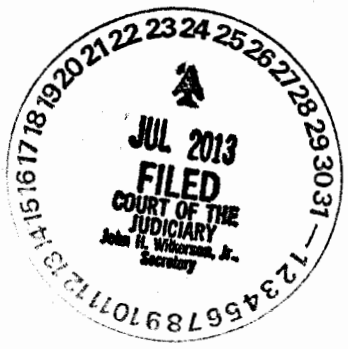

IN THE ALABAMA COURT OF THE JUDICIARY

In the Matter of:

DOROTHEA BATISTE,
Jefferson County Circuit Judge

Case No. 43

TRIAL BRIEF
OF THE JUDICIAL INQUIRY COMMISSION

The charges in this case are very simple and uncomplicated. Judge Batiste is alleged to have failed to follow well-settled, fundamental, bedrock principles of Alabama and U.S. law by ordering the arrest and detention of litigants and witnesses without providing them due process of law, including giving them notice that contempt proceedings were being commenced against them and providing them with a hearing on the charges prior to holding them in contempt and/or issuing orders for their arrest.

Although Judge Batiste would be equally guilty of violating the due process rights of these contemnors even if they had, in fact, willfully disobeyed lawful court orders or subpoenas in failing to appear, the evidence will establish that in most, in not all, of the cases in which Judge Batiste ordered these alleged contemnors arrested and detained, the alleged contemnor either did not fail to appear or had not been properly served with a subpoena or other court order directing them to appear, and thus had no legal obligation to appear before Judge Batiste on the dates and times in question.

Judge Batiste compounded her denial of due process to these seven alleged contemnors by further denying the contemnors of another of their constitutional rights: the right to bail guaranteed to them by the Eighth Amendment to the U.S. Constitution and Article I, Section 16 of the Alabama Constitution,[1] both of which guarantee the right

[1] Article I, Section 16, of the Alabama Constitution, provides:

to bail in all cases other than capital cases. Specifically, in all of these seven orders, Judge Batiste directed that each of these alleged contemnors be held without bail or held pending further order of the court with no provision for bail.

A.

Due process and the exercise of contempt power

Due process is the heart of this case. It is one of the most basic, fundamental, and valuable rights guaranteed to citizens by the U.S. and Alabama Constitutions: the right to be free from arbitrary arrest and detention by the government. See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992):

> Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Youngberg v. Romeo, 457 U.S. 307, 316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones [v. United States, 463 U.S. 354, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983)], supra, at 361 (internal quotation marks omitted). We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. [United States v.] Salerno, [481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095], supra, at 750.

Stripped to its essentials, due process requires that prior to the arrest and detention, a citizen must be given notice of the charge that subjects him/her to loss of freedom, and they must be accorded the right to be heard in defense of that charge. These requirements are not difficult or complicated: notice and the opportunity to be heard.

> That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required.

See also *Sullivan v. State*, 939 So. 2d 58 at 64, n.4 (Ala. Civ. App. 2006): "A constructive-contempt proceeding is bondable."

It is essential that judges, who are given the awesome and unparalleled power to, on their own authority and initiative, order a person to be jailed,[2] are competent and remain competent in the law that governs and limits the contempt power's use. This is particularly true of a judge who, like Judge Batiste, frequently uses contempt power.

Judge Batiste is alternatively charged with either failing to maintain competence in contempt law or has decided to ignore Alabama law regarding her use of contempt power. She either does not know the law or she refuses to follow it.

Both the Alabama appellate courts and the U.S. Supreme Court have repeatedly held in a long line of cases that persons charged with constructive criminal contempt of court *must* be accorded their due process rights.[3]

While there may be some issues or areas of contempt law that are difficult or complex, this issue—whether alleged contemnors are entitled to notice of the contempt charges and a right to be heard in defense of those charges—is not. The right to due process in proceedings where a person's liberty is at stake is a cornerstone of American jurisprudence that is taught to every first-year law school student in their first Constitutional Law course.

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[2] In *The Federalist No. 84*, Alexander Hamilton in arguing the absolute necessity of due process as a guarantee against arbitrary imprisonment, stated:

> [T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: "To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

[3] All of the contempt proceedings herein were constructive criminal contempt proceedings. See Section C, infra.

