QJ-1 Responses of Judge Franklin Bynum
CJC No. 20-0145 & 21-0679

Responses

1. My work address is [redacted]
[redacted].

My work e-mail address is [redacted].

My phone number at work is [redacted].

2. I have been Judge of Harris County Criminal Court at Law # 8 since January 1, 2019. I am Board Certified in Criminal Appellate Law by the Texas Board of Legal Specialization.

3. As a public servant elected by the people of Harris County, part of my duties is to provide information about the operation of their government and their courts. When John Nichols of *The Nation* magazine invited me to answer questions and speak publicly in the summer of 2019, I accepted because good judges seek to educate and inform. In fact, Canon 4B(1), titled "Activities to Improve the Law," encourages speaking, writing, lecturing, and teaching.

The quotes attributed to me appear to be mostly correct although some errors appear. For example, Maranda ODonnell is misspelled as "Miranda" and my reference to the Civil Rights Corps is incorrectly transcribed as "civil rights court." [C-1, page 33].

The Nation is one of this country's longest-running publications and originally began in the 1830's as an "abolitionist

newspaper"—that is, an anti-slavery paper. This history made it a particularly apt forum in which to discuss the historical connection between slavery and the criminal justice system. As a judge presiding over misdemeanor cases, it is important to know the history of this class of low-level offenses.

Since medieval times, judges following the common law—including American judges implementing the new United States Constitution—were strictly prohibited from denying pretrial release to those accused of misdemeanors. This changed after the Civil War:

"Misdemeanors and other low-level crimes played an important role in oppressing African Americans in the South. Not only were African Americans denied release before trial, but they were sent to farms or other places to work after being charged with minor crimes.221 Officially, the Thirteenth Amendment to the U.S. Constitution prohibited owning another person as property, but the practice of forced servitude was perpetuated through the criminal justice system." Shima Baradaran Baughman, The History of Misdemeanor Bail, 98 B.U.L. Rev. 837, 864–65 (2018).

I told the interviewer that the system is an outgrowth of chattel slavery not because this is some inflammatory, reckless opinion but rather because it is a well-documented historical fact that should be more widely known.

I told the interviewer that I am a prison abolitionist because, like many of my people in the community, I believe that our current system of mass incarceration as the way to deal with all of society's problems must be abolished and transformed into a system of providing care and services to address the real root causes of anti-social behavior. For low-level misdemeanor cases that are

largely comprised of "poverty crimes," this is inarguably a realistic way to better serve our community.

I have never indicated that I "reject the idea of reshaping the system through the legislative system." Mr. Mitcham's assertion on this point speaks volumes about the liberties taken throughout the complaint to mischaracterize my words and actions. It is plainly apparent that when asked if I imagined running for another office, I said that I love being a judge and prefer to serve in the judiciary because I find the daily work to be uplifting, interesting, and fulfilling [C-1, page 45]. I celebrate the separation of powers in our system of government and have great respect and reverence for the legislative branch of government.

4. While the best practice would have been to alert *The Nation* of the typos mentioned above, the day-to-day responsibilities of running a court and being a single father do not allow me time to accomplish all that I would wish to do.

5. My public statements to *The Nation*, fairly considered, cannot reasonably cast any doubt on my capacity to act impartially as a judge.

The District Attorney's furious condemnation of my public statements here perfectly illustrates the grave misconceptions and intolerances underlying all of their complaints. A few illustrative examples here are helpful to understand the pattern of Mr. Mitcham's entire complaint: demonstrably false factual claims paired with vitriol and hyperbole. Mr. Mitcham's entire complaint misrepresents my words and actions throughout, but the pattern of distortion is easy to see regarding The Nation interview.

For one, Mr. Mitcham's claim I have "disdain for the law" and seek "demolition of the criminal justice system" is false— I actually stated the opposite. [C-1, page 3] My disdain is for the *illegal* system that was *demolished* by the Fifth Circuit's ruling in the landmark civil rights case *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018). My interest is in *rebuilding* the system so that it complies with the constitutional guarantees of Equal Protection and Due Process.

Claiming that I "did not consider the bail reform lawsuit to be 'disrupting' enough" is also contrary to my statements. I said that while federal courts are "great at disrupting systems," they are "unwilling or unable – a little of both – to actually follow through and see that the problem is ultimately remedied." [C-1, page 38-39]. As I explained, my duty and desire is to *rebuild* in accordance with the law following the disruption created by the *ODonnell* case.

In *Republican Party of Minnesota v. White*, the United States Supreme Court held judicial ethics rules violated the First Amendment by prohibiting a judge's statements announcing views on disputed legal or political issues. 536 U.S. 765 (2002). Justice Scalia, writing for the majority, explained that "judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches." The Court noted that—just as in the Texas Canons— "the Minnesota Code not only permits but encourages this." They concluded, "That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here." *Id.* at 779.

Justice Scalia further explained how the political views of the American judiciary plays a valid role in shaping the law. "This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. *Id.* at 784.

Moreover, in *Scott v. Flowers,* the Fifth Circuit held that it was a violation of the First Amendment for the Texas Commission on Judicial Conduct to issue a public reprimand to a judge for criticizing perceived injustice in the administration of the county court system. 910 F.2d 201 (5th Cir. 1990). The court explained that as "an elected official, chosen directly by the voters of his justice precinct, and, at least in ordinary circumstances, removable only by them...it was not unexpected that Scott not only would exercise independent judgment in the cases brought before him but would be willing to speak out against what he perceived to be serious defects in the administration of justice in his county." *Id.* at 212.

Awarding attorneys fees to the plaintiff a Texas judge, the Fifth Circuit wrote: "Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness

in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote." *Id.* at 213.

