CR-_____

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)

PETITION FOR A WRIT OF MANDAMUS

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TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF MANDAMUS

The Honorable Glenn Thompson has revealed his personal bias against the State and its case and/or his partiality toward Daniel Wade Moore in the following ways:

1. He has publicly declared the State's evidence to be insufficient by demeaning the State's mitochondrial DNA evidence and Moore's confession and ignoring the State's damning seven-million-to-one genomic DNA evidence;

2. He improperly freed Moore by ignoring contrary caselaw directly on point, and he did so in such a manner that the State could not ensure Moore's incarceration pending appeal for several days;

3. Without reason, he improperly removed the victim's husband from the courtroom during the most critical post-trial evidentiary hearing; and,

4. He has, on numerous occasions, publicly demonstrated his disdain for the State's lead prosecutor and its lead investigator.

Thanks to widespread media coverage, these personal beliefs and actions are well-known to the average citizen of Morgan County and the family of Karen Tipton, who Daniel Moore was once convicted of murdering. Accordingly, to ensure the appearance of absolute fairness and integrity in Moore's re-trial, the State petitions this Court to issue a writ of mandamus directing Judge Thompson to recuse himself from the re-trial of Daniel Wade Moore.

Statement of the Facts

1. This Court set forth the detailed facts of this case in State v. Moore, 2006 WL 2035664, at *1-2 (Ala. Crim. App. 2006). Briefly, Moore was convicted of the capital murder of Karen Tipton and sentenced to death based in large part on 1) genomic DNA evidence that Moore was over seven million times more likely than another person to be the contributor of a pubic hair covered in Mrs. Tipton's bodily fluid; 2) mitochondrial DNA evidence that excluded 99.8% of the population, but not Moore, from leaving the hair; and, 3) Moore's confession that he was present on the second floor of Mrs. Tipton's home at the time Mrs. Tipton was being murdered on the second floor. Id. (R. 1465-66, 1962, 1973-74, 3149-51)[1] Judge Thompson, however, granted Moore's motion for a new trial on Brady grounds and then released Moore after dismissing his indictment on Double Jeopardy grounds. Id. This Court reversed Judge Thompson's order of dismissal, unanimously finding that the Double Jeopardy Clause could not bar Moore's re-trial. Id.

[1]The State requests this Court take judicial notice of the record in State v. Moore, CR-04-0805, 2006 WL 2035664, (Ala. Crim. App. July 21, 2006)

2. After this case was remanded for re-trial, the State filed a detailed motion to recuse. (Exh. B) After having more than five months to deliberate, Judge Thompson denied the State's motion with the single word "DENIED," instead of addressing any of the arguments and reasons for recusal the State presented in its motion. (Exh. C)

Statement of the Issue Presented and Relief Sought

3. The issues presented in this petition are

a) Does Canon 3(c)(1) of the Alabama Canons of Judicial Ethics require Judge Thompson's recusal based on a reasonable perception of impartiality?

b) Does Canon 3(c)(1)(a) require Judge Thompson's recusal based on his actual bias in favor of Moore and/or against the State?

4. As relief, the State seeks a writ of mandamus ordering Judge Thompson to recuse himself from Moore's re-trial under either, or both, of the above Canons.[2]

Standard of Review

5. A writ of mandamus is a proper method by which to seek the pre-trial recusal of a trial judge. *See, e.g.*, Ex

[2]In Ex parte Fowler, 863 So. 2d 1136, 1140 (Ala. Crim. App. 2001), this Court held that Canon 3(c)(1) and 3(c)(1)(a) provide separate avenues of relief.

parte Atchley, 2006 WL 251166 (Ala. Crim. App. Feb. 3, 2006). To be entitled to a writ of mandamus ordering the recusal of a trial judge, a petitioner must show that recusal is required under Canon 3(C) of the Alabama Canons of Judicial Ethics. *See, e.g.*, Atchley, 2006 WL 251166, at *2-5; Ex parte Eubank, 871 So. 2d 862, 864 (Ala. Crim. App. 2004); Bryant, 682 So. 2d at 41.

