
Case No. 1150818

IN THE SUPREME COURT OF ALABAMA

Ex parte Roy S. Moore
(In re: Roy S. Moore v. Judicial Inquiry Commission of the
State of Alabama)

**THE JUDICIAL INQUIRY COMMISSION'S RESPONSE TO
SHOW CAUSE ORDER**

John L. Carroll
jic@jic.alabama.gov
Rosa Hamlett Davis
rosah.davis@jic.alabama.gov
ALABAMA JUDICIAL INQUIRY
COMMISSION
P.O. Box 303400
Montgomery, AL 36130-3400

R. Ashby Pate
apate@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE,
L.L.C.
The Clark Building
400 North 20th Street
Birmingham, AL 35203-3200
(205) 581-0700
(205) 581-0799 (Facsimile)

Attorneys for Alabama Judicial Inquiry Commission

THE JUDICIAL INQUIRY COMMISSION'S RESPONSE TO
SHOW CAUSE ORDER

On December 7, 2016, this Court ordered the Judicial Inquiry Commission ("JIC") to show cause within fourteen (14) days as to why the Motion to Intervene and Unseal filed by the Alabama Political Reporter on October 19, 2016, which was supported by the Chief Justice's October 21, 2016 Response thereto, should not be granted.

To date, the JIC has remained silent on these issues, but now, in accordance with this Court's Show Cause Order, and because the Rule 19 Petition that forms the basis of this case was filed under seal by Chief Justice Moore himself, during the pendency of a JIC investigation, and pertaining to matters in that investigation, the presumption of open court proceedings and the Chief Justice's own consent to lifting the seal are insufficient to overcome the Alabama Constitution's strict confidentiality mandate that "[a]ll proceedings of the [JIC] shall be confidential, except the filing of a complaint with the [COJ]." See Art. VI, § 156(b), Ala. Const. 1901; see also Rule 5A, Ala. R. P. Jud. Inq. Comm'n.

ARGUMENT

A. The Alabama Supreme Court's decision to leave the seal in place was not an abuse of discretion

Throughout the very short pendency of this case, which pertains solely to Chief Justice Moore's confidential request for relief under JIC Rule 19¹ during the JIC's ethics investigation – and throughout the pendency of the JIC's ethics prosecution of Chief Justice Moore in the Court of the Judiciary ("COJ"), which is currently pending appeal before this Special Court – the JIC has never taken a position on this issue.

That is, it has never taken a position on the Alabama Supreme Court's decision first to grant Chief Justice Moore's own Motion to Seal those Rule 19 proceedings, and it has never taken a position on the Alabama Supreme Court's repeated decisions to deny Chief Justice Moore's later motions to unseal them. Indeed, the JIC had little chance to do so, because the Chief Justice filed the Rule

¹ JIC Rule 19 reads in pertinent part: "Any judge who is the subject of investigation by the commission and who claims to be aggrieved by any violation of these Rules may petition the Supreme Court directly for relief. Any judge who is the subject of prosecution by the commission may petition the Court of the Judiciary for relief and, if not satisfied with the Court of the Judiciary's action on such petition, may then petition the Supreme Court for relief." See Rule 19, Ala. R. P. Jud. Inq. Comm'n.

19 Petition as an expedited, extraordinary writ, and the Alabama Supreme Court ruled upon it accordingly, i.e., within two days' time. In its denials of the Chief Justice's motion to unseal these proceedings, the Alabama Supreme Court did not explain, and was not necessarily required to explain, the various reasons for leaving the seal of these proceedings in place, and the JIC has never felt it was the JIC's place to speculate about them.

But a court's "sealing of the record or documents is clearly subject to review for abuse of discretion." *Ex parte Barze*, 184 So. 3d 1012, 1014 (Ala. 2015) (citing *Holland v. Eads*, 614 So.2d 1012, 1014 (Ala.1993); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir.1985) (where parties presented no legally sufficient reasons for the closure of the record, the sealing of the record was an abuse of discretion)). Here, legally sufficient reasons clearly exist supporting the Alabama Supreme Court's decision to leave the seal in place - namely, the confidentiality mandate for all JIC investigatory proceedings under the Alabama Constitution. See Art. VI, § 156(b), Ala. Const. 1901 ("[a]ll proceedings

of the [JIC] shall be confidential except the filing of a complaint with the [COJ].").

