions. Complaint ¶ 104. The Complaint does not dispute that the trial transcript supported Judge Todd’s summary contempt finding. Nonetheless, it alleges that she should have disqualified herself from

making that finding because “her conduct indicat[ed] embroilment with DDA Gonzalez.” *Id.* ¶ 107. The allegation misconceives the problem of embroilment in the criminal contempt context. The question is whether the alleged contemnor so vilified the judge that, from an objective perspective, no judge could reasonably be expected to rule fairly. Nothing in the Complaint suggests that was the case here, and nothing at trial supports such a conclusion. Nor is there a suggestion that Judge Todd made comments that expressed personal bias. Rather, the premise of the Complaint against Judge Todd is that the very contempt finding and sanction were evidence of a lack of impartiality. By that measure, no judge could ever hold contumacious parties or lawyers in contempt.

Further, the Complaint asserts that Judge Todd lacked authority to order DDA Gonzalez not to return to court, as a sanction for contempt and out of concern for safety occasioned by DDA Gonzalez’s “willful disregard for court instructions or displays of mental instability.” The Complaint does not allege that Judge Todd’s concern was factually unfounded but nevertheless regards the order as beyond the court’s authority, whether as a sanction or precaution. Although larded with citations to case law, the Complaint fails to acknowledge authority for precisely this sanction.<sup>1</sup> Ultimately, the question of Judge Todd’s authority to adjudicate summary contempt charges and to “banish” a lawyer from her courtroom are questions of constitutional and procedural law on which there may be room for disagreement. The appropriate context in which to challenge the judge’s action is in an appellate court, not in a judicial disciplinary hearing.

During his testimony, DDA Gonzalez testified:

1. That he did not respect Todd. DDA Gonzalez denied being upset with Judge Todd for sending a letter of complaint against him to the District Attorney’s Office because “I don’t put much stock” into what she says, and “I would put my reputation up against

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<sup>1</sup> See Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 Fordham L. Rev. 1179, 1191-93 (2001) (citing authority for banning prosecutors from the courtroom for engaging in misconduct).

hers any day”;

2. That he was working with four other attorneys in his office DDA Patrick Lamb, DDA Drew Herring, Chief Deputy DA Joe Roberts and Interim District Attorney Danny Carr to compile a complaint against Judge Todd. In doing so, DDA Gonzalez kept records and notes to submit to the other attorneys for composition of the complaint;

On the other hand, five witnesses, called by both parties, proffered testimony of DDA Gonzalez’s misconduct:

1. Cetonia Parham, judicial assistant to Judge Todd, testified that DDA Gonzalez sent a sexually explicit text message to her. Ms. Parham further testified that DDA Gonzalez was often unprepared for court. Ms. McCoy testified that DDA Gonzalez’s unpreparedness affected the administration of justice to the extent that victims would call the courtroom seeking assistance with reaching DDA Gonzalez for information on cases and cases being dismissed because DDA Gonzalez failed to subpoena necessary witnesses. Ms. Parham explained that DDA Gonzalez exhibited mood swings, and that it was understandable that Judge Todd was concerned about the safety and integrity of the courtroom. Ms. Parham, a retired police detective, testified that Judge Todd was the best employer that she has worked with. Ms. Parham described Judge Todd as kind, smart and attractive;
2. Courtney Roberts, court reporter for Judge Todd, testified that DDA Gonzalez removed a sex toy from an evidence box during a break in a rape trial and waived it in her face causing dried bodily fluids to fall on her desk.
3. Tiara Hudson, Jefferson County Chief Deputy Public Defender (PD), testified that DDA Gonzalez was often unprepared and had a general reputation in her office as being a “lazy DA.” PD Hudson testified that DDA Gonzalez was often disrespectful

to Judge Todd, and on one occasion yelled at Judge Todd so loud that it could be heard from behind closed doors in the courtroom. In her testimony, PD Hudson described Todd as one who follows the rules and requires excellence from the litigants. PD Hudson described Judge Todd as a fair and compassionate judge. PD Hudson attributed her growth as an attorney in part to working with Judge Todd;

