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20-1415

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June 24, 2020

Ms. Jacqueline Habersham
Executive Director
State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711

Re: Judge Franklin Gordon Bynum, State Bar of Texas No. 24069451

Dear Ms. Habersham:

Please accept this complaint against Franklin Bynum, the elected judge of Harris County Criminal Court at Law No. 8. For the reasons detailed below, Judge Bynum has engaged in judicial misconduct.

A. Overview

Since taking office in January of 2019, Judge Bynum has repeatedly and willfully ignored basic principles of criminal jurisprudence and conducted proceedings in his court with an unprofessional and irredeemable bias against the State of Texas and its prosecutors. This conduct has been prejudicial to the State's interest in fair and impartial trials and, in one instance, has been potentially dangerous to the health of Harris County prosecutors.

Specifically:

- On April 28, 2020, Judge Bynum was recused from *State of Texas v. Christopher Bales*, Cause No. 2305212, a misdemeanor theft case, because Judge Bynum made a series of bad faith decisions apparently designed to expedite the defendant's release from jail, including making an unfounded finding of no probable cause and setting Bales' case for trial to take place five days later without first according Bales assistance of counsel. Judge Bynum thereafter abusively accused the trial prosecutor of endangering the health of the trial participants by refusing to dismiss the case.

- On June 1, 2020, Judge Bynum transmitted an email to the prosecutors assigned to his court requiring them to attend court proceedings in violation of the Supreme Court's COVID-19 social distancing orders, only relenting after the Harris County District Attorney filed motions to recuse him in all of the cases on his docket for two days. Judge Bynum thereafter made an intentionally false statement that his email had not been an order, a statement belied by the context of his email and his subsequent unwillingness to withdraw the content of the email.
- Judge Bynum has engaged in retaliatory conduct against Harris County prosecutors by: (1) refusing to permit them to contact his court staff by email; (2) not allowing prosecutors to speak to other court participants; (3) refusing to accept any agreed pleas of guilty or nolo contendere from defendants as a court policy; and (4) refusing to permit them to view his court proceedings through the Zoom platform.
- Throughout his tenure in County Criminal Court at Law No. 8, Judge Bynum has been unnecessarily and unprofessionally rude and abusive to prosecutors.
- Judge Bynum, without notice to the State and an opportunity to be heard, ordered the Sheriff not to comply with Section 411.1471(b)(1) of the Texas Government Code, which requires the Sheriff to collect DNA samples from convicted individuals.
- Judge Bynum has repeatedly released defendants on the basis of indefensible determinations that the State had failed to establish probable cause for the defendants' prosecutions. Judge Bynum has made these unfounded determinations in bad faith: (a) as an extralegal mechanism to end prosecutions with which he personally did not agree; or (b) as an extralegal mechanism to expedite the release of defendants not eligible for release on personal bond. Many of these "no probable cause" findings have been made *sua sponte* without notice or a hearing, often in the dead of night. In several instances, the State has subsequently obtained misdemeanor indictments, which are implicit rebukes of Judge Bynum's bad faith rulings by grand juries.
- Judge Bynum has dismissed at least twenty cases pursuant to a theory that has no foundation in law, namely, that the State did not insert a sworn recitation of the events leading to the defendant's arrest on the face of the misdemeanor complaint. This has resulted in an unprecedented twenty State's appeals arising out of his court, unnecessarily delaying justice due to Judge Bynum's frivolous rulings.

- Judge Bynum has exhibited an indefensible bias against victims of crime, particularly victims of domestic violence. His bad faith rulings have resulted in a loss of faith in the fairness and impartiality of the criminal justice system by some victims of crime seeking justice in his court.

Judge Bynum's conduct appears not to be solely the product of incompetent judging or an antisocial personality. Instead, it appears to be motivated by Judge Bynum's publicly expressed desire to "see the demolition through" of the criminal justice system.

Judge Bynum has refused to enforce Texas law as it is written. Instead, he has substituted his own unwritten code of criminal procedure in a manner intended to prejudice the State of Texas's ability to prosecute criminal cases.

The zone of judicial discretion to interpret existing law is large, but not boundless. All judges in Texas are obliged by their oath of office to follow the law as provided to them by the Texas Legislature and the Texas and United States Constitutions. If they cannot do so, they can seek redress in the legislative branch to change the law, but they cannot unilaterally change the laws they do not like from the bench. That way madness lies, because the law should be predictable and impartially applied to all parties.

Judge Bynum's disdain for the rule of law and the prosecutors practicing in his court is apparent and inexcusable. He should be disciplined.

B. Judge Bynum's Contempt for the Criminal Justice System

In reviewing Judge Bynum's myriad acts of misconduct, it is necessary to understand what motivates his bad faith rulings. By his own public admission, he is seeking the "demolition" of the criminal justice system.