6. My appearance on the podcast does not cast any doubt on my ability to act impartially. I take my role as a neutral arbiter seriously.

7. I did appear on the public access television program *Reasonable Doubt* during the summer of 2019 because I was invited to participate on a panel with a moderator for that show. This is a show that generally has invited guests which have included judges, including judges from the Court of Criminal Appeals, forensic scientists, lawyers and nonlawyers. I do not possess a copy.

8. I did not refer to the training in a dismissive way. I did refer to the "College for New Judges" program sponsored by the Texas Center for the Judiciary (TCJ) as "baby judge school"—as did virtually every other judge from across the state there. The term is one of levity, camaraderie, or endearment. The term partially, I believe, is a play on the common term "baby prosecutor school," referring to an annual program for new prosecutors produced by the Texas District and County Attorneys Association (TDCAA); many of my colleagues at the College program had also attended the TDCAA program.

The College program I attended was, disappointingly, of poor quality, and I have said often that attending the program gave me insight into the quality of the judiciary in Texas. In my over ten years of practice across the state, I found many judges did not understand constitutional and technical aspects of criminal law. The TCJ program, in turn, hardly covered any criminal

law topics. There was no discussion of discovery in criminal cases. There was no discussion of litigating constitutional issues related to search and seizure.

Whenever a defendant in a criminal case was mentioned at this program, the speaker was expressing that every defendant should be treated as personally a safety danger to the judge both inside and out of the courtroom, and that defendants frequently do not appear for court. This teaching does not comport with my experience as a lawyer or a judge and, in fact, is the kind of approach to judicial education that perpetuates structural unfairness.

9. I missed one morning session of the TCJ College to participate in a very important conference call regarding the *ODonnell v. Harris County* litigation. My election to the bench meant that I would be a party to this litigation beginning January 1, and that morning in December we had an important settlement conference with multiple parties that could not be rescheduled.

When I arrived downstairs following the call, Judge Atkinson approached me at the coffee urn and asked two other judges who were speaking with me to "excuse us." Judge Atkinson told me with a raised voice that if I did not want to attend the program, that I would be forcibly excused. I told him that I was on an important call that morning related to my job duties, and that I did intend to complete the entire remainder of the program.

I believe I did refer to the call as being regarding the "system [Judge Atkinson] created," because that statement is true. The bail system found to be unconstitutional in Harris County by

a federal judge was in large part created and sustained during the years Judge Atkinson served in County Criminal Court # 13.

10. My interactions with Judge Atkinson were always in accordance with the Canons of Judicial Conduct. I always spoke with Judge Atkinson with professional courtesy. Everyone who witnessed that encounter, including the two judges I was speaking to, later approached me in shock that Judge Atkinson would accost a participant that way. Later in the program Judge Atkinson apologized to me for how he spoke to me that morning, and I accepted the apology with kind appreciation.

11. The public access television appearance did not cast any discredit on the judiciary. On the contrary, public candor and honestly are essential to maintaining strong public trust in the judiciary.

Summary Response for # 11 – 16

The following questions are regarding Mr. Mitcham's many general, non-specific claims that I have created an environment of lawlessness and terror under color of judicial power. This is false. Mr. Mitcham's entire complaint should be understood in the context of the hyperbole and dishonesty of the claims found in these questions.

I am one of sixteen county criminal court at law judges in Harris County. I share several floors, and often a courtroom, with many fine colleagues who support me and often see the daily environment in Court 8. I am supported by one of the best court administrators in Texas, Ed Wells, along with a large professional court administration staff. Not one of those people

would allow the nightmare described by Mr. Mitcham to occur without saying something to me or the Commission.

Every statistical metric that reflects court operations is in line with other local courts. I have enclosed a sample of court data from our dashboard with charts reflecting normal court operations, in line with every other local county criminal court at law.

12. Mr. Mitcham's claim that I have "repeatedly and willfully ignored" the law is false. His claim that I follow my "own unwritten code of criminal procedure" and "unilaterally change the laws" on a whim is also false.

13. I am Board Certified in Criminal Appellate Law and am a student of the criminal law and procedure of Texas. I have absolutely maintained competence in the law of handling my cases; any suggestion otherwise is patently false.

14. I am proud to maintain one of the friendliest, most transparent, most comfortable courtrooms in Harris County. Mr. Mitcham's claim that my courtroom is hostile in any way to any person is false.

15. Mr. Mitcham's claim that my "divine purpose is to bully young misdemeanor prosecutors," frankly, makes me sad for the young prosecutors that have practiced in Court 8. I have strived to maintain positive interactions with the prosecutors assigned to my court.

For one, I have taken every group of prosecutors assigned to Court 8 (before Covid restrictions) to tour the local booking

facility to see their own office's operation there, alongside the Sheriff, Pretrial Services, the Public Defender, and many other county agencies. Many prosecutors on this tour had never seen this critical part of our facilities. All the prosecutors who have taken this tour have been grateful for the after-docket learning experience.

More importantly, I invite every new group of prosecutors within days of their new assignment to visit with me in chambers. There, I give my commitment to a safe and comfortable courtroom and tell them that my door is open at any time for any complaint, including regarding my staff. Every courtroom in Texas is staffed by many different agencies, with different staffing and supervision policies. On top of that, the courtroom itself hosts scores of lawyers and others every day. I acknowledge this diffuse environment with the prosecutors and encourage them to alert me to any discomfort from any source—with my promise that despite the diffuse nature of the courtroom, I am responsible for a safe and comfortable working environment. I have consistently delivered on my promise to them, my staff, and the public. The claim that I bully young prosecutors is false.

16. I have never exhibited any such bias.

17. I have never manifested any such bias by words or conduct.

Summary Response for # 17 – 20

These questions are regarding the *State v. Bales* matter, which I remember well. This was the first matter for which we had a hearing while the courthouse was closed by the pandemic.