B. The Alabama Constitution mandates that proceedings related to JIC investigations should remain confidential, and neither a judge's consent nor the presumption of open court proceedings can override that mandate

Again, all JIC investigatory proceedings are bound by strict confidentiality rules - namely, the Alabama Constitution, which mandates that "[a]ll proceedings of the [JIC] shall be confidential except the filing of a complaint with the [COJ]." See Art. VI, § 156(b), Ala. Const. 1901; see also Rule 5A, Ala. R. P. Jud. Inq. Comm'n. Here, the Rule 19 Petition, as well as the accompanying Motion to Seal Proceedings, were filed by Chief Justice Moore, during the pendency of a JIC investigation, and pertaining to that investigation. Thus, Chief Justice Moore's initial Motion to Seal the Rule 19 Proceedings was entirely appropriate, given that proceedings brought pursuant to JIC Rule 19 are, by definition, JIC proceedings, and again "[a]ll proceedings of the [JIC] shall be confidential." Rule 5A, Ala. R. P. Jud. Inq. Comm'n.

Chief Justice Moore himself cited the Alabama Constitution's strict confidentiality mandate in his original Motion to Seal, arguing that that "[d]ue to the highly sensitive, private and confidential nature of these proceedings, it is absolutely essential that these proceedings be kept sealed." See Motion to Seal Proceedings at 2, filed on 05/03/2016, Case No. 1150818 (emphasis added). He went on to note that "[n]either the public nor the Respondent will be harmed by keeping these proceedings under seal." *Id.* (emphasis added).

Here, the Alabama Political Reporter's Motion to Intervene and Unseal, and the Chief Justice's Response in Support thereof, largely either ignore these constitutional considerations or seek to subordinate them to other public policies. To be sure, the Motion to Intervene is premised upon the admittedly important presumption that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." See Memo. In Support of Mot. to Intervene at 4 (citing *Nixon v. Warner Commc'ns, Inc.*, 435

U.S.589, 597-98 (1978))². And, with this presumption in mind, it argues that no "countervailing interest exists to offset the public right of access to those filings."³ Thus, it reasons, this Court should now lift the seal because the only "person with a potential interest in retaining the seal on Case No. 1150818 is Chief Justice Moore," who has "publicly requested that that case be unsealed." See Memo. In Support of Mot. to Intervene at 6.

But this glosses over the Alabama Constitution's confidentiality mandate. Moreover, the Motion to Intervene, and the Chief Justice's Response in Support thereof, similarly fail to recognize that (a) the Alabama Supreme Court has already exercised its discretion, on numerous occasions, to keep this matter sealed, and (b) neither Chief Justice Moore's consent, nor the presumption of open proceedings are sufficient to overcome the Alabama Constitution's confidentiality mandate over JIC investigatory proceedings.

² The Alabama Political Reporter's Motion to Intervene and Unseal does not contain page numbers, but this citation occurs on the fourth consecutive page of the section titled, Memorandum in Support.

³ See Memo. In Support of Mot. to Intervene at 6.

Again, the Alabama Constitution mandates that discussion – in any forum – of the JIC's investigation of Chief Justice Moore should remain confidential. See Art. VI, § 156(b), Ala. Const. 1901 (“[a]ll proceedings of the [JIC] shall be confidential except the filing of a complaint with the [COJ].”). And no authority supports the notion that Chief Justice Moore's consent to the full disclosure of proceedings initiated during and pertaining to a JIC investigation can somehow unilaterally override the Alabama Constitution's confidentiality mandate. Indeed, neither Chief Justice Moore nor the Alabama Political Reporter has cited any authority for such a proposition.

This is because the confidentiality mandate exists not only to protect the integrity of ethics investigations⁴ and to protect judges who are under investigation from the exposure of unjustified complaints, but perhaps most importantly, to protect the process itself and to

⁴ The JIC has no power to restrict a judge's ability to reveal aspects of his case to the public or to the COJ as he sees fit. See Rule 5B, Ala. R. P. Jud. Inq. Comm'n. (requiring that the JIC has no “power to restrict speech or communications by persons other than the members, staff and agents of the commission itself.”). And indeed, the JIC never attempted to prevent Chief Justice Moore from raising these same issues before the COJ during his ethics prosecution – and he concedes that he in fact did raise them, albeit unsuccessfully.