During a July 2, 2019, interview with *The Nation*, Judge Bynum said that bail reform litigation in federal court motivated him to seek the bench:

And at that point I saw an opportunity because I never wanted to be a judge, but I saw that the system as it was, was going to be destroyed. And I knew that there would be a new system built in its place. And I saw that I had the opportunity to see the demolition through, and see the design of something different through also. And so that's ultimately why I did it.

Exhibit No. 1 at 12.

Judge Bynum told the *Nation* interviewer that he had campaigned on a platform of “telling people that I was a socialist, that I was a prison abolitionist, and that I was trying to end pretrial detention.” *Id.* at 13. Judge Bynum said he did not consider the bail reform lawsuit to be “disrupting” enough; he “knew that we had to build a political and an organizing . . . we had to build a base of power and follow through on the disruption.” *Id.* at 16-17. Judge Bynum said that he views the present criminal justice system as “an outgrowth of chattel slavery.” *Id.* at 22. However, Judge Bynum rejected the notion of reshaping the system in a legislative capacity. *Id.* at 23.

On July 25, 2019, Judge Bynum appeared on a local television show sponsored by the Harris County Criminal Lawyers Association, a criminal defense attorney organization.¹ During this broadcast, Judge Bynum publicly cast aspersions on the Texas judiciary as a whole and, in particular, upon retired Harris County Criminal Court at Law Judge Mark Atkinson, the training director for the Texas Center for the Judiciary.² Judge Bynum dismissed the TCJ training as “Baby Judge School,” stated he now knows why the quality of the judiciary across the state is so poor, and mocked Judge Atkinson, who apparently cautioned him about skipping an entire morning of training. Judge Bynum said he told Judge Atkinson, “I’m busy trying to fix the system you created.” Discussing prison abolition on this same show, Judge Bynum stated that he now has a badge that “opens gates” and that his signature can “free people.”

C. Judge Bynum’s Acts of Judicial Misconduct

In his short tenure as the presiding judge of County Criminal Court at Law No. 8, Judge Bynum has engaged in a pattern of judicial misconduct that justifies imposition of judicial discipline.

1. Judge Bynum’s April 29, 2020 Recusal

On April 29, 2020, Judge Bynum was recused by Administrative Judge Susan Brown pursuant to a motion by the State of Texas alleging various acts of judicial

¹ The broadcast can be accessed at www.youtube.com/watch?v=3LFiuTWeE4I

² Judge Atkinson presided over Harris County Criminal Court of Law No. 13 for 24 years. He is now Chief Executive Officer of the Texas Center for the Judiciary. *See* www.yourhonor.com/web/Online/About_Us/Staff.aspx.

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misconduct in *State of Texas v. Christopher Bales*, as summarized *supra*, at page 2.³ See Exhibit No. 2. The motion to recuse and supporting exhibits are incorporated into this complaint, including a link to a YouTube video depicting Judge Bynum's behavior.

Of particular interest is the effect that Judge Bynum's public conduct had on the complainant in the *Bales* case and the vice president of the company from which Bales allegedly stole a computer. Shane Merz, Vice President of MRE-Consulting, concluded after watching the case on YouTube that Judge Bynum

has already decided to acquit Mr. Bales, since he does not consider this case to be important or worthy of the court's time. This is why he did not want a jury trial – he wanted to be sure the verdict was “not guilty.”

Exhibit No. 2, at Exhibit E (Merz affidavit).

Merz concluded that Judge Bynum's conduct “has certainly taken away a lot of my faith in the criminal justice system” and that he has “no confidence in Judge Bynum's ability to be fair and impartial.”

Complainant Natalie Drew, after watching the YouTube video, said:

I was surprised at the immediately hostile tone that Judge Bynum took with the ADA's office. I was also surprised that he seemed to already have a determined course of action that he preferred before ever talking with Mr. Eber and Mr. Valdez.

....

Judge Bynum seemed grossly unprofessional, at least compared to what I'd expect from someone in his position.

....

It is clear, to me at least, that Judge Bynum seems far more interested in letting Mr. Bales go (ironic given he's facing a fugitive case in another state) than he is in upholding the laws that he took an oath to uphold.

Exhibit No. 2, at Exhibit F (Drew affidavit).

³ Once the motion was filed, Judge Bynum failed to voluntarily recuse himself or forward the motion to Judge Brown, as required by TEX. R. CIV. PROC. 18a(f). The State had to forward the motion to Judge Brown after three full working days (5-1/2 actual days) had elapsed.

2. Intentional Endangerment of Prosecutors

On June 1, 2020, at 3:03 p.m., Judge Bynum sent an email to two of the prosecutors assigned to his court and copied his court coordinator and his court reporter. Exhibit No. 3 (email from Judge Bynum).