This is particularly so when in a proceeding in which a person's liberty is put in jeopardy, one person acts as not only the judge, but also as the complaining witness, the prosecutor, and the jury (or fact finder).[4] Placing this much power in the hands of a single individual, is "inconsistent with the most rudimentary principles of our system of criminal justice"[5] and is subject to abuse, e.g., *McQuade v. United States*, 839 F.2d 640 (9th Cir. 1988) "The contempt power carries with it the inherent danger of arbitrariness and abuse."

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[4] e.g., *In re Gustafson*, 650 F.2d 1017 at 1022 (9th Cir. 1981):

> Summary contempt proceedings are unique to criminal procedure: the otherwise inconsistent functions of prosecutor, jury, and judge are united in one individual. Courts have long noted the manifest potential for abuse. E. g., Bloom v. Illinois, 391 U.S. 194, 202, 88 S. Ct. 1477, 1484, 20 L. Ed. 2d 522 (1968); Ex parte Terry, 128 U.S. 289, 313, 9 S. Ct. 77, 82, 32 L. Ed. 405 (1888).

[5] e.g., *Green v. United States*, 356 U.S. 165 at 198 (1958) (Black, J., dissenting, along with three other justices in arguing for a right to jury trials in contempt proceedings):

> It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state.

And *Brown v. United States*, 356 U.S. 148 at 161 (U.S. 1958) (Brennan, dissenting)

> It will not be gainsaid that danger of abuse of this extraordinary power [contempt power] inheres in the absence of the safeguards usually surrounding criminal prosecutions, notably trial by jury and any but self-imposed judicial restraints upon the extent of punishment. That danger of abuse has required this Court closely to scrutinize these cases to guard against exceeding the bounds of discretion in the use of the power.

As a consequence of the danger of abuse of this extraordinary power, courts have been extremely careful to limit the exercise of criminal contempt power by insisting that courts strictly comply with and adhere to constitutional due process requirements. As examples, in *Cooke v. United States*, 267 U.S. 517 (U.S. 1925), a case involving due process rights of a person charged with contempt of court, the U.S. Supreme Court held:

> Due process of law . . . in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (citations omitted)

In *Ex parte Tarpley*, 300 So. 2d 409 (Ala. 1974) the Alabama Supreme Court, citing *Cooke v. United States*, supra, and another early 20th century Alabama Supreme Court opinion, among other authority, held, 300 So. 2d 409 at 413:

> The United States Supreme Court has held that indirect contempt, not committed in open court, requires that the accused be afforded due process of law; that is, notice of the charge and an opportunity to be heard before the court. Harris v. United States, supra; Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925). This question has also been spoken to in Alabama. In Ex Parte Bankhead, 200 Ala. 102, 75 So. 478 (1917), the Court held that in order to punish for constructive contempt the offending party should have notice of the nature and character of the charge and be given an opportunity to answer.

See also *Charles Mfg. Co. v. United Furniture Workers*, 361 So. 2d 1033, 1036-1037 (Ala. 1978):

> Proceedings charging one with an indirect criminal contempt requires that the accused be afforded due process of law. Cooke v. United States, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925); Ex parte Seymore, 264 Ala. 689, 89 So.2d 83 (1956). Where an individual is charged with indirect or constructive contempt, due process requires that he be given notice of the charges and a

> reasonable opportunity to meet them, the right to call witnesses and confront his accuser, and the right to give testimony relevant either to the issue of complete exculpation or extenuation of the offense and in mitigation of the penalty imposed. In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); Cooke v. United States , supra; International Brotherhood of Electrical Workers v. Davis Contractors and Engineers, Inc., 334 So.2d 892 (Ala.1976); Ex parte Seymore, supra; Ex parte Bankhead, 200 Ala. 102, 75 So. 478 (1917).

These types of repeated instances of violations of constitutional rights have been held to be among the most serious types of judicial misconduct and warrant removal from the bench, e.g., the Georgia Supreme Court affirmed the judge's removal from office based on similar denials of litigants' rights in *In re Inquiry Concerning a Judge*, 462 S.E.2d 728, 736 (Ga. 1995):

> We find that Judge Vaughn engaged in conduct extremely prejudicial to the administration of justice when she (1) refused to set appeal bonds for Park and Tarkenton when the law clearly obligated her to do so, (2) issued bench warrants for the arrests of Reeder and Adams without probable cause for such issuance, and (3) forced Williams to enter a plea of guilty in the absence of his counsel. Moreover, Judge Vaughn acted improperly and irresponsibly when she illegally denied (1) Park's, Tarkenton's, and Reeder's liberty without due process of the law, (2) Reeder and Adam's Fourth Amendment rights to be free from warrants not issued upon probable cause, and (3) Williams' Sixth Amendment right to counsel. Judge Vaughn's cavalier disregard of these defendants' basic and fundamental constitutional rights exhibits an intolerable degree of judicial incompetence, and a failure to comprehend and safeguard the very basis of our constitutional structure.
>
> * * * * *
>
> Having concluded that Judge Vaughn is unfit to hold the office of judge, we must now determine whether to follow the Commission's recommendation that she be removed from office. We find that Judge Vaughn's judicial conduct has strayed too far from the

acceptable to warrant only the issuance of a reprimand, along with instructions to modify her judicial conduct in the future.