"insulate[] complainants and witnesses who might otherwise be too intimidated to give information." See Charles Gardner Geyh, James I. Alfani, Steven Lubet, & Jeffery M. Shaman, *Judicial Conduct & Ethics*, § 12.12[8] (5th Edition 2013) (cataloging authority holding that judges should be prohibited from waiving confidentiality for "statements other than their own").

Though the Alabama Supreme Court has not provided specific guidance on the dangers of allowing judicial consent to waive the constitutional confidentiality mandate of judicial disciplinary proceedings, other courts have.

For example, one of the seminal cases cited in judicial ethics treatises is *Leff v. State Commission on Judicial Conduct*, No. 80-185-86 (N.Y. Sup. Ct. Sept. 30, 1980), *aff'd*, 78 A.2d 620, 434 N.Y.S.2d 644 (1980), where a New York state judge was accused of misconduct for his refusal to perform assigned duties in accordance with an administrative order. See *Judicial Conduct & Ethics*, § 12.12[8]. When the judge was requested to testify before the commission, he refused to appear unless the entire proceeding was opened to the public. Among other things, the judge claimed that public access to judicial

disciplinary proceedings is required to ensure public confidence in the administration of justice. On appeal, the *Leff* Court determined that though "it was only logical to allow the judge under investigation to waive confidentiality so far as his own statements were concerned, . . . confidentiality also insulates complainants and witnesses who might otherwise be too intimidated to give information." See *Judicial Conduct & Ethics*, § 12.12[8]. In the end, the *Leff* Court allowed the judge to waive confidentiality for his own statements, but kept the proceedings as a whole confidential.

Likewise, in *Owen v. Mann*, 475 N.E.2d 886 (Ill. 1985), the Illinois Supreme Court noted that "the [Judicial Inquiry] Board can fulfill its responsibilities only if complainants and witnesses freely come forward with information. Such free flow of information depends, in part, on a person's expectation of confidentiality to shield him from possible recrimination by an individual subject to investigation." *Owen*, 475 N.E.2d at 891 (holding that the section of the State Constitution requiring that all proceedings of the Judicial Inquiry Board be confidential serves several important purposes: protecting

judges against unfavorable publicity resulting from irresponsible and unfounded charges, encouraging participation of witnesses by providing protection against retaliation and harassment, and allowing the Board's work to proceed unimpeded).

Though the Alabama Supreme Court has not opined directly on the issue, its well settled practice of keeping JIC Rule 19 proceedings under seal supports the notion that Alabama too respects the confidential nature of ongoing and concluded JIC investigations. See e.g., *Ex parte Judge [Redacted]* (In re: A Proceeding Before the Judicial Inquiry Commission of Alabama, No. 1130475 (Dec. 17, 2015) (similar under-seal Rule 19 proceeding in which Alabama Supreme Court denied Rule 19 relief to a petitioner judge). That is, these overarching policy concerns are not extinguished simply by the conclusion of a single investigation.

The fact is, countervailing interests do exist here – namely the Alabama Constitution and the protection of the integrity of the JIC's investigatory process in this and future cases. Thus, the presumption of open courts, even coupled with Chief Justice Moore's own consent, cannot vacate longstanding provisions of the Alabama Constitution

requiring confidentiality in these kind of proceedings.
Other compelling state interests are in play.

C. The issues raised in this Rule 19 proceeding were also raised – and rejected – by the Court of the Judiciary

Finally, it must be noted that the issues raised in this case are duplicative⁵ of and thus immaterial to the issues in Chief Justice Moore's appeal from his ethics conviction in the Court of the Judiciary in Case No. 1160002.

The fact is, Chief Justice Moore presented the same arguments that he raised in this interim Rule 19 Petition to the COJ during his ethics prosecution, i.e., those regarding any alleged "leak" of information in violation of the JIC rules. And, when the Chief Justice in fact did so, the COJ found that he failed to produce any supporting evidence in support thereof, or otherwise failed to meaningfully present and preserve this issue. See COJ Final Judgment at 18-21 (holding that Chief Justice Moore

⁵ In his recently-filed appellate brief, the Chief Justice reveals that these were the same issues at play in his Rule 19 Petition: "Chief Justice Moore filed a Petition for Relief pursuant to Alabama Judicial Inquiry Commission Rule 19 on May 4, seeking an injunction against the JIC's investigation based on the JIC's breach of confidentiality in violation of JIC Rule 5. See Appellant's Br. at 12, Case No. 1160002.

presented insufficient evidence to establish any alleged JIC leak and failed to present any "authority indicating he is entitled to the remedy he seeks: dismissal of the charges."). Moreover, notwithstanding Chief Justice Moore's failure to provide any evidence to support his leak accusation, the leak issue is now once again presented on appeal by Chief Justice Moore in Case No. 1160002, where the "Statement of the Issues" section lists the issue regarding JIC's alleged "leak." See Appellant's Br. at 4-5, Case No. 1160002.