6. Under Canon 3(c)(1)(a), recusal is required if the trial judge "has a personal bias or prejudice concerning a party." Alternatively, even if actual bias cannot be proven, recusal is required under Canon 3(c)(1) if "[the trial judge's] impartiality might reasonably be questioned." Under Canon 3(c)(1), "recusal is required when 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." Atchley, 2006 WL 251166, at *2 (*quoting* Ex parte Duncan, 638 So. 2d 1332 (Ala. 1994)).

7. In reviewing this case for actual bias and/or facts that could lead a member of the public or a party to question Judge Thompson's impartiality, this Court must remember that "[a]n independent and honorable judiciary is

indispensable to justice in our society, and this requires avoiding all appearance of impropriety, even to the point of resolving all reasonable doubt in favor of recusal." Brooks, 847 So. 2d at 398 (emphasis added). As shown below, there are numerous individual facts that could lead an average person in Morgan County and/or a party in this case (the State) to question Judge Thompson's partiality, all of which must be resolved "in favor of recusal." Id. When these facts are taken as a whole, there is no question that recusal is warranted.

Statement Why The Writ Should Issue

8. In the past 10 years, this Court has published decisions in nine cases where a party sought pre-trial, mandamus relief to recuse a circuit court judge.[3] In more than half of those cases, this Court recused the judge to

[3]*See* Ex parte Atchley, 2006 WL 251166 (Ala. Crim. App. Feb. 3, 2006); Ex parte Adams, 910 So. 2d 827 (Ala. Crim. App. 2005); Ex parte Eubanks, 871 So. 2d 862 (Ala. Crim. App. 2003); Ex parte Brooks, 855 So. 2d 593 (Ala. Crim. App. 2003); Ex parte Brooks, 847 So. 2d 396 (Ala. Crim. App. 2002); Ex parte Bentley, 849 So. 2d 997 (Ala. Crim. App. 2002); Ex parte Pritchett, 832 So. 2d 100 (Ala. Crim. App. 2002); Ex parte Fowler, 863 So. 2d 1163 (Ala. Crim. App. 2001); Ex parte Knotts, 716 So. 2d 262 (Ala. Crim. App. 1998); Ex parte Price, 715 So. 2d 856 (Ala. Crim. App. 1997)

ensure the appearance of impartiality at trial.[4] For example, in its most recent recusal case, this Court ordered the recusal of a trial judge based solely on allegations of negative comments made between the judge and the defendant 20 years before the trial in question because "another person . . . might question the judge's impartiality." *See* Atchley, 2006 WL 251166, at *5.

9. The State asks this Court to apply the same standard in this case on behalf of Karen Tipton's family and the citizens of Morgan County, who possess the same right as a defendant to a trial in which the judge's impartiality cannot "reasonably be questioned." Canon 3(c)(1). As shown below, this case mandates recusal far more than Atchley because Judge Thompson's negative opinions about the State's case and its prosecution team are current, and they are demonstrably known throughout Morgan County; they are not merely allegations of events that occurred 20 years ago as in Atchley. Thus, if Atchley required recusal to preserve the appearance of the court's impartiality, this case certainly must for the reasons outlined below.

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[4]Recusal was ordered in Atchley, Eubanks, Brooks, Fowler, and Price.

I. Judge Thompson Has Pre-Judged And Denounced The State's Evidence.

10. "A necessary component of a fair trial is an impartial judge." Ex parte Kelly, 870 So. 2d 711, 728 (Ala. 2003). Certainly, to be considered impartial, a judge who rules over each party's motions -- especially motions concerning the admissibility or sufficiency of the evidence -- cannot show partiality toward the weight and/or credibility of either party's evidence. Instead, "[t]he weight to be accorded the evidence is within the exclusive province of the jury." Dick v. State, 677 So. 2d 1267, 1270 (Ala. Crim. App. 1996)(emphasis added). As this Court has stated, "[i]n situations where premature remarks are made, a red flag is raised in regard to potential bias on the part of the judge." Wright, 628 So. 2d at 1073.

