IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:	*	
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TRACIE TODD	*	CASE NO. 61
CIRCUIT COURT JUDGE	*	
BIRMINGHAM DIVISION	*	
CRIMINAL DIVISION	*	
JEFFERSON COUNTY, AL	*	

JUDICIAL INQUIRY COMMISSION'S RESPONSE IN OPPOSITION TO MOTION FOR RECUSAL

COMES NOW, the Judicial Inquiry Commission (hereinafter "the Commission") and hereby files this Response in Opposition to Judge Tracie A. Todd's Motion for Recusal. The Commission objects to Judge Todd's motion and moves this Court to deny it for two reasons: (1) because of Judge Todd's unnecessary and unjustified delay in filing her Motion for Recusal, she has waived the grounds for recusal; and (2) Judge Todd has not met her substantial burden of establishing a reasonable basis for questioning the impartiality of the members of this Court. As grounds for its opposition and motion to deny Judge Todd's Motion for Recusal, the Commission states as follows:

I. Waiver

1. As the Alabama Supreme Court has stated:

> A motion to recuse "should be filed at the earliest opportunity because 'requests for recusal should not be disguises for dilatoriness on the part of the [moving party].'" Johnson v. Brown, 707 So. 2d 288, 290 (Ala. Civ. App. 1997) (quoting Baker v. State, 52 Ala. App. 699, 700, 296 So. 2d 794, 794 (Ala. Crim. App. 1974)). The issue of recusal may be waived if it is not timely asserted. Knight v. NTN-Bower Corp., 607 So. 2d 262, 265 (Ala. Civ. App. 1992).

Ex parte Parr, 20 So. 3d 1266, 1270 (Ala. 2009) (quoting Price v. Clayton, 18 So. 3d 370, 376 (Ala. Civ. App. 2008)).[1]

2. On March 16, 2022, the Commission filed a Complaint with this Court charging Judge Todd with numerous violations of the Alabama Canons of Judicial Ethics. Complaint, In re Todd, No. 61 (Ala. Ct. Jud. Mar. 16, 2022).

3. All of the facts forming the basis of Judge Todd's Motion for Recusal—that Judge Elisabeth A. French and other members of this Court sat together on COJ No. 58 and that Judge French may be a witness in COJ No. 61—were known to Judge Todd at the moment the present Complaint was filed on March 16, 2022.

4. Indeed, Judge Todd's Motion for Recusal notes that it is "[b]ased upon the contents of the Complaint." Mot. for Recusal at 1.

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[1] See also Rule 7, R. P. Ala. Ct. Jud. ("Dilatory motions will be treated with disfavor.").

5. On March 17, 2022, the day after the Commission's Complaint was filed, Judge French filed a Notice of Recusal. Mot. for Recusal, Ex. A.

6. Yet, Judge Todd did not file her Motion for Recusal "at the earliest opportunity." Ex parte Parr, 20 So. 3d at 1270 (cleaned up). Rather, she waited more than two and a half months to file.

7. Moreover, on May 10, 2022, this Court stated that "parties should expect a scheduling order setting forth discovery deadlines and a date for trial." Order on Application to Appear Pro Hac Vice, In re Todd, No. 61 (Ala. Ct. Jud. May 10, 2022). And on May 19, 2022, this Court entered an Order setting trial for August 15 and 16, 2022. Order, In re Todd, No. 61 (Ala. Ct. Jud. May 19, 2022).

8. Yet, Judge Todd did not file her Motion for Recusal until June 3, 2022, almost three weeks after this Court's May 10 order and more than two weeks after this Court's May 19 order setting trial.

9. In Ex parte Parr, the Alabama Supreme Court faulted the movant for filing a motion to recuse fourteen months after the lawsuit began and almost three weeks after the entry of a scheduling order. Because the movant knew or should have known the facts underlying her motion to recuse but delayed filing without justification, the Court held

that she "waived any right to seek [the judge's] recusal." Ex parte Parr, 20 So. 3d at 1270.

10. Likewise, Judge Todd knew all of the facts underlying her Motion for Recusal on March 16, 2022. Yet, without justification, she waited months after the Complaint was filed and more than two weeks after this Court set the case for trial to file her Motion for Recusal.

11. Judge Todd's Motion for Recusal is untimely. Thus, she has waived any right to seek recusal of the members of this Court.