The courthouse closed on Friday, March 13. There may have been stray jail dockets held that day, but I believe not.

The daily jail docket is one of the most important functions of a criminal trial court. Each defendant has a constitutional right to pre-trial release and can only be detained after a hearing and entry of factual findings supporting detention. If the daily jail docket does not occur, people's constitutional rights—even just the minimal due process guarantee of a speedy hearing—are violated.

The week of March 24, the first week of pandemic closure, the courthouse could only operate minimally: one jail docket per day, per floor, covering all four courts on that floor. Only one operating courtroom per floor, only for jail docket, only four days per week. Each judge on a floor had one assigned weekday to cover jail cases for all four courts. My assigned day under this arrangement was Monday. The courthouse was closed for disinfection on Friday.

While the courthouse was technically open, there were enough barriers to entry and uncertainty about the future that we judges and our technical staff knew we had to build live-streaming facilities as quickly as possible to guarantee open court proceedings. During this first week that court was closed, I worked literally day and night with our technical staff to build the infrastructure to live stream hearings so that we could open court proceedings and hear cases regarding detained people, and so we could hold public court via live stream on Friday when the courthouse was closed to the public.

The first hearing held remotely and live streamed, to guarantee open courts, was the constitutionally guaranteed detention hearing for Mr. Bales. I completed the technical setup for this hearing just *minutes* before the hearing was to begin. Going in, I had no idea why Mr. Bales was detained or what was at issue in the case. I only knew that a person was detained on Thursday afternoon and was due a detention hearing the following day: Friday. Court staff had worked all week to make it happen. I was the first judge in Harris County to hold open court by live stream: Friday March 20, 2020 at 3 p.m.

I began the hearing by announcing the live broadcast and how the broadcast satisfied the guarantee of open court proceedings. The parties proceeded to litigate the detention hearing. The State was represented by Michael Eber, newly assigned to the Court the previous Monday. Mr. Bales was represented by Cheryl Brown, an appointed lawyer who specializes in extradition cases.

The parties began the hearing by discussing the procedural context. Mr. Bales had appeared on the Court 8 jail docket the previous Monday. At that time, I reviewed the probable cause affidavit and found that it did not establish probable cause. I entered a written order on Monday finding no probable cause for further detention and ordering that Mr. Bales be discharged from custody. I scheduled the case for a trial the following Monday. Even though the chances of an actual trial as scheduled were slim, scheduling matters for a speedy trial is one method of getting lawyers to work on a particular case.

At the jail docket on Monday, I found that the affidavit—originally filed three years (nearly to the day) before, on March 16, 2017—did not contain sufficient credible facts to support

probable cause for further detention. The investigation described was poor and not detailed. Probable cause affidavits are, in my experience, typically much longer and more detailed than this one.

Mr. Bales also had an out-of-state hold for a case out of Michigan, so he remained in custody while Ms. Brown worked to secure either transport or release on bond on the extradition matter.

On Thursday, Ms. Brown requested a hearing on Mr. Bales continued detention, which came as news to me given the ruling on Monday.

At the hearing Friday, Mr. Eber said that he had taken the case to a grand jury on Thursday, which had returned an indictment. As discussed in the response to Question 44, a grand jury's return of an indictment following a trial judge's finding of no probable cause is common. I would hope and expect that the grand jury heard more than I read in the original affidavit, especially since there surely is more information available after three years have passed. The fact that an indictment is returned after a finding of no probable cause is not indicative that the facts provided for a probable cause determination were sufficient for a finding of probable cause at the time the facts were presented.

Mr. Eber could have presented those supplemental facts to me at any time, as prosecutors routinely do when an affidavit is deficient. Mr. Eber chose to take to the grand jury the afternoon before the courthouse was closed for three days, ensuring that Mr. Bales would be detained for four days without being able to see a judge.

I found Mr. Eber's conduct in this case to betray an indifference to the constitutional rights of Mr. Bales, particularly the constitutional right to pretrial release. I also found Mr. Eber's conduct to show, at best, indifference to the life and safety of Mr. Bales and this community during a global health crisis. Mr. Eber's conduct in this case fell short of the conduct expected of a prosecutor, whose duty under the Code is to do justice and uphold the law. Furthermore, I had an obligation under the First Emergency Order issued by the Supreme Court and Court of Criminal Appeals to take "reasonable action to avoid exposing court proceedings to the threat of COVID-19." My actions in the *Bales* matter were all in accordance with my constitutional duties, my duties under the Canons, and my duties under the Emergency Order.

18. Judge Brown ruled on the recusal motion. The case file is enclosed as requested.

19. Every single time that a recusal motion has been filed in a case before me, I notify Susan Brown immediately. I usually call her directly and ask how to proceed. I notified Judge Brown of the recusal motion in this matter as soon as I learned of it. The motion was filed on April 15, 2020. The movant did not present the motion me. I learned of the motion after it was filed, when my clerks brought it to my attention. My referral to Judge Brown is signed April 23, 2020, and I believe Judge Brown gave me permission to file it at that time under the circumstances.

In April of 2020, daily court operations were still severely disrupted. The Emergency Order provided Judge Brown the ability to suspend the deadline of Rule 18a(f), which I believe she

simply did informally. In any event, I am confident that my referral was timely and compliant.

20. The issue of pretrial release stands completely apart from the ultimate substantive question or guilt or acquittal. I did repeatedly emphasize the age of the allegations and their non-violent nature, but this was only in the context of the constitutional right to pre-trial release under those circumstances. Mr. Bales may very well have been convicted by a jury, but the judge releasing him on bond on a finding that the allegations are not sufficient to support detention are no comment at all on that ultimate issue.

