

People's Alliance PAC 2018 Questionnaire for North Carolina Trial Division Judicial Candidates

Please return this completed form along with a resume or biographical statement describing your education, work history, community service, and prior political experience as soon as possible, but by **July 20, 2018** at the latest. Please note that following this deadline, the Durham People's Alliance PAC may publish your responses to this questionnaire and your resume.

You may e-mail your responses to Tom Miller at tom-miller@nc.rr.com or mail them to Tom at 1110 Virginia Avenue, Durham, NC 27705

Thank you for completing this questionnaire and your willingness to serve the people of North Carolina.

Candidate's name: Michael O'Foghludha

Judicial office sought: Superior Court District 14B

Address: P.O. Box 78 Durham NC 27701

E-mail address: info@judgemichaelo.com

Phone: 919-795-1081

When answering this questionnaire, please repeat the questions in your response document with each question numbered and organized as it appears here. Type your responses in italics, bold, or a different font to distinguish your responses from the questions. Please do not use colors. Please respond to questions using your own words and cite outside sources when applicable. You may explain your answer to every question, but please be concise.

About you:

1. Are you conservative or liberal? Please choose one and then explain your answer.

In today's politically polarized climate, these terms carry implications that not only are not helpful to the public's ability to weigh the qualifications of a judicial candidate, they are both inapplicable and inaccurate. A good judge is open-minded, tolerant, patient, thoughtful, considerate, willing to listen to different points of view, and open to people of varied cultures and economic backgrounds. I humbly believe I have demonstrated all of those qualities in my eight years on the bench. I treat everyone in the courtroom with respect, be they attorneys, witnesses, victims, defendants, law enforcement, or courtroom personnel. I am also deliberate, curious, cautious, and committed to following precedent and the rule of law. I will leave it to others to decide whether those qualities make me liberal or conservative.

2. Please describe how your religious and/or philosophical beliefs may affect your conduct and decision making if you are elected.

I try very hard not to let religious or political beliefs influence my decisions as a Superior Court Judge. I can honestly say that I have never let a personal religious or political belief influence any decision I

have ever made as a judge. However, I am very aware that we all carry subconscious biases, as we are all human. I am very interested in this subject, and have taken training in this area, and frequently read about this subject, in order to better understand how cultural bias can influence decision making.

3. Have you ever been convicted of a criminal offense (other than a minor traffic or minor drug offense)? If the answer is yes, please describe the circumstances and the outcome.

No.

4. Have you personally ever been a party in a civil legal proceeding? If the answer is yes, please explain the circumstances and the outcome of the case.

No.

5. Describe your current community involvement. As a judge, do you envision any community involvement beyond the specific duties of the office? If yes, please describe that involvement.

As someone who has lived in Durham for nearly 50 years, I am very involved in the life of Durham. I support many community organizations and attend many community functions. However, as a sitting judge I am prohibited from making political contributions, and the Code of Judicial Conduct also limits a judge's involvement in general fundraising activities. In addition, I have held court in 25 of North Carolina's counties in the past eight years, and have only been in Durham for approximately twelve months of those eight years. These considerations have limited my formal involvement with Durham organizations during my time as a judge. I have frequently volunteered my time with non-profits in Durham, such as Black Ops Theatre Company, Little Green Pig, and ManBites Dog Theatre. However, when I was a practicing attorney in Durham from 1987 to 2010, and in my role as the managing partner for Pulley, Watson, King, and Lischer, I was involved in many formal community activities. I organized the Bike Head First program, giving away bicycle equipment to low income children, helped organize and/or participate in the Carolina Baby Fair, Christmas for the Troops, the Urban Ministries Food Drive, built houses with Habitat for Humanity, and organized our firm's annual Young Lawyers Reception. In addition, our firm was the largest annual contributor the Access to Justice Campaign for North State Legal Services, and I was a pro bono volunteer for both that organization and the North Carolina Bar Association. I was also a volunteer mentor annually for new lawyers with the North Carolina Advocates for Justice.