II. Alabama Law Does Not Require Recusal

A. The Law

12. Even if this Court declines to find that Judge Todd has waived the issue of recusal, she has failed to meet the substantial burden of establishing a reasonable basis for questioning the impartiality of the members of this Court.

13. "All judges are presumed to be impartial and unbiased." Salvagio v. State, 274 So. 3d 310, 314 (Ala. Crim. App. 2018) (cleaned up); see also, e.g., Ex parte Ala. Dep't of Rev., No. 1190826, 2020 WL 6374805 (Ala. Oct. 30, 2020) ("[T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.")

(cleaned up); Henderson v. G & G Corp., 582 So. 2d 529, 530 (Ala. 1991) ("[T]here is a presumption that a judge is qualified and unbiased."); Baldwin v. Baldwin, 160 So. 3d 34, 37 (Ala. Civ. App. 2014) ("Prejudice on the part of a judge is not presumed.").

14. The decision whether to recuse is "a matter within [a judge's] discretion." Price, 18 So. 3d at 376; see also, e.g., Keaton v. State, No. CR-14-1570, 2021 WL 5984951, at *64 (Ala. Crim. App. Dec. 17, 2021) ("[A] judge's ruling on a recusal motion is reviewed for an abuse of discretion."); Ex parte Siegel, No. 2200703, 2021 WL 3009695, at *5 (Ala. Civ. App. July 16, 2021) (quoting Ex parte Hill, 508 So. 2d 269, 271 (Ala. Civ. App. 1987)) (reviewing court looks to whether a judge "abused his discretion by recusing himself").

15. Because of the general presumption that judges—who have already sworn to administer impartial justice—are unbiased, a party seeking recusal "has a substantial burden of proof." Henderson, 582 So. 2d at 530. In other words, "a heavy burden is placed on any party attempting to establish that recusal is required." Otwell v. Bryant, 497 So. 2d 111, 119 (Ala. 1986) (emphasis added).

16. "A mere accusation of bias, unsupported by substantial fact,

does not require disqualification of a judge." Banks v. Corte, 521 So. 2d 960, 962 (Ala. 1988) (quoting Ross v. Luton, 456 So. 2d 249, 254 (Ala. 1984)). Rather, the moving party must support its argument for recusal with "substantial evidence." Henderson, 582 So. 2d at 530. "Recusal is not required where there is not substantial evidence to support an accusation of bias." Ex parte Adams, 211 So. 3d 780, 789 (Ala. 2016) (cleaned up).

17. Also, "[a]ny disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source." Ex parte Monsanto Co., 862 So. 2d 595, 605 (Ala. 2003) (emphasis added) (cleaned up). "While a true personal bias" will require recusal, "a judicial bias, if one exists, will not disqualify a trial judge from hearing a case"—e.g., if a "judge stated that his views were founded on evidence presented at the previous trial of this cause." Whisenhant v. State, 555 So. 2d 219, 223 (Ala. Crim. App. 1988) (cleaned up). Evidence of work on previous cases is not sufficient to support a motion to recuse. Rather, the evidence must be "of an 'extrajudicial source.'" Ex parte Adams, 211 So. 3d at 790.

18. Moreover, "in order to support the policy favoring the deciding of cases, the courts generally will not require recusal based on alleged

personal, or unofficial, partiality that is not related to the case." Dunlop Tire Corp. v. Allen, 725 So. 2d 960, 977 (Ala. 1998) (See, J., statement of nonrecusal) (emphasis added).[2]

19. The "standard for recusal is an objective one: whether a reasonable person knowing everything that the judge knows would have a reasonable basis for questioning the judge's impartiality." Ex parte Smith, 282 So. 3d 831, 840 (Ala. 2019) (cleaned up). In other words, the "test is whether facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." Id. (cleaned up). "The necessity for recusal is evaluated by the totality of the facts and circumstances in each case." Id. (cleaned up).

20. While true that "reasonable doubts should also be resolved in favor of recusal," Ex parte Williamson, 329 So. 3d 664, 671 (Ala. Civ. App. 2020) (cleaned up), it is equally apparent that judges should not recuse where there are "no doubts to resolve in favor of recusal." Conroy on behalf of Aflac, Inc. v. Amos, 785 F. App'x 751, 755 n.3 (11th Cir. 2019).