4. Chuantae Brown, DDA for the Bessemer Division and former PD, testified that she enjoyed working with Judge Todd. DDA Brown testified that Judge Todd required the litigants to be prepared and professional. DDA Brown explained that she looked up to Judge Todd as a mentor and great judge. DDA Brown described DDA Gonzalez as unprepared and exhibiting mood swings. DDA Brown stated that she looked forward to cases prosecuted by DDA Gonzalez when she was a defense attorney, because the case was going to be dismissed if she requested a trial.
5. Sammie Shaw, Chief Deputy Public Defender, testified that Judge Todd is an excellent judge. PD Shaw described Todd as smart, fair and professional. PD Shaw explained that he observed DDA Gonzalez in Judge Todd's courtroom and described DDA Gonzalez as disrespectful. PD Shaw further testified that in serious cases that he tried with DDA Gonzalez, the verdicts were not guilty or were dismissed.
6. Tabitha Champion, former trial coordinator for DDA Gonzalez, testified that DDA Gonzalez would often lay his head on the counsel table while court was in session.

Each witness testified to some extent that DDA Gonzalez's misconduct affected the outcome of cases, hindered the administration of justice and offended those involved. Testimony from PD Hudson, DDA Brown and PD Shaw indicated that Judge Todd DDA Gonzalez exhibited abnormal and disruptive behavior for more than a year. The witnesses testified that Judge Todd never demonstrated a bias toward DDA Gonzalez despite his behavior. On the other hand, the witnesses

described Todd's demeanor as professional, fair, kind and compassionate. Chief Deputy District Attorney Joe Roberts acknowledged that the leadership in the District Attorney's Office received complaints regarding DDA Gonzalez from Judge Todd. Judge Clyde Jones testified that he conducted a mediation after Judge Todd asked DDA Gonzalez not to return to resolve the ongoing issues related to DDA Gonzalez, but no resolution was reached.

Judge Todd demonstrated extraordinary restraint in addressing the frequent misconduct exhibited by DDA Gonzalez. The Commission argues that Judge Todd should have held DDA Gonzalez in contempt instead of "banishing" him after nearly a year of misconduct. However, the testimony showed that much of DDA Gonzalez's behavior was not associated with a particular case. Judge Todd attempted to discuss her concerns with DDA Gonzalez, reported the misconduct to DDA Gonzalez's superiors, and participated in a mediation called by Judge Jones to resolve the situation. Nonetheless, evidently in retaliation for asking DDA Gonzalez to leave the courtroom, the District Attorney's Office scoured Judge Todd's record going back to 2014 for evidence of alleged bias which it then incorporated into a lengthy, accusatory, unverified instrument that was filed 14 days after DDA Gonzalez was asked not to return.

In addition to the District Attorney's Office filing an unverified complaint with the Commission, DDA Gonzalez simultaneously filed nearly 20 retaliatory petitions for writ of mandamus with the Court of Criminal Appeals seeking to have Judge Todd removed from cases assigned to her courtroom. The Court of Criminal Appeals dismissed Gonzalez's petitions. DDA Gonzalez was reassigned to another courtroom, and remains employed with the Jefferson County District Attorney's Office. Judge Todd was made subject of an ethics complaint, remained under investigation for nearly four years and was brought before the Court at trial. This circumstance is egregiously unfair and unprecedented.

In our judgment, both the process and the charges against Judge Todd pose a threat to all

judges' independence in criminal cases, because they set a precedent for prosecutors retaliating against judges by filing a disciplinary complaint alleging bias anytime they are dissatisfied with a judge's rulings. On this point, the Commission called DDA Matt Casey, DDA Neal Zarzour, DDA Gonzalez and Chief Deputy Roberts to testify. All of these men testified under oath that they did not consider Judge Todd's rulings adverse to their position to be legal decisions. Chief Deputy Roberts maintained that they were just "decisions."

Likewise, the Complaint misconceives the expectations of judging insofar as it accuses Judge Todd of being biased or "embroiled" in cases in which she questioned the prosecution about the decision whether to move to dismiss a case, raised additional concerns that defense counsel had not articulated, and drew on her prior prosecutorial experience to recognize the prosecutor's office's deviation from its ordinary procedure in *State v. Kemp*. In ruling on motions in criminal cases, judges are not required to be passive and simply to rubberstamp prosecutors' "discretionary" decisions; and a judge is not a tabula rasa but may take account of prior professional experience regarding criminal procedure. The District Attorney did not file a motion to reconsider challenging Judge Todd's findings based on a review of her docket nor did it file an appeal. Instead, the District Attorney improperly used the mandamus and disciplinary process to challenge an adverse ruling issued by Judge Todd. At trial, it was established that the District Attorney's Office violated the Alabama Crime Victim's Act by not notifying a victim in the *Kemp* and related cases. Judge Todd's findings to disqualify the District Attorney's Office in *Kemp* was based in part on this violation. Nonetheless, on her own accord, Judge Todd recused from the *Kemp* proceedings.

