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In the ALABAMA COURT OF CRIMINAL APPEALS

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Ex parte State of Alabama

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In re:

STATE OF ALABAMA,  
Petitioner,

v.

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

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

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**STATE'S REPLY BRIEF**

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Alabama Canons of Judicial Ethics,

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## SUMMARY OF THE ARGUMENT

Judge Thompson asserts that he is not actually biased against the State. Moore argues the same. But even if this Court takes Judge Thompson at his word, recusal is still required. Whether this Court grants the State's petition does not turn on the question of whether Judge Thompson is actually biased alone. Mandamus relief is also required if a member of the public or a party could reasonably question whether Judge Thompson can be impartial.

Recusal is required, regardless of actual bias, if there are any facts "which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." Ex parte Atchley, 2006 WL 251166, at \*2 (Ala. Crim. App. Feb. 3, 2006). Recusal is required here because, if a "member of the public" knew all of the facts -- indeed, if he had only read each party's filings in this mandamus proceeding -- he would have reason to question Judge Thompson's impartiality.

Judge Thompson has questioned the believability of Moore's confession, which places Moore at the murder scene during the murder. He has questioned the validity of the

State's DNA evidence, which also places Moore at the scene of the crime during the murder. He has also stated that the State's key opportunity evidence is "almost irrelevant." In his own words, Judge Thompson has concluded that "there [is] no direct evidence linking [Moore] to the scene of the crime." (C. 53)

Judge Thompson cannot take back his words. Nor does it matter why he said them (although he had no legal reason to do so). Judge Thompson's words are his opinion, and his opinion is known. Knowing that Judge Thompson does not believe the State's key evidence -- the same evidence it will present during Moore's re-trial -- a "member of the public" or "a party" would reasonably question whether Judge Thompson would be a fair and impartial judge. Id. This reason to question Judge Thompson's partiality alone warrants recusal.

## ARGUMENT

### I. **Recusal Is Required Because A Person Can Reasonably Question Judge Thompson's Impartiality; Regardless Of Whether Judge Thompson Is Actually Biased.**

Throughout their responses, both Moore and Judge Thompson attempt to convince this Court that Judge Thompson is not actually biased toward Moore or against the State. While the record supports a finding of actual bias, more noteworthy is that both Respondents effectively side-step a threshold issue: This Court need not reach the issue of actual bias if it finds an appearance of impartiality.

Not only must this Court ensure that cases are tried by judges who are not actually biased, it must also protect the essential **perception** that every trial is governed in a fair and impartial manner. Regardless of whether Judge Thompson is actually biased, this Court must order a recusal "if 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." Ex parte Atchley, 2006 WL 251166, at \*2 (Ala. Crim. App. Feb. 3, 2006) (quoting Ex parte Duncan, 638 So. 2d 1332 (Ala. 1994)). That standard is met here.

In the minds of the public, there must exist a perception of that the trial judge will treat both sides -- the defendant *and* the victim/State -- with fairness and impartiality. As Canon 1 states, "[a]n independent and honorable judiciary is indispensable to justice in our society." In other words, our legal system cannot work if the citizens and parties it serves do not have complete faith that both sides are treated fairly.

Thus, under Canon 3(c)(1), "[t]he focus of our inquiry, [] is not whether a particular judge is or is not biased toward the petitioner; the focus is instead on whether a reasonable person would perceive potential bias or a lack of impartiality on the part of the judge in question." Ex parte Brooks, 847 So. 2d 396, 398 (Ala. Crim. App. 2002). Accordingly, Respondents' argument that Judge Thompson is not actually biased fails to address the fundamental issue because, even if taken as true, "the reasonable person/appearance of impropriety test may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Id. (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

This Court's recent decision in Atchley is a perfect example of this principle. In Atchley, the defendant claimed that, 20 years earlier when Judge Jennifer Holt was still a defense attorney, he and Judge Holt entered into a "very heated" verbal disagreement concerning whether the defendant should plead guilty. Atchley, 2006 WL 251166, at \*1. Judge Holt responded by stating that she did not recall the 20-year-old incident. Id. This Court held that, "We do not question Judge Holt's impartiality; indeed, we know that she is a fine jurist; however, the question is not whether Atchley has shown that Judge Holt is biased, but whether there is an appearance of impropriety." Id. at 4. Under this standard, this Court ordered Judge Holt's recusal by holding that a person "might reasonably question" her partiality based solely on an alleged argument (seen or heard by no one else) that occurred 20 years earlier. Id.

This Court's decision in Atchley shows the distinction between the State's "appearance of impropriety" argument and Respondents' focus on a finding of no actual bias. Regardless of whether Judge Holt was actually biased by the previous disagreement with the defendant, this Court had to

order her recusal to ensure the **perception** that the defendant was getting an absolutely impartial trial court judge.