21. No, I did not accuse Mr. Eber of endangering the health of others by his refusal to dismiss the case. Rather, I did expressly criticize Mr. Eber's conduct that created prolonged, unlawful detention of Mr. Bales, which under the circumstances of a crowded jail was a danger to the health and safety of Mr. Bales and those around him.

Summary Response for # 21 – 25

These questions are regarding the many *ad hoc* policies and procedures implemented as part of the response to the global pandemic.

I am proud of the work that we have done in Harris County to keep the judiciary operating under these circumstances. Most of all, I am proud of the extraordinary efforts we have taken to protect litigants and the public safe from Covid. Court 8 was the first court in Texas to close due to the pandemic: we began to physically close a full week before any other court. While

physically closed, my court continued to carry out necessary court business. My colleagues at the time wondered about the scale of my response. I was proven correct, and it all was in service of the ideal that no one should be unsafe in the courtroom. I am proud of my response to the public health crisis we continue to face.

22. At all times, without question, the policies and procedures of Court 8 have followed the oft-revised Emergency Orders issued by the Supreme Court and Court of Criminal Appeals.

23. On June 1, 2020, the numbers as we understood them were on the wane and many people believed that we would be able to resume more normal court operations after two months of disruption. Mask mandates were being relaxed, businesses were reopening. At the courthouse, many courts had prosecutors appearing in person for docket voluntarily, because performance of the many duties of the prosecutor was simply not effective over Zoom. In the context of a criminal court, where one party is one "side of the v" in every case, having that party present through counsel is essential to normal court operations. This is irrefutable. Please understand: I need prosecutors in my courtroom working every day. Zoom was not, is not, an adequate substitute.

I proposed to the District Attorney that they send one single prosecutor each day. That prosecutor would have been given a private space with a personal bathroom, in the jury room, to be present on Zoom. This seemed to me to be, given the prevailing wisdom on June 1, 2020, to be a reasonable requirement moving forward.

Mr. Mitcham and his colleagues treated this as a personal, physical attack on the safety of prosecutors—even though many prosecutors were already appearing personally in other courts. In written, sworn motions the District Attorney called this an attempt to literally kill prosecutors and their families. This was not reasonable then and is not now. Frankly, the rhetoric is outrageous.

I am far from the only, or the first, judge in Texas who asked prosecutors to return in person to daily docket in accordance with the then-effective Emergency Order. I worked tirelessly and diligently to maintain our local judiciary during an unprecedented time.

24. One morning, I came into court and my clerk told me that the District Attorney had filed sworn recusal motions for every case on the docket. My clerk asked what to do, and I said we cannot touch any of these cases. I called Judge Brown right away.

These were my first recusal motions. I asked Judge Brown what to do. She asked me for what I knew, and I told her. We spoke collegially about the unprecedented nature of what had occurred as we figured out logistically how to get the motions in front of her. In fact, logistical concerns were foremost in my conversations with Judge Brown. I would have to prepare dozens of cases for her to review and she would have to issue dozens of orders. This is a significant amount of work. Usually, recusal motions come into the Administrative Region office one or two at a time. That day over 100 recusal motions were filed.

With this work looming, Judge Brown attempted to facilitate a universal resolution to the situation on a group e-mail with

many parties, including many prosecutors and local administrative Judge Robert Schaffer. Judge Brown, effectively, was facilitating an administrative remedy to the District Attorney's complaint in her role as regional administrative judge, further empowered to supervise local Covid-response operations by the Emergency Order.

In the end, the District Attorney withdrew all its recusal motions and normal court operations resumed.

25. Yes, I did say we needed a prosecutor in court. We did. We do. My staff, masked and dutifully carrying out courtroom functions, had been burdened with administrative tasks for the prosecutors who were usually in the courtroom: printing and collating documents, arranging communication with counsel, scanning and e-mailing.

At the time I said we needed a prosecutor in court, every single county agency that staffs the daily docket had sent back at least one person: Pretrial Services, the probation department, the District Clerk, the Sheriff, the court itself. The only agency that would not send a single person was the most powerful agency in the courtroom: the one "side of the v" in every case on docket every day.

This arrangement caused many problems, particularly at the jail docket. When a prosecutor is in the courtroom, that prosecutor is expected to answer for each of the cases on docket for the State. On the Zoom call, prosecutor presence and responsibility was far less clear. On many occasions, prosecutors on Zoom were not present or confused about who was responsible for a case. For the jail docket, when time is of the essence and

deputies must make certain deadlines for prisoner transport to and from the courtroom, the delays caused by the State not having an assigned lawyer present at all times was a significant burden on court operations. I addressed these matters of court operation in a fair manner, consistent with the Canons, the Emergency Orders, and the approved local emergency operating procedures.

26. I am proud of my clear, published court policies. The court website, has a set of standard operating procedures and a scheduling order, which are revised frequently to reflect and improve upon daily court operations. I often talk to my court administration staff about case management strategies and implement new ideas so that Court 8 may better serve the litigants and the public. The policies are fair and transparent. I have never crafted any policy with any hostility toward any party.

27. I have tried to get lawyers to stop e-mailing my staff basically since taking office. My staff is drowning in e-mail.

Roughly six weeks into remote court, around April 2020, the strain of e-mail on court operations had reached a breaking point. Lawyers sent messages to staff regularly without copying opposing counsel. Mr. Eber began filing miscellaneous motions seeking relief with unanswered e-mails to staff as exhibits purporting to show evidence of the court's hostility or indifference to the State.

My staff reached a breaking point with e-mail, and I took measures to remedy the situation. For the State, I simply told them to stop sending messages. For defense lawyers, staff created an auto-reply with instructions to appear in remote court

rather than attempt to obtain a reset or other court attention by e-mail.