About your practice of law:

6. Please describe your practice as a lawyer. Describe the areas of your practice and your specialties. Describe the diversity of your client base as a part of your answer.

I began practicing law in 1983, representing indigent criminal defendants as a solo practitioner. After only a few months I accepted a position as a temporary staff attorney with E. Central Community Legal Services in Raleigh, where I handled a wide range of civil matters for indigent clients, including public benefits appeals, social security disability cases, and class action landlord tenant litigation. In January 1984 I began work as an Assistant Public Defender for Cumberland and Hoke counties, and represented indigent clients in criminal matters for the next four years. This was before the creation of IDS or the Capital Defender's Office, so our office represented all the death penalty cases in Cumberland County during those years, of which there were many. In 1987 I was hired as an associate with the Durham law firm of Pulley, Watson, King, and Hofler, where I remained until I was elected as a Superior Court Judge in 2010. I became a partner with the law firm in 1991. In the law firm I represented many hundreds of individuals in personal injury, medical malpractice, and worker's compensation cases. I represented a broad range of individual clients, usually without regard to their economic ability to pay fees, and always faced

more economically powerful litigants, such as insurance companies, corporations, and employers.

7. Please describe a case you have handled as an attorney or judge that best illustrates the abilities and temperament you would (or do) display as a judge. Please describe a case you handled where you did not exemplify, perhaps, the model temperament of a judicial figure.

In 2015 I was assigned to preside over the case of Newberne v. Crime Control and Public Safety, a case brought by a former highway patrolman against the highway patrol for a violation of the Whistleblower Act. The plaintiff alleged that he had been terminated by the Highway Patrol for truthfully reporting facts which tended to show that another trooper had used excessive force during an arrest. The facts occurred in 2000, and suit was filed in 2002. The case was initially dismissed, and by the time the case reached me, the case had been the subject of three appellate opinions spanning thirteen years, the last of which sent the case back to the trial court for a jury trial. The case involved many complex legal issues involving the admissibility of witness statements, the admissibility and legal effect of a prior settlement between the parties before an Administrative Hearing Officer, the proper allocation of the burden of proof, and the applicability of punitive and treble damages. All of these issues were ones of first impression, as by the time the case was tried, there still had never been a case other than Newberne that had created precedent under the Whistleblower Act, and obviously, the case had not reached trial until it reached me. I therefore had to carefully write the jury instructions, as these instructions would also be of first impression. The case ultimately resulted in a 1.1 million dollar verdict for the plaintiff. I then had to decide the issue of attorney fees against the State, which the Attorney General vigorously opposed. I did award significant attorney fees. Ultimately the case was settled on appeal. I had to carefully consider many legal issues, all of which were vigorously contested, and for which there was very little or no precedent.

In all honestly, I do not believe I have failed to display appropriate temperament in any case that I have handled as a judge in my eight years on the bench.

8. Have you ever been publicly or privately disciplined by the North Carolina State Bar or any other professional or occupational licensing authority in North Carolina or any other state? "Disciplined" should be read to include reprimands, censures, and warnings in addition to license suspension, surrender, revocation, and disbarment. Is the State Bar or any governmental authority considering a complaint against you at the present time? Have you ever been found in contempt of court? For each "yes" answer, please tell us what happened and describe the outcome of the matter.

No

9. Please describe the nature and extent of any pro bono work you have done. Is there a pro bono matter to which you have contributed that best illustrates your values?

As mentioned above, when I was in private practice our firm gave the maximum amount every year to North State Legal Services Equal Access to Justice campaign, and I served as a volunteer lawyer for that organization, the North Carolina Bar Association, and the North Carolina Advocates for Justice for many years. Although I handled a number of cases for those organizations, my most satisfying case involved obtaining child custody for an indigent client who had to escape from an abusive spouse.