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[2] See also, e.g., Henderson, 582 So. 2d at 530 (Recusal not required when the evidence of bias or prejudice "was the trial judge's testimony against the [party's] attorney in a proceeding that was unrelated to this case."); Afassco, Inc. v. Sanders, 142 So. 3d 1119, 1125 n.3 (Ala. 2013) (Alabama courts "have a stated policy in favor of deciding cases.").

"[T]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is. Indeed, a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation." Id. (quoting In re Moody, 755 F.3d 891, 895 (11th Cir. 2014)); see also Ex parte Siegel, 2021 WL 3009695, at *5 ("We are not prepared to permit a trial judge to withdraw from a case because one party perceives bias that is not objectively reasonable.").

21. Recusal principals "must be applied in a way that balances the underlying policies of the judicial duty to decide cases and the need to preserve judicial impartiality." Cottrell v. Nat'l Collegiate Athletic Ass'n, 975 So. 2d 306, 355 (Ala. 2007) (See, J., statement of nonrecusal).

22. Recusal should only occur when a judge's impartiality might reasonably be questioned. Otherwise, if recusal motions are "too liberally granted," that could "encourage judge shopping" in an effort to procure a more sympathetic judge or panel of judges. Ex Parte Thacker, 159 So. 3d 77, 82 (Ala. Civ. App. 2014) (cleaned up).

B. Argument

23. The reasoning and conclusion underpinning Judge Todd's

Motion for Recusal boils down to the following: (1) Judge French may be a witness in COJ No. 61; (2) this Court may have to make credibility determinations, including instances in which Judge Todd and Judge French "may testify inconsistently with one another," Mot. for Recusal at 2; (3) the "Court of the Judiciary judges appear to have a special camaraderie and friendship," Mot. for Recusal at 4; and (4) thus, there is a reasonable basis for questioning whether this Court could assess Judge French's testimony in an unbiased and impartial manner.[3]

24. No Alabama appellate court has ever held that recusal is required in a situation such as this. Judge Todd cites no case law that is remotely comparable. Furthermore, even if credited, Judge Todd's allegations do not establish a reasonable basis for questioning the impartiality of the members of this Court.

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[3] All of Judge Todd's allegations involve whether the members of this Court have a "personal bias or prejudice." Canon 3(C)(1)(a), Alabama Canons of Judicial Ethics. She does not allege that any members of this Court have "personal knowledge of disputed evidentiary facts concerning the proceeding," which was cited by Judge J. William Cole in his Order of Recusal. See Mot. for Recusal, Ex. B. But one of the cases that Judge Todd discusses does have to do with the personal-knowledge grounds for recusal. See supra ¶¶ 36–39. It is worth noting, however, that Judge Todd does not allege, and the Commission is not aware, that any of the current members of this Court have personal knowledge of disputed evidentiary facts that will form the basis of the trial in COJ No. 61.

25. Judge Todd cites a single extrajudicial example to support her claim that the members of this Court "appear to have a special camaraderie and friendship"—i.e., that during a trial recess in COJ No. 58, the members of this Court "held a birthday party for Judge French with a birthday cake." Mot. for Recusal at 4.

26. In general, "social acquaintanceships . . . are insufficient, by themselves, to require disqualification." Charles Gardner Geyh et al., Judicial Conduct and Ethics § 4.07[4], 4-33 (6th ed. 2020). And "the question of disqualification seems to turn on the extent of the personal relationship." Id. at 4-32. So, for instance, impartiality might reasonably be questioned where a judge and an attorney "were such close friends that their families were going to take a vacation together." Id. But a judge's impartiality is not reasonably called into question by membership in the same legal organization or college fraternity as a lawyer appearing before him or even if "a judge asked an attorney appearing before him to be a pallbearer at his father's funeral." Id. at 4-33. "[I]t is an inescapable fact of life that judges serving throughout the state will necessarily have had associations and friendships with parties coming before their courts. A judge should not be subject to disqualification for such ordinary

relations with his fellow citizens." Ex parte Hill, 508 So. 2d at 272.[4]

27. Even assuming the veracity of Judge Todd's allegations, no reasonable, objective observer would raise questions of bias or partiality because colleagues in a professional setting shared birthday cake on someone's birthday. Co-workers sharing cake reveals nothing about their bias or partiality for or against their fellow co-workers. It certainly does not indicate the type of close, personal relationship that would require recusal. And Judge Todd cites no authority to suggest that this is a type of situation requiring recusal.

