IN THE ALABAMA COURT OF THE JUDICIARY

In the Matter of:

DOROTHEA BATISTE, Case No. 43
Jefferson County Circuit Judge

RESPONSE OF THE JUDICIAL INQUIRY COMMISSION
TO THE MOTION TO STRIKE OR FOR SUMMARY JUDGMENT

Comes now the Judicial Inquiry Commission and responds to the motion to strike or for summary judgment filed on behalf of Judge Dorothea Batiste. The motion is without basis in law or in fact; and upon the strength of the following argument, citation of authority, and evidence is due to be denied.

Paragraph 1

Respondent states in paragraph 1 of her Motion to Strike or for Summary Judgment that the Complaint filed in this case "basically alleges abuse of discretion by Batiste in the use of her contempt power."

Respondent is mistaken. Abuse of discretion is not charged in the Complaint. In order for discretion to be abused, discretion first has to exist.[1] The Complaint alleges that

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[1] e.g., *Serenity Recovery Homes v. Somani*, 710 N.E.2d 789 at 792 (Ohio Ct. App., 1998):

> Appellant's . . . assignment of error is unfounded because the trial court had no jurisdiction to consider the appeal because of appellant's failure to timely file with the administrative agency. Therefore, the trial court had no discretion whatsoever with respect to choosing whether to review the matter or not. Accordingly, where no discretion to act exists, there can be no abuse of discretion. (underlining supplied)

by failing to comply with Rule 70A, A.R.C.P., Judge Batiste had no authority or discretion to initiate these contempt proceedings or to make findings of contempt or to order the arrests of any of the seven contemnors referred to in the Complaint.

Rule 70A is not discretionary—in the absence of compliance with Rule 70A, including the filing of a petition which specifies the essential facts alleged to constitute contempt, service of this petition upon the alleged contemnor, notice of a hearing on the petition, with an opportunity for the alleged contemnor to be heard on the charge of contempt, Judge Batiste had no discretion to exercise contempt power in these cases.

In fact, respondent acknowledges these requirements in the "Memorandum of Law" attached to respondent's motion as Exhibit F. At page 5 of this memo, citing and quoting *Fludd v. Gibbs*, 817 So. 2d 711 (Ala. Civ. App. 2001), respondent states:

> In regards to the due process requirement of Rule 70A, the Alabama Court of Civil Appeals looks to determine if the following elements were present: (1) notice of the charges; (2) reasonable opportunity to meet them; (3) right to call witnesses; (4) right to confront the accuser; (5) right to give relevant testimony either to the issue of complete exculpation or extenuation of the offense; and (6) right to offer evidence in mitigation of the penalty imposed.

Paragraph 1 (Part II)

Respondent further states in paragraph 1. of her Motion to Strike or for Summary Judgment that: "Nowhere in the 38-page AJIC complaint . . . is there any allegation that Judge Batiste engaged in bad faith." Again, respondent is plainly and demonstrably wrong.

In subparagraph a. of paragraph 7., the Complaint alleges that with regard to all seven of the contemnors, Judge Batiste collectively acted in "bad faith." The Complaint then realleges individually, for each of the seven contemnors, that Judge Batiste acted with "bad faith." See paragraph 8. (relating to Sonja Bell, the contemnor in the *Bearden*

case); paragraph 30. (relating to Curtis Austin, the contemnor in the *Austin* case); paragraph 51. (relating to Kizzy Lacey, Kimberley Clark, and Cande Franklin, the contemnors in the *Isom* case); paragraph 71. (relating to Deva Walker, the contemnor in the *Gipson* case); and paragraph 89. (relating to Barbara Kyle, the contemnor in the *Kyle* case).

Still further, the allegation of bad faith is required only for charges which allege (a) violations of Canons 2A and 2B, and (b) are based on erroneous legal rulings, e.g., *In the Matter of Billy Joe Sheffield*, 465 So. 2d 350 (Ala. 1984):

> [A]bsent bad faith (i.e., absent proof of malice, ill will, or improper motive), a judge may not be disciplined under Canons 2A and 2B of the Alabama Canons of Judicial Ethics for erroneous legal rulings.