Concerning law and policy:

10. What is your position on the death penalty?

The death penalty is legal under North Carolina law, and should a prosecutor decide to proceed capitally against a defendant, and should I be chosen to preside over such a trial, either by

special or general assignment from the Administrative Office of the Courts, I would be obliged to preside over such a trial. I should not state my personal opinion on the death penalty for a number of very sound reasons. A judge has the obligation under the North Carolina Code of Judicial Conduct to be impartial. By being impartial, a judge promotes the integrity of the court system and promotes public confidence in that system. If I were to state that I was opposed to the death penalty, for example, a number of negative consequences would flow from that statement. The public might have less confidence in the outcome of a capital trial if the public perceived that I had a personal opinion that may, in public perception, have affected this outcome. In addition, I might be disqualified from presiding over the trial, just as potential jurors who oppose the death penalty in all circumstances are prohibited from serving on capital juries. Conversely, a defendant and his or her attorney would be uncomfortable having a death penalty advocate for a judge. Finally, I do not let my personal, religious, or political beliefs affect my decision-making as a judge. I follow the precedent given to me by the state and federal courts, and the state and federal constitutions.

11. What, if anything, should be done to improve access to the courts for people with limited financial means?

The jurisdiction of Legal Aid attorneys should be returned to the scope that existed in the 1980s, before severe cutbacks to funding were implemented by Congress, and before limitations were imposed on the types and numbers of cases those agencies could handle. Relying on the good will of private attorneys to provide pro bono legal services to those of limited means does not adequately address the needs. Similarly, the recent cutting of fees to private attorneys performing indigent criminal defense is a negative step. Funding for indigent criminal defense, and indigent civil litigation, needs to be significantly expanded on both state and federal levels.

12. North Carolina incarcerates an extraordinary number of people, including persons convicted of non-violent crimes. Those who are incarcerated are disproportionately people of color. What would you (do you) do in your role as judge to address the issues of mass incarceration and racial bias in the administration of justice?

I am committed to doing all that I can within the scope of my judicial discretion and responsibilities to reduce racial and ethnic disparities. In order to significantly reduce our rate of incarceration and eliminate or reduce racial disparity, systemic societal changes would need to be implemented, such as increasing the number and quality of drug treatment facilities, significantly increasing the availability and funding of mental health treatment, expanding affordable housing, eliminating the school to prison pipeline, and decreasing the income gap between the rich and poor in our society. Another legislative change which would have a huge impact on the rate of recidivism for persons with criminal convictions would be to reduce or eliminate the lengthy and wide range of collateral consequences that arise from a felony conviction. The responsibility to make these changes, resides largely within the power of the legislative branch and, unfortunately, are mostly beyond the scope of the judicial system.

According to statistics compiled by the NC Division of Adult Corrections and verified by the UNC School of Government, the incarceration rate in North Carolina has fallen steadily since 2009. The state's inmate population is approximately 10 percent less than it was in 2010, and despite a significant growth in population (we are now the 9th most populous state), the inmate population is now approximately the same as it was in the mid-2000s. Consistent with this trend, the Division of Adult Corrections has closed 12 prisons in the past decade, and opened none. NC is the 9th most populous state, ranks 30th in the nation in incarceration rate, and has the lowest incarceration rate in the South. As far as the demographics of the inmate population, the largest percentage (approximately 12%) of inmates in the Division of Adult Corrections are serving sentences for rape and sexual offenses. The second largest cohort is second degree murder, with armed robbery, drug trafficking, and first degree murder close behind. Non-violent offenders usually enter the prison system through violations of probation. This percentage has also declined since the passage of the Justice Re-Investment Act, as now probation may only be revoked for the commission of a new felony or class 1 misdemeanor, or for absconding.

It is true that the United States incarcerates the highest percentage of its population in the world. (While the U.S. accounts for only 4.4% of the world's population, it accounts for 22% of the world's inmates). The reasons for this are multi-faceted. In the 1980s and 1990s, mandatory minimum sentences in federal court were implemented. "Three-strikes" laws became widespread nationally (in North Carolina this is known as the 'Habitual Felon Law"- sentences for this status were reduced for low level felony convictions in 2014 in N.C); and crack cocaine sentences were extraordinarily disproportionate. The fallacy of these sentencing practices are now being recognized.