28. To illustrate, in January 2022, Judge French sent Judge Todd a "happy birthday" email. See Ex. A. But no reasonable observer would believe that email demonstrated "a special camaraderie and friendship" between Judge Todd and Judge French. Mot. for Recusal at 4.

29. Moreover, the birthday cake allegation is "an incident in the past." Gipson v. State, 646 So. 2d 701, 703 (Ala. Crim. App. 1994). It is completely "unrelated to this case." Henderson, 582 So. 2d at 530. And

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[4] See also Clemmons v. State, 469 So. 2d 1324, 1326 (Ala. Crim. App. 1985) ("That the trial judge and victim knew each other and possibly enjoyed a friendship both professionally and socially is not reason enough to require the judge to recuse himself."); Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (same).

"courts generally will not require recusal based on alleged personal, or unofficial, partiality that is not related to the case." Dunlop Tire Corp., 725 So. 2d at 977 (See, J., statement of nonrecusal).

30. Judge Todd also cites judicial collaboration and collegial interactions by the members of this Court during cases, including COJ No. 58, as a reason for recusal. Specifically, that Judge French "conferr[ed] with the other judges . . . on questions of law and objections" and that she showed "an ethics manual to the presiding judge and at least one other colleague" during COJ No. 58. Mot. for Recusal at 3.[5]

31. However, motions to recuse must be supported by allegations that are "personal" and "extrajudicial." Ex parte Monsanto Co., 862 So. at 605. Ordinary work-related activities during the course of a case are not the type of conduct that could support a motion to recuse.

32. Judge Todd cites several cases to support her argument that all members of this Court—and not just Judge French—must recuse. All

[5] Judge Todd also vaguely refers to "case-related interactions out of court" and to "the many other times that [Judge French] and the judges worked collaboratively to hear and decide cases together." Mot. for Recusal at 3. But these nebulous and unspecific accusations are not the type of "substantial fact[s]" required to support a motion to recuse. Banks, 521 So. 2d at 962. Rather, they are imprecise and insufficient "speculation." In re Moody, 755 F.3d at 895.

of the cases are inapposite.[6]

33. Judge Todd cites Ex parte Bryant and Ex parte Price, in which the Alabama Supreme Court and the Court of Criminal Appeals ordered recusal of all judges of the 13th Judicial Circuit and all Madison County circuit judges, respectively. Ex parte Bryant was a "very peculiar" case, and the Supreme Court made clear that such "an order as this is reserved for only the most extraordinary of circumstances." 682 So. 2d 39, 42 (Ala. 1996). The primary basis for the drastic order was "the nature of the crime"—i.e., that someone appointed by the judges of that circuit "to serve in a fiduciary capacity" allegedly stole millions of dollars, thereby "systematic[ally], intentional[ly], and egregious[ly] violati[ng] the trust that had been placed in [him] by Mobile County's judiciary." Id. Likewise, in Ex parte Price, the defendant allegedly used "his position as a conservator and guardian for the Madison County courts to steal money,

[6] In a footnote, Judge Todd fleetingly argues that Judge Jeffery W. Kelley, who replaced Judge French for COJ No. 61, must also recuse because of his contact with Judge French through the Alabama Circuit Judges Association. Mot. for Recusal at 2 n.1. There is no allegation that Judge French and Judge Kelley ever discussed Judge Todd or this Court. Nor does Judge Todd cite any case law suggesting that this type of tenuous connection through a professional association should ever require recusal. Moreover, the end result of this argument would likely be the forced recusal of all circuit judges from hearing COJ No. 61.

thereby violating the trust placed in him by the Madison County judiciary." 715 So. 2d 856, 859 (Ala. Crim. App. 1997).

34. In contrast, aside from COJ No. 58 and COJ No. 61, Judge Todd has no involvement with the Court of the Judiciary whatsoever, much less a position of immense trust that she could violate. Ex parte Bryant and Ex parte Price do not support Judge Todd's arguments.