Today, the standard operating procedures on the Court 8 website say this about e-mail: "Counsel must not contact court staff by e-mail requesting that the Court rule on a matter, review a case file, or reschedule a case."

28. The announced discouragement of e-mail that began in April 2020 was always applicable to all parties. The District Attorney, as a uniquely situated party in a criminal court, received notice in a different form than the defense lawyers. My staff could have just as well sent the same auto-reply to every prosecutor, and had them receive dozens of auto-replies to learn of the new court policy. Instead, the prosecutors were told of the change directly. This kind of communication about court operations with prosecutors is very common.

29. Live streaming of court proceedings is solely at the discretion of the judge, unless streaming is required to make proceedings public. The courtroom was open on June 10 and 11, so live streaming was not required to guarantee open court proceedings. I do not recall whether court was streamed that day, but it probably was not.

30. Yes, I have at various times, always temporarily and usually for operational reasons, announced a temporary policy of not accepting any pleas of guilty with an agreed punishment recommendation. Texas judges are expressly authorized to do this at any time, for any reason. *Moreno v. State*, 572 S.W.2d 550 (Tex. Crim. App. 1978).

31. I do not recall any proceedings in *State v. Catlin* and defer to the written record of the proceedings, included as requested.

32. I frequently disable the "Chat" function of the Zoom meeting for remote court. I do not read or use the chat and find it distracting. I was not aware that this disabled "person to person" chat and have significant concerns about courts maintaining online chat rooms for attorney conferences. For one, even "person to person" chat messages are viewable by the meeting host: the judge. No judge should facilitate and have access to private messages between lawyers. Lawyers in Court 8 are expected to confer outside of the court-provided Zoom meeting.

33. Court streaming is solely at the discretion of the judge and is only required when the courtroom is closed or the courthouse inaccessible. On June 10 and 11, the courtroom was open and operation of the live stream was discretionary.

34. Mr. Mitcham's florid language here bears no resemblance to any proceedings in Court 8 under my watch. I reject and deny all Mr. Mitcham's caricatures contained in this question and affirm again that every day, I treat all lawyers in my court with courtesy and respect.

I do also engage in routine courtroom control, as every judge must. Lurking behind Mr. Mitcham's claims here is the conduct of Mr. Eber, who lacked experience and supervision and routinely engaged in unprofessional behavior in court. For example, Mr. Eber once repeatedly interrupted and tried to speak over me during the Zoom call. After being told to wait to be heard, he said that the State, as a part of another branch of government, has a right to be heard on his terms alone. I told him that he was

incorrect: the district attorney in Texas is part of the judicial branch, and that he needed to have a seat (virtually).

35. Yes, I told the Houston Chronicle that a judge's job is "to be tough on lawyers in court, period." I believe this. Tough does not mean cruel, as Mr. Mitcham claims.

The word "tough" here reflects the reality of the courtroom: the courtroom is something of a battlefield, where some of the most important questions in our community are presented every day by licensed professionals who are under a professional obligation to represent their clients and uphold ethical standards. Under those circumstances, I do believe the role of the judge is to hold the lawyers to high standards of ethics and preparedness. I do this every day during my docket. Often when a lawyer is not prepared, all I can do is grant more time. Yet I will, with professionalism and kindness, tell that lawyer what had been expected or schedule a hearing sooner than the lawyer might like.

Under Canon 3C(2), "A judge should require staff, court officials and others subject to the judge's discretion and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."

The lawyers in my court are expected to be prepared, that's all that was meant from that comment. I believe the public expects judges to hold attorneys to reasonably high standards; doing so with patience and kindness, and tell reflects favorably on the judiciary, in accordance with the Canons.

36. I have treated every prosecutor who has ever worked in Court 8 with the patience, dignity, and courtesy required by Canon 3B(4).

37. As a trial judge, I only make individual rulings in individual cases. I have never entered any kind of omnibus, blanket order to the Harris County Sheriff, nor would I expect the Sheriff to accept such an order. If an order were entered in a case regarding the referenced section of the Government Code, the order would have been made in open court in the presence of the parties with an opportunity to object. I do not have any specific recollection of entering orders regarding this section of the Government Code and would defer to the records of the proceedings.

38. I do not have any specific recollection of entering orders regarding this section of the Government Code in any particular case. I also do not recall any objection or litigation at the court of appeals regarding this section of the Government Code.

39. I deny Mr. Mitcham's allegation that any rulings in any case are anything but that: rulings on that case. I do not consider matters not before me.

40. Mr. Mitcham here claims that certain probable cause rulings have been "indefensible," in his opinion. Litigants frequently—about half the time—disagree with a judge's rulings, often strongly. I do not recall any proceedings in the cases listed and defer to the records of those cases. The rulings made in those cases were based on the law and the evidence and nothing else.

41. Mr. Mitcham knows very well, or should, that many probable cause determinations are presented to a judge *ex parte*,

without notice to the defendant. The most common example is, of course, an application for an arrest warrant—in Texas the instrument is called a "complaint to be."

A complaint to be is filed with the clerk without notice to the defendant and then the judge signs, finding probable cause or not, typically on paper without the presence of any party. Mr. Mitcham complains that the digital signature times on the documents are sometimes at night.

Quite often I will log on the evening before a working day and review my "document queue" provided by the Harris County District Clerk to review documents pending. I do this to get a jump on the next day. Signing documents at night is not judicial misconduct.

42. My rulings in the *Berry* matter were limited to the facts presented to me and nothing else.

43. The allegations in this question are false. Every ruling that I make, on probable cause and otherwise, is the result of a careful, unbiased application of law to facts as presented in that matter. I understand that Mr. Mitcham does not agree with all my rulings—most of the time, one side does not agree—but that is not any evidence of an extrajudicial, extralegal scheme of persecution as Mr. Mitcham says.