B.

Contempt law in Alabama

Prior to the Alabama Supreme Court's adoption of Rule 70A of the Alabama Rules of Civil Procedure, the procedures necessary to accord due process to alleged contemnors could only be determined from case law. However, since 1994, when the Alabama Supreme Court adopted Rule 70A, Ala. R. Civ. P., the procedures for initiating and conducting contempt proceedings have been expressly defined in and governed by that Rule.[6] Specifically, Rule 70A(c), Ala. R. Civ. P., provides for the following procedures that must be followed in constructive contempt proceedings to accord due process:

> ***(c) Disposition of constructive contempt proceedings.***
>
> *(1) Initiation of action. A proceeding based on constructive contempt, whether criminal or civil, shall be subject to the rules of civil procedure. The proceeding shall be initiated by the filing of a petition seeking a finding of contempt (the petition may be in the form of a counterclaim or cross-claim authorized under Rule 13). The petition shall provide the alleged contemnor with notice of the essential facts constituting the alleged contemptuous conduct.*
>
> *(2) Issuance of process and notice. Upon the filing of a contempt petition, the clerk shall issue process in accordance with these rules, unless the petition is initiated by counterclaim or cross-claim authorized under Rule 13. In any case, the person against whom the petition is directed shall be notified (1) of the time and place for the hearing on the petition and (2) that failure to appear at the hearing may result in the issuance of a writ of arrest pursuant to Rule 70A(d) (Interim), to compel the presence of the alleged contemnor.*

[6] *Petrey v. Petrey*, 989 So. 2d 1128 at 1133 (Ala. Civ. App. 2008): "Rule 70A, Ala. R. Civ. P., governs the disposition of contempt proceedings in civil actions."

Thus, constructive contempt proceedings must "be initiated by the filing of a petition seeking a finding of contempt." The petition initiating a contempt proceeding must "provide the alleged contemnor with notice of the essential facts constituting the alleged contemptuous conduct." The alleged contemnor must be served with "process [a copy of the contempt petition] in accordance with these rules." A hearing on the contempt charges must be scheduled and "the person against whom the petition is directed shall be notified (1) of the time and place for the hearing on the petition and (2) that failure to appear at the hearing may result in the issuance of a writ of arrest pursuant to Rule 70A(d) (Interim), to compel the presence of the alleged contemnor."

Although Rule 70A plainly and in detail states the procedures for according due process in contempt proceedings and needs no amplification or explanation, these requirements have also been restated many times in the appellate court opinions of this state both prior to Rule 70A and afterward, e.g., in *State v. Thomas*, 550 So. 2d 1067 at 1073 (Ala. 1989):

> Where an individual is charged with indirect or constructive contempt, due process requires that he be given notice of the charges and a reasonable opportunity to meet them, the right to call witnesses and confront his accuser, and the right to give testimony relevant either to complete exculpation or to extenuation of the offense and evidence in mitigation of the penalty to be imposed. In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); International Brotherhood of Electrical Workers, Local 136 v. Davis Constructors & Engineers, Inc., 334 So. 2d 892 (Ala. 1976).

And in *Fludd v. Gibbs*, 817 So. 2d 711 at 713 (Ala. Civ. App. 2001):

> In considering whether a lower court complied with the requirements of due process in a case of constructive or indirect contempt, we look to determine if the following elements were present: (1) notice of the charges; (2) reasonable opportunity to meet them; (3) right to call witnesses; (4) right to confront the accuser; (5) right to give testimony relevant either to the issue of complete exculpation or extenuation of the offense; and (6) right to offer evidence in mitigation of the penalty imposed. Ex parte State, 550 So. 2d 1067, 1073 (Ala. 1989).

Or most recently, *Ex parte Sheffield (In re Kaur v. Singh)*, 2013 Ala. Civ. App. LEXIS 41 (February 15, 2013).