11. In this case, Judge Thompson has declared that he believes the State's evidence is deficient. As outlined in this Court's June 2006 opinion, the proper, and only, legal question before Judge Thompson when considering Moore's Double Jeopardy claim was whether the State had intentionally goaded Moore into seeking a mistrial -- a burden that Moore obviously could not meet. *See* Moore,

2006 WL 2035664, at *7-12 (applying Oregon v. Kennedy, 456 U.S. 667 (1982)).

12. Yet, after he pieced together an incorrect legal basis for dismissing Moore's indictment, Judge Thompson gratuitously attacked the State's evidence. First, Judge Thompson challenged Moore's confession evidence:

> The Defendant, Daniel Wade Moore, made an incriminating statement to this uncle while being returned to jail by his uncle and grandfather. . . . This Court will not speculate about this. However, it is not at all uncommon for a person addicted to crack cocaine, especially one involved in a check kiting scheme, to make any statement, true or false, and even against his own interest to avoid being put in jail.

(C. 52-53) Speculating that Moore confessed to his uncle to avoid having to go to jail ignores the plain evidence that Moore testified at trial that his uncle drove him to "[pay] the bondsman" to keep Moore out of jail, not to put him in jail. (R. 3149-51)

13. Next, Judge Thompson gratuitously attacked the State's DNA evidence:

> At the trial of the Defendant, DNA evidence was presented by the prosecution. This evidence was not nuclear DNA which would have been able to identify the perpetrator with a high degree of scientific certainty. The DNA evidence offered against the Defendant in this case was mitochondrial DNA. This evidence only failed to exclude the Defendant as the donor; however, it

> also did not exclude others as the possible donor of the sample tested.

(C. 53) Not only was this attack completely uncalled for, it was largely false.

14. Inexplicably, Judge Thompson denied the existence of the State's genomic DNA typing evidence that "Daniel Moore [was] about seven and a half million times more likely" to have contributed his DNA to the hair sample on Mrs. Tipton's bed than "some random individual." (R. 1962)

15. Furthermore, the State's additional mitochondrial DNA evidence (which Judge Thompson acknowledged) proved that only 0.2% of persons could have left the hairs next to Mrs. Tipton's body, and Moore fell within that miniscule 0.2 percent. (R. 1396-1410, 1444) Contrary to Judge Thompson's insinuation, the State's evidence did exclude David Tipton, who Moore continues to blame for the murder, as the possible donor. (R. 1465-66, 1973-74) Simply put, Judge Thompson attempted to wash away the State's most damning evidence of Moore's guilt by making gratuitous and largely false statements about the State's evidence.

16. After attempting to discredit the State's DNA and confession evidence, Judge Thompson continued by demeaning the State's case as a whole:

> [T]he trial of the Defendant was based almost entirely on circumstantial evidence. There is no direct evidence linking the Defendant to the scene of the crime. Additionally, the prosecution pointed to the circumstance that the Defendant had previously been employed by the burglar alarm company that installed the system belonging to the victim, stating that he knew how to disable it. However, the statement of Sarah Joyce Holden made to the Decatur Police, makes this evidence almost irrelevant.

(C. 53) Due to briefing limitations, the State will not address all of the reasons this statement is factually incorrect.[5] Suffice it to say, Judge Thompson's statement that there is "no direct evidence linking [Moore] to the scene of the crime" is either incredulous because it again ignores the State's DNA and confession evidence or it shows

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[5]The State will note, however, that Judge Thompson's reliance on Sarah Holden's post-conviction testimony is severely misplaced. Ms. Holden claimed post-trial that Mrs. Tipton informed her five days before the murder that she pulled or ripped some part of the security system out of the wall. (C. 41; R. 3710-11) However, there was also evidence at trial that Mrs. Tipton called the security company just two days before her murder because the problem persisted, called them back the night before the murder because she had "temporarily" fixed the problem, and asked the security company to contact her on the day of her murder. (R. 1732-1736) Accordingly, Judge Thompson's reliance on Ms. Holden's testimony that Mrs. Tipton ripped-out the system at least five days before the murder to discredit the State's theory of the case is wrong because, if his theory were correct, Mrs. Tipton would not have had problems two days before the murder that led to her calling the security company.

that Judge Thompson does not believe that DNA and confession evidence are sufficient indicia of guilt.

