BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA
CASE NO.: 06-52

INQUIRY CONCERNING JUDGE CHERYL ALEMAN; SUPREME CT. CASE NO. SC07-198
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FINDINGS, CONCLUSIONS AND RECOMMENDATIONS
BY THE HEARING PANEL OF THE JUDICIAL QUALIFICATIONS COMMISSION

The Hearing Panel of the Judicial Qualifications Commission ("JQC") respectfully submits the following Findings, Conclusions and Recommendations pursuant to Article V, § 12(a)(1), (b) and (c), of the Florida Constitution.

OVERVIEW AND CONCLUSIONS

Judge Cheryl Aleman, a Circuit Judge in the Seventeenth Judicial Circuit of Florida, was charged by the Investigative Panel of the JQC with certain violations of the Code of Judicial Conduct. The alleged violations relate to the conduct of Judge Aleman, while she served in the criminal division of the circuit court. The charges were initially contained in the Notice of Formal Charges of February 6, 2007, which contained five numbered paragraphs, referred to here as "Counts." Judge Aleman moved to dismiss the charges and based on counsels' legal arguments, the motion was denied as to Counts 1, 2 and 5 and granted with leave to amend as to Counts 3 and 4. (Order, May 23, 2007). Amended Charges were then filed on June 13, 2007, containing Counts 1, 2, 3 and 4. A second motion to dismiss

resulted in the dismissal of Count 3 by the Chairman of the Hearing Panel. (Order, November 14, 2007). The full Panel reviewed this ruling pursuant to Rule 7 of the JQC Rules and unanimously supported the Chairman's Order. (Notice, November 30, 2007). Thus the remaining charges were Counts 1, 2 and 4 of the Amended Charges.

At the request of Judge Aleman, the matter was set for hearing in the Broward County Courthouse. The hearing was to begin on December 4, 2007. On the day before the hearing, counsel for the Investigative Panel announced that Count 2 was being dismissed. (T. 10). Thus the Counts to be heard were Counts 1 and 4, both of which concerned attempts to disqualify Judge Aleman and her reactions to those attempts. (T. 10).

After consideration of all the evidence and argument, the Hearing Panel concludes that Judge Aleman is guilty of Count 1, based on her admissions and the clear and convincing evidence. Judge Aleman is found not guilty of Count 4 due to a lack of clear and convincing evidence on that Count. The Panel recommends that Judge Aleman should be publicly reprimanded by this Court but remain on the bench. She should also be required to pay the costs of this proceeding. A disturbing pattern of motions for disqualification by the defense counsel has been

noted by the Panel and this pattern will be discussed further herein.

The Charges and the Answer

Judge Aleman was served with the Amended Notice of Formal Charges by the Investigative Panel on June 11, 2007. Counts 2 and 3 were dismissed before the hearing and the remaining two charges in Counts 1 and 4 are here quoted in full:

COUNT 1:

> **In violation of Canon 1, Canon 2A, and Canon 3B(4), you denied motions to disqualify that were filed by public defender Sandra Perlman and Bruce Raticoff in the case of *State v. Braynen*.**
>
> **A. Specifically, during morning proceedings in the *Braynen* matter on January 24, 2006, you denied an oral motion to disqualify made by Ms. Perlman without affording her a reasonable opportunity to prepare the appropriate documents and file said motion in writing, as required by applicable law.**
>
> **B. Thereafter, during afternoon proceedings, Ms. Perlman made another oral motion for disqualification based, in part, upon the fact that: i) you had engaged in preferential treatment in favor of the State by refusing to grant Ms. Perlman's request that the lunch recess be delayed by 15 minutes in order to allow her to attend a previously schedule plea hearing before another judge; yet, you readily granted a request from the assistant state attorney for a 15-minute delay in the start of the afternoon proceedings; and ii) you had impugned Ms. Perlman's integrity by calling, or directing other courthouse personnel to call, the other judge's courtroom at the time Ms. Perlman was scheduled to appear in front of the other judge in a perceived attempt to "check up" on her.**
>
> **C. When Ms. Perlman asked for 1 hour to reduce her oral motion to writing, you proceeded to give her a**

pen and pad of paper and advised her she had 15 minutes to prepare the motion, despite the fact the courtroom was on the 7th floor and the public defender's office was on the 4th floor, which under normal circumstances would require 3-5 minutes in travel time each way. You then stated court would be in recess from 2:20 p.m. to 2:35 p.m. At approximately 2:42 p.m., court resumed and neither Ms. Perlman nor Mr. Raticoff was in the courtroom. You then announced a brief recess in the proceedings. At approximately 2:49 p.m., when only Mr. Raticoff had returned to the courtroom, you abruptly issued a rule to show cause against both Ms. Perlman and Mr. Raticoff, despite Mr. Raticoff informing you that Ms. Perlman was printing the motion to disqualify and that he would make a phone call to determine her exact whereabouts.