In that email, Judge Bynum stated he would be holding jail dockets on Wednesday and Thursday, and wrote:

On those days, the State will not be allowed to appear remotely. At least one prosecutor who can speak for every case will appear in person in Court 8 every Wednesday and Thursday morning.

At the end of the email, Judge Bynum stated:

I will not answer any questions about this. Do not make any inquiry of me or my staff about these procedures. This is very simple: a prosecutor with authority to bind their client⁴ on every case will appear personally on Wednesday and Thursday at 9 a.m. until further notice.

This order violated three sets of orders intended to protect court participants from the COVID-19 pandemic: (1) the Texas Supreme Court's First, Twelfth, and Seventeenth Emergency Orders; (2) the Proposed Schedule for Civil, Family, and Juvenile District Courts and County Civil and Criminal Courts at Law approved by the Eleventh Administrative Judicial Region on May 29, 2020; and (3) Harris County Judge Lina Hidalgo's May 21, 2020 Fourth Amended Stay Home, Work Safe Order.

Judge Bynum's order also placed the prosecutors assigned to his court between a rock and a hard place: they would either have to involuntarily attend court at the height of the COVID-19 pandemic or risk being held in contempt by Judge Bynum for violating his clearly stated order. The Harris County District Attorney's Office (HCDAO) sought relief from Susan Brown, the presiding judge of the Eleventh Administrative Judicial Region, on June 2, 2020, asking her to intervene in the matter. *See* Exhibit No. 4 (June 2 letter from HCDAO to Judge Brown).

⁴ It is unclear to whom the judge is referring. The State of Texas does not have clients.

By the close of business on Tuesday, June 2, 2020, Judge Bynum had not rescinded his order to the prosecutors. Thereafter, the HCDAO filed motions to recuse for every case on his June 3 docket. *See* Exhibit No. 5 (sample of the 69 motions filed).

During Judge Bynum's June 3 docket, prosecutors appearing remotely reminded Judge Bynum that he could not act on any case because there was a recusal motion pending. Judge Bynum did engage in conversation with at least one defense lawyer about how he could do nothing unless the State was willing to withdraw its recusal motion. When a prosecutor pointed out that he could voluntarily recuse himself and allow the case to be reassigned, Judge Bynum became angry and agitated, and replied, "Mr. Hagerman, I will decline that request at this time." He then banished the prosecutor from Zoom court.

For most of the morning's proceedings,⁵ Judge Bynum virtually locked out the prosecuting attorneys, so his activities are unknown. At no time during the brief period of court proceedings that were actually open to the State did Judge Bynum rescind or otherwise address his email concerning mandatory personal appearances by the State. Since he was unable to address any case, he could not find the prosecutors in contempt for not being physically present.

Later that Wednesday, Judge Bynum provided Administrative Judge Susan Brown with a form that he wished to have completed for every case on each day's docket, notifying the court of which assistant district attorney would be assigned to every case. Judge Bynum claimed he had required the prosecutors to personally appear because he was too confused during Zoom dockets about who handled which cases. The HCDAO respectfully declined to perform this task, citing the overwhelming numbers of cases implicated by the order, the existence of other, easier options for the judge to connect cases with lawyers, and the violation of the standing emergency orders. *See* Exhibit No. 6 (June 3 letter from HCDAO to Judge Brown). The HCDAO advised that, if the order was not rescinded, it would be compelled to file motions to recuse for Thursday's docket, and seek additional relief via writs of mandamus and prohibition, as necessary.

When Judge Bynum did not rescind his order during business hours on Wednesday, the State filed recusal motions for every case on his June 4 docket. Judge Brown advised Judge Bynum via email at 5:31 p.m. that the HCDAO would not agree to his plan, that he

⁵ Judge Bynum had previously failed to include a third court prosecutor assigned to his court, Jennifer McCoy, on his emailed dictate, so she was permitted to participate remotely for part of the docket. (He apparently did not recognize her as one of the court prosecutors.) However, the judge then left the bench for a while, and returned asking her identity. Once informed, he shut her out of the proceedings as well.

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was still in violation of the Supreme Court's emergency orders, and the approved Harris County Operating Plan, and that she would have to notify the Supreme Court of his violation if he did not rescind the order.

On June 3 at 6:12 p.m., Judge Bynum emailed Judge Brown and falsely stated, "I have not ordered them to do anything," and that he would allow remote appearances on Thursday morning. Judge Bynum thereafter reiterated his false statement, saying:

I have not made any order. They have indicated at this point they will continue to file recusal motions because of a staffing e-mail. The only apparent issue is whether the e-mail is grounds for recusal.

See Exhibit No. 7 (June 3 email thread between Judge Brown and Judge Bynum).