17. Either way, the above comments raise one obvious question: Why did Judge Thompson strain to disparage almost every piece of the State's case when such an attack was completely unnecessary in deciding the legal question of whether to dismiss Moore's indictment on Double Jeopardy grounds? If "a red flag is raised in regard to potential bias" each time a judge makes pre-trial comments on the evidence, then the answer is simple: Judge Thompson is biased against the State's case and/or is partial toward Moore's defense. Wright, 628 So. 2d at 1073; *See* Canon 3(C)(1)(a). Even if these comments do not prove an actual bias, they certainly provide facts that could lead an average "member of the public or a party" to reasonably question whether Judge Thompson would be biased against the State's case on re-trial.[6] *See* Atchley, 2006 WL 251166, at *2.

18. In Fowler, this Court recused a circuit judge based solely on his pre-trial comments that the defendant

[6]Judge Thompson's order was released on the internet and is still available at http://www.whnt.com/Global/story.asp?S=2914775.

would receive a longer sentence in circuit court than in district court. Fowler, 863 So. 2d at 1145. Like the judge's pre-trial comments in Fowler, Judge Thompson's pre-trial comments here raise "an appearance of impropriety" under Canon 3(c)(1); thus, they warrant recusal. Id.

Why These Comments Pose A Problem

19. In making these disparaging comments about the State's evidence, Judge Thompson effectively abdicated his role as an impartial arbiter and outlined Moore's defense strategy for the re-trial. How can the State or the Tipton family reasonably believe they will receive an impartial ruling on Moore's admissibility and/or sufficiency arguments when Judge Thompson has given Moore's attorneys the roadmap to his thoughts?

20. For example, Judge Thompson has essentially opened the possibility of dismissing Moore's indictment on a claim of insufficient evidence from which the State has no recourse. That such an action could occur is not unfounded speculation, as a federal district court judge followed a similar course to permanently prevent the criminal trial against Paul Hamrick and Don Siegelman by excluding key pieces of the government's evidence, thereby forcing a

voluntary dismissal of the government's case on insufficiency grounds. (Exh. D) Based on his comments and actions at the Siegelman/Hamrick trial, the Eleventh Circuit Court of Appeals recently recused the same district court judge from the re-trial of Siegelman and Hamrick's co-defendant, Phillip Bobo, in "respon[se] to the appearance of a lack of neutrality and, in the interest of eliminating any doubt of judicial fairness and impartiality." (Exh. E, F)[7]

21. Like the Eleventh Circuit, this Court should not allow a judge with a publicly stated, pre-conceived notion that the State's evidence is deficient preside over a re-trial in which the judge has shown a propensity for dismissing the defendant's indictment. If this Court fails to grant the State's petition, this Court's failure to act could lead to ultimate and irreversible damage to the State's case.

22. Finally, even if Judge Thompson would not dismiss this case on sufficiency grounds, his pre-judgment of the State's case could undoubtedly influence the jury on re-

[7]The unpublished opinion of the court, United States v. Bobo, No. 05-16392, 2006 WL 1737382 (11th Cir. June 23, 2006), is attached as exhibit F.

trial. Even if he never speaks his true feelings about the State's evidence again, Judge Thompson's comments are public record and on display for the potential jury pool to see.[8]

II. Judge Thompson Ignored Caselaw Directly On Point To Release A Once-Convicted Murder Without Informing The State, Despite Assurances That He Would Do So.

23. Fearing that Moore would be wrongfully set free if his motion to dismiss was granted, the State requested that Judge Thompson inform the State of his ruling "before there's a final release sent" so that the State could file motions and present arguments to prevent Moore's release. (C. 4083-84) Judge Thompson agreed that he would. (Id.) Yet, after waiting over 12 months to rule, Judge Thompson entered an order of dismissal without prior notice -- thereby freeing Moore -- at 4:15 p.m. on a Friday, just 15 minutes before the Morgan County courthouse closed. (C. 39) This action effectively ensured that the State could not prevent Moore's release, nor could it effectively seek his re-incarceration, until the courts reopened on Monday.[9]

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[8]See footnote 6.