D. When Ms. Perlman returned to the courtroom and explained she was unable to complete the motion for disqualification and accompanying affidavit in the 15 minutes you authorized, you refused to dismiss the rule to show cause and instead advised counsel the matter would be held "in abeyance until the conclusion of the[e] proceeding."

E. At approximately 3:05 p.m. after Mr. Raticoff expressed concern that the rule to show cause had placed counsel in the untenable position of having to defend themselves and their client during the same proceeding, Ms. Perlman made another oral motion for disqualification based, in part, upon the issuance of the rule to show cause. Ms. Perlman again requested a reasonable amount of time to prepare the written motion. Notwithstanding your knowledge that 15 minutes was insufficient time to prepare a written motion based upon your issuance of the rule to show cause just minutes earlier, you nonetheless indicated you would only give Ms. Perlman 15 minutes. When Ms. Perlman objected and expressed concern she would again be subjecting herself to contempt inasmuch as 15 minutes was insufficient, you responded by indicating court would be in recess for only 12 minutes. After Ms. Perlman objected to 12 minutes, you then stated she would be given 22 minutes (from 3:08 p.m. to 3:30 p.m.) to prepare the motion.

F. At approximately 3:35 p.m., proceedings resumed. At that time, you handed counsel an order denying the first written motion to disqualify. Ms. Perlman then explained she had not been able to complete the second written motion in the 22 minutes allotted but had returned to the courtroom at 3:30 p.m. as directed out of fear she would be held in contempt a second time. She then requested an additional 5 minutes for Diane Cuddihy, an appellate attorney in the public defender's office, to complete the motion and bring it to your courtroom. You permitted the additional 5 minutes and upon receipt of the second written motion, promptly denied it as well.

COUNT 4:

In violation of Canon 1, Canon 2A, and Canon 3E(1), you refused to disqualify yourself in cases in which attorney Michael Gottlieb was counsel of record; namely, *State of Florida v. Walls* and *State of Florida v. Suppa*, despite the fact you had previously disqualified yourself in another case in which Mr. Gottlieb filed a motion for disqualification wherein he detailed his acrimonious relationship with you during the time you served as an assistant statewide prosecutor.

Judge Aleman's Answer to Counts 1 and 4 generally admitted that she denied the various motions to disqualify her as the sitting judge in the State v. Braynen case, the State v. Walls, case and the State v. Suppa case. The Answer asserted that all motions for her disqualification in Braynen were by Public Defenders Sandra Perlman and Bruce Raticoff and were denied as unmeritorious. The Answer further admits that Judge Aleman issued a "rule to show cause" against Public Defenders Perlman

and Raticoff in that case and then held an actual finding of contempt in abeyance. (Answer at 2). The "rule to show cause" is referred to herein as an "order to show cause."

The Answer also contained twelve Affirmative Defenses, several of which became inapplicable because they applied to the dismissed Counts or to Count 4 on which Judge Aleman has been found not guilty due to insufficient clear and convincing evidence.

The Defenses which were applicable asserted that the Formal Charges relied upon mere disagreement with the trial judge's judicial rulings on the motions for disqualification, that an attorney's failure to appear at even one hearing was adequate grounds for an order to show cause threatening contempt, and that Judge Aleman had properly consulted with another circuit judge (Judge Anna Gardiner) about the proper manner in which to handle the Perlman and Raticoff motions to disqualify her. The Answer also asserted that the entire JQC proceeding infringed and interfered with the jurisdiction of the Fourth District Court of Appeal, which was the sole legal body authorized and empowered to review the judicial rulings on the disqualification motions. (Answer ¶ 20).