Judge Brown informed the HCDAO at 7:29 a.m. on June 4, 2020, that Judge Bynum was no longer requiring the prosecutors' personal appearance. At 9:01 a.m., Judge Bynum advised the HCDAO that the morning docket would be delayed until it filed withdrawals of the motions to recuse. At 9:05 a.m., HCDAO Post-Conviction Writs Division Chief Josh Reiss informed Judge Bynum that the HCDAO was prepared to execute the withdrawals verbally, to be followed by written documentation, if the court would accept that. The court would not. At 9:10 a.m., Judge Bynum responded that he "will not accept a verbal withdrawal unless necessary for the safety of the deputies."⁶ *See Exhibit No. 8 (email thread between Judge Bynum and Reiss).* Reiss reminded Judge Bynum that the situation was of his own making, and it would take some time to individually withdraw 140 motions to recuse in writing.

At 12:40 p.m., Reiss emailed Judge Bynum concerning the fact that he had been in the Court's virtual waiting room since before 9:00 a.m. Reiss advised that he had sent Judge Bynum multiple emails about the reason for his appearance and the necessity of making a record of the events of June 3 and June 4. Reiss had also requested assistance from County Courts at Law Staff Attorney Veronica Nelson at 11:30 a.m. Reiss had called the court's phone line and that of the court clerk, getting only a voicemail message on both occasions. In the course of the morning, Reiss had learned that, despite claiming he would accept only written withdrawals of the motions to recuse, Judge Bynum had actually accepted two verbal withdrawals. Reiss informed Judge Bynum that he considered the judge's refusal to allow him to make a record to be retaliatory. *See Exhibit No. 9 (Reiss'*

⁶ Judge Bynum did not explain how either the filing or withdrawal of a motion to recuse the judge for bias would affect the "safety of the deputies."

email to Judge Bynum). Reiss was held in the court's virtual waiting room until 1:55 p.m., at which time Judge Bynum abruptly ended the session without allowing Reiss to be heard.

The *Houston Chronicle* published a lengthy article describing the incident with Judge Bynum. See Exhibit No. 10 (*Chronicle* article).⁷ The article references an email from Judge Bynum, in which he claimed he needed a prosecutor in court because "his own staff has become overburdened from taking on tasks that prosecutors can't complete from afar." What Judge Bynum did not explain to the reporter was that he had implemented a policy prohibiting email communication between Harris County prosecutors and himself and his staff, as discussed below.

Judge Bynum's June 1, 2020 email intentionally and vindictively violated various orders designed to protect the health of court participants. It also caused the HCDAO and the Harris County District Clerk's Office to expend hours of work during a time of limited resources in a pandemic. And Judge Bynum compounded his misconduct by falsely denying that his email was an order. There is absolutely no precedent for this level of judicial misconduct.

3. Retaliatory Conduct

Judge Bynum has instituted targeted court policies with the apparent intent of retaliating against the HCDAO for its advocacy.

Prosecutors Not Allowed to Communicate with Court Staff by Email. On April 22, 2020, one week after the State filed its motion to recuse in the *Bales* case, Judge Bynum announced he would no longer permit email communication between himself or his staff and any member of the HCDAO. See Exhibit No. 11 (April 22 email from Judge Bynum).

It appears Judge Bynum's prohibition against email communication did not extend to the defense bar, even though he claimed in his April 22 email he would be announcing a "similar rule" for those lawyers. On April 30, 2020, his court coordinator sent an *ex parte* email to defense counsel on *State of Texas v. John Patrick Winters*, Cause No. 2291028, with no copy to the State. The coordinator wanted to know what counsel planned to do with the case, which was set for jury trial on May 5, 2020. The court wished to know if that was still the plan (although presently there is no jury call in Harris County). Whether initiated by the court coordinator at the judge's request, or by the judge himself, this is an

⁷ www.houstonchronicle.com/news/houston-texas/houston/article/Motion-for-recusal-dropped-as-DA-judge-spar-over-15321154.php.

improper *ex parte* communication. If the judge is going to forbid email communication with or by the State, then he must likewise forbid that communication to the defense bar. Communications between the court and a party concerning pending matters should include opposing counsel.

Judge Bynum's coordinator has also instructed defense counsel to pass along information to the court prosecutors, rather than contacting them directly himself. For example, on Friday, May 15, 2020, an unidentified defense lawyer left a voice mail for the chief prosecutor, advising the coordinator wanted a dismissal to be filed in a case where the defendant had completed his pretrial intervention courses. *See State of Texas v. Jean Carlo Palacio*, Cause No. 2215365.