The trial record is replete with evidence of DDA Gonzalez's prolonged and frequent cavalier attitude, chronic unpreparedness, lack of communication with witnesses and victims, and unpredictable mood swings. The misconduct perpetuated by DDA Gonzalez was not only directed at Todd and others, but undoubtedly had an adverse impact on courtroom decorum and the

administration of justice. Judge Todd acted reasonably and appropriately by reporting DDA Gonzalez's misconduct to the District Attorney's Office. When the District Attorney ignored Judge Todd's concerns, Judge Todd acted within her authority to maintain the integrity of the courtroom. The allegations regarding Judge Todd's embroilment with the District Attorney's Office was not proven by clear and convincing evidence and was due to be dismissed. We further move this honorable Court to clarify its December 3, 2021 order to reflect its findings on allegations related to these charges.

### **Disregard for Appellate Authority**

A review of the Complaint and the testimony at trial leads a reasonable person to conclude that the other charges are largely of a piece with the allegations of embroilment, in that they arise out of a contested view of the law. This is most obviously true of the Complaint's central allegations regarding Judge Todd's rulings in four capital cases following the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016). *Hurst* struck down Florida's capital sentencing scheme, under which the jury served an advisory function and the trial judge decided whether to impose the death penalty. After roughly 55 pages of briefing from the defense and prosecution, Judge Todd issued a 28-page decision in the four cases holding that Alabama's sentencing scheme was unconstitutional in that it suffered from a similar infirmity.

The *Hurst* decision created legal uncertainty across the county, as judges grappled with the implications on related state laws. At trial, Judge Clyde Jones testified that he and other judges across the state had grave concerns about the *Hurst* decision in Alabama. In an email distributed among trial judges across the state following *Hurst*, Judge Jones stated, "I think we have a problem." Judge Jones, along with a number of judges across the state suggested that the trial judges "get with" the legislature to draft legislation to address the infirmities in the Alabama death penalty sentencing scheme. *Hurst* motions were being filed by defense attorney's across the state

petitioning the Alabama trial courts to hold the Alabama death penalty sentencing scheme unconstitutional in light of the Supreme Court's decision in *Hurst*.

Nearly six years after *Hurst*, Florida judges continue to reckon with the aftermath of the decision. See: *Storm of the Decade: The Aftermath of Hurst v. Florida & Why the Storm Is Likely to Continue*, Melanie Kalmanson, 74 U. Miami L. Rev. Caveat 37 (2020); *Florida Supreme Court "Recedes" from Major Death Penalty Decision Creating Uncertainty About Status of Dozens of Cases*, American Bar Association Groups, Death Penalty Representation Project, Project Press Spring 2020; *Will Florida's new Supreme Court reconsider landmark death row decision?* News Service of Florida, May 2019.

The Commission argued at trial that Judge Todd disregarding the appellate decisions, and cited Judge Todd's failure to recuse in *State v. McMullin* and *State v. Bohannon* in issuing a judicial override in *State v. Marcus Benn*. In her response to the Court of Criminal Appeals regarding these allegations, as proffered by the Commission, Judge Todd explained the circumstances leading to these oversights, and that she adjudicated over 4,000 cases at the time. Of the 4,000 cases the Commission offered these two unrelated instances as a pattern of Judge Todd disregard for appellate authority.

In the instance regarding *McMullin*, one of the four cases regarding the *Hurst* order, Judge Todd's judicial assistant Ms. Parham testified at trial that Judge Todd was out of the country when the Alabama Court of Criminal Appeals issued an order for Judge Todd to recuse. Ms. Parham further testified that the case was set for a status hearing, but when Judge Todd learned of the appellate order, she instructed Ms. Parham to enter an order of recusal. Ms. Parham complied, and entered the order.<sup>2</sup> In the Complaint, the Commission makes reference to Judge Todd's response

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<sup>2</sup> The Court may take judicial notice that Judge Todd entered an order of recusal in *McMullin*'s co-defendant's case (*State v. Stanley Chatman*) without incident prior to the order in *McMullin*. The appellate court's orders of recusal in these cases were issued separately.

to the petitions for writ of mandamus filed with the Court of Criminal Appeals, and offered her responses into evidence. In her response Judge Todd explained the circumstances regarding the appellate court's orders. This Court may take judicial notice that the case involving the four defendants relating to *Hurst*, in *State v. Billups, et.al*, was pending before the Alabama Supreme Court on a writ of certiorari, that was not denied until after Judge Todd's sentencing in *Benn*. Even so, Judge Todd's sentence in *Benn* was consistent with *Bohannon* and lawful under Alabama law at that time.