[9]The State avers that trial counsel, Beth Poe and William Dill, were both present at the Attorney General's Office

24. Partiality toward Moore is the most plausible explanation why Judge Thompson would allow a once-convicted murderer to walk free late on a Friday afternoon without following through on his assurance that the State could seek preventative measures. This is especially true when the judge had 12 previous months to issue the ruling on any other day and time, or he could have simply given the State advance notice (as he had agreed) so that the State could ensure Moore's incarceration pending appeal.

25. Even if this action does not prove actual bias, a member of the public or a party to this case (the State) could certainly question whether Judge Thompson's late-hour ruling that allowed a once-convicted murderer to walk free without the possibility of State recourse showed a partiality toward Moore. Because "all reasonable doubt" of impartiality must be resolved "in favor of recusal," Judge Thompson's action in releasing Moore requires his recusal. Brooks, 847 So. 2d at 398 (emphasis added).

26. Additionally, Judge Thompson's legal basis for releasing Moore also reveals a bias against the State. In

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throughout the Friday that Judge Thompson issued his order of dismissal. The State's attorneys first learned of the order from a non-party phone call to the AG's office after the courts had closed.

its response to Moore's motion to dismiss, the State cited and argued Robinson v. State, 405 So. 2d 1328 (Ala. Crim. App. 1981); precedent from this Court directly on-point that held the Double Jeopardy Clause could not bar Moore's re-trial. (C 2425-26). In order to dismiss Moore's indictment in the face of Robinson, Judge Thompson had to either sufficiently distinguish, or completely ignore, this Court's binding precedent. He chose to ignore it.

27. Instead of citing this Court's decision in Robinson, or the Supreme Court's controlling precedent in Kennedy, Judge Thompson omitted both cases and relied on federal cases from the 1970's that were specifically distinguished by this Court in Robinson and explicitly overruled by the United States Supreme Court in Kennedy. (C. 48-51); *See* Kennedy, 456 U.S. at 674, 679; Robinson, 405 So. 2d at 1331-32. While such action might normally be considered a judicial mistake, when added to the late Friday-afternoon release of his order, an average person could reasonably question whether Judge Thompson's legal ruling shows a bias against the State's argument and/or partiality toward Moore. *See* Canon 3(c)(1). Just as importantly, Judge Thompson's refusal to even acknowledge

the State's on-point, Double Jeopardy precedent could also lead a reasonable person to question whether Judge Thompson will give full and fair consideration to the State's future legal arguments at Moore's re-trial. *See* id.

III. Judge Thompson Improperly Removed The Victim's Husband From The Courtroom, In Violation Of State Law.

28. "[I]t is essential to the fair and impartial administration of justice that a victim of a criminal offense be afforded a reasonable opportunity to attend any trial or hearing." Ala. Code 15-14-51(a) (1995). Accordingly, a victim or her representative has the right to be present at trial or any hearing and cannot be removed unless he/she is "engag[ing] in disruptive behavior or disorderly conduct so that the trial or other proceeding cannot be carried on in an orderly fashion." Ala. R. Crim. P. 9.2(a); Ala. Code §§ 15-14-53, 15-14-54. Being subpoenaed and/or called to testify as a witness cannot warrant the removal of a victim or her representative from the courtroom during any proceeding:

> [T]he Legislature hereby finds and determines that it is essential to the fair and impartial administration of justice that a victim of a criminal offense not be excluded from any hearing or trial or any portion thereof conducted by any court which in any way

> pertains to such offense, merely because the victim has been or may be subpoenaed to testify at such hearing or trial or because of any arbitrary or invidious reason.

Ala. Code § 15-14-51(b); *see also* Ala Code § 15-14-55.