The Complaint herein charges violations of not only Canons 2A and 2B, but also violations of Canons 1, 3A(1) and 3A(4). See Charges 2, 3, 4, 7, 8, 9, 12, 13, 14, 17, 18, 19, 22, 23, 24, 27, 28, and 29, all of which are based on Canons other than Canons 2A and 2B. No authority exists requiring allegation or proof of bad faith as to these charges.

Last, bad faith is a state of mind and therefore is not ordinarily susceptible to direct proof, but must be inferred from the other evidence. In the *Sheffield* case, 465 So. 2d at 358, the Alabama Supreme Court cited and quoted with approval the opinion of the Supreme Court of Illinois in *People ex rel. Harrod v. Illinois Courts Commission*, 372 N.E.2d 53 at 65 (Ill. 1977) in which the Illinois Supreme Court approved the inference and affirmed the finding of bad faith where, as here, a judge repeatedly failed to follow law that is clear on its face:

> Mere errors of law or simple abuses of judicial discretion should not be subject of discipline by the Commission, [but] where the law is clear on its face, a judge who repeatedly imposes punishment not provided for by law is subject to discipline by the Commission.

Rule 70A is clear on its face. It imposes clear requirements for judges to meet in order to exercise their contempt powers, particularly in cases of indirect criminal

contempt, which includes all of the exercises of contempt power alleged in the Complaint. Judge Batiste repeatedly ignored the Rule's requirements and imposed punishment in a manner not allowed by law on the seven contemnors, as is more particularly alleged in the Complaint.

Similarly, Judge Batiste failed to follow Section 12-21-182,[2] Code of Alabama, 1975, the Alabama statute governing "proceedings upon failure of a subpoenaed witness to attend and remain" and failed to provide the seven persons for whom Judge Batiste issued writs of attachment with the protections afforded by that statute.

Again, as with Rule 70A, the Commission has not charged Judge Batiste with abusing her discretion under that statute. She is charged with acting without lawful authority, i.e., in absence of discretion. The limitations on attachments and the procedures for its employment specified in the statute, as with Rule 70A, are not subject to judicial discretion. In order to be authorized to issue a writ of attachment pursuant to this statute, the judge must follow the statute. And whether exercising the authority to

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[2] § 12-21-182. Proceedings upon failure of subpoenaed witness to attend and remain:

> (a) Any witness who, after being subpoenaed, fails to attend pursuant to the mandate of the subpoena and remain until his testimony is given or he is discharged forfeits $100.00 to the use of the party summoning him, and the attendance of such witness may be compelled by attachment.
> (b) A conditional judgment must, on motion of such party, be entered against such witness and a notice issued to him that such judgment will be made absolute unless he appears within 30 days from the date of the service of such notice and renders a good excuse for his default; and, if he fails to appear and render a satisfactory excuse for his default, such judgment may be made absolute or reduced, as the court may direct.
> (c) Witnesses failing to attend court may make their excuse by affidavit, or viva voce, in open court, which the court must hear at any time, unless engaged in the trial of a case, and, if the excuse is sufficient, release the party from any fine imposed, without the payment of costs.

issue a writ of attachment power under § 12-21-182 or the contempt power under Rule 70A, A.R.C.P, Judge Batiste had no discretion not to follow their procedural safeguards, yet she repeatedly failed to do so.

Other courts charged with enforcing judicial discipline have come to the same conclusion that the Illinois Supreme Court reached in *Harrod*, supra, which as noted, was cited with approval by the Alabama Supreme Court in the *Sheffield* case, 465 So. 2d at 358: where repeated judicial error results in repeated violations of constitutional rights, such conduct violates the canons, e.g., in *In re Hammermaster*, 985 P.2d 924, 937-38 (Wash.1999), the Washington Supreme Court, citing judicial discipline cases decided by the New York, New Jersey, and Michigan Supreme Courts, similarly held:

> While we recognize that legal error is usually a matter for appeal and does not generally trigger judicial discipline, a repeated pattern of failing to protect a defendant's constitutional rights can constitute misconduct. In re Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984); In re Yengo, 72 N.J. 425, 371 A.2d 41 (1977); In re Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980). As the Michigan Supreme Court noted:
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> > Judicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review, but one does not necessarily exclude the other. One path seeks to correct past prejudice to a particular party; the other seeks to prevent potential prejudice to future litigants and the judiciary in general.