35. Judge Todd also cites United States Supreme Court case Williams v. Pennsylvania to argue that if one member of a multimember court is required to recuse, all members should recuse. On the contrary, Williams suggests exactly the opposite. In Williams, one jurist's failure to recuse caused the Supreme Court to vacate and remand for rehearing. However, the Court indicated that it would be appropriate to allow "an appellate panel to reconsider a case without the participation of the interested member." Williams v. Pa., 579 U.S. 1, 16 (2016). The Court did not state that a "lack of impartiality affects not just each judge singly but the entire Court," as Judge Todd suggests. Mot. for Recusal at 7.

36. Judge Todd next cites the Nicholas Acklin case, in which all of the judges of the 23rd Judicial Circuit recused themselves from his postconviction proceedings. Acklin is not a typical postconviction case.

Usually, a judge who presided over a trial is not required to recuse from postconviction proceedings, even when certain claims in the Rule 32 petition allege misconduct or error by the judge.[7] Indeed, the trial judge is often the person best suited to hear the postconviction proceedings.[8]

37. Acklin is also plainly distinguishable from the circumstances here. Judge James Smith, the trial judge in the Acklin case, recused because he had "personal knowledge of disputed evidentiary facts"—i.e., what happened when the judge "went in the jury room briefly to answer questions by the jurors" following the trial. Mot. for Recusal, Ex. C at 3–4. Thus, he could have been a witness at an evidentiary hearing. More specifically, Judge Smith was likely privy to "facts that [were] material"

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[7] See, e.g., Harris v. State, No. CR-19-0231, 2021 WL 2882472, at *8 (Ala. Crim. App. July 9, 2021); Stanley v. State, 335 So. 3d 1, 63 (Ala. Crim. App. 2020); Woodward v. State, 276 So. 3d 713, 729 (Ala. Crim. App. 2018); Ex parte Knotts, 716 So. 2d 262 (Ala. Crim. App. 1998).

[8] See, e.g., Stanley, 335 So. 3d at 22 (quoting Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991)) ("[A] judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed."); Morris v. State, 261 So. 3d 1181, 1187 (Ala. Crim. App. 2016) (quoting Boyd v. State, 913 So. 2d 1113, 1126 (Ala. Crim. App. 2003)) ("If the circuit judge has personal knowledge of the actual facts underlying the allegations in the petition, he may deny the petition without further proceedings so long as he states the reasons for the denial in a written order.").

to the Rule 32 petition and that were "not readily ascertainable from other sources." Ex parte Jones, 86 So. 3d 350, 353 (Ala. 2011).

38. Then, all of the circuit judges of Madison County recused, but not merely because they all worked together. Rather, Judge Loyd Little, who received the case when Judge Smith recused, had already "had conversations with Judge Smith as to this issue when the case was assigned to Judge Smith" and had "shared the information with the other Circuit Judges." Mot. for Recusal, Ex. C at 5. Thus, they all had knowledge of disputed evidentiary facts from the original source.

39. In contrast, aside from Judge French, none of the members of this Court have personal knowledge of disputed evidentiary facts that will form the basis of the trial in COJ No. 61, and Judge Todd does not allege as much in her Motion for Recusal. Judge Todd also does not allege, and the Commission is not aware of, any conversations that any members of this Court have had with Judge French about the issues in this case. Thus, the reasons requiring recusal in the Acklin case are not present here, and it does not support Judge Todd's Motion for Recusal.

40. Finally, Judge Todd cites two online news articles regarding instances in which all judges of the 20th Judicial Circuit and all Madison

County judges recused from two cases. Those, too, are quite dissimilar.

41. In the Jamie Connolly case, she alleged that the assistant district attorney assigned to prosecute her drug charges had exchanged romantic messages with her. The Attorney General's Office took over prosecuting the charges and all judges of the 20th Judicial Circuit recused due to "allegations of misconduct against the assistant district attorney assigned to prosecute" her case, and because the assistant district attorney "regularly prosecutes cases before each" circuit judge. Order of Recusal, State v. Connolly, No. CC-2020-51, Doc. 64 (Cir. Ct. Mar. 4, 2022). The assistant district attorney was suspended, and federal agents have investigated his behavior. See https://www.wdhn.com/news/crime/federal-agents-look-into-a-case-of-possible-misconduct-by-a-houston-county-prosecutor. In light of a pro se letter sent by Connolly to the court, the assistant district attorney's misconduct is likely to be a focal point of her case. Letter, Connolly, Doc. 47 (Cir. Ct. Feb. 9, 2022).