The hearing on the issues presented in the above pleadings began on December 4, 2007, and lasted three full days. The

prosecution presented the testimony of Judge Aleman, Public Defender Bruce Raticoff, attorney Michael Gottlieb, Public Defender Diane Cuddihy, Public Defender Sandra Perlman and Circuit Judge Anna Gardiner. Judge Aleman was on the stand for the entire first day. (T. 41-271). The witnesses called by the defense were attorney James Cobb, attorney Raag Singhal, attorney Richard Valuntas, Broward County Sheriffs Officer James Civille, attorney Lawrence Marin, State Attorney Peter Holden, Psychologist Michael Brannon and Circuit Judge Ilona Holmes. All of the witnesses were examined by counsel and questioned further by the Hearing Panel members. After the testimony and receipt of the documentary evidence, Judge Aleman's counsel moved for an order of acquittal. (T. 690). This motion was argued and denied. (T. 690.705).

The Record

The pleadings, including the charges and defenses, are already before the Court in the JQC file designated as SC07-198. The complete transcript of the testimony is in 6 volumes and will be designated herein as (T. ____). The exhibits consist of court records, pleadings and transcripts and were all admitted into evidence by stipulation. This documentary evidence is filed along with these Findings, Conclusions and Recommendations. The Exhibits will be designated by exhibit and

page numbers when possible. The transcript of the Braynen trial is designated as (Braynen T. ___). The evidence offered by the prosecution consisted of two notebooks, while Judge Aleman's evidence is contained in a third notebook.

The Hearing Panel's Proceedings

After the filing of Pretrial Statements and Exhibit Lists there were unsuccessful attempts at resolving this case by agreement. The matter then proceeded to a hearing before the Hearing Panel composed of Judge Thomas B. Freeman (Chair), Judge Preston Silvernail, attorney Miles McGrane, III, attorney John P. Cardillo, lay member Dr. Leonard Haber and lay member Ricardo Morales. The hearing occurred in Ft. Lauderdale, Florida at Judge Aleman's request and lasted three days. The Investigative Panel of the JQC was represented by Special Counsel Lansing Scriven. Attorneys J. David Bogenschutz and Perry Hodge acted as defense counsel to Judge Aleman. Attorney John Beranek served as counsel to the Hearing Panel. Mr. Marvin Barkin was present in the courtroom as Interim General Counsel to the JQC prosecution.

The findings of guilt contained in these Findings, Conclusions and Recommendations were each determined by at least a two-thirds vote of the six member Hearing Panel in accordance with Article V, § 12(b) of the Florida Constitution and Rule 19 of the JQC Rules. In the view of the Hearing Panel, each of the affirmative findings herein are supported by Judge Aleman's admissions along with clear and convincing evidence in

accordance with In re: Henson, 913 So. 2d 579 (Fla. 2005); In re: Ford-Kause, 703 So. 2d 269 (Fla. 1999); In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997); and In re: Davey, 645 So. 2d 398, 404 (Fla. 1994). The vote of the six member panel on both guilt and recommended discipline met the two-thirds requirement of the Florida Constitution and JQC Rules.

Count 1 - The State v. Braynen Case

The Braynen case was a first degree murder prosecution in which the state was seeking the death penalty. The case never actually got beyond jury selection before Judge Aleman. No jury was sworn in and only limited voir dire examination occurred. (Braynen T. 1-561). Three days were used in attempted jury selection and rulings on other pretrial problems which resulted in a continuance. (Braynen T. 548-550).

The stated reason for the continuance concerned the asserted lack of identification of the witnesses to be called by the State. (Braynen T. 548). Over the State's disagreement, Public Defender Perlman asserted she had no notice of some of the witnesses and had not deposed them. (Braynen T. 546). This resulted in a Richardson Hearing on the third day of the proceedings.[1] A continuance was then ordered on January 25, 2006 after the defendant himself was closely questioned by Judge

[1] In the Richardson Hearing, Judge Aleman reviewed the court filed and concluded that all witnesses had been disclosed to the Public Defender's Office. (Braynen T. 539.9). This ruling is somewhat inconsistent with the reasons for the continuance suggested by Judge Aleman in her questioning of defendant Braynen. (Braynen T. 546-549).

Aleman who suggested to him that his attorneys did not know of approximately eight State witnesses and had not had the opportunity to talk with them and depose them. (Braynen T. 546-549). When he was told by the Judge that his lawyers had not yet talked to the witnesses, he finally agreed to a continuance. (Braynen T. 549).

There were also delays in starting the Braynen trial caused by numerous oral motions for disqualification, attempts to draft the required written motions for disqualification, the rulings on those motions, an order to show cause threatening contempt against defense counsel and motions to withdraw as counsel and for dismissal of the entire jury panel by both the defense and the State. (Braynen T. 372-415).