Here, there can be no question that current facts -- not 20-year-old facts -- exist "which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge" toward the State. Atchley, 2006 WL 251166, at \*2. And as this Court can see from the tone of the responses, it is apparent there is current animus toward the State's lead prosecutor from the judge, who refers to the prosecutor repeatedly as a liar.<sup>1</sup> (Judge Thompson's response at 3-4, n.1) Thus, regardless of where each party wants to place blame, recusal is required to ensure the perception of fairness in this case. If the reasoning from Atchley is applied to the facts here, the same result must occur.

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<sup>1</sup>The State denies the factual allegations and assertions in each Respondent's answer, but will not address them here. Because perception is the prevailing issue, a resolution of the underlying factual assertions -- such as whether the prosecutor repeatedly lied -- is not necessary.



## II. Judge Thompson's Statements Concerning The State's Evidence Alone Warrant Recusal.

Even if this Court ignores every else presented in the State's petition, Judge Thompson's statements about the evidence alone warrant recusal under the "appearance of impropriety" standard. In his order dismissing Moore's indictment, Judge Thompson disparaged the State's case by stating that "there was no direct evidence linking [Moore] to the scene of the crime." (C. 53) To reach that conclusion, Judge Thompson had to 1) give his personal belief that Moore's confession that he was at the murder scene was false; 2) argue that seven-million-to-one DNA evidence linking Moore's pubic hair to the murder scene is not evidence that Moore was present at the murder scene; and, 3) give his personal opinion that the State's evidence that Moore "had previously been employed by the burglar alarm company that installed the system belonging to the victim" is "almost irrelevant" in the light of "the statement of Sarah Holden to police." (C. 52-53)

The petition for mandamus outlined why each of Judge Thompson's personal beliefs about the evidence is wrong, and the State will not duplicate those efforts again. The problem is not whether Judge Thompson's personal opinions

about the State's evidence are right or wrong. The problem is that Judge Thompson disclosed his personal opinions.

Trial court judges preside over cases every day in which they hold personal opinions as to the defendant's guilt or innocence, the sufficiency or credibility of certain pieces of evidence, and the attorneys on each side. But the judge keeps those personal opinions to himself because it is essential that he protect the perception of an impartial judiciary.

When Judge Thompson vocalized his personal opinions about the State's case -- whether right or wrong -- he removed the essential perception that he is impartial. No matter what justifications Moore may present to explain why Judge Thompson released his personal opinion, or why his thoughts "do not pose a problem," neither Moore nor Judge Thompson can take back what Judge Thompson said. (Moore's response at 17.) The perception of complete impartiality cannot exist if Judge Thompson remains the judge on re-trial. See Canon 3(c)(1). Thus, recusal is required.

Judge Thompson completely side-steps this issue by denying he made "any findings that the State's case was

insufficient<sup>2</sup>" and stating his orders "speak for themselves." (Judge Thompson's response at 2.) Moore tries to wash away the effects by giving two justifications for why the statements do not matter. (Moore's response at 12-19.) The State briefly addresses each of Moore's responses.

**A. Judge Thompson's Comments Were Unnecessary To The Legal Issue Presented.**

Moore first attempts to justify Judge Thompson's comments about the State's evidence by arguing they were necessary to decide whether to dismiss Moore's indictment on Double Jeopardy grounds. (Moore's response at 12-17.) Judge Thompson implicitly argues the same by claiming his order "speaks for [it]self." (Judge Thompson's response at 2.) This justification fails because the question of guilt or innocence was completely irrelevant to the question of whether a Moore's double jeopardy rights had been violated.

Respondents would not argue that if the State's evidence of guilt was even more overwhelming, then Judge Thompson could have correctly ruled that Moore lost his

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<sup>2</sup>Judge Thompson's argument is a red herring. Whether Judge Thompson previously went so far as to make a specific *legal* finding of "sufficiency" is not pertinent.

right against Double Jeopardy. For example, it is implausible to believe that Judge Thompson would have ruled that, if the State also possessed a videotape of Moore committing the murder, the State could try Moore repeatedly until getting the result it wanted.

As this Court held on appeal, the legal question before the trial court was whether the conduct that led to the trial court's Brady finding "was intended to provoke the defendant into moving for a mistrial;" a standard Moore could not meet. Moore v. State, 2006 WL 2035664, at \*11 (Ala. Crim. App. July 21, 2005). No discussion of the State's DNA, confession, or motive and opportunity evidence was necessary to make that ruling.<sup>3</sup> Thus, Judge Thompson's personal opinions on each piece of the State's evidence were not necessary to dismiss Moore's indictment. To the contrary, they were completely gratuitous comments made by Judge Thompson to justify his ruling (and Moore's defense) once he thought the case had ended.