44. I have never acted in a punitive manner toward lawyers in court, let alone regarding routine rulings on probable cause.

45. The fact that a grand jury finds probable cause after an in-person presentation of facts in a particular matter is no rebuke at

all, implicit or not, to any previous ruling of a trial court which is often presented with a different record.

46. The issue of how sworn statements supporting probable cause are provided to the court and documented on paper has been hotly contested in litigation spanning many local courts. I have heard arguments of counsel on the matter and learned a great deal. Judges are often called upon to look at what *is* happening in practice and what *should be* happening and fashion an effective remedy accordingly.

The local practice, usually, is for the District Attorney to keep the statement supporting probable cause in its own internal database and read it to the judge on request. This practice was challenged in federal court in 2017, in *Lomas v. Harris County*.

The result of the *Lomas* lawsuit was a consent decree signed by District Attorney Kim Ogg making the District Attorney subject to new requirements to ensure the statements kept in their database were properly sworn and appointing an independent monitor for three years.

Since the *Lomas* consent decree became effective, many local defense lawyers have challenged the validity of probable cause statements with many theories arising from the revelations and remedy in *Lomas*.

When a defense lawyer raises an issue regarding probable cause in a case, I hear arguments of counsel and make a ruling based on what was presented.

Additionally, rulings on probable cause are always without prejudice. The District Attorney can cure any deficiency with

probable cause at any time by simply representing the case with the details which were previously missing.

47. I respect the decision of the court of appeals in all matters and have nothing to add regarding the opinion in this case.

48. My rulings are only based on a neutral application of law to facts, mothing more. Mr. Mitcham's suggestion that I am biased against complaining witnesses in assault cases involving a family member as defined in the Family Code is false. In fact, most of my daily docket is spent on arraignments in those kinds of cases, carefully crafting conditions and temporary orders to protect witnesses—this is one of my most important daily tasks and my daily work in court reflects this.

49. Mr. Mitcham's claim about these cases is false. I do not have any recollection of these cases and again will defer to the official records of the cases, included as requested.

50. Mr. Mitcham's sweeping claim here is false.

51. I do not recall ever referring to witnesses in a case as "pawns" or "foils."

52. Mr. Mitcham's claim is false.

53. I have no recollection of the matter described. A trial judge has broad discretion to weigh credibility in a probable cause affidavit. On many occasions I have found parts of probable cause affidavits not credible, simply evaluating them within the "four corners" of the document; affidavits often contain conflicting accounts of facts.

54. I do not recall saying “who cares” as described on Page 230. Continuing to Page 236, the alleged statement was apparently in response to Mr. Hagerman offering unsworn statements outside of a probable cause affidavit to bolster his argument for a finding of probable cause. A court reviewing probable cause cannot consider such statements. Mr. Hagerman, an experienced prosecutor in Court 8, understands the record he is limited to during this type of hearing.

55. I have performed my judicial duties at all times in accordance with Canon 3B(5).

56. I have not manifested at any time by words or conduct any bias or prejudice towards any witness.

57. Mr. Mitcham’s baseless claim that I suffer any “mental impairment” is false and should be emphatically rejected.

58. The records of the court will reflect that Mr. Mitcham’s claim that I limited case outcomes in any way is false. I hear many cases every day and dispose of several each day, all with varying outcomes as litigated by the parties. I have never foreclosed or favored any forms of relief.

59. The Covid-response policy of Court 8 has always simply been to follow the larger policies set by the local administrative judge, and the presiding judge of the county courts at law. My courtroom practices only differ in that they are more permissive than the larger rules allow. Virtually anyone—defendant, defense lawyer, prosecutor—may appear remotely at any time. Courtroom capacity is set by the Harris County Engineer, and we

work hard to limit in-person appearances to this day to stay within these limits on court operations.

60. Open courts are one of the most fundamental guarantees of our judiciary. One of the most foundational principles of our government is a rejection of the star chambers of the crown. I take the obligation to uphold this high principle as one of the most important obligations as a judge.

Mr. Mitcham's claim that Court 8 has ever held closed court proceedings under my watch is false.

61. As discussed in the response to Question 29, I have at various times, always temporarily and usually for operational reasons, announced a temporary policy of not accepting any pleas of guilty with an agreed punishment recommendation. Texas judges are expressly authorized to do this at any time, for any reason. *Moreno v. State*, 572 S.W.2d 550 (Tex. Crim. App. 1978).

62. Mr. Mitcham's claim that I took no records during this time period is demonstrably false. In fact, we held more hearings on the record during the six months following Covid closure than ever before, as shown by the summary of invoices provided by my court reporter Jennifer Slessinger and included in this response. The District Attorney paid for over $7,000 worth of transcripts for the period that Mr. Mitcham claims I repeatedly denied reporter's records.

Mr. Mitcham himself says that I have often reminded parties the "importance of a reporter's record" because I am an "experienced appellate lawyer." This is all true. I bend over

backwards to provide a reporter's record upon request, because one is important. Any suggestion that I have acted otherwise is false.

63. I have never denied a reporter's record to any party.

64. On November 11, 2020, prosecutor Charles Hagerman appeared on a case early in the docket, and then appeared toward the end of docket demanding a court reporter to record his account of the earlier hearing. I informed Mr. Hagerman that the court reporter takes down proceedings, and that the proceedings in the earlier matter had concluded. Mr. Hagerman would not relent, and I did give him a contempt warning because he did not heed the ruling of the court.

65. I did tell Mr. Hagerman that he would "not leverage" the official court reporter to come into the courtroom and take down his complaints about a matter that had already concluded.