The case was continued on January 25, 2006 and was then set for a status conference before Judge Aleman on March 7, 2006. The case was then transferred to another judge and later reset and tried before Judge Anna Gardiner, who had previously been

contacted regarding the disqualification motions before Judge Aleman. (T. 55-56). Prior to the trial actually taking place, the State withdrew the request for the death penalty. (T. 625, 628,645). Judge Aleman had been transferred to the civil division and Judge Gardiner presided over the trial. (T. 624-5).

Aggravated Facts

Braynen was a child abuse first degree murder charge in which the defendant allegedly beat a small child and then delivered her to a hospital emergency room where she died a short time later. The State was initially seeking the death penalty. The murder trial was originally assigned to Judge Backman and a previous Public Defender had been prepared to go to trial in 2004. The case was then reassigned to Judge Aleman and this was her first assignment to a first degree murder trial. All of the evidence in this JQC case made it obvious that a case involving the death penalty must be handled with the upmost care. As stated by Judge Aleman, "death is different." (T. 255). The Panel fully recognizes that had the defendant been convicted and sentenced to death, the possibility that the trial judge should have granted a motion for her own disqualification would have been cause for a reversal on appeal. In Judge Aleman's view, the Public Defenders were trying to take advantage of every possible argument for her disqualification in the hopes of saving their client from being exposed to the death penalty.[2]

[2] Public Defender Raticoff who would have done the penalty phase of the case denied using disqualification as a trial tactic but

The Panel is troubled by the actions of the public defender's office. As alleged in the charges, there were at least five motions to disqualify in the Braynen matter and the case never even got beyond the jury selection stage. Repeated disqualification motions before the first witness is called is a rare circumstance. We also are confused by Judge Aleman's attitude in continuing the trial while at the same time denying motions to excuse the first panel and bring up a new panel.

Since most of the motions for disqualification happened during attempted jury selection they were initially made orally. Each time there was also a request for an immediate recess so that the motion could be reduced to writing. Under Rogers v. State, 630 So. 2d 513, 516 (Fla. 1994), the Florida Supreme Court has ruled that when a motion to disqualify a judge occurs "mid-trial or mid-hearing" the motion must still be reduced to writing. The trial court is required to give counsel a "recess" in which to prepare the written motion and file it. The motion

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did state that the "word was she was cold-hearted and, you know, she was going to kill our client." (T. 319).

must then be ruled upon before the case can proceed. The consistent and accepted practice in Florida's circuit courts is that all pleadings are typewritten with copies furnished to opposing counsel.

Rogers states at p.516:

> Accordingly,...all motions for disqualification of a trial judge must be in writing and otherwise in conformity with this Court's rules of procedure. The writing requirement cannot be waived and a presiding judge must afford a petitioning party a reasonable opportunity to file its motion. Where a party discovers mid-trial or mid-hearing that a motion for disqualification is required, he or she may request a brief recess-which must be granted-in order to prepare the appropriate documents.

This Panel suggests that the "appropriate documents" to be filed by any lawyer would have been a typewritten motion in full compliance with Rule of Judicial Administration 2.330. This is one of the few times that a rule dictates exactly what must be contained in the motion. The motion must be in writing, filed with the clerk and immediately served on the judge and opposing counsel and then "ruled on immediately" before the case proceeds.

Although the requirement could have been waived, technically the motion was required to be on 8 ½ by 11 inch paper pursuant to Rule of Judicial Administration 2.520(a). The required content included specific stated facts and reasons showing prejudice or bias by the judge in the mind of the defendant. Under Rule 2.330, the client had to sign the motion under oath or an affidavit and the attorney filing the motion had to sign and

separately "certify" that the motion was filed in good faith. See Rule 2.330.

In Braynen, there were actually three written motions to disqualify and four oral motions to disqualify. The first motion was in writing and concerned an argument that Judge Aleman should disqualify herself because she was up for reelection and several members of the Public Defender's office (including defense counsel Perlman) were supporting her opponent in the race. Judge Aleman denied this motion for disqualification and the Public Defender's office sought prohibition in the Fourth District Court of Appeal which denied relief. Braynen v. State, 895 So. 2d 1169 (Fla. 4th DCA 2005).