Again, there is nothing difficult, esoteric, or arcane about these basic requirements for contempt proceedings. However, the evidence at trial will be that Judge Batiste ignored or failed to comply with most, if not all of these requirements, prior to her entry of all seven of her orders for the arrest or attachment of these seven contemnors,.

C.

Direct contempt vs. Constructive contempt
and Civil contempt vs. Criminal contempt

Rule 70A, Ala. R. Civ. Proc., and Alabama case law that preceded its adoption, distinguish between direct contempt and constructive (or indirect contempt) contempt; and also distinguish between criminal contempt and civil contempt.

All seven of the contemnors herein were held in constructive criminal contempt of court by Judge Batiste. These distinctions are important because they determine when summary imposition of contempt sentence can be imposed and the nature and length of the jail sentence that can be imposed.

1.

Direct and constructive contempt

Direct contempt is defined in Rule 70A(a)(2)(A), A. R. Civ. P. as:

> disorderly or insolent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court's business, where all of the essential elements of the misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court's dignity and authority before the public."

All other contempt charges are indirect or constructive contempt. See the definition of constructive (or indirect) contempt contained in Rule 70A(a)(2)(B), A.R.Civ.P.: "any criminal or civil contempt other than a direct contempt."

Contempt proceedings arising from the failure to appear have consistently been held by Alabama appellate courts to be constructive contempt proceedings. In *Ex parte Tarpley*, 300 So. 2d 409 at 410 (Ala. 1974) the Alabama Supreme Court held:

> Contempt for falure to appear as a witness is an indirect contempt and as such the accused is entitled to the constitutional notice and an opportunity to be heard[.]

For other cases so holding, see *Quick v. State*, 699 So. 2d 1300 (Ala. Civ. App. 1997) and *Ex parte Sheffield*, 2013 Ala. Civ. App. LEXIS 41 (February 15, 2013)

2.

Criminal contempt and civil contempt

Criminal contempt differs from civil contempt in the purpose of the proceedings. Criminal contempt proceedings are intended to punish or sanction the contemnor for past misconduct. However, the purpose of civil contempt is to compel or coerce future performance of some act by the contemnor, i.e., some act that is "by its nature is still capable of being complied with," quoting Rule 70A(a)(2)(D), A. R. Civ. P.

Contempt proceedings that are based on a person's failure to appear on a particular date in the past are thus, by definition, criminal contempt proceedings since an order directing a person to appear in court on a day in the past is obviously not now "capable of being complied with."

As was recently explained in *Ingram v. Allred*, 2013 Ala. Civ. App. LEXIS 1 (January 4, 2013) the Alabama Court of Civil Appeals in holding that a person's failure to appear at a date in the past is a criminal contempt, stated:

> . . . obviously, when the trial judge found [the contemnor Ingram] in contempt on March 6, 2012, for failing to appear at the March 5, 2012, hearing, Ingram could not travel back in time and appear at

> the March 5, 2012, hearing in order to purge herself of the contempt.

Earlier this year, in *Ex parte Sheffield (In re Kaur v. Singh)*, 2013 Ala. Civ. App. LEXIS 41 (Ala. Civ. App. Feb. 15, 2013), the Court of Civil Appeals reaffirmed that contempt proceedings involving failure to appear are criminal contempt proceedings:

> Our review of the record and the trial court's judgment leads us to conclude that the trial court found Sheffield guilty of criminal contempt. Compare Rule 70A(a) (2) (D), Ala. R. Civ. P. (defining "civil contempt" as "willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with"). See also Ingram v. Allred, [Ms. 2110636, October 19, 2012, as modified on denial of rehearing on January 4, 2013] So. 3d , , 2013 Ala. Civ. App. LEXIS 1 (Ala. Civ. App. 2013) (concluding that an attorney's failure to appear at a scheduled hearing was criminal contempt); Ex parte Baker, 623 So. 2d 304, 306 (Ala. Civ. App. 1993) (trial court's contempt sanction against attorney for failing to appear was to "impress upon [the attorney] the importance of respecting a court order and to impose punishment").

The holdings in *Ex parte Sheffield (In re Kaur v. Singh)*, supra, and *Ingram v. Allred*, supra, are not new law. In *Ex parte Baker*, 623 So. 2d 304 (Ala. Civ. App. 1993), which was an appeal of an order holding an attorney in contempt for failing to appear, the Court of Civil Appeals held that contempt proceedings arising from failure to appear are criminal contempt proceedings, holding that the purpose of such proceedings is punishment, 623 So. 2d at 306:

> It is apparent from the record that the trial judge here was attempting to impress upon Baker the importance of respecting a court order and to impose punishment.