In addition, there are other facts and circumstances in the charged cases which support a finding of bad faith by Judge Batiste in her handling of these cases.

As an example, in *Bearden v. Bearden*, even at the post-incarceration hearing, held *after* Ms. Bell had served a 3-day jail sentence for contempt, Judge Batiste refused to hear testimony regarding why Sonja Bell did not appear in court. Further, Judge Batiste appeared to hold Ms. Bell in contempt based, at least in part, on bare allegations regarding Ms. Bell's past behavior that were unrelated to the question of whether Ms. Bell had willfully failed to appear on August 10th pursuant to a properly served subpoena.

Still further, when questioned by the Judicial Inquiry Commission concerning her failure to give Ms. Bell a hearing before having her arrested and jailed for contempt, and her future actions, Judge Batiste told the Commission "I'm going to do nothing differently."

As another example, in the *Kyle* case, Judge Batiste held Barbara Kyle in contempt and ordered her arrested for failure to appear in response to an order requiring Ms. Kyle's attendance at a hearing that was set on less than two days' notice. In doing so, Judge Batiste refused to consider the facts that Ms. Kyle was in California when the order was issued and that her order, which was issued at 3:47 PM on a Monday, set the hearing less than 48 hours later on Wednesday at 1:30 PM, thereby making it virtually impossible for Ms. Kyle to be notified of the order to appear in time to arrange her return to Alabama from California.

Judge Batiste also appeared to have prejudged Ms. Kyle, based on something Judge Batiste overheard from Ms. Kyle at a previous proceeding that was unrelated to whether Ms. Kyle willfully failed to appear. Judge Batiste further misrepresented to the Judicial Inquiry Commission and to this Court that she did not learn that Ms. Kyle was in California until after the attachment and contempt order had been entered, when in fact she was informed by Ms. Kyle's attorney at the hearing that Ms. Kyle was in California before she entered the order holding Ms. Kyle in contempt. In fact, at the hearing a colloquy occurred between Judge Batiste and Mr. Wright, Ms. Kyle's attorney, concerning Ms. Kyle being in California.

In *Austin v. Austin,* Mr. Austin was held in contempt for failure to comply with unspecified prior orders of the court in a proceeding in which he had not been properly served and in which Judge Batiste had no jurisdiction. Mr. Austin was nevertheless arrested pursuant to Judge Batiste's writ of attachment and held in jail for 12 days. During this 12 day period, Mr. Austin's attorney filed 3 successive motions pointing out some of these errors and seeking his release. When Judge Batiste did not set these motions for a hearing and Mr. Austin's attorney was advised that Judge Batiste did not intend to set the motions for hearing, he filed a petition for a writ of habeas corpus to gain

Mr. Austin's release. However, when Judge Batiste was presented with this petition, her response, made through her judicial assistant, was that she did not intend to hear the habeas petition stating, "This is not a criminal court" or words to that effect. Mr. Austin was released only when a second habeas petition was filed and assigned to another civil division judge who granted the writ and released Mr. Austin.

Paragraph 2

Additional allegations made by respondent in paragraph 2 are also mistaken. Contrary to respondent's allegation, the Commission received sworn complaints that were the basis for initiating the investigations that led to each of the charges made in the Complaint. These sworn complaints, which were filed regarding each of the five domestic relations cases in which Judge Batiste held the seven contemnors in contempt, have been served on Judge Batiste.

Paragraph 3

In paragraph 3 of respondent's motion, she includes a long quotation from an "unsigned affidavit" of Teresa Love, who was Judge Batiste's former judicial assistant prior to resigning that position. The quotation from this unsigned document describes Judge Batiste in very favorable terms.

Although respondent has been provided with a transcript of Teresa Love's testimony given before the Commission on February 28, 2013, and respondent makes reference to that transcript in her motion, respondent fails to tell the Court in her motion that Ms. Love disavowed the contents of her unsigned affidavit in her testimony before the Commission on February 28, 2013.