29. Moore's attorneys subpoenaed David Tipton on the day of the motion to dismiss hearing, even though Dr. Tipton had no relevant testimony as to whether the prosecutors intentionally withheld evidence to provoke a mistrial under Kennedy. (R. 3689-90) Over the State's objection, Judge Thompson removed Dr. Tipton from the courtroom for the entire hearing, without requiring Moore's attorneys to explain why Dr. Tipton's removal was necessary or what testimony he might present. (R. 3689-95) Of course, Dr. Tipton was never called to testify; he was simply forced to sit outside the courtroom for the entire hearing. This episode leads to two reasonable conclusions: Either 1) Judge Thompson was transferring his bias against the State's prosecutors onto Dr. Tipton or 2) Judge Thompson also holds negative feelings toward Dr. Tipton. Either way, these reasonable beliefs require recusal. *See* Canon 3(c)(1).

30. As this Court made clear in Atchley, "recusal is required when 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." Atchley, 2006 WL 251166, at *2 (emphasis added). Judge Thompson acknowledged Dr. Tipton's statutory right to represent his deceased wife at the hearing; yet, he disregarded that right. Even worse, Judge Thompson did not attempt to determine why Dr. Tipton's absence was necessary. Thus, recusal is required here because Dr. Tipton's wrongful removal raises questions of bias and/or impartiality.

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

31. There is little question that Judge Thompson holds a personal disdain for the State's lead prosecutor, Don Valeska, and its lead investigator, Michael Petty. In his order dismissing Moore's indictment, Judge Thompson stated that Mr. Valeska and Mr. Petty are dishonest, "[choose] to suppress justice," "willfully defy this Court's orders," and will do anything to win. (C. 48-54) Certainly, a member of the public or a party to this case has reason to question whether these comments show that Judge Thompson would harbor "a personal bias or prejudice" against Mr. Valeska and Investigator Petty during the re-trial of the

same case that provoked these comments.[10] *See* Canon 3(C)(1)(a).

32. Of course, these comments were just the culmination of numerous instances in which Judge Thompson showed a bias or animosity against Mr. Valeska, Investigator Petty, and their case. For example,

a) After Mr. Valeska's cell phone rang, and the jury was excused, Judge Thompson stated, "If that telephone rings one more time I'm going to own it or you're going to be in jail. I've known you a long time but I'm tired of putting up with it." (C. 3565)

b) At trial, Moore called two persons to insinuate that local attorney H.M. Nowlin was having an affair with Karen Tipton and therefore had motive and opportunity to murder Karen Tipton. (R. 2777, 2810-17) In rebuttal, Mr. Valeska called Mr. Nowlin to prove Mr. Nowlin had never been to the Tipton's house and was out of town the week of the murder. (R. 3232-37) Based on Moore's objection, Judge Thompson prevented Mr. Valeska from asking Mr. Nowlin whether he could not have committed the murder or if he was having an affair with Mrs. Tipton. (R. 3234-37) Of course, during closing arguments, Judge Thompson allowed Moore's theory of defense that Mrs. Tipton's murder was likely based on her alleged extra-marital sex life and that Mr. Nowlin was involved in that sex life. (R. 3390-95)

c) Like he did with Dr. Tipton, Judge Thompson also improperly ordered Investigator Petty from the courtroom, in violation of Rule 615(2) of the Rules of Evidence, which allows the State to choose a law

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[10] *See* footnote 6 (showing that Judge Thompson's order was released to the public via the internet).

enforcement representative who is excluded from "The Rule." (R. 3689-95)

d) In arguing that Investigator Petty had the right to be present as the State's representative under the rule, William Dill (another State prosecutor) argued, "We relied on Investigator Petty; He's our connection with Decatur and with this case, and we need to talk to him; The State has the right." In response, Judge Thompson flippantly remarked, "You've been talking to him for three years." This comment caused laughter to break out in the courtroom, and forced Judge Thompson to declare that he would clear the courtroom "if there's any more outbursts of laughter or cheering or booing or hissing or anything else". (R. 3691)