The fact is, the Chief Justice has had numerous opportunities during this proceeding and in his ethics prosecution to present the issues raised in his under-seal Rule 19 Petition. Thus, it is clear that this Motion to Intervene, and the Chief Justice's Response in Support thereof, are brought for some other purpose. Candidly, the JIC submits that this Motion represents little more than a concerted effort by Chief Justice Moore and a political reporting entity to undo prior rulings by the Alabama Supreme Court and to foster attacks on sitting justices, unable themselves to respond in any way.

Indeed, the Chief Justice, through his present counsel, has now publicly accused his colleagues on the Alabama Supreme Court of somehow conspiring to initiate the ethics prosecution against him. As recently as last week, his own counsel was quoted as saying "I believe that's why they don't want to unseal it, because it makes it very obvious that this case was set up by a few people on the Alabama Supreme Court from the very beginning."⁶

This kind of public attack on sitting members of the Alabama Supreme Court, and the open peddling of conspiracy theories involving some combination of members of the Alabama Supreme Court, the party who initiated the ethics Complaint, the nine-member JIC, and now the nine-member COJ,⁷ should simply not be sanctioned or rewarded. This is

⁶ See WHNT 19 News, "Suspended Chief Justice Roy Moore filing appeal to get his job back," by Brian Lawson, available at <http://whnt.com/2016/12/12/suspended-chief-justice-roy-moore-filing-appeal-to-get-his-job-back/> (Last visited, Dec. 14, 2016).

⁷ Chief Justice Moore himself accuses the nine-member COJ of "sinister evasion" of the law. See Appellant's Br. at iii, Case No. 1160002. And in one of the most impertinent examples, certain parties supporting Chief Justice Moore lob the following assault on the COJ itself: "If this Court allows that decision to stand, it would improperly sanction the violations of Alabama Judicial Ethics that have been committed not by the Chief Justice, but by the judicial members of the [Court of the Judiciary]" See December 9, 2016 Brief of Amici Curiae

especially true because he concedes that his Rule 19 issues were raised before the COJ – and rejected by it – and because the Alabama Constitution itself plainly mandates that Rule 19 JIC proceedings should remain under seal to protect the integrity of the JIC's investigatory processes.

The Chief Justice himself filed the original Motion to Seal the Rule 19 Petition here, and when he did not obtain the relief he was seeking, he sought to lift the seal in order to personally and publicly attack his colleagues. The Alabama Supreme Court exercised its discretion repeatedly to deny his motion to unseal the proceedings, and the Alabama Constitution's confidentiality mandate for all JIC proceedings provided ample justification for them to do so. Though the JIC has remained silent on these issues during the pendency of this dispute, in response to the Court's Show Cause Order, the JIC respectfully submits that the Motion to Intervene and Unseal, and the Chief Justice's Response in Support thereof, are contrary to the Alabama State Constitution and to public policy.

in Support of Appellant on Behalf of United States Justice Foundation, at 3, Case No. 1160002.

/s/ R. Ashby Pate
Attorney for Alabama Judicial
Inquiry Commission

OF COUNSEL:

R. Ashby Pate

apate@lightfootlaw.com

LIGHTFOOT, FRANKLIN & WHITE, L.L.C.

The Clark Building

400 North 20th Street

Birmingham, AL 35203-3200

(205) 581-0700

Rosa Hamlett Davis

rosah.davis@jic.alabama.gov

ALABAMA JUDICIAL INQUIRY COMMISSION

P.O. Box 303400

Montgomery, AL 36130-3400

CERTIFICATE OF SERVICE

This is to certify that on this 19th day of December, 2016, a true and correct copy of the foregoing was served on counsel of record electronically and by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to

Mathew D. Staver, Esq.
court@lc.org
Horatio G. Mihet, Esq.
hmihet@LC.org
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 54074

Phillip L. Jauregui, Esq.
plj@judicialactiongroup.com
JUCIAL ACTION GROUP
7013 Lake Run Drive
Birmingham, AL 35242

/s/ R. Ashby Pate

Of Counsel