Further, with a civil contempt, the contemnor is said to hold the keys to their own jail cell, since he/she is capable at any time of performing the act sought to be compelled and thereby "purging" his/her contempt of court by complying with the order and gaining his/her freedom, e.g., *Davenport v. Hood*, 814 So. 2d 268, 273 (Ala. Civ. App. 2000) holding that a person held in civil contempt and jailed:

> "'carries the [key] of his prison in his own pocket '[and] can end the sentence and discharge himself at any moment by doing what he had previously refused to do.'" (citations omitted)

All of the seven contempt orders herein were entered to punish the alleged contemnors for failing to comply with a subpoena or order of the Court requiring some action to have been taken in the past, i.e., for example, to have appeared in court on some date in the past. In all seven of the cases before this Court herein, at the time Judge Batiste entered her order of attachment or arrest, there was no future act that any of the contemnors could have performed which would have purged their alleged contempt and allowed them to gain their release.

D.

Judge Batiste's lack of any defense on the merits

Judge Batiste has no real defense to the charges that she failed to accord these contemnors with due process; given the court records in these five cases, she cannot contest in any significant way her failures to comply with Rule 70A, Ala., R. Civ. P. Similarly, there is no defense her ordering the contemnors held without bail in violation of Alabama and federal law. Rather, Judge Batiste will attempt inject other extraneous legal and factual issues into the trial of this case.

For example, one of the supposed defenses to the charges advanced by Judge Batiste and her counsel is that the alleged contemnors were guilty (or *would have been found guilty*, had she accorded them their due process rights) of contempt of court.

Although this assertion—that the contemnors were all guilty of failing to appear after having been properly and lawfully served with a subpoena or order to appear—will be proven false at trial, it would be unavailing and irrelevant, even if it were true.

Whether the seven alleged contemnors were actually guilty of failing to appear pursuant to a lawfully served subpoena or court order is not the issue. These contemnors were entitled to due process regardless of their guilt or innocence. Due process is required to be accorded the guilty as well as the innocent. *Duncan v. State*, 176 So. 2d 840 at 867 (Ala. 1965):

> [I]t is axiomatic that the guilty, as well as the innocent, must be accorded due process of law.[7]

Another attempted excuse or justification advanced by Judge Batiste in supposed defense of these charges is that the Commission is denying Judge Batiste a tool—the contempt power—that is necessary to control litigants, attorneys, and witnesses in her courtroom. To the contrary, the Commission does not deny, nor do the charges herein infringe upon Judge Batiste's right to exercise, within its lawful limits, the contempt power that is an inherent and necessary power of all courts.

In *Ex parte Tarpley*, 300 So. 2d 409, the Alabama Court of Civil Appeals addressed this argument—that judges must have contempt power to control proceedings in their courtrooms—and held that notwithstanding the need for contempt power to maintain order in court proceedings, that power, like any other power of a court, must be lawfully exercised and that courts must comply with the requirements of due process, 300 So. 2d 409 at 413:

> We understand fully the frustration experienced by the trial Court, and nothing in this opinion is to be construed as infringing on the

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[7] See also *In re Borchert*, 359 P.2d 789, 807 (Wash. 1961) ("The guilty, as well as the innocent, are entitled to due process."); *Bean v. State*, 199 A.2d 773, 780 (Md. 1964) ("[T]he guilty, as well as the innocent, must be afforded constitutional due process."); *State v. Wofford*, 114 N.W. 2d 267, 273 (Minn. 1962) ("Due process . . . requires that the same standards of fairness be observed for the guilty as well as the innocent."); *State v. Miller*, 388 A.2d 218, 223 (N.J. 1978) ("[T]he guilty as well as the innocent were entitled to due process."); *United States ex rel. Dennis v. Murphy*, 184 F. Supp. 384, 387 (N.D.N.Y 1959) ("[T]he full measure of our present day concept of due process is due to both the innocent and the guilty.")

> right of the petitioner to run his courtroom in the manner he sees fit, so long as the requirements of due process of law are met.

The charges made herein are fully consistent with the Court of Civil Appeals opinion: the contempt power, although necessary, is limited by the due process clauses of the Alabama and U.S. Constitutions.