Law enforcement largely determines the people who enter the judicial system. Prosecutors have discretion to determine who is indicted, and for what level of crime. Judges in criminal court must hear the cases that are placed before them by the District Attorney's Office. By the time a case reaches a Superior Court docket, these levels of discretion have already been utilized. Once time comes for sentencing, the Structured Sentencing Act sharply curtails a judge's discretion. All crimes in North Carolina are given a classification from A (first degree murder, for example) to I (possession of cocaine, for example), and also a prior record level from 1 (0 to 1 prior class 1 misdemeanors) to 6 (18 or more prior points for felonies and misdemeanors). All crimes above class E level 1 are mandatory active sentences. Therefore a Superior Court Judge can only sentence a defendant to probation for defendants convicted of crimes in class F levels 1- 3, Class E level 1, class G levels 1-4, class H levels 1-5, and all of class I.

In my practice as a judge, whenever possible, I place people on probation following a conviction. I don't impose burdensome financial obligations on probationers, and strive to not set probationers up for failure. I also strive to understand my own biases by taking frequent courses on-line about subconscious bias, and I have participated in racial bias training, as discussed elsewhere in this questionnaire. I strive hard not to treat defendants differently based on race, gender, or other classification. I can't be sure that I always succeed, but I am very aware of racial disparities and inherent racial bias and strive to eliminate these factors to the maximum extent in my own practice within the range of my discretion.

13. Would you (do you) assess or strike Failure-to-Appear fees in cases involving traffic offenses? Would you have a bright line rule?

As a Superior Court Judge I do not assess failure to appear fees in traffic matters, as these matters are handled in District Court. I always strike called and failed and bond forfeiture orders in Superior Court as long as the defendant appears within a reasonable time of missing a court date. Most missed court dates are the result of miscommunication, confusion, or neglect, rather than a deliberate attempt to evade court.

14. What guidelines would you (do you) use to determine whether pre-trial confinement is appropriate for a defendant?

I use the guidelines established by North Carolina statutes. Under N.C.G.S. 15A-534 the Court must consider the defendant's ties to the community, family ties, employment history, criminal record, character, mental condition, the weight of the evidence, the prior history of the defendant's ability to appear in court, the seriousness of the case, the defendant's ability to pay, the safety of the community, and any other evidence relevant to the issue of release.

15. What is your position on bail? What, if any, changes need to be made to the current bond schedule?

I take the question to mean to ask about the weaknesses of North Carolina's current bail bonding system. There is no doubt that our current bail bond system needs reform. Multiple studies have found that defendants afforded pre-trial release are more likely to be acquitted or given shorter sentences than those detained pre-trial, while a defendant's dangerousness or likelihood of appearing for trial are generally unrelated to his or her financial status. That being said, there is nothing inherently wrong with a system that insures that a defendant facing a possible lengthy loss of freedom

have an incentive to appear for trial. Most of the current problems with our bail policies come from people being detained for misdemeanors or low level felonies; crimes for which active sentences are unlikely to be imposed. In those cases, even short periods of detention can lead to the loss of housing and employment, particularly for those living on society's margins. The weakness of any bond schedule which sets presumptive bonds is that such schedules are not based on any individualized risk assessment. That is why, as a judge, I don't consult bond schedules in setting bonds in Superior Court. I consider only the arguments of the District Attorney and the Defense Attorney. However, I usually only hear bond arguments in high level felony cases. There is no doubt that misdemeanors and low level felonies should be released more often. The far more challenging and troubling cases are high level and violent felonies. Certainly in these cases the defendant's ability to pay must also be considered, as excessive bond is prohibited under the 8th amendment, but the fact that the defendant is often facing a lengthy sentence weighs more significantly in the calculus of whether the defendant will actually appear for trial. In such cases, our pretrial release services must be expanded and increased, and the monitoring tools improved, both of which will require significantly higher levels of funding from either state or local agencies in order to insure public safety, and the achievement of justice for both the State and the defendant, if more persons are going to be released pre-trial.

