LAW OFFICES OF
RUSSELL, STRAUB & KYLE
804 BANK STREET
P. O. BOX 327
DECATUR, ALABAMA 35602-0327

NOBLE J. RUSSELL (1911-1985)
ROBERT STRAUB
J. TIMOTHY KYLE

TELEPHONE
(256) 353-7641

TELECOPIER
(256) 340-9810

March 6, 2007

Honorable Lane W. Mann, Clerk
Alabama Court of Criminal Appeals
State of Alabama Judicial Building
300 Dexter Avenue
P.O. Box 301555
Montgomery, Alabama 36130-1555

Re: State of Alabama v. Daniel Wade Moore
Ala. Crim. App. No.: CR-04-0805; Morgan Cir. Ct. No.: CC-00-1260, CC-02-646
Response to Petition For Writ of Mandamus

Dear Mr. Mann:

Enclosed please find the original and five copies each of Daniel Wade Moore's Response to Petition For Writ of Mandamus.

These documents are filed with your office by placing said original and five copies in the first-class certified mail of the United States Postal Service, return receipt requested, and proper postage prepaid.

We have also served copies of the brief upon the Office of the Attorney General for the State of Alabama and upon the Hon. Glenn E. Thompson, Circuit Judge for Morgan County, by placing said copies in the first class mail of the United States Postal Service.

Yours very truly,

J. Timothy Kyle

ONE OF THE ATTORNEYS FOR
DANIEL WADE MOORE

JTK:pg
Enclosures
pc: Hon. Troy R. King, Attorney General
Attn: Donald G. Valeska, Assistant Attorney General

Hon. Glenn E. Thompson, Circuit Judge

COPY FOR AG

~~ORIGINAL~~

CR - ~~04-0805~~ 06-0747

IN THE ALABAMA COURT OF CRIMINAL APPEALS

Ex parte State of Alabama

In Re:

STATE OF ALABAMA, Petitioner

V.

HONORABLE GLENN E. THOMPSON
Circuit Judge, Eighth Judicial Circuit, Respondent

On Petition for A Writ of Mandamus to the
Morgan County Circuit Court
(State v. Daniel Wade Moore; CC-00-1260, CC-02-646)

APPEAL FROM MORGAN CIRCUIT COURT NO. CC00-1260, CC02-646

RESPONSE OF DANIEL WADE MOORE TO PETITION FOR WRIT OF MANDAMUS

ATTORNEYS FOR APPELLEE:

Sherman B. Powell, Jr.
247 E. Moulton Street
Decatur, Alabama 35601
Telephone: (256)353-6612

J. Timothy Kyle
RUSSELL, STRAUB & KYLE
P. O. Box 327
Decatur, Alabama 35602-0327
Telephone: (256)353-7641

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Response To Petition For A Writ Of Mandamus 1

Statement of the Facts 7

Statement of the Issues Presented 8

Standard of Review 9

Response to Statement Why The Writ Should Issue . . . 11

I. Judge Thompson Has Not Prejudged And Denounced The State's Evidence 12

II. Why These Comments Do Not Pose A Problem 17

III. Judge Thompson Ignored Caselaw Directly On Point To Release A Once-Convicted Murderer Without Informing The State Despite Assurance That He Would Do So 19

IV. Judge Thompson Improperly Removed The Victim's Husband From The Courtroom, In Violation of State Law 21

V. Judge Thompson Has Shown A Personal Bias Against The State's Lead Prosecutor And Investigator . . 23

VI. Morgan County Citizens Currently View This Case As Judge Thompson Versus The State 27

VII. Karen Tipton's Family And The Citizens Of Alabama Deserve The Same Right To A Fair And Impartial Trial As Daniel Wade Moore 27