Prosecutors Not Allowed to Speak to Other Court Participants. On April 30, 2020, while presiding over a consolidated docket via Zoom, the judge declared the "chat" function would be disabled, so the participants could not communicate among themselves, and only one prosecutor per case would be permitted to speak. If a prosecutor wished to confer with a supervisor or another prosecutor with knowledge of the case, he or she would have to leave the proceedings and make a phone call. About four minutes into docket, Judge Bynum advised that the court reporter was making a record of all proceedings. Judge Bynum also made what have become his usual disparaging comments concerning "middle management" of the HCDAO observing the courtroom.⁸

Prosecutors Not Allowed to Present Agreed Pleas. On May 14, 2020, shortly after Judge Brown recused Judge Bynum in the *Bales* case, Judge Bynum announced that he would no longer accept plea bargain offers made by the State.⁹

⁸ Judge Bynum's ongoing behavior has necessitated constant supervision by senior members of the HCDAO, to serve as witnesses, if necessary, and occasionally to assist the misdemeanor prosecutors with their responses to the judge's actions or demands. Judge Bynum apparently wishes to be free to exercise his abusive behavior with only less-experienced (albeit extremely competent) prosecutors as his audience.

⁹ An example of this arbitrary behavior in action is attached as Exhibit No. 12 (reporter's record of hearing in *State of Texas v. Xavier Tim Catlin*, Cause No. 2303366). Judge Bynum refused to allow the defendant to plead guilty, despite his counsel's expressed desire for him to do so, refused to say whether he would find probable cause, and refused to answer any of the prosecutor's questions about why the case was being set for trial over the defendant's wishes. The State was forced to dismiss the case.

Because the State is the only party that can make a plea bargain offer, it was unclear how Judge Bynum intended to proceed. The State understands that no judge has to accept any plea bargain, but such decisions have to be made on a case-by-case evaluation of the agreement, not systemically and arbitrarily.

Prosecutors Not Allowed to View Court Proceedings Remotely. On June 10 and June 11, 2020, shortly after being compelled to withdraw his June 1 order, Judge Bynum arbitrarily refused to allow Harris County prosecutors to remotely view court proceedings through the readily available “live stream” facilities. Judge Bynum’s unfortunate course of conduct is detailed in the June 16, 2020 letter from the HCDAO to Administrative Judge Susan Brown, attached as Exhibit No. 13.

4. Discourtesy to Prosecutors.

Judge Bynum frequently fails to treat the prosecutors assigned to County Criminal Court at Law No. 8 with courtesy and respect.

Misdemeanor prosecutors generally lack the years of experience possessed by the judge, and of course are subordinate in terms of power. However, rather than use his experience and position to educate the neophytes, Judge Bynum mocks and ridicules the prosecutors when he believes they are incorrect.

Several examples of this can be found in the YouTube video cited in the motion to recuse (Exhibit No. 1) attached to this document (<https://youtu.be/vup7pbtyMk>), wherein the judge chastises Michael Eber for doing his job, and for ensuring an indigent defendant the judge had set for trial in less than a week was represented by counsel.

On another occasion during docket (March 26, 2020), the judge sneered and ranted when one of the prosecutors mistakenly stated the District Attorney’s office belongs to a co-equal branch of government (a forgivable error, since the Department of Justice is part of the Executive Branch of the federal government). Judge Bynum told the prosecutor to “come back when you know what branch of government you’re in.”

Judge Bynum is also quick to jump on any claim that the State has a “right” to do something, scathingly proclaiming, “The State has no rights, only individuals have rights!” Although this is correct, Judge Bynum’s scornful, derisive tone is inexcusable. Also, “right” is often shorthand for “statutory authority.” A gentle reminder to practice precision in speech and thought would be more appropriate.

5. *Sua Sponte* Refusal to Comply with the Texas Government Code

Judge Bynum has opted to exempt himself from the mandatory requirements of Section 411.1471(b)(1) of the Texas Government Code, which became effective on September 1, 2019. That statute requires that “[t]he court shall require the defendant to provide to a law enforcement agency one or more specimens for the purpose of creating a DNA record,” upon conviction for certain enumerated misdemeanor offenses.

Without a motion or request from either party, the judge has issued *sua sponte* “orders of protection” for collection-eligible defendants, arguing that said collection “would violate Article 1.06 of the Code of Criminal Procedure.”¹⁰ Four court orders in convictions occurring after the effective date of the statute are attached. See Exhibit No. 14 (*sua sponte* protective orders).

Although a judge is free to make rulings based on his or her understanding of the law, Judge Bynum seems to have tacitly declared Section 411.1471 to be unconstitutional without prior notice to the State and without providing an opportunity for the parties to present law and arguments in support of their positions. Judge Bynum has taken it upon himself to interfere with the creation of a statewide DNA data base to assist in the apprehension, prosecution, and conviction of criminal offenders.

6. *Ex Parte* Findings of No Probable Cause

Judge Bynum regularly makes findings that a prosecution is not supported by probable cause for reasons entirely unrelated to the absence of probable cause.