Furthermore, on the questions of Judge Todd disregarding appellate orders, the District Attorney petitioned the Court of Criminal Appeals to hold Judge Todd in contempt. Again, Judge Todd gave an explanation for her oversights in both cases. The Court of Criminal Appeals declined to hold her in contempt at the District Attorney's request. Instead of appealing Judge Todd's ruling in *Benn*, the District Attorney's Office improperly challenged Judge Todd's legal interpretation on this question in an ethics complaint and through a petition for writ of prohibition. When the Court of Criminal Appeals dismissed the District Attorney's petition, the District Attorney filed a petition for Writ of Mandamus against the Court of Criminal Appeals. It is clear that the District Attorney's office has used extraordinary petitions and disciplinary proceedings against the court when the rulings have not been in its favor. This honorable Court should not endorse such abuses.

In light of the confusion surrounding *Hurst*, the disruptions caused by DDA Gonzalez and operating in the state's largest jurisdiction, the evidence shows that Judge Todd did not willfully disregard appellate orders. The Commission did not prove by clear and convincing evidence that Judge Todd had a bias against the death penalty. The Commission failed to prove that Judge Todd had a duty to recuse on matters related to the death penalty. But when ordered to so, Judge Todd complied with appellate direction. At best, the Commission proved that Judge Todd is human. And under these unprecedented circumstances, being human does not equate to the high standards

required to establish that a judge acted unethically under the canons.

**Judge Todd is entitled to First Amendment Protections and was consistent with relevant authority**

Although Judge Todd's March 2016 death penalty decision was largely devoted to, and predicated on, a review of *Hurst* and other constitutional case law, and a consideration of whether Alabama's sentencing scheme was meaningfully distinguishable from that of Florida for purposes of the constitutional case law, the decision discussed, by way of background, the problems posed by allowing the sentencing judge to override the jury's decision to impose a life sentence, including principally that elected judges are subject to political pressure. As explained at trial, Judge Todd's language in her 28-page order tracked and echoed the dissenting opinion in *Woodward v. State*, 571 U. S. \_\_\_\_ (2013), rendered by U.S. Supreme Court Justice Sonya Sotomayor. In her dissent, Justice Sotomayor expressed direct concerns regarding the influence of politics and electoral pressures on Alabama judges overriding jury verdicts to sentence people to death. Justice Sotomayor's dissent included a number of citations to case law, secondary sources and charts compiled by various organizations and contained in an array of professional literature. The Commission asked this Court to find Judge Todd unethical for echoing the sentiments expressed by a U.S. Supreme Court Justice, and relevant case law and secondary sources cited in the professional literature presented in briefings filed by the litigants and/or in an opinion written by a Justice on the highest court in the land.

In *Petric v. State*, Judge Todd held attorney Charles Salvagio in contempt for disregarding a direct order to discontinue his attempt to tamper with or intimidate witnesses testifying against him at a post-conviction petition for relief from a sentence of death based on ineffective assistance of counsel. DDA Chuntae Brown testified at trial, that she observed the *Petric* hearing and heard Mr. Salvagio testify, as supported by the transcript, that he used the trial to aid in the election of