Conclusion 30

Certificate of Service 31

TABLE OF AUTHORITIES

Brady v. Maryland, 373 U.S. 83; 83 S.Ct. 1194
10 L. Ed.2d 215
(1963) 8

Dick v. State, 677 So.2d 1267
(Ala. Crim. App. 1996) 12

Ex parte Adams, 669 So.2d 128
(Ala. 1995) 7,12

Ex parte Brooks, 847 So.2d 396
(Ala. Crim. 2002) 10

Ex parte Brooks, 855 So.2d 593
(Ala. Crim. 2003) 10, 11

Ex parte Cotton, 638 So.2d 870, 872
(Ala. 1994) 9

Ex parte Fowler, 863 So.2d 1145
(Ala. Crim. App. 2001) 17

Ex parte Grayson, 665 So.2d 986, 987
(Ala. Crim. App. 1995) 9

Ex parte Knotts, 716 So.2d 262, 264
(Ala. Crim. App. 1998) 9

State v. Moore, 2006 WL2035664
(Ala. Crim. App. 2006) 7

Wright v. State, 628 So.2d 1073
(Ala. Crim. App. 1993) 12

OTHER AUTHORITIES:

Alabama Rules of Evidence
Rule 412 22
Rule 615 22

Code of Alabama, 1975
§15-14-51(a) 21
§15-14-54 21

RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

Daniel Wade Moore ("Moore") denies that there has been any demonstration of "personal bias" or "partiality toward" Mr. Moore.

The prosecuting attorney alleges trial judge "publicly declared the State's evidence to be insufficient". This is incorrect. In fact, this declarative statement is at best a misrepresentation, at worst a deliberate deceit. In his February 5, 2005 Order, the closest Judge Thompson came to making a finding as to the nature or sufficiency of evidence in the case was his holding and recital at page 14 thereof that:

> "The information wrongfully withheld from the defense included the names of others who had the means, motive, and opportunity to commit the crime of which the Defendant was accused. ***The information suppressed is exculpatory in nature and supportive of the Defendant's contentions and defense.*** By excluding this evidence, Mr. Valeska greatly enhanced his chances for conviction." [Emphasis added.]

At no point in his Order, his Findings of Fact (none of which were appealed and all of which are now final) does the trial judge comment or make findings

on sufficiency of evidence. The trial judge found evidence had been withheld, that it was exculpatory, and applying what this Court has determined an inappropriate standard, found that a retrial would conflict with double jeopardy prohibitions. The mischaracterization by the prosecuting attorney before this court of any ruling or comment by the trial judge as having labeled or otherwise determined the State's evidence to be "insufficient" is wrong, and by its very nature establishes that the Petition For Writ is filed in bad faith.

Paragraph 2 rehashes the same ground that the trial judge applied the incorrect standard of law. The bone of contention in this matter is that the Defendant should not have been discharged. This matter was resolved fairly quickly and the Defendant was returned to custody. This does not warrant recusal.

In paragraph 3 the prosecutor complains about the removal of the victim's husband from the courtroom during "the most critical post-trial evidentiary hearing." This removal occurred as the trial judge was

beginning to hear testimony and evidence regarding allegations of misconduct by investigators and prosecuting attorneys involved in the allegations of withholding, misrepresenting, and destroying evidence in a capital murder case. The victim's husband was identified as a witness and subpoenaed in connection with any knowledge he might have as to those specific issues of this case (not with regard to his knowledge or participation in the guilt or sentencing phases). Such a matter as this has never appeared in reported decisions in Alabama and the trial judge's efforts, even if erroneous, to insure that he did not prejudice or corrupt any further evidence or testimony in this case are to be commended. The exclusion evidenced no bias and did not accompany any comments or observations by the Court reflecting bias against the victim, the victim's husband, the victim's family, or any party.

With regard to the allegation in numbered paragraph 4, that the Judge "has, on numerous occasions, publicly demonstrated his disdain for the

State's lead prosecutor and its lead investigator", Mr. Moore denies and disputes this allegation. The trial judge has fastidiously avoided any public comment. The State's original motion for recusal points out the judge's fairness and objectivity essentially through all phases included sentencing, the judicial override of the jury recommendation for life without parole sentence, that he had properly conducted himself in that phase. The prosecuting attorney cites no facts, statements, transactions, occurrences, or bases upon which to support this conjecture except for his personal hurt feelings at being reprimanded for what was apparently one of a series of cell phone interruptions during capital murder pre-trial and trial proceedings. He also points out that when matters occurred on two occasions when members of the audience laughed or otherwise disrupted judicial proceedings, the trial judge reprimanded the audience threatening to clear the courtroom to maintain order. None of these events, none of these statements by the trial judge, support recusal.