For example, Judge Bynum belatedly found no probable cause in *State of Texas v. Domanichian Berry*, Cause No. 2280690. This was done on Judge Bynum’s own motion and out of court. On October 3, 2019, Mr. Berry was accused of driving while intoxicated and posted a \$100.00 cash bond on October 4, 2019. According to the responding officer, Berry was found in the seat of a red SUV that had snapped a power pole, hit a parked car and collided with some trees in a residential yard. The car was still running and in drive; the airbags had deployed. Berry was too impaired to walk or talk, and the hospital later confirmed this was not due to injuries. He had bloodshot eyes and “considerable” resting nystagmus. The officer found these signs consistent with PCP intoxication, and a search warrant for Berry’s blood based on an affidavit of probable cause was signed by a magistrate and executed.

¹⁰ Article 1.06 prohibits searches without probable cause.

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Since his arrest, Berry appeared in court several times. On March 25, 2020, Judge Bynum decided to find no probable cause. *See* Exhibit No. 15 (no probable cause finding). Berry was scheduled to enter a plea of guilty that date; his lawyer had conceded the issue of probable cause. When trial court prosecutors questioned Judge Bynum's decision, he would reply only that he had reviewed the case file and there was no probable cause. Berry's blood did test positive for the presence of PCP and his case will be presented to a grand jury for a misdemeanor indictment.

It is apparent from Judge Bynum's commentary on some of the findings that he either does not understand the concept of probable cause, or he is manipulating his findings to achieve an ulterior purpose, such as dismissal of the cases. As he himself has said, he wishes to abolish pretrial detention. Given his political views, it is reasonable to conclude that he is likewise opposed to prosecution of the very offenses over which this court has jurisdiction.

As troubling as the community safety risk is the fact that the findings of no probable cause often occur at unknown times, away from open court, where the parties have no opportunity to be heard, in violation of Article I, Section 13, of the Texas Constitution.

This was happening even before the COVID-19 crisis. For example, in *State of Texas v. Marissa Mancias*, Cause No. 2258292, a burglary of a motor vehicle prosecution, the complaint was sworn on May 3, 2019, and the defendant was granted a general order bond that same date. Following several settings, the defendant failed to appear in court on March 4, 2020. The case was set for bond forfeiture and court-appointed counsel sought to withdraw, citing no contact and failure to appear.

On April 29, 2020, the HCDAO learned that Judge Bynum had made a finding of no probable cause on March 4, 2020, without notice to or participation by the trial court prosecutors. *See* Exhibit No. 16 (no probable cause finding). It appears from the motion to withdraw that defense counsel likewise was not privy to those proceedings. This is less problematic for the defense, since Judge Bynum's ruling favors the defendant, but the State is being denied the opportunity to plead the victims' cases or supply whatever information the judge believes is missing.

Judge Bynum issued another out-of-court finding of no probable cause, on his own motion, on April 1, 2020 (not filed until April 20, 2020) in *State v. Bennett Kofi*, Cause No. 2246520. *See* Exhibit No. 17 (no probable cause finding). On February 10, 2019, Kofi was charged with assault and criminal trespass in an incident in which he was asked to

leave a Walmart and physically assaulted the store clerk by throwing his shoes and hitting her. Kofi previously entered into a written agreement that he was not to go on any Walmart property because he has been known to sleep in the restroom because he allegedly watches pornography on the display computers while masturbating. Probable cause was originally found by a magistrate on February 11, 2019. Kofi was denied a personal bond by the magistrate, was granted a \$100 bond the next day over a different signature, failed to appear on the second setting, was re-arrested, was granted a personal bond, again failed to appear, was re-arrested, and was granted a \$500 bond on January 1, 2020 (previous finding of probable cause noted). It is unclear whether or not Kofi made this bond or whether he ever appeared at subsequent settings between the time of his most recent arrest and Judge Bynum's discharge.

During the COVID-19 crisis, grand jury time has become quite precious due to space and scheduling issues, so misdemeanor presentations are on hold. Judge Bynum's unwarranted discharges have created a large backlog of misdemeanor cases that must be indicted once the pandemic has passed. Meanwhile, the victims remain at the mercy of their abusers.

Cursorily, it might seem Judge Bynum is finding no probable cause to release these defendants from custody and fulfill his pledge to abolish pretrial detention, as in the *Christopher Bales* case cited above. The majority of these no probable cause findings, though, are in cases where the defendant is already out on bond, or in some cases not even arrested.¹¹

7. Twenty State's Appeals

On March 6, 2020, the Harris County District Attorney's Office (HCDAO) filed an unprecedented twenty notices of appeal on cases assigned to Harris County Criminal Court at Law No. 8. This list is attached as Exhibit No. 18, along with a synopsis of the probable cause statement for each case. The cases are primarily domestic violence, DWI, and theft.