attorney Amber Ladner who was running for judge. Ms. Ladner was added to the defense team within days of the trial. Mr. Salvagio testified that adding Ms. Ladner to such a high-profile case would be good publicity for her campaign. In the transcript presented by the Commission, it is clear that Mr. Salvagio first raised the consideration of campaigns in a death penalty case. This unfortunate circumstance was consistent with Justice Sotomayor's concerns in *Woodward*. Judge Todd's questioning regarding Mr. Salvagio's contributions to the trial court in *Petric* was not based on a bias against Mr. Salvagio, nor did it impugn the trial court. Instead, it was consistent with the concerns expressed by former Alabama Supreme Court Chief Justice Sue Bell Cobb who described the campaign contribution practice in Alabama akin to "legalized extortion." DDA Brown testified that none of the attorneys from Sidley Austin, Lightfoot Franklin or the two attorneys from the Attorney General's Office objected to Judge Todd's questioning. DDA Brown testified that she did not perceive a bias as she observed. DDA Brown, and other witnesses testified that Mr. Salvagio was observed in Judge Todd's courtroom prior to the *Petric* hearing on numerous occasions. The witnesses testified in this trial that Judge Todd did not display a bias against Mr. Salvagio. Instead, the evidence showed that Mr. Salvagio continued to intimidate, interfere and tamper with witnesses after being admonished by Judge Todd. Judge Todd had an obligation to maintain the decorum of the courtroom until a decision was reached this serious matter involving a death sentence. At trial there was no evidence that a reasonable person could have perceived her questioning to be based on a bias or undermining of the Alabama judiciary. Instead, Judge Todd's questioning was based on legitimate concerns about the possibility of political influence in a death penalty case. Concerns injected initially by Mr. Salvagio. Nonetheless, when instructed by the appellate court to recuse in Salvagio's contempt proceedings for tampering with and intimidating witnesses, Judge Todd complied.

At trial witnesses testified that they observed Mr. Salvagio appearing in Judge Todd's court

on numerous occasions prior to the *Petric* hearing. The witnesses testified that they did not observe Judge Todd demonstrating a bias against Salvagio at any time. Furthermore, Attorney Marc Polson testified that he contributed to Judge Todd's campaign, but never received an appointment from her office. Mr. Polson described her as the kind of judge we want. Former DDA Tom Moore, who worked with Judge Todd during her tenure as a DDA and judge, testified that he attempted to contribute to Judge Todd's campaign, but that Judge Todd would not accept contributions from attorneys who practice before her. There was no evidence that Judge Todd demonstrated any bias, instead there was evidence that Judge Todd went above and beyond to buttress the credibility of the Alabama judiciary even at her own professional expense.

Here, Judge Todd's order interpreting *Hurst* and her questioning in *Petric* was consistent with the opinions of a U.S. Supreme Court Judge and a former Alabama Chief judge.<sup>3</sup> Additionally, her speech is protected by the First Amendment. Although Judge Todd's legal viewpoint maybe out of sync with the prevailing political viewpoints in the state of Alabama, she is nonetheless entitled to the same protections afforded to other judges in this state, and free speech should not be characterized as impugning the integrity of the Alabama judiciary no more than other speech can be described as impugning the integrity of the United States Supreme Court.

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<sup>3</sup> See also Alabama Justices Surrender to Judicial Activism Birmingham News ^ | January 1, 2006 | Tom Parker, where Alabama Supreme Court Justice Tom Parker wrote in an opinion editorial that, "I am not surprised the liberal activists on the U.S. Supreme Court go to such lengths to usurp more political power. I am also not surprised they use such *ridiculous reasoning to try to force foreign legal fads* on America. After all, this is the same court that has declared state displays of the Ten Commandments to be unconstitutional...But I am surprised, and dismayed, that my colleagues on the Alabama Supreme Court not only gave in to this *unconstitutional activism* without a word of protest but also became accomplices to it by citing Roper as the basis for their decision to free Adams from Death Row. The proper response to such *blatant judicial tyranny* would have been for the Alabama Supreme Court to decline to follow Roper in the Adams case....After all, the liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity and other blessings of our great state. We Alabamians will never be able to sufficiently appease *such establishment liberals, so we should stop trying and instead stand up for what we believe without apology*. Conservative judges today are on the front lines of the war against political correctness and judicial tyranny. Happily, Alabama's Supreme Court has a reputation of being one of the most conservative in the nation.

(See *Alabama Justices Surrender to Judicial Activism Birmingham News, January 1, 2006* by Tom Parker).