The prosecuting attorney refers to "widespread media coverage" alleging these "personal beliefs and actions" are apparently tied to everyone in Morgan County. The prosecuting attorney affixes a great deal more to a couple of newspaper articles and a television story, than anyone else in Morgan County. There is no evidence to reflect or indicate that the prosecutor cannotget a fair and impartial jury in Morgan County, Alabama. If the prosecutor's concern is that a juror might have heard enough about this case or had dealings sufficient with any other party, attorney or the judge as to prejudice that potential jury member's service, then that is why we have *voir dire* examination of potential jurors.

It is odd to find Mr. Moore responding to the State's averments that the State will not get fair shake in this case. The State was allowed in large measure to proceed to present virtually all the evidence it chose to. Mr. Moore was convicted. The jury recommended a sentence of life without parole. The trial judge overrode the jury recommendation and

imposed a sentence of death. Where was prejudice or bias particularly any arising out of any extra-judicial basis? Subsequently, the trial court heard evidence in post trial hearings that exculpatory evidence had been communicated to law enforcement and that law enforcement had withheld that information. A new trial was ordered. The State challenged that ruling and this Court affirmed the trial judge.

After a motion to dismiss was filed and a hearing held with additional testimony and evidence offered concerning evidence withheld from the Defendant and also indicating some evidence may have been destroyed, establishing the knowledge of the investigators and the prosecutor of some of this evidence. The trial court found that should have been produced to the Defendant. The State cannot seriously be claiming bias because the judge found that evidence of the identities and existence of other witnesses to matters relevant to a capital murder case should not be made available to the defendant. For the trial court to so find and rule is certainly not evidence of a personal

bias or prejudice against the State's case. Again, through there is no basis to claim the trial judge, his actions, rulings, decisions, or demeanor reflect any personal bias or prejudice against the State arising from any extra-judicial matter.

The trial court's dismissal has been determined by the Court to be error. Misapplying the law of a case to the facts of a case is not evidence of personal bias or prejudice.

Statement of the Facts

The procedural history of this case is set forth in the numerous decisions of the Alabama Court of Criminal Appeals appearing at: State v. Moore, 2006 WL2035664 (Al. Crim. App. 2006) and its predecessors. Most pertinent to the averments in the Petition For Issuance of A Writ of Mandamus, Circuit Judge Glenn E. Thompson was called upon to take testimony on a motion to dismiss and make findings of fact as mandated by law as a trier of fact sitting in accordance with Ex parte Adams, 669 So.2d 128 (Ala. 1995). At no time in these proceedings did Judge Thompson "comment on the

evidence" merely rather making findings of fact as a trier of fact. There are no "comments" pre-trial or otherwise by Judge Thompson except within express parameters of specific findings of fact as appeared to be required to be addressed by the trier of fact (trial judge sitting after waiver of jury) in the hearing on the motion to dismiss. These findings of fact were not appealed and are therefore not "comments" or "gratuitous" mischaracterizations or attacks on the prosecuting attorneys or the investigators; they are findings of fact which are final and not subject to collateral attack by the prosecuting. The Alabama Court of Criminal Appeals reversed Judge Thompson on the grounds of him having applied an erroneous standard with regard to Brady matters. This does not require recusal.

Statement of the Issues Presented

The State seeks a Writ of Mandamus ordering Judge Thompson to recuse himself based upon Canons 3(c)(1) or 3(c)(1)(a) with regard to personal bias or

prejudice allegations. Mr. Moore denies that the State is entitled to the relief it seeks in its Petition.