The Public Defender's office then sought review in the Florida Supreme Court and eventually sought a stay of the case before Judge Aleman pending possible Supreme Court acceptance of jurisdiction. Public Defender Perlman argued the motion for stay and handed Judge Aleman a proposed order requested by the judge granting the stay. (T. 495). Judge Aleman indicated that she would deny the motion and ripped up the proposed order in what Perlman described as an impolite manner. (T. 496-8). This ripping up of the proposed order resulted in the first oral disqualification motion. (T. 497). Perlman argued that this caused her and her client to believe that he would not receive a fair trial before Judge Aleman and thus she moved for her disqualification. (T. 496-7). The second oral motion concerned the alleged overly aggressive questioning amounting to cross-examination of a prospective juror by Judge Aleman. (T. 498-9).

This juror was clearly excluded from serving by reason of his nonresidence in Broward County. (T. 500-2) and (Braynen T. 75-77). This motion was also denied. The third oral motion concerned alleged preferential treatment of the state-attorney concerning a 15 minute delay in an afternoon session. A fourth motion for disqualification concerned the necessity that Public Defender Perlman appear at a previously set plea conference before another circuit judge. (T. 507). An argument over this obligation resulted in Judge Aleman's office contacting Judge Gold's office and Perlman contended that this was an indication that Judge Aleman was checking up on her and questioned her credibility which again caused her client to believe that he would not receive a fair trial. (T. 507-512).

The evidence on all of the motions for disqualification is reflected in the transcript of the aborted Braynen trial which occurred on January 23, 24 and 25, 2006 and was stipulated into evidence. The first oral motion for disqualification occurred on the morning of January 24, 2006, and it is clear that Judge Aleman did not give the Public Defender adequate time to prepare this motion in writing before denying it. Judge Aleman asserted that there had been an evening recess so no additional time was necessary and the Public Defender countered with the argument that she was entitled to daily copy on the transcript in this death penalty case which had been requested under a local Administrative Order but had not yet been made available to her. In any event it is clear that an oral motion for disqualification was made and a request for a recess pursuant to Rogers v. State

was made and denied. (T. 505). Rogers was cited and argued to Judge Aleman.

At one point Public Defender Perlman specifically asked the judge for a one hour recess to reduce her oral motion to writing. This request was not granted. Instead Judge Aleman handed Perlman a pen and pad of paper and directed that she had 15 minutes to handwrite the motion. (Braynen T. 375). Judge Aleman said nothing about leaving or staying in the courtroom. (T. 57). Perlman and Raticoff intended to have the motion researched and typed in the normal fashion and left to go to their office on the third floor to obtain the assistance of Ms. Cuddihy, who was the appellate attorney in the Public Defender's office. Ms. Cuddihy had experience on disqualification issues and they had discussed disqualification with her and intended to have her prepare the written motion. Ms. Cuddihy later testified that this motion would take at least several hours to prepare. (T. 465). A great deal of argument occurred over exactly how much time the attorneys needed; 5 minutes, 10 minutes, 15 minutes and the like were discussed and argued over.

Typical of the time controversy and Judge Aleman’s threats of contempt against the attorneys was the following:

> THE COURT: How much time are you asking for just to prepare just the motion itself?
>
> MS. PERLMAN: You mean if I have the transcripts?
>
> THE COURT: No, I'm asking how much time are you asking to prepare the motion itself?
>
> MS. PERLMAN: I think I would need at least an hour.

> THE COURT: We'll be in recess for five minutes. (Braynen T. 374)

Judge Aleman then extended this time to 15 minutes and furnished counsel with a pad and pen to handwrite the motion. (Braynen T. 375). When counsel did not meet this deadline, the court stated:

> THE COURT: Okay. The Court's go[ing] to issue a rule to show cause, and we'll hold this in abeyance until conclusion of the trial. The Court had gave counsel 15 additional minutes to handwrite a motion, provided a paper and pen for counsel to do so, and when the Court returned back neither Defense Counsel was here, and now it's 2:49 and we're still missing one of the defense counsel.
>
> Again, good grounds for the rule to show cause is failure to abide by the Court's order with respect, and we'll hold that in abeyance until the concluding of the proceeding. (Braynen T. 377)

Ms. Cuddihy further summed up her reactions to the time limits stating:

> It almost was surreal to me, particularly when I was in the courtroom, and there was discussion about whether one minute had ticked off the clock or two minutes had ticked off the clock. This was a death penalty case. And I can say I was appalled that we were being put under that kind of pressure.... (T. 442).

