BEFORE THE FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION
STATE OF FLORIDA

CASE NO. 07-774

INQUIRY CONCERNING A
JUDGE NO. 06-249 RE: JUDGE
MICHAEL E. ALLEN
_________________________________/

JUDGE MICHAEL ALLEN'S PRE-TRIAL MEMORANDUM AND RENEWED MOTION TO DISMISS

A. THE TRIAL CHOREOGRAPHY

There are two competing narratives in this case. One is that Judge Allen's opinion in *State v. Childers*, 936 So. 2d 619, 622 (Fla. 1st DCA 2006) (Allen, J. concurring) was motivated by "prejudice" (Notice of Charges, ¶ 8) and "ill will." Notice of Charges, ¶ 14. The other is that Judge Allen's opinion *was not* motivated by "prejudice" and "ill will," but by concern for the integrity of the court and its process. To prevail, the JQC must prove its narrative by "clear and convincing evidence" – evidence or testimony that is "'credible,' 'distinctly remembered,' 'precise,' and 'explicit' – evidence which 'must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitancy, as to the truth of the allegation sought to be established.'" *Lee County v. Sunbelt Equities, II, Limited Partnership*, 619 So. 2d 996, 1006, n.13 (Fla. 2d DCA 1993)

quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Judge Allen has no evidentiary burden; the JQC must adduce clear and convincing proof that Judge Allen's "state of mind" was captured by prejudice and ill will against Judge Kahn and that but for such prejudice and ill will, Judge Allen would not have written his opinion in *Childers*. If the JQC fails to carry its heavy evidentiary burden Judge Allen will be entitled to a directed verdict.

If a directed verdict is denied, the burden of persuasion will shift to Judge Allen. That will call for him to adduce evidence that creates a reason or reasons for the panel to "hesitate" in its assessment of his state of mind. Such hesitancy would mean that the JQC had not carried its clear and convincing evidentiary burden.

That trial choreography reveals the extraordinary nature of this proceeding: it is the first time in Florida history that an appellate judge has been charged with misconduct based on his written and published opinion.

B. RENEWING THE MOTION TO DISMISS

Judge Allen renews the Motion to Dismiss previously filed (and denied) in this case. The allegations of the Notice of Formal Charges fail to state a legally sufficient basis for initiating charges against Judge Allen. The allegations do not, as a matter of law and fact allege cognizable violations of Judicial Canons, the

Rules Regulating the Florida Bar or the Oath of Admission to the Florida Bar. The unprecedented effort to sanction an appellate judge based on a written opinion which is not indecent, profane, vulgar or racist, threatens the independence of the appellate judiciary. The effort to sanction an appellate judge based on his or her "motivation" for a published opinion violates every precept of the Anglo-American common law tradition. We renew our objections to the institution of the charges in order to preserve the record prior to trial.

C. THE EVIDENTIARY ISSUES

The JQC has put Judge Kahn's integrity at issue by virtue of its charge that the opinion disparaged his integrity: "[Y]our disparagement of Judge Kahn's integrity was contrary to your duty to observe high standards so that the integrity and independence of the judiciary may be preserved." Notice of Charges, ¶ 4. That construct means that if Judge Kahn lacked integrity, then Judge Allen's opinion served the integrity and independence of the judiciary. Indeed, JQC's Special Counsel, in a February 14, 2008 letter to undersigned counsel, acknowledged that his Motion in Limine seeking to limit testimony about Judge Kahn "does not apply to any evidence relating to the relationship between Judge Kahn and the Levins."