42. This case is vastly different. Judge French is obviously not accused of sexual or criminal misconduct. In addition, the focus of COJ No. 61 will be on Judge Todd's behavior, not on any sort of intimate relationship between Judge Todd and Judge French. As Judge Todd

maintains, Judge French had "not spoken with Judge Todd in well over a year." Mot. for Recusal at 4. Furthermore, the assistant district attorney in Connolly frequently appeared before the judges of that circuit, all of whom resided in a small geographic area. Meanwhile, this Court is comprised of members from across the State and meets infrequently only when charges have been filed in the Court of the Judiciary, which has only happened 61 times in almost fifty years.

43. The Madison County case cited by Judge Todd is even further afield. Roland Campos was charged with forcibly having sex with someone under the age of 16. Indictment, State v. Campos, No. CC-2018-435, Doc. 1 (Cir. Ct. Feb. 2, 2018). All of the Madison County judges recused because Campos "was a former Sheriff's Deputy who is well known by the Judges of this Circuit." Order, Campos, Doc. 35 (Cir. Ct. Mar. 29, 2018). Campos had interacted with the Madison County Court personnel as a law enforcement officer "for decades" and had appeared before "every judge either as a witness or prosecuting case agent." Motion to Recuse, Campos, Doc. 31 at 1 (Cir. Ct. Mar. 23, 2018).

44. In contrast, Judge French is a possible witness, not a criminal defendant. She obviously has not been involved with the Court of the

Judiciary for decades. Further, the Sheriff's Deputy in Campos appeared regularly as a witness or prosecuting agent in front of the judges of that circuit, all of whom resided in a small geographic area. But this Court is comprised of members from across the State and meets infrequently only when charges have been filed in the Court of the Judiciary, which has only happened 61 times in almost fifty years.

45. Also, it is worth pointing out that in the Acklin case, the Connolly case, and the Campos case, the decisions whether to recuse were "within [the judges'] discretion." Price, 18 So. 3d at 376. No appellate court ever made any specific findings on the propriety of recusal or stated that recusal would have been required. In that way, they are distinct from Ex parte Bryant and Ex parte Price, in which recusal was ordered.[9]

III. The Due Process Clause Does Not Require Recusal

46. Alabama law requires "only a reasonable appearance of bias"

[9] One final point. Judge Todd states that it would be a "simple matter" to substitute all of the members of this Court. Mot. for Recusal at 9. That is not true. Judge Todd cites a case involving recusal in postconviction proceedings under Rule 32 of the Rules of Criminal Procedure. But here, recusal and substitution are governed by the Rules of Procedure for the Alabama Court of the Judiciary, which does not explicitly lay out the method of selecting alternates for every member of this Court. See Rule 26, R. P. Ala. Ct. Jud. If the law requires recusal, then difficulty should not stand in the way. But it is not, as Judge Todd claims, a simple matter.

for recusal rather than "actual bias." Ex parte Smith, 282 So. 3d at 840 (cleaned up). But Judge Todd next argues that the probability of actual bias in this case is high enough to violate the Due Process Clause of the Fourteenth Amendment. Obviously, if Judge Todd has failed to establish even the appearance of impropriety, as the Commission argues above, then she cannot establish a serious risk of actual bias.

47. To support her argument, Judge Todd relies primarily on the United States Supreme Court case Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). The Caperton Court "identified two circumstances in which that Court had previously required a judge's recusal on due-process grounds: cases in which a judge has a financial interest and certain types of cases involving criminal contempt." Ala. Dep't of Pub. Safety v. Prince, 34 So. 3d 700, 705 (Ala. Civ. App. 2009) (cleaned up). The Caperton Court then applied the principals from prior cases to "the context of judicial elections" and found "a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."

Caperton, 556 U.S. at 881–82, 884. The appellant in Caperton had contributed $3 million to the campaign of a West Virginia Supreme Court Justice, who declined to recuse and ultimately sided with the appellant.

48. "The Caperton Court's holding, however, was narrow. It noted the 'extreme facts' of that case and limited its holding to the 'extraordinary situation' where the 'probability of actual bias rises to an unconstitutional level.'" McMillan v. State, 258 So. 3d 1154, 1184 (Ala. Crim. App. 2017) (cleaned up); see also United States v. Rodriguez, 627 F.3d 1372, 1382 (11th Cir. 2010).