Attached to respondent's motion as Exhibit D are pages 139 through 141 of the transcript of Teresa Love's February 28th testimony before the Commission. On pages 140 and 141, Ms. Love testified that Ms. Love did not think her unsigned affidavit was a true statement when she wrote it (p. 140, lines 12-15) and that the reason why the affidavit is unsigned is that Ms. Love "didn't believe what she said [in her unsigned

affidavit]" and "honestly, that is not my opinion of [Judge Batiste]. It was just to support her because everybody was, you know, just after her, so." (p. 141, lines 5-14)

The questioning of Ms. Love by a member of the Commission, which respondent characterizes in paragraph 4. as an attempt to "coach" Ms. Love, is, in fact, an attempt to reconcile the stark differences between, on one hand, this unsigned affidavit, and on the other hand, Ms. Love's sworn written complaint filed with the Commission and her testimony before the Commission on February 28, 2013, both of which are very critical of Judge Batiste.

Paragraph 5

In paragraph 5 of her motion, respondent alleges that she is a victim of selective prosecution. In particular, she alleges racial discrimination—that the Commission has subjected Judge Batiste to "disparate treatment," citing two other Caucasian judges who have "far more abused contempt power useage than she has."

The motion advances only bare, unsupported allegations. Respondent has submitted no evidence that any complaints about these particular alleged instances of abuse of contempt power by these two judges were filed with the Judicial Inquiry Commission[3] or that the Commission turned its head on complaints concerning identical unlawful misuse of the contempt power by these judges.

To sustain the allegation of disparate treatment, the burden of proof[4] is on the respondent to show that there have been complaints filed against these two judges

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[3] As respondent has previously noted in her motion, the Commission may not begin an investigation of a judge without a sworn complaint. Section 156 of the Constitution provides that all proceedings before the Commission are confidential and this includes information about whether a complaint has or has not been filed against a judge. Therefore, the Commission may not divulge or disclose whether any complaints alleging abuse of contempt power have or have not been filed against the two judges named by respondent in her motion.

[4] E.g., *In re Dandridge*, 337 A.2d 885 at 889 (Pa. 1975):

alleging abuse of the contempt power identical in nature to that alleged to have been perpetrated against Judge Batiste and that no action was thereafter taken on them. Respondent has not made that showing. Absent such a showing, there is absolutely no evidence of any disparate treatment of Judge Batiste.

Moreover, whether "selective prosecution" is a defense to a charge of judicial misconduct is questionable. There is authority that selective prosecution is not a defense to a charge of judicial misconduct, e.g., *In re Dandridge*, 337 A.2d 885 at 889 (Pa., 1975):

> Finally, we feel compelled to address Judge Dandridge's complaint that he has been "prosecuted" discriminatively in light of the fact that a practice allegedly exists among some Philadelphia judges to retain testimonial dinner proceeds. . . . Ignorance of the Canons and misconduct by others are no defense. (underlining supplied)

> There is no evidence in this record that the Judicial Inquiry and Review Board has turned its head on specific violations by other judges or that any particular instances were brought to its attention. And the record is equally barren of any suggestion that Judge Dandridge was singled out by the Board; that he is a "scapegoat." If discrimination was to be established, Judge Dandridge had the burden of placing the appropriate evidence on the record. (underlining supplied)

And *In re Lokuta*, 11 A.3d 427 at 446-47 (Pa. 2011):

> To prove selective prosecution, appellant must show "first, others similarly situated were not prosecuted for similar conduct, and, second, the Commonwealth's discriminatory selection of them for prosecution was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification." Commonwealth v. Mulholland, 549 Pa. 634, 702 A.2d 1027, 1034 (Pa. 1997) (citing Wayte v. United States, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). Appellant fails to develop any argument as to how her prosecution was based on impermissible grounds. Therefore, this claim fails for lack of development. See Walter, at 566.

Paragraph 7

In paragraph 7, respondent again is mistaken about both the Commission's contentions and about the holding of *Palmer v. Palmer*, 556 So. 2d 390 (Ala.1990).

Contrary to allegations made in paragraph 7, the Commission does not contend that § 12-21-182, Code of Alabama, 1975, does not authorize writs of attachment to compel the attendance of a witness.