For some reason JQC counsel has consistently introduced the specter of

"corruption" *vis a vis* Judge Kahn, both in his deposition questioning of his own witnesses (*See* Judge Michael Allen's Response In Opposition to JQC's Motion in Limine to Exclude Evidence of Purported Misconduct of Others, pp. 3-6) and in his written submissions: "On June 28, 2006, Judge Michael Allen issued a concurring opinion based on innuendo and supposition that accused his fellow judge, Charles Kahn, of corruption." JQC's Motion in Limine to Exclude Evidence of Purported Misconduct of Others, p. 1. The Motion continued: "There is no evidence that the purported corruption existed in fact." *Id.*

Judge Allen did not, and will not, ascribe "corruption" to Judge Kahn. It is unfortunate that the JQC has so characterized the case. The opinion does not assert corruption; indeed Judge Allen's June 21, 2006, 4:17 p.m. e-mail to Judge Kahn and all the First District Court of Appeal judges decries that suggestion, saying, *inter alia*:

> As I explained in my email to each of you on June 15, 2006: "What Judge Kahn seems unable or unwilling to accept is that my opinion does not accuse him of corrupt conduct or even partiality[.] The only thing it does accuse him of is poor judgment in failing to recuse himself from consideration of this case in light of how his role in the panel decision would have looked to members of the public knowledgeable of widely – disseminated public information. And it would never have accused him of

> anything at all — in fact, it would never have been written — if he and Judge Wolf had not made unfair and harmful accusations against honorable members of this court, accusations that still could – and should – be withdrawn."

Judge Padovano's June 26, 2006, 10:54 a.m. e-mail to Judge Kahn and the other First District Court of Appeal judges provides some insight into the concerns that surrounded *l'affaire Childers*:

> Chuck: There are offensive parts of the opinion, notably the part that suggests that en banc is a matter of getting the votes (I don't like to think of myself as a person whose vote was simply gotten), but I think the bigger problem is with the opinion itself. You have suggested in this case that the en banc rule is unconstitutional, yet you have used it many times without objection in other cases. You have suggested that this court certify a series of questions that were not argued or decided.
>
> * * *
>
> You asked what the problem is with your opinion, so I will tell you. Overall the opinion suggests that the court acted arbitrarily in decided to hear this case en banc. It should come as no surprise that this put some of us in the majority on the defensive. It made me want to explain why I voted to hear the case in banc, so I did. As I said before, I think the lawyers and litigants would be much better off without all the inside details about why some of us

> voted to hear the case en banc and why some of us did not. But as long as any judge is going to suggest that this court acted arbitrarily, I intend to explain my vote.

We provide this brief e-mail evidence excerpt as an introduction to alert the Hearing Panel to what this case is not about; *it is not about* a character assassination of Judge Kahn. It is about whether the JQC can clearly and convincingly prove that the only reason for Judge Allen's opinion was "prejudice" and "ill will."

Because the JQC has made state of mind – motivation, animus, prejudice and ill will – the linchpin of its case, what Judge Allen knew about Judge Kahn will be relevant – how else can one divine what is in a person's mind unless one knows what that person knows. Thus the JQC witnesses can be asked what they told Judge Allen about Judge Kahn and when they told him. There is no doubt that the JQC will elicit testimony from its witnesses about what Judge Allen said to them about Judge Kahn. And there can be no doubt that Judge Allen can testify about what people told him about Judge Kahn during the relevant time periods. Those statements, made to Judge Allen, are not being offered to prove the facts contained in the statements; they will be offered because they are relevant to Judge Allen's state of mind. *See* Florida Statute § 90.801(2)(c) and *Pope v. State*, 932

So. 2d 515 (Fla. 1st DCA 2006) which makes clear that a statement "not offered for the truth of its contents" is not hearsay. The *per curiam* court (Kahn, Webster and Hawkes, JJ) relied upon "Charles W. Ehrardt, *Florida Evidence*, § 801.2 at 714 (2005 ed.) (explaining that an out of court statement offered for a purpose other than to prove the truth of its contents is admissible provided that the purpose for which it is offered relates to a material issue)." *Id.*

Thus the stage is set for an extraordinary exploration of the appellate decision making process in the *Childers* case. There will be e-mail evidence detailing the progress of the *Childers* case: the reasons for the swing from a reversal of his conviction to a 10-4 *en banc* affirmance; the exchanges among the judges about the need for, and the propriety of an *en banc* decision; the exchanges among the judges about the need for and the propriety of certifying *Childers* to the Supreme Court of Florida. The evidence will reveal spirited discussions, strong opinions, strong language, severe disagreements, a disturbing allegation by Judge Kahn that to go *en banc* in *Childers* "is illegal" (Kahn e-mail to First District Court of Appeal judges, July 18, 2005, 9:23 a.m.; Allen Ex. 2 to Kahn Deposition). But the evidence *will not establish* that Judge Allen's opinion was the product of "prejudice" or "ill will;" only concern for a court that had worked itself into a state of distress in its quest to do justice and to appear just.