In the face of this clear authority, Judge Batiste's position throughout not only the proceedings in these five cases, but throughout the investigation and prosecution of this case has consistently been that she does not have to comply with Rule 70A and that, in effect, "I don't need a trial in order to find them guilty."

E.

The alleged "affirmative defenses"

Judge Batiste has also raised some alleged affirmative defenses. Most of these alleged defenses have no support under Alabama law or under other jurisdictions' judicial discipline law. Most attempt to bring in other extraneous and irrelevant matters which will unnecessarily prolong the trial of this case. The Commission has filed a motion to strike most of these defenses and that motion remains pending before this Court at the time of the filing of this brief.

The assertion of these alleged "affirmative defenses" are a further indication of the lack of any legitimate defense to the charges made in the complaint. In asserting these supposed affirmative defenses, Judge Batiste is attempting to make the trial of this case about *anything* other than the factual allegations of the Complaint and Judge Batiste's resulting repeated violations of Alabama law and violations of the Canons of Judicial Ethics.

Most of these alleged affirmative defenses have never been recognized as legitimate defenses to charges of judicial misconduct or violations of judicial canons by this Court, by the Alabama Supreme Court or by any other court in the United States in which judicial discipline cases are tried or reviewed on appeal.

1.

Paragraph 3 of the Affirmative Defense section of the Answer

Judge Batiste alleges in paragraph 3 that the Commission's complaint filed against Judge Batiste was "wrongfully motivated by a sexual harassment retaliation by Judge Scott Vowell due to Respondent Batiste's having rejected Vowell's sexual advances."

There are several problems with this assertion as a supposed defense to the complaint herein.

First, implicit in Judge Batiste's allegation that the Commission's filing of the complaint herein was motivated by Judge Vowell's desire to retaliate against Judge Batiste, is that Judge Vowell filed or caused the filing of the complaint in this Court.

This allegation is a non sequitur. Judge Vowell cannot retaliate by filing charges if he has no ability to file or to cause the filing of a complaint in the Court of the Judiciary by the Commission.

Under Section 156 of the Alabama Constitution, the only entity that may file a complaint in this Court against an Alabama state court judge is the Judicial Inquiry Commission. Judge Vowell was not, is not, and has never been a member of the Judicial Inquiry Commission.

The nine members of the Judicial Commission, after their investigation of sworn complaints of misconduct by Judge Batiste, concluded it was their duty[8] to file the complaint herein. Under Section 156 of the Alabama Constitution, all proceedings before the Commission are confidential. Therefore, Judge Vowell had no access to the

[8] Section 156 provides, in pertinent part:

> The commission shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the commission decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics [or] misconduct in office[.]

Commission's deliberations, was not privy to, and played no part in the Commission's decision to file its complaint against Judge Batiste.

Second, even if it were assumed for the sake of argument that Judge Vowell was motivated by ill will toward Judge Batiste in providing information or a complaint to the Commission regarding Judge Batiste, that fact would be irrelevant to the truth or falsity of the charges made by the Commission herein. The identity of the person who brought the information to the Commission that initiated its investigation that led to the charges being filed is not relevant to whether that information and other information accumulated in the resulting investigation, some of which was subsequently alleged in a complaint filed by the Commission in this Court, is true.

Otherwise stated, the issue is not the good will or ill will of persons who may have provided information to the Commission which may have led to the investigation that these charges are based upon, but is rather the truth or falsity of the charges. Neither the identity nor the motives of the person(s) who filed the initial complaint(s) with the Commission alleging Judge Batiste's misconduct have any bearing on whether the charges that the Commission makes in the complaint it filed in this Court are true or not.

2.

Paragraph 4 and 8 of the Affirmative Defense section of the Answer

The gist of these alleged defenses is that Judge Batiste is a victim of selective prosecution. In particular, Judge Batiste alleges racial discrimination—that the Commission has subjected Judge Batiste, an Afro-American, to "disparate treatment," citing two other Caucasian judges who have "far more abused contempt power useage than she has."

First, no legal authority exists in Alabama which recognizes selective prosecution as a defense to a charge made by the Commission in the Court of the Judiciary. However, there is persuasive authority from the United States Supreme Court which has been cited and applied in a neighboring jurisdiction in a judicial discipline case to hold that selective prosecution is not a defense to a charge of judicial misconduct, e.g.,

Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 at 1065 (Miss. 1999):

> The United States Supreme Court has stated that a selective prosecution claim is an independent assertion of misconduct by a prosecutor, ". . . not a defense on the merits to the . . . charge itself, . . ." United States v. Armstrong, 517 U.S. 456, 463, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687 (1996). Judge Sanders is attempting to use the selective prosecution claim as a defense to the charges raised against her in the formal complaint. The charges in the formal complaint relate to alleged judicial misconduct by Judge Sanders and are a separate matter from the charges of selective prosecution against the Commission.