The Commission *does* contend that neither § 12-21-182, nor *Palmer v. Palmer*, 556 So. 2d 390 (Ala.1990), authorize judges to peremptorily impose jail sentences under the guise of writs of attachment. A writ of attachment is a means of bringing a witness before the Court to answer a charge of failure to appear. It is a pre-adjudication means of securing testimony to resolve a contempt charge. It is not intended to be used and is unlawfully misused when employed to impose jail sentences without due process of law, i.e. notice and a hearing.

Respondent is either unable or unwilling to grasp the distinction between and the differing purposes of a writ of attachment and an order imposing a jail sentence for an already adjudicated offense.

When legitimately employed in the present context, a writ of attachment is an order directing law enforcement to bring a person who is alleged to have failed to appear pursuant to a court order or subpoena before the court to testify and answer a charge of civil contempt that is based upon that failure to appear.[5]

However, when used in the fashion that Judge Batiste utilized writs of attachment, there was no need to compel the alleged contemnors' presence in court to testify about their failure to appear, because at the time of the issuance of the writ of attachment, Judge Batiste had already held them in contempt, ordered them jail and/or sentenced them to

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[5] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 472, n.1 (1986):

> A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt.

jail terms. The writs were not used to secure testimony prior to an adjudication of the contempt charge, but used to impose punishment for an adjudication of contempt that had already been made.

As previously noted, respondent has admitted the requirements of due process that Rule 70A mandates in Exhibit F, the "Memorandum of Law" which is the attached to respondent's motion. At page 5 of Exhibit F respondent quotes *Fludd v. Gibbs*, 817 So. 2d 711 at 713 (Ala. Civ. App. 2001) regarding the requirements incumbent upon Judge Batiste in order to comply with due process in exercising the court's contempt power:

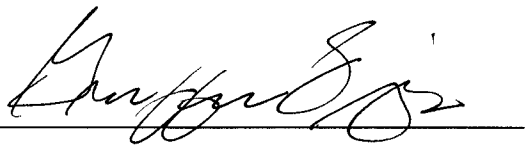
> In regards to the due process requirement of Rule 70A, the Alabama Court of Civil Appeals looks to determine if the following elements were present: (1) notice of the charges; (2) reasonable opportunity to meet them; (3) right to call witnesses; (4) right to confront the accuser; (5) right to give relevant testimony either to the issue of complete exculpation or extenuation of the offense; and (6) right to offer evidence in mitigation of the penalty imposed.

See also *Ex parte Tarpley*, 300 So. 2d 409 (Ala.1989), a case cited in the one-page opinion in the *Palmer* case, in which the Alabama Supreme Court reaffirmed the long history of U.S. Supreme Court and Alabama Supreme Court cases requiring due process to be provided to those charged with indirect contempt of court:

> The United States Supreme Court has held that indirect contempt, not committed in open court, requires that the accused be afforded due process of law; that is, notice of the charge and an opportunity to be heard before the court. Harris v. United States, supra; Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925). This question has also been spoken to in Alabama. In Ex Parte Bankhead, 200 Ala. 102, 75 So. 478 (1917), the Court held that in order to punish for constructive contempt the offending party should have notice of the nature and character of the charge and be given an opportunity to answer. The Court made its most thorough analysis of a constructive contempt proceeding in Hunter v. State, 251 Ala. 11, 37 So.2d 276 (1948), and again held that the accused is entitled to due process that requires that he be advised of the charges and have a reasonable opportunity to meet them.

Judge Batiste failed to accord most, if not all, of the six elements recited in *Fludd v. Gibbs*, supra, to the seven contemnors referenced in the Complaint prior to holding them in contempt and ordering their arrest and detention.

The Judicial Inquiry Commission respectfully submits that the motion to strike or for summary judgment is due to be denied.



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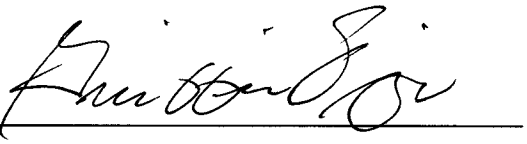
Certificate of Service

I hereby certify that a copy of this Response to the Motion to Strike or for Summary Judgment has been sent to Julian McPhillips, Esq., counsel for Judge Dorothea Batiste, by first class mail, postage prepaid, on this 26th day of June, 2013.



Of Counsel