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<sup>3</sup>That Judge Thompson's personal opinions on the State's evidence were not necessary to determining the issue presented is further demonstrated by the fact that this Court, over the span of four pages, quoted Judge Thompson's "findings of fact" concerning the issue presented -- none of which included his comments on the State's evidence of Moore's guilt. Moore, 2006 WL 2035664, at \*2-5.

**B. Voir Dire Cannot Purge The Taint Of Judge  
Thompson's Personal Opinion Statements.**

In the alternative, Moore argues that Judge Thompson's comments on the State's evidence "do not pose a problem" on re-trial because sufficient voir dire can purge the taint of the comments. (Moore's response at 17-18.) This argument fails for two reasons.

First, Judge Thompson's comments are different. Generally, the State would agree that a juror's pre-trial knowledge of a case can be cured by a sufficient voir dire in which the judge asks a potential juror whether he can put aside any pre-trial comments made by a friend, a television reporter, etcetera. But that is not what happened here. The comments here came not from a reporter or disinterested third party, but from the trial judge, who is supposed to espouse fairness and impartiality. No voir dire question can purge the taint of a juror knowing the presiding judge's feelings about the evidence.

Second, and more important, voir dire cannot cure the release of Judge Thompson's personal opinion because it does not matter whether the re-trial jury is aware of Judge Thompson's opinion or not. The question under Canon 3(c)(1) is whether Judge Thompson's personal opinions would

cause a "member of the public" or a "party" -- not just a potential juror -- to question Judge Thompson's impartiality if he knew about the opinions. Brooks, 847 So. 2d at 398. Even if no one on the re-trial jury heard Judge Thompson's personal opinion of the State's evidence, he still has that opinion. No voir dire question asked of the jurors can purge Judge Thompson of his own personal view, and his opinions alone require recusal here because -- now that his opinions are known -- they allow a member of the public or a party to "perceive potential bias or a lack of impartiality on the part of the judge." Id.

It does not matter who sits on Moore's re-trial jury. The law should not require the State or Ms. Tipton's husband and teenage daughters to sit through a re-trial in which the trial judge has 1) already released his personal opinion that the State's evidence is lacking and 2) has shown a propensity to dismiss Moore's indictment. More importantly, this Court has before it the facts not only to believe, but to know, Judge Thompson's personal opinion of the State's evidence. See Atchley, 2006 WL 251166, at \*2 (holding that recusal is required "if 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") Accordingly, to ensure the absolute appearance of fairness of the judicial system, this Court must recuse Judge Thompson. See id.; Canon 3(c)(1).

### **III. Recusal Is The Only Way To Restore The Appearance Of Complete Fairness In This Case.**

Finally, to further demonstrate why recusal is required, this Court should look forward to the re-trial through the eyes of a member of the public. Should Moore be acquitted, could a member of the public reasonably question whether Judge Thompson's feelings toward the State's prosecutor and evidence were a contributing factor? When a motion for a judgment of acquittal is filed, could a member of the public reasonably question whether Judge Thompson will grant it based on his known opinions about the State's evidence? Or, if he denies the motion, could a person reasonably question whether Judge Thompson reached the correct ruling due to fear that he would be accused of bias based his previous comments about the evidence? Unfortunately, the answer to each question is "yes," a member of the public could reasonably question any ruling

Judge Thompson makes during the upcoming re-trial based on the facts already known.

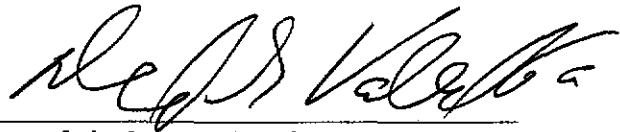
The goal of the Canons is to ensure the perception of "[a]n independent and honorable judiciary" in the eyes of the parties and the public. Canon 1, Alabama Canons of Judicial Ethics. In its current posture, a member of the public has every reason to question the fairness and integrity of Moore's upcoming re-trial. And because the same attorneys for each party will be present at the re-trial, the only way to restore the perception of absolute impartiality in the eyes of the public would be to have a new judge preside over the case; a judge who has no history in this case and has not stated his or her personal feelings toward either party's attorneys or its evidence.



### Conclusion

This Court must ensure the perception of absolute impartiality within the judicial system for both parties. Because the State has provided this Court with facts that could lead a member of the public or a party to reasonably question Judge Thompson's partiality in this case, this Court should grant the State's petition for a writ of mandamus and order Judge Thompson's recusal.

Respectfully submitted,



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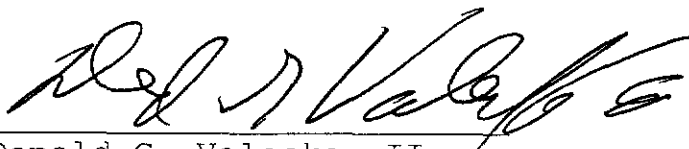
**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of March, 2007,  
I served a copy of the foregoing on Moore's attorneys and  
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