See also *In re Dandridge*, 337 A.2d 885 at 889 (Pa., 1975):

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

Second, even if there was case law which recognized selective prosecution as a legitimate or legally recognized defense in judicial discipline cases, there is another fact or circumstance that forecloses the alleged defense of selective prosecution herein.

If the Judicial Inquiry Commission has not received a sworn complaint against a judge,[9] the Commission has no authority to investigate, and, in fact, is affirmatively prohibited by the Rules of Procedure promulgated by the Alabama Supreme Court from

[9] Unfortunately, the Commission cannot divulge whether or not any such complaints alleging due process violations by these judges in contempt cases have been filed against these other two judges. Article VI, Section 156 provides, in pertinent part:

> All proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary.

initiating or pursuing any such investigations without such a complaint.[10] Judge Batiste has not alleged that the Commission has received any such similar complaints against either of the judges named in her pleadings alleging that they ordered litigants or witnesses jailed without according them the due process rights that are required by Rule 70A, Ala. R. Civ. P.

Third, to sustain the allegation of selective prosecution or disparate treatment, the burden of proof[11] is on the party asserting it to show that there have been identically

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[10] Rule 6A of the Rules of Procedure for the Judicial Inquiry Commission provide:

> Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff.

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

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

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

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

based complaints filed against these two judges alleging abuse of the contempt power, i.e., failing to accord the alleged contemnors their due process rights, and that the Commission took no action on these complaints.

Judge Batiste has not even alleged such facts, much less made such a showing of them. Without such allegation and proof, there is absolutely no basis for any defense to the charges based on selective prosecution or disparate treatment of Judge Batiste by the Commission.

Before injecting the volatile issue of racial discrimination into this case, there must be more than bare, unsupported allegations. Cf. *United States v. Armstrong*, 517 U.S. 456 463-64 (1996):

> Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a "background presumption," cf. United States v. Mezzanatto, 513 U.S. 196, 203, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995), that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

3.

Paragraph 5 of the Affirmative Defense section of the Answer

In the fifth alleged affirmative defense, Judge Batiste alleges that the Commission failed to allege or prove bad faith by Judge Batiste. Judge Batiste is plainly and demonstrably wrong.

In subparagraph a. of paragraph 7., the original Complaint and the Amended Complaint, the Commission alleges that with regard to all seven of the contemnors, Judge Batiste collectively acted in "bad faith." Both the original and Amended Complaint then reallege individually, for each of the seven contemnors, that Judge Batiste acted with "bad faith." See paragraph 8. (relating to Sonja Bell, the contemnor in the *Bearden* case); paragraph 30. (relating to Curtis Austin, the contemnor in the *Austin* case); paragraph 51. (relating to Kizzy Lacey, Kimberly Clark, and Cande Franklin, the contemnors in the

Isom case); paragraph 71. (relating to Deva Walker, the contemnor in the *Gipson* case); and paragraph 89. (relating to Barbara Kyle, the contemnor in the *Kyle* case).

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

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

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

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

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

Rule 70A is clear on its face. It plainly imposes requirements for judges to meet in order to exercise their contempt powers, particularly in cases of indirect criminal contempt, which includes all of the exercises of contempt power alleged in the Complaint. Judge Batiste repeatedly ignored the Rule's requirements and imposed

punishment in a manner not allowed by law on the seven contemnors, as is more particularly alleged in the Complaint.

Courts in other jurisdictions charged with enforcing judicial discipline have come to the same conclusion that the Illinois Supreme Court reached in *Harrod*, supra, which as noted, was cited with approval by the Alabama Supreme Court in the *Sheffield* case, 465 So. 2d at 358.