49. Subsequent to Caperton, the Supreme Court has found only one other circumstance in which recusal was required on due-process grounds. In Williams v. Pennsylvania, the Court vacated the denial of postconviction relief because a Pennsylvania Supreme Court Justice who participated in the decision to deny relief had been the district attorney who approved the decision to seek the death penalty in the defendant's case. The Court found "an unconstitutional potential for bias" when the "accuser" in a case later becomes the "adjudicator." 579 U.S. at 8.[10]

[10] In re Murchison, 349 U.S. 133 (1955), the other Supreme Court case cited by Judge Todd, involved a similar issue. The Murchison Court concluded "that the Due Process Clause is violated when a judge

50. Judge Todd's case does not involve any of the "extreme facts" or "extraordinary situations" identified in Caperton and Williams. She did not allege that any of the members of this Court have a financial interest in this matter, and this case has nothing to do with criminal contempt. Nor have any of the members of this Court acted as both "accuser" and "adjudicator"—i.e., there is no one who sits as a member of the Court of the Judiciary who has also filed charges against Judge Todd in the Court of the Judiciary on behalf of the Commission.

51. This Court should decline Judge Todd's invitation to expand upon Supreme Court jurisprudence regarding when the Fourteenth Amendment requires a judge's recusal on due-process grounds.

52. Judge Todd discusses one other case in this section, State Tenure Commission v. Page, 777 So. 2d 126, 129 (Ala. Civ. App. 2000). Page has nothing to do with the issues raised in her Motion for Recusal. In Page, the Phenix City Board of Education violated the due process rights of a teacher by failing to notify her of all grounds for termination prior to a hearing and by "prejudg[ing] the case against the teacher."

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adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case." Williams, 579 U.S. at 17 (Roberts, C.J., dissenting).

Page, 777 So. 2d at 131. Page concerned whether the Board had "pre-decided the case of Ms. Page before her hearing was ever convened," Id. at 130, not whether the Board members had a personal bias or prejudice for or against a party or witnesses at the hearing.

53. The Alabama Court of Civil Appeals concluded that three pieces of evidence established "an 'intolerably high risk of bias' on the part of the Board and indicate that it may have pre-decided Page's case and thereby denied her due process of law": (1) minutes from a Board meeting; (2) a letter from the Board's counsel to Page; and (3) Board member comments to the media. Id. at 131. All of this occurred prior to the hearing. For instance, the letter from the Board's counsel to Page sent four days before the hearing stated, "it is the intention of the Board to abolish this position and to cancel [Page's] contract." Id. at 129. The conclusion that the Board had pre-decided the case was inescapable.

54. Here, however, Judge Todd does not argue that any members of this Court have prejudged any issue in this case. She certainly has not made any specific factual allegations regarding conduct by any members of this Court that would suggest they have pre-decided the case. In short, Page does not support her due process argument.

IV. Judge Todd's Request for a Hearing

55. The Commission feels compelled to address Judge Todd's request for "an evidentiary hearing on this motion to develop evidence, including by testimony, for the record of reasonable bases to question impartiality." Mot. for Recusal at 12. This request should be denied.

56. "[A] party filing a motion for recusal does not have an automatic right to establish a record in open court or participate in an evidentiary hearing, nor does a need even exist for an evidentiary hearing if the facts presented by a party seeking recusal are insufficient on the face of the motion." F.T.C. v. Namer, No. 06-30528, 2007 WL 2974059, at *5 (5th Cir. Oct. 12, 2007); see also Ex parte Knotts, 716 So. 2d at 265 (The court "applaud[ed] Judge Price for his prompt ruling" on a motion to recuse and noted that "[f]orcing a judge to hold a hearing on every motion that is filed would unduly burden trial judges."); Neuman v. Phillips, No. M202101162COAT10BCV, 2021 WL 6055923, at *3 (Tenn. Ct. App. Dec. 21, 2021) ("[W]e are aware of no right to an evidentiary hearing on a motion to recuse. In most cases, conducting such a hearing would run counter to our supreme court's directive that, when presented with a recusal motion, a trial judge must 'act promptly by written order