16. What can be done to improve language access for defendants, victims, and witnesses during court proceedings?

Expanding the number and availability of court interpreters through the Administrative Office of the Courts.

17. What changes, if any, would you make to the local rules of court and why?

Our local rules of court for civil cases work very well. The case management system for criminal cases could be improved in consultation with the District Attorney's Office and the Public Defender's Office to eliminate delays. Delays occur for a myriad of reasons, some of which are within the control of the attorneys, and some that are not. Our Senior Resident Judge has implemented a homicide case status calendar in an effort to monitor the progress of homicide cases, and this is a positive step. Any change in our overall case management system would have to be approved by our Senior Resident Superior Court Judge.

18. Should judges be appointed or elected in North Carolina? If you believe judges should be appointed, who should appoint them? If you believe judges should be elected, what system should be employed to elect them? Should judicial elections be partisan?

Whether judges should be elected or appointed is a debate that is at least one hundred years old, and is unlikely to be resolved before I retire. I certainly believe that judges should not be elected in the way they are being elected this year. Judicial races should be non-partisan. There should be primaries for judges. There should be public financing for judicial campaigns. All of those used to be the law, so we are not making much progress. Having a partisan label beside a judge's name is an absolutely terrible idea. It gives the impression that judges make decisions based on political affiliation, and that has not been my experience at all on the Superior Court bench. As far as merit selection goes, there are only two issues: 1) who decides on the merit? 2) who does the selecting? If both could be accomplished in a non-partisan manner, then merit selection would be fine. For example, a diverse committee, some selected by the Bar Association, some selected by the local bar, some selected by the appellate courts, some selected by local law schools, and some selected by the community, could interview candidates and provide a short list of names to the governor, who would be required to pick from that list. This could provide a workable system. The current proposal to have the legislature pick the candidates is also a terrible idea. This is not due to any partisan objection; selection by only the legislature is completely antithetical to the entire notion of a tripartate government. The

legislative, executive, and judicial branches must be independent in order to preserve the checks and balances system upon which our system of government is founded.

19. Should race bias training be mandatory for persons involved in the justice system? What should this training consist of and for whom should it be required? Have you any special training in issues related to racial disparities and equities?

Yes, it's very important for everyone in the system to have this training. I am very interested in this topic and regularly conduct a self-assessment on-line by taking the Harvard implicit bias testing, available at implicit.harvard.edu. I participated in the ABA's pilot program on implicit bias at the Duke Law School.

20. How have (or will) you address legislation that requires notice to be given to all impacted governmental agencies before a judge waives costs and fines for a criminal defendant? Under what circumstances should a court waive costs and fines?

Fines are not mandatory in criminal cases, but can be imposed in the discretion of the trial judge. Because court costs have risen dramatically in recent years (costs in superior court were approximately 50 dollars only twenty years ago, and now they are close to 400), and because the number of fees imposed on criminal defendants have expanded and multiplied in this same period, I rarely impose a fine in criminal cases. Fees (which are different from fines) can include the following: ten dollars a day for being in jail, forty dollars a day for a split sentence, forty dollars a month for probation supervision fees, ninety dollars for being placed on electronic monitoring (plus a daily fee), two hundred and fifty dollars to perform community service, fees for drug testing, fees for domestic violence classes, and the list goes on. Many of these fees are waivable in the discretion of the trial judge. Those that are waivable, I usually waive. I do this not out of any leniency, but because the vast number of criminal defendants are indigent and cannot afford to pay them. True costs (which are defined by statute differently from fines and fees) are waivable only with written findings of just cause. In addition, costs imposed for cases occurring after December 1, 2017 are only waivable with notice to those entitled to collect costs. Thankfully the AOC has sent out monthly notices to those affected parties, and I find as a matter of law that this is adequate notice, unless a specific objection is lodged by a party. I have yet to have received any specific objection from the AOC notices, and therefore upon findings of just cause, I will waive costs.