Finally, the evidence *will not* establish any basis for concluding that there was any violation of the Code of Judicial Conduct, the Rules Regulating the Florida Bar or the Lawyer's Oath. The Code of Judicial Conduct, Canon 3D(1) and (2) provides:

> **D. Disciplinary Responsibilities**.
> (1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.
> (2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

No judge on the First District Court of Appeal or of any other Florida court – trial, district court of appeal or Supreme Court – reported Judge Allen to any sanctioning body because of his opinion. The First District Court of Appeal judge witnesses called by the JQC acknowledged their "action" duties and responsibilities under the Canon, and the fact that they took no action. See for example, this colloquy with Judge Benton:

> Q. Are you are you familiar with Canon 3D (1) of the Code of Judicial Conduct which I will read to you because I know no one ever memorizes these things.
>
> It says: A judge who receives information

> or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this claim [sic] shall take appropriate action.
>
> Are you familiar with that obligation that the judge has to report violations of the code?
>
> A. Yes.
>
> Q. Is that a serious duty and obligation?
> A. Yes.
>
> Q. Did you ever report Judge Allen based on the opinion that he wrote?
>
> A. I did not.
>
> Q. Did you know if anyone else on the court reported Judge Allen based on that?
>
> A. I do not.
>
> Q. You are the chairman of what Supreme Court committee?
>
> A. The judicial ethics advisory committee.

Deposition of Judge Robert R. Benton, II, pp. 15-16. See also Deposition of Chief Judge Browning, pp. 35-36, 44-45.

Deposition of Judge Webster:

> Q. So does that [the Canon] impose a duty upon a judge to refer a matter, for example, to the JQC is a judge thinks there has been a violation of the canons?

A. It's always been my understanding.

Q. Did you refer Judge Allen to the JQC based on his concurring opinion?

A. No.

Q. Do you know if anyone on your court referred Judge Allen to the JQC?
A. No.

Id. at pp. 19-20.

The only person to file a complaint with the JQC was Martin Levin, the son of Fred Levin, the lawyer who Judge Kahn called "the day that the opinion on the motion for certification — I am not sure if its a motion for certification — I am not sure what it was. I called him that afternoon" (Judge Kahn Deposition, p. 28) and "then the next think I knew, he said that he had his son, Martin Levin, look into the matter and Martin was going to file a complaint." *Id.* at 30. As to Canon 3D, Judge Kahn said: "I am aware of Canon 3D. And no, I never seriously considered filing an ethical complaint against Judge Allen. If that violates Canon 3D, then so be it, but no, I never considered it." *Id.* at 31.

CONCLUSION

We believe the following views of the Montana Supreme Court, rejecting the only reported effort to sanction an appellate judge for his or her opinion, provides

an important caution for the forthcoming trial.

> It [the opinion] is characterized by the Commission as "intemperate" but the language quoted is not profane or vulgar. It may not have been pleasant for the majority in McKenzie to have been called "intellectually dishonest" or to have been told that they were "slippery with the facts." Yet it seems nearly every day newspaper editors say something equally derogatory about our decisions. As long as the justice, or a judge, in writing opinions, does not resort to profane, vulgar or insulting language that offends good morals, it may hardly be considered "misconduct in office." More important than to censure, suspend or remove Daniel J. Shea from office for his "intemperate" language is to preserve an independent judiciary in this State.

State ex rel Shea v. Judicial Standards Commission, 643 P.2d 210, 223 (Mont. 1982). And the Supreme Court of the United States has rejected the theory that criticism of Courts and judges will undermine public respect and confidence *vis a vis* the judiciary:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the

> character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270-71 (1941).

We respectfully submit that the Hearing Panel should dismiss the charges against Judge Allen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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