66. I treated Mr. Hagerman with patience, courtesy, and respect throughout his appearances in court on November 11, 2020.

67. The notes of prosecutor Dana Nazarova on Pages 173-201 are not accurate representations of court proceedings.

68. I do not recall any proceedings under cause 2275979, *State v. Martinez-Contreras* and would defer to the records of the case, included as requested.

69. The judgment that appears on Pages 269-270 comports with all requirements of Penal Code § 49.09(a).

70. I do not recall any proceedings under cause 2255605, *State v. Ortiz* and would defer to the records of the case, included as requested.

71. The judgment on file in *State v. Ortiz* comports with all the applicable law at the time of the judgment, including Code of Criminal Procedure art. 42A.401.

72. I defer to the record in the *State v. Sapon-Rosales* matter, which will be provided as soon as the Harris County District Clerk can provide it to me. For some technical reason, the clerk's files in this case will not download as a batch from clerk systems. As of close of business on November 12, 2021, my lead clerk Ivone Gomez told me that she is still not able to download the case file. We are pursuing an escalation request with technical staff and I will provide this case file the same day that the clerk provides it.

73. Mr. Mitcham's claim that Court 8 has ever held closed proceedings is false.

74. At all times, proceedings in Court 8 have been open to the public.

75. This question seems to assume that my courtroom has ever been closed to the public. I have never denied anyone access to open court proceedings and have at all times followed Canon 3B(8).

76. William Salazar is the best court coordinator in Harris County. He does not communicate *ex parte* in violation of the Canons. He makes heroic efforts to not communicate *ex parte*. I

have never met a coordinator more helpful to the lawyers than William Salazar. He is a treasure.

Mr. Mitcham's claim that Mr. Salazar "interferes with the court's decisions on the timing of resets for the State" simply makes no sense. Mr. Salazar sets the court's calendar at the judge's direction, and often must reconcile the judge's stated intentions with the reality of the calendar. That is his job, he does it well.

77. I am not habitually late to court proceedings.

78. Court 8 has fully functioned every working day, contrary to Mr. Mitcham's claim.

79. Mr. Mitcham's claims about the issuance of warrants and summonses are more a complaint about the document automation capacity of the District Clerk than with the operations of Court 8. I am familiar with this issue from my work with the Criminal Courts Technology Working Group, a local committee with representatives from many agencies, including the District Attorney. Mr. Mitcham is aware or should be aware of the technology aspect of his complaint here and should know that it is not isolated to Court 8 at all.

When a complaint to be is found to contain probable cause and the judge signs the complaint, at that point generally either a capias or a summons will issue for the defendant. The District Clerk can generate a warrant automatically and deliver it to the Sheriff for processing. The clerks assigned to Court 8 still walk the day's signed, printed paper complaints over to be processed by the Sheriff's Central Records Division every afternoon.

The District Clerk does not have capacity to generate a form summons. Instead, the party seeking the summons is required to file a proposed summons for issuance. Issuance of the summons, once the judge finds probable cause in the complaint, is a ministerial act undertaken solely by the clerk.

Requiring a party to file a proposed order or instrument is not an attempt to “drain” the party seeking court action of resources. Every single court in this country requires parties to file proposed orders.

That said, I have worked tirelessly to improve document automation to improve life for all users of Harris County courts by working with justice partners in committees to improve systems integration and document automations. In the meantime, for many common orders and instruments, the party seeking relief is still required to file a proposed order.

80. I do not have any practice of refusing the issuance of warrants or summons.

81. I do not recall ever taking any such photograph. I do not recall ever posting any such photograph to any social media platform. I searched for any post on Twitter or Instagram, my only active social media accounts, containing this photo and could not find any post containing this photo.

The photo that appears on Page 245 is of poor quality, with rounded edges as if it were a screenshot from a text message but also with several visual artifacts that would not appear in a digital screenshot of a text message.

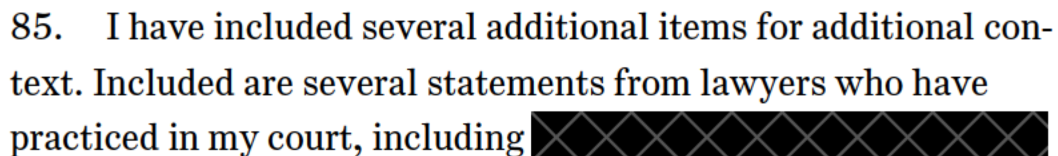
The author of this post, taking the image on Page 245 at face value, is the Houston Police Officers' Union (HPOU). I did not send HPOU or anyone associated with it any such image. I do not know the provenance of the image on Page 245 and do not recognize it. I am alarmed to see this for the first time in this complaint.

I do not have a Facebook account and have not for about ten years. My campaign "page" was created and managed by volunteers and has been mostly dormant, to my knowledge, since the election.

82. I deny the anonymous complainant's allegations regarding the photo discussed above.

83. I deny posting the photo to Facebook, as discussed above, and do not recall posting the photo to any other platform.

84. I deny posting the photo to Facebook, as discussed above, and do not recall posting the photo to any other platform.

85. I have included several additional items for additional context. Included are several statements from lawyers who have practiced in my court, including 

Also included are two *Houston Chronicle* editorials. One is an editorial endorsing me in the general election. The *Chronicle* said they had "probably done more research on this one race than any other judicial contest, and nearly every lawyer we talk to says the same thing about Bynum: He's a brilliant attorney who cares deeply about his clients." They credited my statement that

"our courts currently act as a coercive system designed to extract pleas and fees from the most vulnerable Houstonians."