The common theme of the appeals is Judge Bynum's refusal to find probable cause on cases that do not include a sworn recitation of the events leading to the defendant's arrest on the face of the complaint. As the State has repeatedly explained to Judge Bynum,

¹¹ Even if the defendants were in custody, the State contends it is an abuse of judicial authority to make spurious findings of no probable cause for the sole purpose of releasing the accused from jail, even during the COVID-19 crisis. Judges may not exempt themselves from the rule of law.

the law does not require a sworn probable cause affidavit to be included on the face of the complaint. *See* TEX. CODE CRIM. PROC. art 21.22; *Holland v. State*, 623 S.W.2d 651, 652 n.1 (Tex. Crim. App. 1981) (when Article 21.22 refers to an “affidavit,” it is referring to the complaint itself and not to some foundational document upon which the complaint rests).

However, the law according to Judge Bynum does so require, and as noted above in the *Bales* recusal, Judge Bynum became quite punitive when the HCDAO refused to abandon the cases on which he has arbitrarily found no probable cause. In *Bales*, Judge Bynum criticized the HCDAO for presenting to the grand jury what he considered a worthless case, considering it a waste of resources, yet Judge Bynum has persistently compelled these wastes of resources by systematically refusing to follow Texas law.

Judge Bynum’s prejudice has become so well-known that the defense bar now files motions to quash the information for failure to state probable cause. Attached as Exhibit No. 19 is a list of six of those cases, along with a sample motion. These motions¹² rely solely on Judge Bynum acting in accordance with his personal belief, which is contrary to the law. Although Judge Bynum heard argument in one case, *State v. Theodore Hoseman*, Cause No. 2187057, on or about February 28, 2020, and the State has submitted a brief explaining the law, he has yet to rule on any of the motions. Hoseman was charged with DWI as a second offender on January 24, 2018, but no motion to quash was filed until February 24, 2020 (over a year after Judge Bynum took the bench). Probable cause was originally found on January 25, 2018 (before Judge Bynum took the bench).

¹² The defense motions incorrectly assert the information “is not supported by a sworn complaint establishing probable cause for any offense.” The informations are supported by sworn complaints; the complaints simply do not replicate the offense reports.

8. Bias Against Victims of Domestic Violence

Judge Bynum has demonstrated an unjustified bias against the victims of domestic assaults, inexplicably finding no probable cause on the assault cases and on violations of protective orders. This is especially troubling during this time of “stay-at-home” orders, when domestic violence risks greatly increase.¹³

For example, on April 2, 2020, Judge Bynum approved a personal bond for a defendant with a case in County Criminal Court at Law No. 2,¹⁴ after the elected judge of that court had declined to grant one. On April 25, 2020, Richards again violated the protective order, and is now charged with a felony. Richards has threatened his father with a knife and has previously assaulted him.

On April 21, 2020, out of court, Judge Bynum found no probable cause on charges of violation of a protective order, even though the complaint contained the probable cause affidavit on its face that had been sworn on March 18, 2020. *See* Exhibit No. 20 (complaint for *State of Texas v. Rudolfo Garcia*, Cause No. 2305126). The affidavit was included on the face of the complaint because the State had sought and received a warrant for Garcia’s arrest. Garcia had been charged with assault on a family member by impeding breathing on December 8, 2019, the felony court ordered “no contact” as a condition of his bond on January 24, 2020, and Garcia acknowledged and signed the order. The felony case was still pending on February 3, 2020, when the complainant reported receiving numerous text messages from the defendant that date and provided copies to the police officer.

¹³ The Legislature has prioritized protection of family violence victims. Article 5.01 of the Texas Code of Criminal Procedure provides:

- (a) Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm or abuse or the threat of harm or abuse as is permitted by law.
- (b) In any law enforcement, prosecutorial, or judicial response to allegations of family violence, the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.

¹⁴ *State of Texas v. Chance Richards*, Cause No. 2305745. Richards was charged with violation of a protective order, stemming from a terroristic threat against his father.

The assault case underlying the protective order violation (cause no. 1656251) involved Garcia breaking into the complainant's home after being told to leave by the police and choking her to the point she "thought her head was going to explode." He attempted to forestall charges by contacting police and claiming the complainant caused a leg injury by attacking him, which medical professionals quickly discounted. He admitted to the police and to the paramedics that he choked the complainant, claiming he is a military veteran and trained to "subdue" people.

Since violation of a protective order is a fairly simple and straightforward offense (as misdemeanors in general are wont to be), Judge Bynum surely cannot lack such a basic understanding of the law. It would appear that his continued disregard for the elements of the offense, as well as for Tex. Code Crim. Proc. art. 5.01, is attributable to a bias against the victims of family violence and a desire to protect the defendants. Judge Bynum may see these cases as yet another "opportunity to try to see the demolition through."