The Complaint takes the view that in this and other cases, Judge Todd exceeded her legal authority or evidenced bias in a manner deserving of sanction. It alleges, for example, that by citing “secondary sources she had gathered through independent investigation,” and “addressing the ‘life-to-death override epidemic’ in her order,” she “exhibited an apparent predisposition against the death penalty generally,” thereby violating her “duty of detachment and neutrality.” Complaint ¶¶ 13-16. The allegations do not turn on whether Judge Todd correctly perceived the relevant constitutional law – a question that the Supreme Court will never ultimately decide because Alabama changed its capital sentencing law to eliminate the judicial override. Rather, the allegation is that, based on her methodology, as well as on later comments to the press that were almost certainly protected by the First Amendment,<sup>4</sup> Judge Todd was too “bias[ed] against the death penalty” to preside fairly over these cases and should have recused herself. Complaint

¶ 24. These allegations misconceive the judge’s proper role in resolving disputed legal questions and, if accepted, would unduly encroach on judges’ independence. First, judges are permitted to engage in research into secondary authority beyond that cited by the parties; indeed, doing so is a sign of a conscientious judge, not a sign of judicial bias. We should want judges to be well read in the professional literature and to be transparent about their legal influences. The decisions in which judges cite secondary authority from their own (or their law clerks’) research are too numerous to mention. Second, in their opinions, judges may take account of the social and political context in which procedural law is implemented and comment on its relevance. This includes drawing on their professional experience on the bench or previously or other experiences and observations of the word around them. See, e.g., *Hagans v. Levine*, 415 U.S. 528, 552 (1974) (Rehnquist, J., dissenting)

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(“since we have been admonished that we may not shut our eyes as judges to what we know as men, the practical as well as the legal consequences of this decision should be squarely faced”). Furthermore, the briefings filed by the litigants prior to Judge Todd’s March 6, 2016 *Hurst* order, contained an abundance of case citations. Each case citation contained another set of case citations and secondary sources such as law review articles. These law review articles contained another subset of case citations, interviews and articles that led to another subset of professional literature and so on. Although the parties may not have raised the sources directly, as a conscientious judge, based on the contents of her order, it is apparent that Judge Todd delved into a serious review of the professional literature presented to her and the other information cited within.

But, even assuming for the sake of argument that Judge Todd’s approach to constitutional interpretation and opinion writing are somehow inappropriate for an Alabama trial judge, this should be the basis for an appeal, not a disciplinary proceeding alleging judicial bias. Beyond that, even assuming one can fairly infer that Judge Todd is philosophically opposed to the death penalty, which the evidence at trial did not support, that is not the sort of “bias” that necessitates a judge’s recusal. Judges can be expected to form opinions about the law they implement and can be presumed to apply the law fairly, regardless of their opinions. That is particularly true of Judge Todd, who has implemented death penalty legislation in prior cases as prosecutor and judge. Judge Todd’s order made national headlines, but no complaint was filed against her in 2016.

### **Conclusion**

We do not address the Complaint charge by charge. Rather, our point is that a fundamental misconception about a judge’s role runs through the entire Complaint, which persistently characterizes disputed procedural rulings as expressions of judicial bias or “embroilment” or disregard for appellate rulings, and were disproven at trial. The Commission conceded that it does not challenge the correctness of Judge Todd’s rulings. Therefore, it is critical that the Court, should

not, at prosecutors' urging, transform appealable legal rulings, or legitimate judicial inquiry, into the predicate for allegations of judicial bias for which an elected judge can be sanctioned.

We move this court to reconsider the basis of our motion for a directed verdict wherein we argued that the Complaint against Judge Todd should be dismissed under the Doctrine of Condonation, failure of the Commission to prove that the Complaint was based on a verified complaint filed by the District Attorney's Office, the Laws of Equity and the Doctrine of Laches. We further contend that in numerous ways, Judge Todd's constitutional rights have been violated. Judge Todd's motions seeking funding to defend against two state agencies were denied. Judge Todd's request to proffer an expert witness in Judicial Ethics and an expert witness in Death Penalty Litigation were also denied. The Complaint is rife with issues of first impression. The Commission misconceived the application of important legal decisions, and misinterpreted applicable Alabama law. It was critical to Judge Todd's defense to proffer the testimony of experts to assist the Court in reaching a decision that is supported by law.

We further move this honorable Court to clarify its findings. The order presented by the Court does not explicate the specific findings related to each charge. Based on the reasons as set out above and those presented at trial, and at every stage of these proceedings we move this honorable Court to vacate its findings against Judge Todd, and set aside its judgement with prejudice.

Respectfully submitted by Counsel for Judge Todd:

/s/ William Pompey  
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We hereby certify that we have on this 10th day of December 2021 electronically filed the

foregoing with the Court of the Judiciary, and that we have further served a copy by placing the same in the U.S. mail postage pre-paid, and properly addressed as follows:

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Respectfully Submitted,

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