The other editorial is more recent, describing District Attorney Kim Ogg's dishonest public statements to discredit bail reform efforts, for which I am a prominent public face. Ms. Ogg released a 56-page "alternative report" of bail reform numbers that the *Chronicle* says "fails to substantiate" her claims even though it "mischaracterizes key data to skew the picture." This is characteristic of the District Attorney's entire public campaign against bail reform, including this complaint.

Verification

My name is Franklin Gordon Bynum. My date of birth is [redacted]. My address is [redacted] [redacted]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, Texas on November 13, 2021.

QJ-2 Responses of Judge Franklin Bynum
CJC No. 20-0145 & 21-0679

Responses

1. Mr. Mitcham's description of the proceedings in this case is not fair or accurate.

2. The two criminal cases filed against Gregory Massenburg are still pending in Court 8, After a finding of no probable cause in both cases, the District Attorney has not filed a motion to dismiss or made a subsequent presentation of supplemental facts to support probable cause.

Mr. Massenburg appeared in Court 8 on Friday, June 18, 2021, charged with terroristic threat against his wife. The prosecutor read the probable cause statement, and I found no probable cause existed for a very clear reason, which I described at the time of the ruling: the only threatening statement made was expressly conditional, and that the facts presented were not sufficient to make even a threshold showing that Mr. Massenburg had the specific intent to place the complaining witness in fear of imminent serious bodily injury as required by Penal Code § 22.07.

I found no probable cause existed in the case and ordered Mr. Massenburg discharged. Mr. Massenburg, a 60-year-old man whose last appearance in criminal court in Harris County was in 1984 on a driving while intoxicated charge, spent a good deal of time at the bench, in the presence of the prosecutor, asking about what the court's ruling meant for his life.

I told Mr. Massenburg that the finding of no probable cause did not vacate the magistrate's order of emergency protected signed previously by a hearing officer at the jail, and that he was still subject to that order, including the order that he not have any threatening or harassing communication with the complaining witness. However, I did amend the order of emergency protection in open court, with no objection from the State, to remove the provision that forbade Mr. Massenburg from returning to his home.

I explained the amendment to Mr. Massenburg at length. My lead clerk Ivone Gomez processed the amendment, including service of the amendment on law enforcement agencies including the Harris County District Attorney, that same afternoon.

The following Friday, June 25, 2021, Mr. Massenburg appeared again for arraignment on a new case: violation of a protective order. I learned that the order was amended and served on the District Attorney that prosecutor Sean Powers had accepted charges for violation of a protective order and authorized the arrest of Mr. Massenburg because he was physically present at his home later that day.

Mr. Massenburg posted a $3,500 surety bond on Saturday and was released that day. When he appeared the following Friday for arraignment, his first words were "judge, you told me I could go home."

The prosecutors in court volunteered right away that the previous amendment of the order was written in their internal computerized case notes, which they represented were available to prosecutors at intake like Mr. Powers. My clerk informed me

that the proof of service of the amendment, on file with the clerk, fell well before the time Mr. Powers accepted charges for violating the order.

I summoned Mr. Powers to court to be served with an order to show cause and a hearing date so that the facts of this situation could be presented formally. That hearing is still pending.

I have enclosed the hearing transcript for that afternoon, when Mr. Powers was ordered to show cause and the matter was set for a hearing. The enclosed hearing transcript is the authoritative account of court proceedings that afternoon, with one important note. On page 3, I tell Mr. Powers that he was "going to be ordered to show cause," that he was "going to be served with it today" and that he would get an immediate personal bond on in the amount of $1.

The following sentence of the transcript appears to be missing a word—common in proceedings transcribed while the court reporter or any party is appearing remotely via Zoom. The transcript says, "I find you in contempt and sentence you to six months in jail," which is then described as a "contempt warning." The missing word here is "could." I have not found Mr. Powers in contempt. There is no judgment of contempt nor did I ever intend for there to be one at that juncture. I expect that the transcript will be corrected in due course, under the applicable procedures.

Both criminal charges against Mr. Massenburg remain pending, despite the findings of no probable cause, as does the show cause proceeding against Mr. Powers.

3. Mr. Mitcham's complaint regarding disposition of bonds following the defendant's failure to appear at a required court appearance is wholly without merit.

There are many different circumstances that occur every day regarding the defendant's appearance in a case. For the vast majority of scheduled court settings, the defendant's appearance is waived by the court. The court retains the discretion to waive the appearance at any time, even on the date of the scheduled appearance. This is a routine practice of scheduling each of the nearly 2,000 cases pending in Court 8.

When the defendant's appearance is required and the defendant does not appear: revocation of the bond for failure to abide by the condition to appear in court as required, or forfeiture of the bond. Which of these legal remedies are used fall squarely within the discretion of the court, and not the district attorney.

My decision on which method to use to issue a capias is always an individual decision based on the facts of the case and the representations and arguments of counsel. For example, in cases when the defendant has failed to appear at a pre-trial motion setting or another intermediate setting, I may revoke the bond as a more administrative remedy than triggering civil forfeiture proceedings that would then need to be formally dismissed if the defendant appears shortly after the missed appearance. Reinstatement of a bond following revocation is administratively far easier on the deputies and the clerks, and so when reinstatement is likely in a particular matter, I may prefer the path of judicial economy.

By contrast, when a defendant does not appear for a jury trial or a dispositive hearing with testimony, I may ask the deputies to initiate the formal forfeiture process by calling the defendant's name in the hallway and have the clerks generate a judgment nisi.

My actions in any case are based on the law and the facts of the case. Exercising discretion in how a capias is issued following non-appearance is a core function of a criminal trial court that I faithfully execute every day. Any suggestion otherwise is false.

4. Additional statements are included in QJ-1 responses.

Verification

My name is Franklin Gordon Bynum. My date of birth is [redacted] [redacted]. My address is [redacted] [redacted]. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, Texas on November 13, 2021.