33. Taken together, these comments and actions toward the State's prosecution team show a bias against the State. *See* Canon 3(c)(1)(a). Even if they do not collectively prove actual bias, they provide additional facts for a "member of the public or a party" to reasonably question whether Judge Thompson holds any animus toward the State's prosecution team. Atchley, 2006 WL 251166, at *2; *See also* Canon 3(c)(1). That Judge Thompson had to quell "outbursts of laughter [and] cheering or booing or hissing," immediately after removing Investigator Petty and Dr. Tipton from the courtroom and rejecting the State's argument to keep them, further shows that "members of the public" in Morgan County 1) recognize Judge Thompson's negative feelings toward the prosecutors and 2) now view

this case as the State versus Judge Thompson, not the State versus Daniel Wade Moore. (R. 3691) *See* Atchley, 2006 WL 251166, at *2. Thanks to the Morgan County media, the public has no other choice.

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

34. All of the comments and events outlined above have not gone unnoticed by the "members of the public" in Morgan County. Id. This case, and its post-trial proceedings, has been the focus of countless articles in Morgan County's largest newspaper, The Decatur Daily, and it was the subject of the nationally televised 48 Hours Investigates. (Exh. G) These media outlets have taken this case and turned it into Judge Thompson versus the State.

35. For example, in an editorial published on June 18, 2006, the Decatur Daily flatly defined this case as "pit[ting] a veteran prosecutor against a powerful circuit judge." (Exh. A) In another Daily article, a Decatur man accused of threatening Judge Thompson's life in a completely unrelated matter stated,

> They know I didn't do it. As a matter of fact, I want to shake Judge Thompson's hand for him freeing Daniel Wade Moore because of a poor

> investigation. . . . The Judge is to be admired for what he did. The way detectives are doing now makes you see just how they did Daniel Moore."

(Exh. H)

36. As shown above, the Morgan County media have defined this case as the State's prosecutor versus Judge Thompson, not the State versus Daniel Wade Moore. Even worse, random Decatur citizens are now demonstrably choosing sides between Judge Thompson and the State. Based on such quotes, no question remains that "members of the public" in Morgan County believe that this case pits Judge Thompson versus the State; a belief that, by definition, requires recusal under Canon 3(c)(1) because it shows that a "member of the public" has reason to believe the judge harbors "a personal bias or prejudice concerning a party." *See* Atchley, 2006 WL 251166, at *2. In fact, there can be no logical conclusion but that an average person in Morgan County actually knows of the negative feelings between the judge and the State based on the media coverage.

37. Again, just last year in Atchley, this Court ordered the recusal of a trial judge based solely on allegations of negative comments between the judge and the defendant that occurred 20 years earlier because "another

person . . . might question the judge's impartiality." *See* Atchley, 2006 WL 251166, at *5. Here, the State does not rely on 20-year-old allegations; it relies on current comments and actions taken straight from the record and published in Morgan County's largest newspaper. Thus, if Atchley required recusal to preserve the appearance of the court's impartiality, this case certainly must. In fact, recusal is the only way to restore this case to its rightful focus; that is, determining whether Moore murdered Karen Tipton.

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

38. Regardless of this Court's ruling, Daniel Wade Moore will receive a fair and impartial judge during his re-trial. If Judge Thompson remains on the case, the record reflects that he will be, at the very least, fair and impartial toward Moore. If this Court recuses Judge Thompson, Moore will receive a fair and impartial trial from the newly appointed circuit judge. Either way, Moore cannot be prejudiced.

39. The same cannot be said for the State and its victims. If this Court fails to grant the State's petition, then the State and the Tipton family face a re-trial in front of a judge who has shown a personal bias against the State and its case. On the other hand, if this Court grants the State's petition, both sides can receive a fair and impartial re-trial from a new presiding judge. Simply put, granting the State's petition is the only way to ensure the appearance of "independent and honorable judiciary" that is promised both to defendants and victims under Canon 1.

40. A criminal trial should never be about the conflicts between the trial court and a party or his attorney(s). Instead, a criminal trial should be focused on one exclusive question: Did the Defendant commit the charged crime? Unfortunately, that is not the current focus of Moore's re-trial. Instead, the citizens of Morgan County view this case as "pit[ting] a veteran prosecutor against a powerful circuit judge." (Exh. A) Unless this Court grants the State's petition, the question in Morgan County will remain, "Who will win, Judge Thompson or the State's prosecutors?"