21. Should data of prosecutors' individual and office-wide juror challenges be collected and published as a method of identifying and neutralizing bias during the peremptory challenge process?

Yes. Any system which analyzes a practice of preemptory challenges based on systematic exclusion can only improve the quality of our justice system.

22. What are the risks and benefits of pre-trial diversion in criminal cases? For what offenses and for which offenders is diversion appropriate? Are their program models you favor?

There are few risks to pre-trial diversion, and many benefits. Avoiding a felony conviction avoids the collateral consequences of that conviction, or which there can be dozens, or even hundreds. (These collateral consequences can be searched at ccat.sog.unc.edu). If a person fails a pre-trial diversion, the case can simply be re-instated. Currently deferrals are only available in certain categories, such as first time drug offenders, or cases where the district attorney allows deferrals for other first time offenders. Deferral decisions are the province of the district attorney, as they are a decision as to how a case will be prosecuted.

23. Yes or No Questions – please indicate your answer the following questions by underlining “YES” or “NO.” If you wish to explain or elaborate your answer to any question, please use no more than 100 words to do so.

- a. Do you support legislation designed to protect gay, lesbian, and transgender people from discrimination in housing, employment, public accommodation, and access to government processes, benefits, and services?

YES

- b. Do you support legislation which excuses magistrates, judges, and other government officials from performing their duties because of their religious beliefs?

NO

- c. Do you support the continuation and expansion of local funding that addresses substance abuse and mental health treatment, including a Drug Treatment Court and Mental Health Court?

YES

- e. Do you support the expanded use of restorative justice practices in shaping outcomes in criminal cases?

YES

- f. In questions of pre-trial release, do you support the use of a screening instrument, calibrated to prevent discrimination, to determine substantial risk of flight and danger to the community, as recommended by the Pretrial Justice Institute?

YES

Your politics

24. How are you registered to vote? Have you ever changed your registration? If you have changed your voter registration, please explain why.

I am registered as a Democrat. I have not changed.

25. Who did you vote for in the 2012 and 2016 presidential and gubernatorial elections? Who did you vote for in the 2014 U. S. Senate election

Obama. Clinton. Hagan.

26. How will you vote if the November ballot contains constitutional amendment referenda in favor of "Marsy's Law" and the filling of judicial vacancies?

NO

Judges and judicial candidates in North Carolina are allowed substantial freedom of political speech. PA PAC believes that every question in this questionnaire may be answered fully within the scope of the applicable rules. For more information on the scope of permitted political speech for judicial candidates, we refer you to the December 17, 2015 memorandum of the Judicial Standards Commission on Permitted Political Conduct. You may find it at:

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/04%20Political%20Conduct%20Guidance%20for%20Judges%202016.pdf

Again, Thank you. **Please do not forget to provide us with your resume or biographical statement.**

Biographical information:

Personal: married to Linda Daniel, Jordan High School graduate, Duke undergraduate, UNC master of science in library and information sciences. Employed as a reference librarian with Duke University

*College: Oxford University, summer 1977
Universite d'Aix-Marseilles, fall 1977
Duke University, B.A. History, cum laude, 1978*

*Law School: University of North Carolina, J.D. magna cum laude 1982
Class rank: 7 of 228 (3rd year)
23 of 228 (overall 3 years)
Awards: Best Brief, Moot Court competition
Highest Grade: Trusts and Estates*

Employment: East Central Community Legal Services: temporary staff attorney, 1983

Public Defender's Office, 12th Judicial District, Assistant Public Defender 1984-1987

Pulley, Watson, King, and Hofler, associate attorney, 1987-1991

Pulley, Watson, King, and Lischer, partner 1991-2006, managing partner 2006-2010

Superior Court Judge 2011-present

*Admissions: United States District Court, eastern and middle districts
United States Supreme Court
United States Court of Claims
United States Court of Military Appeals*

Rated "AV" by Martindale-Hubbell, the nationwide confidential legal rating organization, in both legal and judicial categories, representing the highest possible rating in legal and judicial ability and ethics.