Standard of Review

While the State seems to seek an analysis on the prosecuting attorney's subjective disdain for the trial judge, the proper standard in analyzing whether or not Canons 3(c)(1) and 3(c)(1)(a) apply the Court must look at the Petition with a careful, jaundiced eye. We begin with the presumption that a judge is impartial and unbiased. Ex parte Cotton, 638 So.2d 870, 872 (Ala. 1994). "[T]he burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice." Ex parte Grayson, 665 So.2d 986, 987 (Ala. Crim. App. 1995). The alleged "disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extra-judicial source. [citations omitted.]" Ex parte Knotts, 716 So.2d 262, 264 (Ala. Crim. App. 1998).

The Petition For Issuance of a Writ of Mandamus demands a judge to be discharged based upon having made adverse findings of fact and rulings in the

ordinary course of deciding issues presented to that judge at trial.

There is no evidence of any kind to reflect or indicate that there is any public or other reasonable perception of personal bias or impartiality as alleged in the Petition. The prosecuting attorney improperly relies upon Ex parte Brooks, 847 So.2d 396 (Ala. Crim. App. 2002). Particularly erroneous in his reliance is the fact that in that case this Court was addressing the status of the trial court judge as a fact witness in a capital murder case. This Court determined that the trial judge in Brooks was indeed "the best and most logical person to testify." That judge was disqualified under Canon 3(c)(1)(a) based on the trial judge having personal knowledge of disputed evidentiary facts. Such is not the Moore case. It is particularly interesting to note, however, that in a subsequent appeal by Mr. Brooks (Ex parte Brooks, 855 So.2d 593 (Ala. Crim. App. 2003) this Court pointed out that "a trial judge's participation in a previous proceeding in a case does not *ipso factor* render him

disqualified to preside at a trial". Indeed, this Court in Brooks II rejected any claim that simply because the trial judge had made prior rulings including adverse rulings as to proceedings concerning that defendant that he would be entitled to have that judge forced out of the case (a fact situation painfully similar to that asserted in the Petition herein).

Response to Statement Why The Writ Should Issue

While the Court is presented with recent citations to decisions in which recusal has been considered, none of those cases are similar in the least to the Moore case. The Petition avers the judge in the Moore case should be ordered to recuse himself from this case based solely on previous adverse rulings.

There are no decisions, findings, or actions by the trial judge by which his impartiality could "reasonably be questioned." There is no evidence of any personal bias or prejudice of the trial judge against the State.

I. Judge Thompson Has Not Prejudged and Denounced the State's Evidence

There have been no "premature remarks" in this case arising within the parameters of Wright, 628 So.2d at 1073 as averred by the State. And, as indicated in Dick v. State, 677 So.2d 1267 (Ala. Crim. App. 1996) the weight of evidence is within the exclusive province of the factfinder. In this case the only evidentiary findings made by the trial judge other than sentencing dealt with specific issues presented to the trier of fact in accordance with Ex parte Adams, Supra, on the question of misconduct as presented in the Motion to Dismiss. Mr. Moore waived his right to a jury. The trial judge, as trier of fact, heard testimony, weighed the evidence on that specific issue and made findings of fact. The trial judge did not make "premature remarks.

At page 7, paragraph 11 of its Petition, the State alleges "Judge Thompson has declared that he believes the State's evidence is deficient." This is not true! Judge Thompson never addressed the issue of sufficiency or deficiency. He did find that

exculpatory evidence had been wrongfully withheld. The State did not appeal.

At paragraph 12 of its Petition at page 8, the prosecuting attorney attacks Judge Thompson's assessment of the statement of Mr. Moore to his uncle in which the Court allows that in its experience it has known it is not uncommon for a person to make multiple statements. The State represents to this Court that the fact that Mr. Moore's uncle then took him to a bondsman to keep him out of jail refutes this analysis; notwithstanding that the judge is simply parroting the argument of Mr. Moore's explanation of why he gave his statement to his uncle. Just who does the State's prosecutor think was going to pay the bondsman? These are not mutually exclusive matters and the recital of a trial judge acknowledging that the statement in and of itself is not conclusive does not present a judicial "challenge" but simply reflects the Court's consideration of numerous evidentiary matters in balancing the new trial, motion to dismiss,

prosecutorial misconduct, suppressed and destroyed evidence, and related issues.