41. To ensure the "independent and honorable judiciary" that is promised under Canon 1, Karen Tipton, her husband, her two daughters, and the citizens of this State must have the same right to an impartial trial judge that Daniel Wade Moore has. Certainly, the Tipton family should not have to sit through a re-trial in which the fairness of the proceedings could "reasonably be questioned" or the focus of the case is not whether Moore is guilty, but who will win in the perceived battle between the State's prosecutor and "the powerful circuit judge." (Exh. A); Canon 3(c)(1).

42. Furthermore, the State's request is not without precedent. This Court has ordered the recusal or reassignment of a trial judge(s) via mandamus at least five times in the past 10 years.[11] The reason for recusal in those five cases, and in prior cases, has ranged from the judge's pre-trial comments in Fowler to a "personal conflict between the petitioner's attorney and the trial judge" in Ex parte Rollins, 495 So. 2d 636, 637 (Ala.

[11] See Ex parte Atchley, 2006 WL 251166 (Ala. Crim. App. Feb. 3, 2006); Ex parte Eubank, 871 So. 2d 862 (Ala. Crim. App. 2003); Ex parte Brooks, 847 So. 2d 396 (Ala. Crim. App. 2002); Ex parte Fowler, 863 So. 2d 1163 (Ala. Crim. App. 2001); Ex parte Price, 715 So. 2d 856 (Ala. Crim. App. 1997).

1986). This case encompasses many of the same reasons for recusal, and none of the previous cases contained the multitude of reasons presented in this petition.

43. In closing, while evaluating the merits of this petition, the State requests this Court to place itself in the shoes of the Tipton family, whose wife and mother was brutally murdered almost eight years ago, and ask the following questions:

1. When an important legal ruling must be made by the trial court, can the Tipton family feel certain that the trial court will give fair and impartial consideration to the State's argument and position?

2. When the trial court must determine whether the State's evidence is sufficient or admissible, can the Tipton family feel certain the trial court is not predisposed to discount the State's evidence?

3. Can the Tipton family sit through Moore's re-trial and feel that their deceased wife/mother is receiving fair and impartial justice?

Unless this Court issues the writ, the simple answer to each question is 'no'; particularly when the Tipton's have seen Judge Thompson improperly release their wife and mother's alleged murderer by ignoring the State's on-point legal argument, publicly disparage the State's evidence, publicly demean the State's prosecutors and investigators,

and (without seeking a sufficient legal reason) improperly exclude Dr. Tipton from the most critical post-trial hearing in this case.

44. In short, this Court must issue the writ because "[a]n independent and honorable judiciary is indispensable to justice in our society, and this requires avoiding all appearance of impropriety, even to the point of resolving all reasonable doubt in favor of recusal." Brooks, 847 So. 2d at 398 (emphasis added). The extraordinary circumstances of this case demand nothing less.

Conclusion

To ensure the appearance of absolute impartiality within the judicial system, this Court should grant the State's petition for a writ of mandamus and order Judge Thompson to recuse himself from Moore's re-trial.

Respectfully submitted,

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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2007, I served a copy of the foregoing on Moore's attorneys and the trial court, by placing said copies in the United States Mail, postage prepaid, and addressed as follows:

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EXHIBITS

Exhibit A:	June 18, 2006 Article from The Decatur Daily
Exhibit B:	State's August 17, 2006 Motion to Recuse
Exhibit C:	Trial Court's Denial of the State's Motion to Recuse
Exhibit D:	October 6, 2004 Article from The Montgomery Advertiser
Exhibit E:	July 9, 2006 Article from The Decatur Daily
Exhibit F:	Bobo v. United States, No. 05-16392, 2006 WL 1737382 (11h Cir. June 23, 2006)(slip op.)
Exhibit G:	May 12, 2005 Article from The Decatur Daily
Exhibit H:	March 22, 2005 Article from The Decatur Daily