and either grant or deny the motion.'"); Packer v. Superior Ct., 339 P.3d 329, 339 (Cal. 2014) ("An evidentiary hearing may be ordered if the defendant's affidavits establish a prima facie case for recusal—that is, if the defendant's affidavits, if credited, would require recusal." "The decision whether to hold an evidentiary hearing" is a matter of discretion and reviewed "for an abuse of that discretion."); United States v. Barnes, 909 F.2d 1059, 1072 (7th Cir. 1990) ("Given Barnes' failure to comply with the procedural and substantive requirements of [filing a recusal motion], we hold that the trial judge's refusal to hold a hearing on this frivolous motion was proper."); In re Wolverine Proctor & Schwartz, LLC, 397 B.R. 179, 186 (Bankr. D. Mass. 2008) ("A motion for disqualification does not confer upon movants a right to make a record in open court nor does it confer upon them a right to an evidentiary hearing.") (cleaned up); Davis v. State, 615 S.E.2d 203, 207 (Ga. Ct. App. 2005), rev'd on other grounds, 628 S.E.2d 374 (Ga. 2006) ("Given Davis's failure to provide a legally sufficient reason for the judge's recusal, the trial court did not abuse its discretion in declining to hold an evidentiary hearing.").

57. Judge Todd's Motion for Recusal is meritless on its face. As discussed above, Judge Todd has waived the issue of recusal, and, even

if credited, her allegations do not establish a reasonable basis for questioning the impartiality of the members of this Court. Thus, an evidentiary hearing is unnecessary and unwarranted. Judge Todd offers no authority indicating that she is entitled to an evidentiary hearing or that a hearing would be helpful in this case.

58. Moreover, Judge Todd does not specify the "testimony" that she wants to elicit at an evidentiary hearing. Aside from the birthday cake incident, Judge Todd merely states that "[o]ther evidence of personal friendship and relationships will be developed at any hearing on this motion." Mot. for Recusal at 4. She does not allege "substantial fact[s]" that, if true, would support a motion to recuse. Banks, 521 So. 2d at 962. Rather, she engages in "highly tenuous speculation." In re Moody, 755 F.3d at 895 (cleaned up). Her request for a hearing "contemplates what is essentially a 'fishing expedition' to determine" the extent of any personal relationships between members of this Court. Ex parte Vulcan Materials Co., 992 So. 2d 1252, 1266 (Ala. 2008); see also Huff v. State, 596 So. 2d 16, 21 (Ala. Crim. App. 1991) ("[I]f the appellant had presented facts which, if taken as true, would have supported his claims, then he would have been entitled to his hearing. However, his motion constitutes

little more than a fishing expedition.").

59. Although Judge Todd does not specify the testimony she seeks, she would presumably try to question every member of this Court. The members of this Court are not required to recuse at this point, but they might be after being subjected to adversarial questioning.

60. Thus, the request for an evidentiary hearing resembles "an orchestrated effort to force a judge's removal from a case." Ex Parte Thacker, 159 So. 3d at 81 (quoting Seeco, Inc. v. Hales, 969 S.W.2d 193, 196 (Ark. 1998)). "It is improper for a lawyer or litigant to create the ground on which he seeks the recusal of the judge assigned to his case." Id. (quoting Sullivan v. Conway, 157 F.3d 1092, 1096 (7th Cir. 1998)) (cleaned up). "[W]here a party seeks to create an artificial appearance of bias . . . , recusal will generally not be required, because the duty of the judge to decide that case outweighs the appearance of partiality." Dunlop Tire Corp., 725 So. 2d at 977 (See, J., statement of nonrecusal).

WHEREFORE, premises considered, because Judge Todd has waived the issue of recusal and because, even if credited, her allegations do not establish a reasonable basis for questioning the impartiality of the members of this Court, the Commission respectfully requests that this

Honorable Court deny the Motion for Recusal without a hearing.

Respectfully submitted this the 13th day June, 2022.

_/s/ John A. Selden_____
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_/s/ Elizabeth C. Bern_____
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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 13th day of June, 2022, electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy upon the following via email as follows:

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_/s/ John A. Selden_____
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Attorney for the Commission

Exhibit A

Elisabeth French

From: Elisabeth French
Sent: Sunday, January 30, 2022 6:36 AM
To: Elisabeth French
Subject: The Honorable Tracie Todd

Good morning, Judges. Please join me in wishing Judge Todd a very happy birthday!

Elisabeth French

Elisabeth A. French
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