At paragraph 13, beginning at page 8 of its Petition, the State attacks Judge Thompson for his having made "gratuitous" attacks on the DNA evidence. Judge Thompson neither gratuitously attacked, nor wholly disregarded, the State's evidence. That evidence did not as the prosecuting attorney would argue prove Mr. Moore was the perpetrator. It was evidence, much as the mitochondrial evidence referred to in paragraph 15 of the Petition dealing with exclusionary analyses. The thrust of Judge Thompson's findings that there was no direct evidence establishing Mr. Moore, to the exclusion of all other persons, as the source of the DNA sample was consistent with the evidence presented at trial. Moreover, the trial judge did not discount or disregard that evidence, simply included it in his recitals reflecting upon, and ultimately giving greater validity to, the fact that the previously withheld, suppressed, misrepresented, and destroyed

evidence disclosed at new trial and motion to dismiss hearings should have been presented to the Defendant. Judge Thompson did not attempt "to wash away" damning evidence. Judge Thompson went through a painful recital trying to reconcile and address the complexity of the evidence in this case and the overwhelming importance of the defendant and jury receiving all of the evidence rather than the State's selected heavily weighted evidence while withholding exculpatory evidence disclosed after conviction and sentencing.

At paragraph 16 beginning at page 9, the State complains that Judge Thompson's findings refer to the absence of direct evidence. The State then again jumps on the DNA bandwagon but failing to embrace the fact that its own expert testimony simply addressed probabilities and did not exclude Mr. Moore. DNA evidence which fails to exclude is circumstantial evidence. The weight given to that evidence is of course weight to be determined by the trier of fact after they hear all the evidence in the case. Judge Thompson did not disregard or recite that the DNA

evidence and confession evidence were insufficient to establish guilt. He simply pointed out that they were a part of the evidence but were not conclusive proof of guilt since there was other exculpatory evidence which should have been considered.

At paragraph 17, the State complains the trial judge proceeded to "strain to disparage almost every piece of the State's case." Such a misrepresentation again distorts the recitals the trial court was making with regard to whether or not there was conflicting evidence, including the withheld and destroyed exculpatory evidence, which should have been produced to the Defendant for the jury to consider. The State in its Petition complains that Judge Thompson made "pre-trial comments" on the evidence. That never happened. Judge Thompson's only findings and recitals have been specific findings of fact concerning evidence and testimony presented to Judge Thompson, post-trial, at new trial and motion to dismiss phases of this case. No pretrial remarks have been made. No extra-judicial remarks have been made. No comments or

remarks have been made in the presence of the jury or any jury member concerning this case. There is no reasonable argument that Judge Thompson making findings of fact and conclusions of law (albeit erroneous as this Court has determined) must therefore be removed from the trial of the case.

The State wrongly relies on Fowler, 863 So.2d at 1145, again mischaracterizing Fowler's pretrial comments about future sentencing with procedural rulings and findings post-trial in this case.

II. Why These Comments Do Not Pose A Problem

If a judge's rulings in the course of procedural matters and hearings trigger a duty to recuse, as alluded to in paragraph 19 at page 12 of the Petition, in every time a judge rules on motions to suppress, temporary relief hearings prior to trial in civil matters, temporary custody hearings, temporary restraining order and preliminary injunction hearings, then the judge who makes those preliminary findings of facts and rulings (indeed even in hearings on pretrial motions to suppress) will then be required to recuse

him or herself because he has made findings, pretrial, which reflect upon that trial judge's status as an impartial arbiter where the judge has heard some testimony or evidence and been required to make determinations based on that evidence which is so often in conflict and becomes a part of the ongoing controversy to be decided at trial and at post-trial proceedings.

At paragraph 20 of page 12 of the Petition, the prosecuting attorney engages in such incredible speculation as to be insulting to the judiciary in general and Judge Thompson in particular. To argue a federal district judge dismissing a case would form the basis of Judge Thompson to dismiss a case is absurd.