The members of the prospective jury (approximately 70 people) were not even in the courtroom. Because of inadequate seating these prospective jurors were sitting on benches and on the floor in the hallways. The Public Defenders (Perlman,

Raticoff and Cuddihy) were actually running up and down the hall in front of the jurors to reach their offices which were several floors below the courtroom.

Judge Aleman testified repeatedly in this JQC proceeding that it was unacceptable to have prospective jurors sitting on the floor in the hallways waiting and that she was trying to speed up the process to protect the jurors. The Panel concludes it was also improper to have the lawyers in the case run up and down in front of the prospective jurors in order to avoid being held in contempt.

Indeed the Panel agrees that this was a totally unacceptable and improper situation and Judge Aleman should not have put counsel in this position. Indeed Mr. Holden, the state attorney trying the case, agreed that the prospective jury which had witnessed these delays should be excused and a new jury should be called. Mr. Holden stated:

> MR. HOLDEN: Sure, Judge. Here is my initial issue that I have right now. We have a jury that has been sitting out there since 1:30 and it is past 4:00 o'clock.
>
> THE COURT: It is 4:06.
>
> MR. HOLDEN: We have a multitude of issues that the defense has brought up; one being in the presence of the jury room on the easel board.
>
> THE COURT: Have you taken a look at it?
>
> MR. HOLDEN: No, I have not. But my question is this.
>
> You have an outstanding rule to show causes against both attorneys. I would recommend or request the Court at this time, let's start anew tomorrow with a new panel. We

> wouldn't [have] any of these issue. You can address the rule to show cause against both counsel and where ever that goes it goes, but at least we can start brand new without any of these issues hanging over this trial and have a fresh start in the morning or in the afternoon. I know you have the morning docket. That would be, of course, were the state at this point.
>
> There is no way that the jury panel that has been sitting on that floor for three hours is going to be anywhere near happy with anyone of us right now. (emphasis supplied).
>
> THE COURT: What is the defense's position with respect to discharging the entire panel?
>
> MS. PERLMAN: There is no objection to striking the entire panel, Your Honor. (Braynen T. 401-2)

Late on the second day of jury selection the prospective jurors were questioned on how the delays and having the lawyers run up and down in front of them might have affected their ability to be fair. (Braynen T. 421-6). The reactions of the jurors were varied. After this questioning, the judge again reserved ruling and the jurors were excused until 1:30 p.m. on the following day. (Braynen T. 426). The next day the court switched to consideration of the witnesses the State would be calling and whether they could be deposed before the trial began. (Braynen T. 517, etc.) This issue resulted in the continuance of the trial. (Braynen T. 550).

The Order to Show Cause

While Perlman and Raticoff were conferring with Cuddihy in an attempt to quickly draft a written motion they exceeded the 15 minute time limit imposed by Judge Aleman. At that point Judge Aleman returned to the courtroom and issued an order to show cause threatening the sanction of contempt against them for being late returning to the courtroom with the written motion. (T. 224-225; Braynen T. 376-380).

The order to show cause which was never reduced to writing and which was never acted upon caused conflicts and further delays. Public Defenders Perlman and Raticoff argued to the court that they were placed in a position of conflict by the threat of contempt hanging over their heads. (Braynen T. 380-381). They had to both defend their client and defend themselves. Under these circumstances they moved to withdraw as counsel for the defendant. (Braynen T. 380-381). The court eventually denied this motion to withdraw. (Braynen T. 382). The Public Defenders further moved to excuse the prospective jurors and to seat a completely new jury panel. The State Attorney Mr. Holden fully agreed and actually requested that the court excuse the jury and start over without having all of the influences which had resulted from the motions for disqualifications and the threat of contempt hanging over the heads of the defense counsel. (Braynen T. 401-2).

On the third day of the trial the jurors did not return until 1:30 p.m. and Judge Aleman dealt primarily with witness problems not involving the jury. She held a Richardson hearing and then questioned the defendant at length asking him whether he

wanted to request a continuance because, as stated by the court, his lawyers were not prepared for trial because they had not talked to and deposed several of the witnesses which the State intended to call. (Braynen T. 548,550). In answer to these questions, the defendant initially declined a continuance but finally said he did want to continue the trial so his lawyers would have an opportunity to talk to all of the necessary witnesses. The court then inquired of the State Attorney and the Public Defenders and they agreed to the continuance. (Braynen T. 550).