The proposition that repeated judicial error which results in repeated violations of constitutional rights violates the canons is well supported in many other jurisdictions. See, e.g., *In re Hammermaster*, 985 P.2d 924 (Wash. 1999) in which the Washington Supreme Court held, 985 P.2d at 937-38:

> Other states have held that a judge's failure to honor the basic rights of defendants is evidence of judicial misconduct. In re Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984); In re Field, 281 Ore. 623, 576 P.2d 348 (1978); Ryan v. Commission on Judicial Performance, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378, 76 A.L.R.4th 951 (1988). A judge's action need not be undertaken in bad faith or malice. Discipline may be appropriate even though the judge acted out of neglect or ignorance. Mississippi Comm'n on Judicial Performance v. Hartzog, 646 So. 2d 1319 (1994); Kloepfer v. Commission on Judicial Performance, 49 Cal. 3d 826, 782 P.2d 239, 264 Cal. Rptr. 100, 89 A.L.R. 4th 235 (1989). A judge has an affirmative duty to learn the relevant legal procedures of which he or she is ignorant. In re Inquiry Concerning a Judge, 265 Ga. 843, 462 S.E.2d 728 (1995); In re Hamel, 88 N.Y.2d 317, 668 N.E.2d 390, 645 N.Y.S.2d 419 (1996).
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> * * * * *
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> While we recognize that legal error is usually a matter for appeal and does not generally trigger judicial discipline, a repeated pattern of failing to protect a defendant's constitutional rights can constitute misconduct. In re Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (1984); In re Yengo, 72 N.J. 425, 371 A.2d 41 (1977); In re Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

As the Michigan Supreme Court noted [in In re Laster, 404 Mich. 449, 462, 274 N.W.2d 742 (1979)]:

> Judicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review, but one does not necessarily exclude the other. One path seeks to correct past prejudice to a particular party; the other seeks to prevent potential prejudice to future litigants and the judiciary in general.

Also supporting this principle, the New York Supreme Court held in *In re Reeves*, 63 N.Y.2d 105 (N.Y. 1984):

> Petitioner contends that the failure to notify clients of their rights and purported violations of statutory procedure are "mistakes and errors of law" which can be corrected on appeal and which fall short of judicial misconduct. A repeated pattern of failing to advise litigants of their constitutional and statutory rights, however, is serious misconduct.
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> * * * * *
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> In reviewing the sanction imposed, we must recognize that the purpose of judicial disciplinary proceedings is "not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents" (Matter of Waltemade, 37 NY2d 111). Petitioner argues that the sanction of removal is excessive because his improper conduct was due to inexperience, court congestion, and a long-standing personal feud with the court staff and the other Family Court Judge in his county. While these factors may have adversely affected petitioner's judicial performance they do not excuse his direction to deliberately falsify court records or his disregard of statutory procedures and of the rights of litigants appearing before him (see Matter of Sardino, supra; Matter of McGee, supra). Petitioner's conduct is inconsistent with the fair and proper administration of justice and renders him unfit to remain in office. (underlining supplied)

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

As an example, in *Bearden v. Bearden*, even at the August 22, 2011 post-incarceration hearing, held *after* Ms. Bell had served a 3-day jail sentence for contempt, Judge Batiste refused to hear testimony regarding why Sonja Bell had not appeared in court on August 10th. Further, Judge Batiste appeared to hold Ms. Bell in contempt based, at least in part, on bare allegations regarding Ms. Bell's past behavior that were unrelated to the question of whether Ms. Bell had willfully failed to appear on August 10th pursuant to a properly served subpoena. In addition to the 3-day jail term, Judge Batiste ordered Ms. Bell, who had never been heard on the contempt charge, to pay a $950 attorney fee to the wife's counsel.

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

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

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

before she entered the order holding Ms. Kyle in contempt. In fact, at the hearing a colloquy occurred between Judge Batiste and Mr. Wright, Ms. Kyle's attorney, concerning Ms. Kyle being in California.

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

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

4.

Paragraph 6 of the Affirmative Defense section of the Answer

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

5.

Paragraph 7 of the Affirmative Defense section of the Answer

Judge Batiste alleges that "the complaint violates respondent Batiste's right of due process because it has denied Batiste an opportunity to confront her accusers [sic]."

This alleged defense is another that is asserted without any basis in law, e.g., *Austin v. United States*, 509 U.S. 602, 607-608 (U.S. 1993):

> Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions."

Judge Batiste has substantially admitted in her Answer to the Complaint herein all of the matters necessary to prove that she repeatedly violated these seven alleged contemnors due process rights and right to bail. The Commission respectfully suggests that to the extent any doubt remains about these violations, it will be amply satisfied by the testimony and evidence at trial.

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Certificate of Service

I hereby certify that a copy of this Trial Brief has been sent to Julian McPhillips, Esq., counsel for Judge Dorothea Batiste, by e-mail on this 24th day of July, 2013.

Of Counsel