Also consider *State of Texas v. Devante Clark*, Cause No. 2308230, in which Clark threatened to go to the complainant's house and shoot her, because she questioned him about how their child's finger was cut off while under his supervision, placing the complainant in fear for her life. Clark has a prior charge of assault on a family member, for threatening his sister with a knife and punching her in the face, which had to be dismissed when the sister became uncooperative. Judge Bynum found no probable cause and discharged the defendant.

C. Texas Code of Judicial Conduct Canons Violated

Canon 1: An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code (Texas Code of Judicial Conduct) are to be construed and applied to further that objective.

Canon 2(A): A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(B)(1): A judge shall hear and decide matters assigned to the judge, except those in which disqualification is required or recusal is appropriate.

Canon 3(B)(2): A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

Canon 3(B)(4): A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Canon 3(B)(5): A judge shall perform judicial duties without bias or prejudice.

Canon 3(B)(8): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.

Canon 3(B)(9): A judge should dispose of all judicial matters promptly, efficiently and fairly.

Canon 3(B)(10) (in pertinent part): A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.

Canon 3(C)(2): A judge should require staff, court officials and others subject to the judge's direction 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.

Canon 4(A): A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties.

D. Prayer for Appropriate Sanction

The Texas Constitution provides that a judge may be disciplined “for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice[.]” TEX. CONST. art. V, Sec. 1-a(G)A.

For purposes of Art. V, sec. 1-a, “willful or persistent conduct that is clearly inconsistent with the proper performance of” a judge’s duties includes a willful violation of a provision of the Code of Judicial Conduct. TEX. GOV’T CODE § 33.001(b)(2). Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence. *In re Davis*, 82 S.W.3d 140, 148 (Tex. Spec. Ct. Rev. 2002); *In re Bell*, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995). A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined. *Davis*, 82 S.W.3d at 148; *In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998).

The mission statement of the State Commission on Judicial Conduct is to protect the public, promote public confidence in the integrity, independence, competence, and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench.

The Code of Judicial Conduct states that it does not intend that every transgression will result in disciplinary action. “Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.” TEX. CODE JUD. CONDUCT, Canon 8, ¶ 4.

Generally, there are three circumstances in which legal error may be found to violate one or more of the Canons:

- Commission of egregious legal error;
- Commission of a continuing pattern of legal error; or,

- Commission of legal error which is founded on bad faith.

In re Barr, 13 S.W.3d 525, 544 (Tex. Rev. Trib. 1998). For legal error to rise to the level of judicial misconduct, a legal ruling or action must be “made contrary to clear and determined law about which there is no confusion or question as to its interpretation.” *In re Ginsberg*, No. 18-0001, 2018 WL 2994940 at *4 (Tex. Spec. Rev. June 11, 2018). “Egregious” means “[e]xtremely or remarkably bad; flagrant,” or “shocking.” *Id.* at *5.

With respect to judicial proceedings, a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority constitutes “bad faith” as a matter of law. *Barr*, 13 S.W.3d at 545.

Judge Bynum’s conduct far surpasses a few inappropriate, juvenile comments to female prosecutors, or a single instance of not knowing the law concerning attachment of witnesses that led to the impeachment and removal of Judge Jim Barr. *See Barr*, 13 S.W.3d 525, *passim*. In fact, the Commission would be hard-pressed to uncover another example of a sitting judge who so consistently and blatantly undermines the rule of law to achieve his own political purposes. These are not isolated instances of ignorance; this is a persistent, willful pattern of conduct intended to undermine the existing criminal justice system – the *sine qua non* of bad faith.

By spuriously and secretively finding no probable cause on righteous cases, by forbidding any prosecutor to communicate directly with the court by email or apparently even by telephone, by releasing violent offenders back into the community without proper bond conditions, by refusing to accept any plea bargain offer made by the State and accepted by the defense, by offending civilian witnesses with his overt contempt for their interests, and by his overall failure to conduct himself in a manner befitting a sitting judge, Judge Bynum’s misconduct demonstrates that he is beyond rehabilitation.

Last, but certainly not least, Judge Bynum repeatedly has circumvented emergency orders from the Texas Supreme Court and his own administrative region to place assistant district attorneys at risk of exposure to death or disease during the biggest health crisis this nation has confronted in over one hundred years.

No public or private reprimand or temporary suspension can sufficiently address or correct his ideologically-based pattern of abusive judicial misbehavior. Accordingly, permanent removal from the Bench is the only appropriate remedy.

Ms. Jaqueline Habersham
June 24, 2020
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Thank you for your consideration of this complaint. I look forward to your prompt resolution of this important matter.

Respectfully submitted,



David Mitcham, First Assistant
Harris County District Attorney's Office

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[REDACTED]
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Attached: 20 Exhibits