The court then advised the lawyers that she would reset the case for trial and scheduled a status conference for March 7, 2007. Public Defender Raticoff then again requested that the court withdraw the order to show cause on contempt. (T. 101-104; Braynen T. 559-560). The aborted trial ended with a formal request to withdraw the order to show cause and a statement by the court that she did not want to have a hearing then on withdrawing the order to show cause. The court concluded with the statement: "I believe everyone is entitled to due process" and then dismissed the lawyers. (T. 102; Braynen T. 559-560). Thus the order to show cause remained pending even after the Braynen trial ended without ever really getting started. In her JQC testimony, Judge Aleman stated she considered contempt further and eventually decided "afterward looking at the transcript and looking at the law not to issue any rule to show cause." (T. 102-3). This was inconsistent with her ruling actually issuing an oral order to show cause and communicating

that order to the defense counsel while they were attempting to prepare the written motion and later during jury selection.

Consultation With Another Judge

Judge Aleman contacted Judge Anna Gardiner, a more senior circuit judge to ask her advice concerning the motions for disqualification which she felt were wrongly delaying the trial. Judge Aleman's recollection of her conversations with Judge Gardiner and Judge Gardiner's recollections of those conversations were somewhat inconsistent. Judge Gardiner testified that Judge Aleman called her saying that she wanted to get the jury into the courtroom and that the motions for disqualifications were delaying things. Judge Gardiner incorrectly understood that there had been a written motion for disqualification already filed and that the problem was how to add one more reason to the existing written motion. (T. 613). Judge Gardiner testified that she suggested giving the lawyers a pad and pen and telling them to write it out. (T. 613). She stated that she did not suggest entering an order to show cause threatening contempt, that she had never held a lawyer in contempt and that the threat of contempt over defense counsel in a death penalty case would have been a "great concern" and a "great problem" on appeal. (T. 614,616). She also denied that she ever addressed the question of how long the attorney should be given to complete the handwritten motion. Judge Gardiner stated very clearly that she had never suggested that an order to show cause be issued and then held in abeyance. (T. 616-618,634).

It is certainly permissible for a trial judge to seek the advice of other trial judges, particularly when they lack experience on a particular issue. However, receiving advice from another judge does not do away with the direct responsibility of the sitting judge to act properly both legally and in accordance with the Canons of Judicial Ethics. The Panel believes that Judge Gardiner was not given all the necessary facts.

The Threat of Contempt

Judge Aleman advised the lawyers that she had issued an order to show cause threatening to find them in contempt. (Braynen T. 377). However, when the lawyers inquired several times concerning the status of the show cause order, Judge Aleman equivocated and advised them that contempt was being held in abeyance. This prompted counsel to seek to withdraw from the case because they argued they were in a position of conflict. (Braynen T. 380,382). The basis for the order to show cause which was never reduced to writing, was that the attorneys were late in returning with the written motion which they had been given 15 minutes to prepare. The Panel concludes that these time limits were unreasonable under all of the circumstances.

The Paper and Pen Approach

Forcing an attorney to prepare a handwritten motion for disqualification of a judge within 15 minutes or within 22 minutes was improper in the context of this first degree murder case in which the death penalty was being sought. A computer keyboard is a faster way to produce a written document.

We will never know the answer to whether the pen and paper step would have resulted in the reversal of a death sentence but it was a step that should have not been taken. In retrospect it is obvious that it accomplished nothing. Under Rogers v. State, a motion to disqualify a judge made during at trial requires that the judge give counsel a reasonable amount of time to prepare the motion in writing. This means that counsel must have time to detail the facts warranting disqualification and to make at least a brief legal argument based upon case-law. There is a substantial amount of case-law governing the disqualification of judges and Rule 2.330 of the Rules of Judicial Administration controls the procedural aspects of such motions. There is simply no requirement that defense counsel in a murder case have all of this law and the procedural requirements committed to memory or even contained in a trial handbook. The Rogers case means counsel are entitled to a reasonable amount of time to prepare the motion in writing and to then present it to the court for a ruling. Conceivable, an attorney might even have second thoughts about such a motion after doing brief research and attempting to put the motion in written form.

Motions to disqualify are almost never the subject of oral argument because the trial judge is required to grant the motion if the motion itself is legally sufficient without regard to the truth of the facts sworn to in the motion. See MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1990); Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). Furthermore, in Levine v. State, 650 So. 2d 666 (Fla. 4th DCA

1995), the court dealt with a contempt situation and held that a trial court must issue an order to show cause which clearly and precisely describes the conduct which is prohibited by the court and makes the person aware of the court's command and direction. Here, Judge Aleman did not enter such an order. Judge Aleman denied every motion for disqualification and did so in no more than minutes. The pen and paper approach obviously saved absolutely no time in this case which was continued for unrelated reasons in any event.