Particularly noteworthy, again, is the State's contention in this case that Judge Thompson has made a "public" statement that the prosecution's evidence was "deficient". There has never been any such public statement and Judge Thompson has certainly never made

any findings or recitals or statements that the evidence was deficient.

Finally, in paragraph 22 is asserted one of the most confusing arguments the State could make in a criminal case. The Petition alleges that information within the public record and "on display for potential jury pool" members to see are bases to remove judges. There is no law to that effect. Proper *voir dire* of the *venire* will avoid any such taint. Does the State seriously contend that the longstanding which allows these matters to be addressed and those jurors to be winnowed from the field by effective *voir dire* examination is inadequate? Surely this is not a serious contention! If that were the analysis then every judge who has issued an opinion, which is by its nature "published" and therefore on public record, would create a situation in which jurors could never be selected and cases could never be tried.

III. Judge Thompson Ignored Caselaw Directly On Point To Release A Once-Convicted Murderer Without Informing The State Despite Assurance That He Would Do So

The State rehashes legal issues and matters as argued before this Court on appeal. A trial judge misapplying the law to the facts in the case is not a basis for recusal and the State can cite no authority to this Court for that proposition. Judge Thompson issuing an order without prior notice to either party is not the basis for recusal either. While the State wanted pre-notice that an order was forthcoming, it is hard to argue that such an *ex parte* notification would be proper. The length of time Judge Thompson took to deliberate and wrestle with the difficult decisions in this case is not a basis for reversal either.

It is quite amazing to see the prosecuting attorney arguing Judge Thompson should be removed from this case because of a personal bias or prejudice arising from an extra-judicial matter when Judge Thompson overrode a jury verdict recommending life without parole to impose the death sentence in this case. How does that evidence bias or prejudice against the State and in favor of the man that Judge Thompson sentenced to die. That is the single most remarkable

display of prejudice in favor of a defendant ever recorded.

IV. Judge Thompson Improperly Removed the Victim's Husband From The Courtroom, In Violation of State Law

This heading raises a most perplexing situation for Judge Thompson to have addressed. Indeed, *Code of Alabama, 1975*, §15-14-51(a) does set out a number of matters concerning a victim's right to be present. However, the meat of The Alabama Crime Victim's Court Attendance Act arises in §15-14-54 which deals with the right of the victim or family member to be present "during the trial or hearing or any portion thereof conducted by any court which in any way pertains to such offense." At that hearing, Mr. Moore subpoenaed the victim's husband as a witness not with regard to the underlying defense, but with regard to the specific acts and conduct of the investigators and prosecuting attorneys in their handling of evidence and materials made subject to prior orders of discovery. It may well have been a violation of that

statute, as well as Rules 412 and 615 of the Alabama Rules of Evidence. However, the victim's husband was not excluded from any testimony regarding the offense. The testimony and hearing from which the victim's husband was excluded involved allegations of misconduct in connection with investigation and evidence assembly, withholding and destruction of evidence, misconduct and misrepresentations to the Court of the existence or not of evidence, destruction of evidence after that evidence was ordered to be produced. Would the better course have been to allow the victim's husband to be present for those hearings? Possibly so. Was that a ruling by the judge which requires his recusal? Certainly not. Judge Thompson was faced in this case with a most difficult set of issues concerning heretofore unprecedented allegations and evidence establishing withholding, tampering with, and destruction of evidence in a capital murder case. Having already ordered the death penalty to be imposed upon this defendant following his first conviction, and realizing the intense scrutiny surrounding a

capital murder case, Judge Thompson erred on the side of caution to protect the integrity of the prosecution against a man who had once been and might again be sentenced to death. It is perfectly reasonable and does not evidence a bias against the State or give the appearance of bias, prejudice or lack of impartiality.