Mere Disagreement with Judicial Rulings

Judge Aleman has argued throughout this case that this entire prosecution is nothing more than a disagreement with her judicial rulings. She asserts that these disagreements cannot properly be the subject of judicial misconduct before the JQC. The Hearing Panel disagrees. "Legal rulings" by judges have often been the subject of judicial discipline. In In re: Perry, 641 So. 2d 366 (Fla. 1994), discipline was imposed against a judge for exercising the powers of criminal contempt in an arbitrary and improper manner. In In re: McCallister, 646 So. 2d 173 (Fla. 1994), this court imposed discipline against a judge for holding an Assistant Public Defender in criminal contempt. In In re: Turner, 421 So. 2d 1077 (Fla. 1982), discipline was imposed against a judge for holding an attorney in contempt and sentencing him to a fine and 24 hours in jail, notwithstanding the defense by the judge that he had informed the attorney that he was not following the court's instructions. In In re: Crowell, 379 So. 2d 107 (Fla. 1979), discipline was imposed

against a judge for abusing his contempt powers on three separate instances. Also see In re: McMillan, 797 So. 2d 560 (Fla. 2001) and In re: Wood, 720 So. 2d 506 (Fla. 1998).

Violations of Canons 1, 2A and 3B(4)

Canon 1 provides in part:

> 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 shall personally observe those standards so that the integrity and independence of the judiciary may be preserved.

Canon 2A similarly provides:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3B(4) provides in part that:

> A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity…

The Panel concludes that Judge Aleman's conduct involving her denial of the motions for disqualifications without giving counsel a reasonable time to prepare the motions in writing and in threatening contempt by announcing entry of an order to show cause and then refusing to vacate the order to show cause constituted conduct which was arrogant, discourteous, and impatient to the lawyers appearing before her and others appearing in the Braynen case. Even after the case was

continued for reasons not related to disqualification, she left pending the threat of contempt for being minutes late when she knew exactly where the lawyers were and what they were doing. She acted in a manner that erodes public confidence in the integrity and impartiality of the judiciary. Even Judge Aleman conceded she decided not to go forward with contempt after her post-trial review of the transcript and the law on contempt. However, she had already issued her formal threat of contempt and placed the burden on the attorneys to demonstrate why they were not in contempt.

As previously stated herein, the Panel is troubled by the Public Defenders' numerous motions for disqualification. However, it is not the responsibility of this Panel to judge the validity of any of the arguments on disqualification. Even if the Public Defender was overly aggressive in seeking disqualification, Judge Aleman was still required to comply with the law and to not engage in an unnecessary dispute with defense counsel. Counsel in contested matters may occasionally act inappropriately. However, the court does not have the liberty to respond in-kind.

The Rogers v. State case which the public defender heavily relies upon is also noteworthy because of the concurring opinion by Justice Major B. Harding. There Justice Harding was critical

of defense counsel's attempts to disqualify a trial judge and although he agreed the judge had to be disqualified he also pointed out that counsel's "tactics" were objectionable. Also see In re Dellinger, 461 F.2d 389 (7th Cir. 1972), the "Chicago 8" contempt case which deals at length with the practice of citing an attorney for contempt and putting off making a decision until the trial is over. As noted, this often requires that another judge step in and try the contempt issues. Also see Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Count 4

Judge Aleman has been found not guilty on this Count also involving disqualification due to a lack of clear and convincing evidence. However, in passing we note that this was a situation where Judge Aleman denied a motion for disqualification after granting disqualification at the request of the same attorney in an earlier case. Judge Aleman testified that the first disqualification was based on a statement she herself made complimenting the attorney and that she knew full well that this statement would require her disqualification. (T. 244). The evidence on this Count was not clear and convincing but it appears obvious that a judge should never engage in making an unnecessary complementary statement about a lawyer which that

judge knows will require her disqualification in that case or another case.

Recommended Penalty

The Panel recommends that Judge Aleman be publicly reprimanded by this Court and ordered to pay the costs of these proceedings. This recommendation is consistent with the past JQC cases involving similar conduct as previously cited herein.

SO ORDERED this 31st day of January, 2008.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ Thomas B. Freeman
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