V. Judge Thompson Has Not Shown A Personal Bias Against The State's Lead Prosecutor and Investigator

Judge Thompson's Order of dismissal made findings from testimony and evidence establishing the existence of witnesses and evidence known to the investigators and to the prosecuting attorney to have existed prior to trial. The findings of Judge Thompson with regard to the deliberate and intentional conduct of the investigator and the prosecuting attorney are subject to the *ore tenus* rule and were, most notably, not appealed. Those findings of fact, wholly and completely supported by the testimony and the record before the Court in the Moore appeal, are now final. A judge making findings of fact which are adverse to a party, or contrary to the desires of that party's attorney, is not guilty of conduct displaying personal

bias or prejudice arising from an extra judicial setting. The footnote reference to the matters being available on the Internet is superfluous.

At paragraph 32 on page 20 of the Petition, the prosecuting attorney cites his most egregious examples of these personal attacks. The said displays of personal paranoia and vindictive pettiness are stunning. At paragraph 32(a) Mr. Valeska complains that Judge Thompson chastised him concerning what was obviously his cell phone ringing a couple of times. Mr. Valeska fails to point out to this Court that on the doors to the Circuit Court courtrooms are posted eye level signs directing all who enter to turn off cell phones and pagers. Mr. Valeska being above the law, apparently ignored that request. Then apparently his cell phone having rung several times prompted Judge Thompson to comment to him that it should not ring any more. Mr. Valeska, were he to bother to inquire, would find that such an admonition is common from all the Circuit judges and indeed, the District judges, in this county with regard to persons whose

cell phones ring in the courtroom (attorneys and non-attorneys alike). It's amazing that this man representing the State in a capital murder case could find it so difficult to focus his attention on the case before the Court, turn off his cell phone, and now be suffering such umbrage because the Judge told him that he wasn't going to put up with it anymore.

Under paragraph 32(b) Mr. Valeska complains about the judge improperly allowing arguments after restricting the scope of testimony. This is not a basis for recusal either. A ruling during a trial based on the judge's perception of testimony to that point, is not a basis for recusal absent a display of personal bias or prejudice arising in an extra-judicial setting. Judge Thompson made no comments on the Record concerning the testimony and evidence or its weight, simply ruling on objections as presented and in the form presented.

With regard to the matter cited in paragraph 32(c) at page 20 of its Petition, Mr. Moore would simply adopt his prior responses as to the victim's

husband. This investigator and the prosecutor were allegedly engaged in conduct expressly and affirmatively violating discovery orders and existing federal and state law requiring disclosure of exculpatory evidence. Thus the law enforcement representative was not being excluded in any trial or hearing concerning the offense. He was available for consultations but he was excluded from hearing testimony taken with regard to alleged misconduct with regard to assembly, retention, withholding, and destruction of evidence being gathered during the course of an investigation of a capital prosecution.

In Paragraph 32(d) appearing at page 21 of the Petition, complains because the judge made a comment after having ordered Investigator Petty out of the courtroom for purposes of the limited testimony issues. Judge Thompson called down the disruption in the courtroom. Somehow, he should now be removed from the case as a result of threatening to clear the courtroom for any further outburst? So, when a judge enforces discipline in his courtroom over attendees

who may themselves have bias toward one side or the other, that judge must recuse himself? Of course not!

The State now argues "Thanks to the Morgan County media, the public has no other choice" than to view this case as "the State versus Judge Thompson." See page 22 of the Petition. There is no evidence to this effect.

VI. Morgan County Citizens Currently View This Case As Judge Thompson Versus The State.

The State has attached some news media excerpts to somehow treat this as a prosecutor versus judge case. Frankly, the overwhelming majority of Morgan County would be surprised and stunned to be informed that The Decatur Daily defines the public's perception, opinions, beliefs and theories. Likewise can be characterized 48 Hours Investigates. Most impressive of all is the contention that some nut who threatened Judge Thompson and then is quoted as saying he likes Judge Thompson after he was arrested for threatening him, evidences a public bias portraying Judge Thompson as the opponent of Mr. Valeska.

VII. Karen Tipton's Family And The Citizens of Alabama

Deserve The Same Right To A Fair And Impartial Trial As Mr. Moore.

The prosecuting attorney under this heading rehashes and rehashes the same issues. There has been no bias or prejudice expressed by Judge Thompson against the State itself, against the victim, or against the victim's family. There is no requirement to remove this judge to insure that he is fair and impartial as to the victim or the victim's family. The only reason the prosecuting attorney is seeking this removal is because of his personal animosity. Judge Thompson's conduct is wholly consistent with the letter and spirit of an "independent and honorable judiciary" as defined under Canon 1 governing judges and their conduct in office.

It is true as the State says that "A criminal trial should never be about the conflicts between the trial court and a party or his attorney(s)." But removing the judge for the attorney's antics is hardly proper.

The question in Morgan County was not, is not, and will never be as framed at page 25 of the State's

Petition, "Who will win, Judge Thompson or the State's prosecutors?" The question is will truth prevail?

None of the cases cited in which this Court has ordered recusal of a trial judge support or indicate directly or indirectly that recusal is proper in this case. Judge Thompson has engaged in no conduct for which, and the State cannot cite a case upon which, recusal would be due.

No ruling by the trial judge has evidenced that Judge Thompson would not give a fair and impartial consideration to the State's arguments. There has been no evidence or action by the trial court which indicates that in a trial of this case it would be "predisposed to discount the State's evidence.

If the Tipton family has any concerns about the delays in this case and the fact it is having to be retried and to whom they should attribute that failure of the system, they need look no further than Investigator Petty and Prosecutor Valeska. This case became a train wreck because of the prosecutorial and investigator misconduct that triggered years of

appellate review and delays in Mr. Moore and the Tipton family receiving a just and speedy trial.

Whose conduct displays a pattern or practice of behavior which reflects negatively on the Court in general and the legal profession in particular? Not Judge Thompson; but, Don Valeska and Mike Pettey. It is time for the Court of Criminal Appeals to tell the prosecutors to behave. Don't reward there antics . . . deny the petition.

Conclusion

The Petition is due to be denied.

Respectfully submitted this 6th day of March, 2007.

Sherman B. Powell, Jr.

247 E. Moulton Street SE
Decatur, Alabama 35601
Telephone: (256) 353-6612

J. Timothy Kyle

RUSSELL, STRAUB & KYLE
P. O. Box 327
Decatur, Alabama 35602
Telephone: (256) 353-7641

ATTORNEYS FOR
DANIEL WADE MOORE

CERTIFICATE OF SERVICE

Pursuant to Rules 25(a) and 27(d) of the Alabama Rules of Appellate Procedure, I do hereby certify that I have filed the original and five copies of the Appellee's Response under Rule 28 of the Alabama Rules of Appellate Procedure, with the Clerk of the Alabama Court of Criminal Appeals, addressed as follows:

Honorable Lane W. Mann, Clerk
Alabama Court of Criminal Appeals
State of Alabama Judicial Building
300 Dexter Avenue
P. O. Box 301555
Montgomery, Alabama 36130-1555

Which filing has been accomplished by placing said original and five copies, proper postage prepaid, in the first class certified mail, return receipt requested, of the United States Postal Service.

I do further certify that I have also served a copy of the foregoing upon the Attorney General for the State of Alabama by placing said copy, proper postage prepaid, in the first class mail of the United States Postal Service and addressed as follows:

Honorable Troy R. King, Esquire
Attorney General, State of Alabama
Attn: Donald G. Valeska, II
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Honorable Glenn E. Thompson
Circuit Judge, 8th Judicial Circuit
Morgan County Courthouse
P. O. Box 668
Decatur, Alabama 35602

Said filing and service being made this 6th day of March, 2007.

J. Timothy Kyle

RUSSELL, STRAUB & KYLE
P. O. Box 327
Decatur, Alabama 35602-0327
Telephone: (256) 353-7641

ATTORNEY FOR APPELLEE

CERTIFICATE REGARDING FONT AND TYPE STYLE

Counsel for Appellee certifies that the font and type style of this brief is Courier New 12 since the nearest other reasonably available font to Courier New 13 would be Courier New 14.

J. Timothy Kyle